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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Charleston County

Honorable Roger M. Young, Circuit Court Judge

\_\_\_\_\_  
MARVIN BOWENS-GREEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001755

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

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1 clear that you attempted to make a proffer but I don't  
2 know that we need to make a proffer if you're going to  
3 call her. If you make a determination not to call her I  
4 will allow you after the State's close to proffer.

5 MR. GROEBER: Thank you, Your Honor.

6 THE COURT: All right. Thank you.

7 MR. GROEBER: And just as to Mrs. Patel I'd like to  
8 put my other grounds for objecting to her testimony on  
9 the record. They will be very similar to the ones you've  
10 already heard. First of all that it is lay opinion  
11 testimony; second of all that -- and again, that would be  
12 the discussion of 701, 704, Blurton and Fripp that we  
13 discussed at length before.

14 What I would say about her testimony in particular  
15 that can be a little different from the others, in 701  
16 there are three criteria that must be met for it to be  
17 introduced, and in 701(a) that the opinions or  
18 inferences, A, which are rationally based on the  
19 perception of the witness, and I think that that's met  
20 here; B, are helpful to a clear understanding of the  
21 witness's testimony for the determination of fact in  
22 issue. Here her testimony about what she saw is not  
23 helpful to a clear understanding of her testimony because  
24 that's all she can really testify about. And C, that it  
25 does not require special knowledge, skill, experience or

1 training. I think that's not --

2 THE COURT: Did you read the whole rule,  
3 Mr. Groeber?

4 MR. GROEBER: I was going to come back to the or.  
5 I think that there's some -- it really is unclear about  
6 if you have to meet only one of those or either one of  
7 those.

8 THE COURT: I think in my ruling and in light of  
9 all of the Court's rulings yesterday these issues are so  
10 intertwined, and while I did take into consideration the  
11 issues specific to what Mrs. Patel testified to today the  
12 legal issues clearly are all the same and intertwined and  
13 your argument is abundantly protected on the record,  
14 Mr. Groeber, I believe, but I stand by my ruling. Your  
15 motion is denied.

16 MR. GROEBER: Thank you. And just to make sure,  
17 the 403 and 404 would be the same analysis that we've  
18 argued before and I would understand Your Honor to be  
19 rejecting that as well, including the 602.

20 THE COURT: Yes. Thank you.

21 MR. GROEBER: Thank you. I appreciate it.

22 THE COURT: So I understand you will have two  
23 witnesses and then you will rest; is that correct?

24 MR. RUTLEDGE DURANT: That's correct, Your Honor.

25 THE COURT: All right. And then you will have a



1 minimum of one witness; is that correct?

2 MR. GROEBER: That is correct, Your Honor.

3 THE COURT: And do you anticipate two? Has your  
4 client made a decision?

5 MR. GROEBER: I believe he has. I would need to  
6 discuss it with him. I talked to him this morning but I  
7 need to check with him again to make sure.

8 THE COURT: My preference is to go straight through  
9 reserving all motions and matters, okay. So you will  
10 have two witnesses, reserving all the motions and matters  
11 and then you will call your doctor, and then we will take  
12 a break.

13 MR. GROEBER: I would tell you that I expect the  
14 testimony of Dr. Beaudry to be significant.

15 THE COURT: Well, we can take an appropriate break  
16 at the time but I don't anticipate that there's going to  
17 be -- based upon what I know of the case so far and what  
18 I heard this morning we're going to go only until not  
19 even until 12:00. So at least Dr. Beaudry can get on the  
20 stand and we can break between 12:30 and 1:00 for lunch.  
21 All right?

22 MR. GROEBER: Yes, ma'am. That's fine.

23 MR. RUTLEDGE DURANT: Yes, Your Honor.

24 THE COURT: Thank you. Let's bring them in.

25 (WHEREUPON, the jury enters the courtroom at

1 approximately 11:00 a.m.)

2 THE BAILIFF: The jury is presence, Your Honor.

3 THE COURT: Thank you. Please be seated.

4 Call your next witness.

5 MR. RUTLEDGE DURANT: Thank you, Your Honor. The  
6 State calls Detective James Perkins.

7 JAMES PERKINS, after having been duly sworn,  
8 testified as follows:

9 THE CLERK: If you'll please state your full name  
10 then spell your last name for the record.

11 THE WITNESS: James Perkins, P-e-r-k-i-n-s.

12 THE COURT: Mr. Durant.

13 MR. RUTLEDGE DURANT: Thank you, Your Honor.  
14 Please the Court.

15 DIRECT EXAMINATION

16 BY MR. RUTLEDGE DURANT:

17 Q. Good morning.

18 A. Good morning, sir.

19 Q. Will you please tell the jury where you are  
20 employed.

21 A. Charleston County Sheriff's Office.

22 Q. And what is your position at the Charleston County  
23 Sheriff's Office?

24 A. I'm a violent crimes detective.

25 Q. And how long has that been your position?

1 A. For approximately six years.

2 Q. And what kind of crimes do you investigate as a  
3 violent crimes detective?

4 A. Usually violent or major crimes like shootings,  
5 armed robberies, homicides, things of that nature.

6 Q. And was that -- I guess that was your position in  
7 December of 2010?

8 A. Yes, sir.

9 Q. And in that capacity did you become involved in the  
10 investigation of a robbery that occurred at 5737 Savannah  
11 Highway in Ravenel?

12 A. It was a case that Detective Lawrence, who was the  
13 case agent, was investigating, basically, and he asked me  
14 to assist him.

15 THE COURT: Detective Perkins, could I have you  
16 speak up just a little bit louder.

17 THE WITNESS: Yes, ma'am.

18 THE COURT: Thank you.

19 BY MR. RUTLEDGE DURANT:

20 Q. So this was not your case as the case agent; is  
21 that correct?

22 A. No, sir.

23 Q. Do you handle your own cases?

24 A. Yes, sir.

25 Q. And are you the case agent on different kinds of

1 cases?

2 A. Yes, sir.

3 Q. Different armed robberies?

4 A. Yes, sir.

5 Q. And commonly you assist other detectives and they  
6 assist you?

7 A. Yes, sir, that's correct.

8 Q. Do you recall when you were brought into this case?

9 A. Yes, sir. It was on the 29th of December. We was  
10 in the office, myself and Detective Lawrence, and of  
11 course we don't sit directly beside each other in the  
12 office, and he was yelling on the side of the office,  
13 Perkins, I need you to come with me.

14 And I said, Okay.

15 And he said, I need you to do a lineup.

16 And of course, I mean, that's a normal practice.

17 So I said, Okay.

18 We got in the car and I got in the vehicle with him  
19 and we rode to the Citadel Mall.

20 Q. Now, why were you asked to conduct a photo lineup?

21 A. Well, I had no knowledge about the incident or the  
22 case.

23 Q. And is that important?

24 A. Yes.

25 Q. And why?

1 A. Well, because I'm just a neutral party. I don't  
2 know anything about the case, the subjects, suspects or  
3 anything. I actually have my own cases, so I'm deeply  
4 involved with my cases not with Detective Lawrence's  
5 case. So for him to ask me I'm a neutral person.

6 Q. What is a six pack photo array?

7 A. A six pack photo array is six pictures, one of the  
8 six pictures include the subject or suspected suspect  
9 that we show the victims or witnesses during the  
10 investigation.

11 Q. And have you had the opportunity to administer a  
12 six-pack photo array previous to this day?

13 A. Numerous times.

14 Q. And if you would, tell the jury how you go about  
15 doing that.

16 A. We pretty much have a form that's somewhat like an  
17 incident report for the sheriff's office. At the very  
18 top it has the case number, it will have the case agent,  
19 which in this case would be Detective Lawrence. It would  
20 have the location where you're administering the photo.  
21 It will also have the time that you are administering it.

22 And after you read each line, you have to read each  
23 line, and after you've read each line they have to  
24 initial advising that they understand. When you complete  
25 that you show them the six pictures.

1           After they advise if they notice or do not notice  
2 anyone on the photograph they would acknowledge that and  
3 you would just check if a photo identification has been  
4 made or if it has not been made.

5 Q.       So it's important for you to let the witness that  
6 you are about to give this photo lineup, to have them  
7 read these admonishments and understand them; is that  
8 right?

9 A.       Yes.

10 Q.       Now, did you actually conduct a photo array lineup  
11 procedure that day?

12 A.       Yes.

13 Q.       Did you know who the suspect was in the photo array  
14 when you presented that lineup?

15 A.       No.

16 Q.       And why not?

17 A.       Well, we are broken down into districts.  
18 Charleston is a very big county. So I'm assigned more so  
19 to the north area, which is North Charleston, Mount  
20 Pleasant, Awendaw. So I usually don't go into some of  
21 the other areas like James Island, areas like that. So I  
22 don't have a vast knowledge of the guys in that area, and  
23 that was one of the reasons I think Detective Lawrence  
24 used me, because I don't normally go into that area.

25 Q.       Did you know anything about this armed robbery he

1 was investigating?

2 A. No.

3 Q. And you didn't know the suspect?

4 A. No.

5 Q. And for those reasons you were chosen to conduct  
6 this procedure?

7 A. Yes.

8 Q. Is that right?

9 A. Uh-huh.

10 Q. And where did you go to conduct it?

11 A. We went to the Citadel Mall, Sears in West Ashley.

12 Q. And who did you go with?

13 A. I went with Detective Lawrence. He was actually  
14 driving. I was in the passenger seat.

15 Q. Who did you meet with there?

16 A. We met with Mr. Patel and his son.

17 Q. And what did you do? If you would, just tell the  
18 jury how you interacted with them and then began to get  
19 into the procedure of showing the lineup.

20 A. When we got there Detective Lawrence approached  
21 them and greeted them, explained that I -- you know, who  
22 I am, explained that I will be showing a photo because of  
23 course Mr. Patel didn't know me. After he did that I  
24 went and shook his hand and told him who I was, explained  
25 to him that I was showing the photo. He understood.

1           His son was there, his 12-year-old son who spoke  
2 English very well. Mr. Patel did but you could tell that  
3 there was somewhat of a language barrier, but he could  
4 understand what I was saying to him. Do you want me to  
5 go on procedurally what I done?

6 Q.       We're interested in the exact way it was carried  
7 out.

8 A.       Okay. I pretty much -- like I initially stated, I  
9 pretty much read line for line the purpose of me being  
10 there, that the photographs that I'm about to show you  
11 may or may not have the person or persons that committed  
12 the crime.

13           I told him -- of course, reading it it would say to  
14 view -- when you view the photographs it may not appear  
15 exactly as it would appear when the incident happened  
16 because of the lighting, because of time frame, different  
17 things likes that, etcetera.

18           After I explained all that to him, each line that I  
19 explained to him, he verbalized that he understood by  
20 saying yes. That's a requirement. Everybody that I read  
21 that to I make -- every line, I read line one and say, Do  
22 you understand. And I don't take nodding. You have to  
23 verbalize yes. You have to say yes. And he said that to  
24 each number. And when we finished I signed and  
25 initialled it and he was shown the lineup.



1           When I showed him the lineup he immediately pointed  
2 to number four. At that time I didn't know if it was the  
3 suspect or not. I told him, I said, Well, thank you,  
4 Mr. Patel. Someone from the sheriff's office will be in  
5 contact with you, and I left. I handed it over to  
6 Detective Lawrence and went back to the car. I was  
7 trying to get back to the office because I had some cases  
8 pending.

9   Q.     All right. Now, let me ask you just a little bit  
10 more and with some specificity. Where exactly at the  
11 Citadel Mall did this take place?

12   A.     It was in the parking lot area.

13   Q.     And where was Detective Lawrence when you  
14 administered this lineup procedure?

15   A.     He was standing -- he was standing a distance away  
16 from me while I was administering it. He wasn't right  
17 there. To my knowledge, I don't think that he could tell  
18 what I was saying or what Mr. Patel was saying either.

19   Q.     Did he participate in any way in conducting this  
20 lineup procedure?

21   A.     No. He just introduced him. He introduced me. He  
22 just -- that was pretty much all he did.

23   Q.     And I'm showing you what's already in evidence as  
24 State's Number 2 and ask you to take a look at that. And  
25 do you recognize State's Number 2?

- 1 A. Yes, sir.
- 2 Q. And what is State's Number 2?
- 3 A. It is the photo lineup report that I completed.
- 4 Q. Is it the admonition?
- 5 A. Yes.
- 6 Q. Is that the exact document you used to admonish
- 7 Mr. Patel?
- 8 A. Yes.
- 9 Q. Before showing him the photos?
- 10 A. Yes, sir.
- 11 Q. And you went over all these admonishments with him?
- 12 A. Yes.
- 13 Q. Did you let him know that he was free to not choose
- 14 anybody?
- 15 A. Yes.
- 16 Q. Did you tell him the suspect may or may not be in
- 17 the photos you were going to present to him?
- 18 A. Yes.
- 19 Q. Did you tell him he had to circle somebody?
- 20 A. No.
- 21 Q. And is it your testimony that his son was able to
- 22 help him understand?
- 23 A. Yes.
- 24 Q. And acknowledge that?
- 25 A. Uh-huh.

1 THE COURT: Is that a yes?

2 A. Yes.

3 THE COURT: Thank you.

4 Q. And did you feel comfortable that he understood?

5 MR. GROEBER: Objection, Your Honor, leading.

6 THE COURT: Just rephrase it. Thank you.

7 BY MR. RUTLEDGE DURANT:

8 Q. Did you feel comfortable that the witness

9 understood what you were telling him?

10 A. Yes.

11 Q. And did he indicate that?

12 A. Yes.

13 Q. And how did he indicate that?

14 A. By initialling and verbalizing yes.

15 Q. And after you went over this form with him what did

16 you do?

17 A. I then showed him that picture of the -- the

18 six-picture array of photographs.

19 Q. What was his reaction when you showed him the six

20 pictures?

21 A. He immediately pointed (indicated) and said, That's

22 him, that's him. And he was pointing like repeatedly

23 (indicated). And I was like, Okay. I said, Well circle

24 it and put your initials and put the time on there.

25 So you time that it starts. If you look at the

1 form here it has the time that you start reading  
2 everything that he had to initial and then at the end  
3 there's a time that it's conducted. So it's a  
4 four-minute time span from the time that I began this to  
5 the time that he was shown the photograph and circled and  
6 initialled it.

7 Q. Now, did the fact that he had circled somebody's  
8 photograph confirm or deny anything to you?

9 A. No.

10 Q. And if Mr. Patel had not chosen anybody what would  
11 you have done?

12 A. Went back to the office, work on my cases.

13 Q. Would it have been noted?

14 A. That he didn't? I'm sorry.

15 Q. Would it have been noted that he didn't choose  
16 anybody?

17 A. On here?

18 Q. Yes.

19 A. Yes.

20 Q. And, in fact, have you administered procedures  
21 where people have not chosen people?

22 A. Numerous times.

23 Q. And do you note that on that form?

24 A. Yes.

25 Q. On a form just like that?

1 A. Yes.

2 Q. And I'm showing you what's already in evidence as  
3 State's 3. Do you recognize State's 3?

4 A. Yes, sir.

5 Q. And what do you recognize that as?

6 A. This is the photo lineup that he was shown and the  
7 one he circled, initialed, dated and put the time on.

8 Q. And is that the exact photo array that he was  
9 shown?

10 A. Yes, sir.

11 Q. And does it contain the picture that Mr. Patel  
12 circled?

13 A. Yes.

14 Q. Did you or Detective Lawrence say anything to him  
15 such as, Good job, you chose the right person?

16 A. No. I didn't know if it was the right person or  
17 not, sir.

18 Q. Did you or Detective Lawrence give any kind of  
19 assurance to Mr. Patel that he had chosen correctly?

20 A. No, sir.

21 Q. Would you have done that?

22 A. No.

23 Q. Do you do that --

24 A. No.

25 Q. -- when you administer procedures?

1           And why do you not do that?

2   A.       Well, as far as me being an independent  
3   administrator the first thing is I don't know -- he could  
4   have picked the wrong person with me not even knowing  
5   because I didn't know who the person was. So I didn't  
6   have a dog in the fight so-to-speak.

7   Q.       And what, if anything, was told to Mr. Patel after  
8   he circled photo number four?

9   A.       I advised him that someone would be contacting him.

10   Q.       Did you influence him in any way to pick out photo  
11   number four?

12   A.       No, sir.

13   Q.       Did you tell him to pick out photo number four?

14   A.       No, sir.

15   Q.       Did anyone involved in this process or right there  
16   when you administered the procedure tell him to pick  
17   photo number four?

18   A.       No, sir.

19   Q.       Is it your testimony that Mr. Patel chose photo  
20   number four on his own free will?

21   A.       Yes, sir, it is.

22           MR. RUTLEDGE DURANT: Thank you.

23           THE COURT: Thank you.

24           Mr. Groeber?

25           MR. GROEBER: Thank you, Your Honor.

**1** CROSS-EXAMINATION

2 BY MR. GROEBER:

3 Q. Good morning, Detective.

4 A. Morning.

5 Q. I'd like to ask you a few questions. You've been a  
6 detective for about six years?

7 A. Seven.

8 Q. Seven years. Okay. And part of being a police  
9 officer is being familiar with the policies of the  
10 office?

11 A. Yes.

12 Q. And Charleston County Sheriff's Office has a policy  
13 manual?

14 A. Yes.

15 Q. And that's pretty much true of most big  
16 organizations, right?

17 A. I'm -- yes.

**18 Q.** You work hard at your job?

19 A. I'm sorry?

**20 Q.** You work hard at your job, right?

21 A. Yes, uh-huh.

22 Q. And you studied the policy manual?

23 A. Yes.

24 Q. Part of probably your training in becoming a deputy  
25 at the very first time you are hired or even a detective

1 would be to study the manual, correct?

2 A. Yes.

3 Q. And you're probably given updates about changes in  
4 the policy?

5 A. Yes.

6 Q. And you have to pay attention to all of that,  
7 right?

8 A. Yes.

9 Q. Because it's important?

10 A. Yes.

11 Q. Because it's basically your boss telling you how  
12 you need to do your job?

13 A. Yes.

14 Q. And you do that, right? You pay attention to the  
15 policies and the updates?

16 A. For the most part, yes, sir.

17 Q. Are you familiar with your office's policy 8-06 on  
18 show-ups, photo identifications and lineups?

19 A. Yes.

20 Q. And the reason that you all have that policy is  
21 because it's important to ensure reliable accurate  
22 identifications?

23 A. Yes.

24 Q. And the policy itself says that, right?

25 A. Yes.



1 Q. And it's important to -- it's also important to  
2 prepare a lineup in a non suggestive manner, right?

3 A. Yes.

4 Q. And the policy says that's so that a suspect does  
5 not unduly stand out from the other people in the lineup?

6 A. Yes.

7 Q. And you know the difference between a sequential  
8 and a simultaneous photo lineup, right?

9 A. Of course.

10 Q. A sequential one is where you present witnesses  
11 with six photographs one at a time?

12 A. Yes.

13 Q. And I guess you can do more than six?

14 A. Uh-huh.

15 Q. A simultaneous one is where you present the witness  
16 with what we call a six pack?

17 A. Yes.

18 Q. Right? And that's what you did in this case?

19 A. Yes, sir.

20 Q. It was a simultaneous, a six pack?

21 A. Uh-huh.

22 Q. Now, there is actually as part of your policy it  
23 tells you how to go about conducting the photo lineup,  
24 right?

25 A. Yes.

1 Q. And first the policy says that in either kind of  
2 lineup, simultaneous or a sequential one, that it's got  
3 to be done in a fair, reliable and objective way, right?

4 A. Yes.

5 Q. And you tried to do that?

6 A. Yes.

7 Q. And you --

8 A. I do that.

9 Q. And you tried to do it in this case, too?

10 A. I did it in this case.

11 Q. Okay. You served as what's called an independent  
12 administrator in this --

13 A. That's correct.

14 Q. So you don't know who the person is --

15 A. Suspect --

16 THE COURT: Please don't speak over each other.

17 Thank you.

18 BY MR. GROEBER:

19 Q. Part of your job as the independent administrator  
20 is to read some instructions --

21 A. Yes.

22 Q. -- correct?

23 MR. GROEBER: May I approach the witness?

24 THE COURT: You may.

25 BY MR. GROEBER:

1 Q. I can't remember if it's State's 2 or 3, which one  
2 is which.

3 A. You talking about 6?

4 Q. State's 2 is identification, right, the  
5 identification form?

6 A. Yes.

7 Q. Okay. And State's 3 would be the six pack, photo  
8 lineup?

9 A. Yes.

10 Q. Okay. And you testified about how you did that in  
11 this case, right?

12 A. Yes.

13 Q. What you do is that you read the information to the  
14 witness?

15 A. Yes.

16 Q. And you make sure they understand each single  
17 sentence?

18 A. Yes.

19 Q. And the way you document that is if after you think  
20 they understand the sentence and they tell you verbally  
21 that they understand the sentence --

22 A. After he or she --

23 Q. He or she. Thank you.

24 A. -- understands it.

25 Q. Then --

1 A. He or she will initial it.

2 Q. Okay. And they'll initial and that says I  
3 understand?

4 A. Yes.

5 Q. And that's after they verbally told you that?

6 A. Yes.

7 Q. And they are asked after you read them all the  
8 instructions to sign the form?

9 A. They are --

10 Q. He or she?

11 A. Yes, signs this form after the lineup has been  
12 shown.

13 Q. And he prints his full name on it, too, right?

14 A. Yes.

15 Q. And there's a space for her or him to write  
16 comments?

17 A. Yes. Uh-huh.

18 Q. And this case was a little unique, wasn't it,  
19 because you had a translator?

20 A. I wouldn't -- I mean, he assisted him but he was  
21 not a translator.

22 Q. Okay. And this was Dhruval Patel?

23 A. Yes, the son. Uh-huh.

24 Q. You asked him to help you to help his father  
25 understand?

1 A. Yeah. I said, Would you assist your dad in case I  
2 come across something that he has difficulty  
3 understanding, and he did that.

4 Q. Okay. So you would read each paragraph or sentence  
5 to Dhruval or to the dad?

6 A. To the dad.

7 Q. Okay. And then Dhruval would translate?

8 A. No, not necessarily.

9 Q. Okay. So he didn't translate every single one of  
10 the seven?

11 A. No.

12 Q. But he did translate some of them to his dad?

13 A. I can't -- I know that there was communication but  
14 I don't know at what point or which one he translated or  
15 assisted him.

16 Q. You didn't do a report in the case, right?

17 A. Well, this is the report.

18 Q. Okay. You didn't do another report other than  
19 that?

20 A. Well, this is the only involvement I had with it.

21 Q. Okay. And, I mean, you know how to write a report,  
22 correct?

23 A. Well, of course.

24 Q. You write reports all the time?

25 A. Of course.

1 Q. That's probably -- you spend most of your time  
2 writing reports?

3 A. Yes.

4 Q. So you know how to do one, right?

5 A. Yes. Uh-huh.

6 Q. And you didn't document on that piece of paper  
7 anywhere saying which ones Dhruval helped and which ones  
8 he didn't help on?

9 A. Well, he was communicating. I don't speak that  
10 language.

11 Q. Hindi.

12 A. So I don't know exactly what was being said to him.

13 Q. Okay.

14 A. So it's hard for me -- I mean, throughout the  
15 process he was communicating with him. I don't know if  
16 it was relating to this or relating to something else.  
17 So I think it would be --

18 Q. But you didn't make any notes about when Dhruval  
19 was talking about a particular sentence or not --

20 A. No.

21 Q. -- did you?

22 A. No, I didn't.

23 Q. And you started the procedure at 3:01, correct?

24 A. Yes.

25 Q. And that's on the form with the questions that says

1 when you started and it's written right on there, 3:01?

2 A. Yes.

3 Q. And you wrote that?

4 A. Yes. That's my handwriting.

5 Q. And then Mr. Patel, you read all the instructions,  
6 correct?

7 A. Yes.

8 Q. He indicated that he understood them all?

9 A. Yes.

10 Q. And Dhruval was talking to him during this  
11 sometimes?

12 A. Yes.

13 Q. And he circled -- he looks at the photo lineup?

14 A. Yes.

15 Q. He circles number four?

16 A. Yes.

17 Q. And then he writes the time?

18 A. Yes.

19 Q. And that was 3:05?

20 A. Yes.

21 Q. Okay. Now, the policy also instructs you not to  
22 provide any feedback to the witness, correct?

23 A. Yes.

24 Q. And you didn't give any feedback in this case?

25 A. No.

1 Q. It also instructs you to ask the witness to provide  
2 a level of confidence, correct?

3 A. Yes. Uh-huh.

4 Q. And you didn't ask for a level of confidence in  
5 this case?

6 A. He was adamant, but I did not. If your question is  
7 -- I did not.

8 Q. You didn't ask him that question?

9 A. No.

10 Q. Your policy also says that you are to instruct them  
11 not to discuss the case with other witnesses.

12 A. Uh-huh.

13 Q. Including the media, right?

14 A. Yes.

15 Q. And that's important because you don't want people  
16 to influence each other?

17 A. Yes.

18 Q. Witnesses to influence each other?

19 A. Yes.

20 Q. Or some other outside person influencing the  
21 witness?

22 A. You are correct.

23 Q. And you told him that in this case?

24 A. Uh-huh.

25 Q. Both Dhruval and Mr. Patel?



1 A. Yes.

2 Q. Now, finally, your policy has a paragraph about  
3 documenting procedures, right?

4 A. I'm sorry?

5 Q. Your policy has a paragraph about how to document a  
6 lineup procedure?

7 A. Yes.

8 Q. And you were supposed to document it by saying the  
9 source of the photos used?

10 A. What do you mean?

11 Q. You're supposed to document where the photos came  
12 from, right?

13 A. Yeah, not me, the case agent.

14 Q. Okay.

15 A. Yeah. The only thing that I'm here to do was  
16 administer the lineup. Outside of that, you would have  
17 to discuss that with Detective Lawrence?

18 Q. Okay. Do you have a copy of your -- the policies  
19 for Charleston County?

20 A. No, I do not.

21 Q. If you took a look -- if I showed you a copy would  
22 that refresh your recollection on whether -- how you're  
23 supposed to document your procedures?

24 A. It may be helpful.

25 MR. GROEBER: Okay. Your Honor, may I approach the

1 witness?

2 THE COURT: You may.

3 BY MR. GROEBER:

4 Q. I'm handing you what's been marked as Defense  
5 Exhibit 2. Do you recognize that?

6 A. It looks familiar.

7 Q. What is it?

8 A. I'm sorry?

9 Q. What is it?

10 A. It's the policy.

11 Q. Okay. The Charleston County Sheriff's Office  
12 policy?

13 A. Yes.

14 Q. And specifically the policy on show-ups, photo  
15 identification and lineups?

16 A. Yes.

17 Q. And I think you testified earlier that you were the  
18 independent administrator in this lineup, right?

19 A. Uh-huh.

20 Q. I refer you to page six of 11.

21 A. Okay.

22 Q. Paragraph 16, and I'd ask you to read that and look  
23 up when you are finished, please.

24 A. The independent administrator will document all  
25 lineup procedures including the source and photos used,

1 the date and time the lineup was conducted and the names  
2 of all persons present when the lineup was shown.

3 Any lineup that an independent administrator shows  
4 to a witness regardless of whether the witness makes  
5 identification of the suspect will become part of the  
6 investigative file.

7 And in the case of the sequential lineup, will  
8 include documentations as to the order of which photos  
9 were shown to the witness.

10 Q. Okay. So your policy contemplates that you  
11 document all the procedures used in the lineup, right?

12 A. Yes. Uh-huh.

13 Q. And what you did, you thought to fulfill that that  
14 you just filled out -- helped Mr. Patel fill out the  
15 form, right, with the instructions?

16 A. Yes. Yes. Uh-huh.

17 Q. The sheriff's office has access to a video camera,  
18 right?

19 A. Yes.

20 Q. And recording devices like audio recording, tape  
21 recorders?

22 A. Of course, yeah.

23 Q. And you did not use any video or audio to record  
24 this particular lineup?

25 A. No.

1 MR. GROEBER: May I have one moment, Your Honor?

2 THE COURT: You may.

3 MR. GROEBER: No further questions. Thank you,

4 Your Honor.

5 BY MR. GROEBER:

6 Q. Thank you, Detective.

7 A. Yes.

8 THE COURT: Mr. Durant?

9 MR. RUTLEDGE DURANT: Briefly.

10 REDIRECT EXAMINATION

11 BY MR. RUTLEDGE DURANT:

12 Q. The six-pack photo array, that's one identification  
13 procedure; is that correct?

14 A. That's correct.

15 Q. There are other procedures?

16 A. That's correct.

17 Q. What are some of the other procedures that you've  
18 ever conducted or that you are aware of?

19 A. You mean as far as the photos being shown?

20 Q. As far as just a witness identifying somebody.

21 A. We've done numerous different kinds; physical,  
22 we've done sequential. I mean, it's numerous lineups  
23 that we've done. Just in this one we did a six-picture  
24 lineup.

25 Q. Ever had the opportunity to just show one single

1 picture to a witness?

2 A. Oh, of course.

3 Q. And in what situation would that more commonly be  
4 done?

5 A. That would be done if, for instance, they've known  
6 them for an extended period of time, that would be done.

7 Q. And that they've told you their name?

8 A. Yes.

9 Q. Maybe commonly a wife saying my husband did this?

10 A. Yes.

11 Q. But there are a lot of different ways to go about  
12 doing it, right?

13 A. That's correct.

14 Q. Did you think that you had suggested in any way  
15 that Mr. Patel needed to pick out number four?

16 A. No.

17 MR. RUTLEDGE DURANT: Thank you.

18 MR. GROEBER: No further questions, Your Honor.

19 THE COURT: You may step down. Thank you.

20 THE WITNESS: Thank you.

21 THE COURT: Call your next witness.

22 MR. RUTLEDGE DURANT: The State calls Jagruti  
23 Patel.

24 THE COURT: Madam Interpreter, if you'd come  
25 forward. I remind you that you are still under oath.

1 MR. GROEBER: Your Honor, at this time I'd renew my  
2 pretrial objections.

3 THE COURT: Thank you. They are so noted.

4 Ma'am, please come forward and take the oath.

5 JAGRUTI PATEL, after having been duly sworn,  
6 testified as follows:

7 THE CLERK: Please be seated. Speak into the mic  
8 and please say your full name and spell your last name.

9 THE WITNESS: Jagruti Patel, P-a-t-e-l.

10 THE COURT: Mr. Durant.

11 MR. RUTLEDGE DURANT: Thank you, Your Honor.

12 DIRECT EXAMINATION

13 BY MR. RUTLEDGE DURANT:

14 (Through the interpreter.)

15 Q. Mrs. Patel, how old are you?

16 A. Thirty-nine.

17 Q. Do you live in Charleston?

18 A. Yes.

19 Q. Where were you born?

20 A. India.

21 Q. When did you come to the United States?

22 A. October 11th, 2003.

23 Q. Why?

24 A. For job and family.

25 Q. Are you married?

- 1 A. Yes.
- 2 Q. Who is your husband?
- 3 A. Natubhai Patel.
- 4 Q. How long have you been married?
- 5 A. Seventeen years.
- 6 Q. Do you have any children?
- 7 A. Yes, two children.
- 8 Q. How old are they?
- 9 A. One of them is 14 and the other is six.
- 10 Q. What do you do for a living?
- 11 A. Behind the register at a store.
- 12 Q. Where is that store located?
- 13 A. 5737 Savannah Highway, Ravenel.
- 14 Q. Do you and your husband own that store?
- 15 A. Yes.
- 16 Q. How long have you owned it?
- 17 A. Four years.
- 18 Q. Do you also work at the store?
- 19 A. Yes.
- 20 Q. And what do you do when you work at the store?
- 21 A. Behind the register.
- 22 Q. Do you interact with customers?
- 23 A. Yes.
- 24 Q. Do you sell things to customers?
- 25 A. Yes.

- 1 Q. I want to take you back to December 24th, 2010.
- 2 A. Okay.
- 3 Q. Do you recall going to the store that morning?
- 4 A. I was at home.
- 5 Q. Did you go to the store that morning?
- 6 A. After my husband called I went there.
- 7 Q. What was going on at the store when you got there
- 8 that morning?
- 9 A. My husband called to tell me about a robbery that
- 10 had taken place, so I just went there, to the store.
- 11 Q. Who did you go with?
- 12 A. With my older son, Dhruval.
- 13 Q. Why did Dhruval go to the store?
- 14 A. He was the only one knowledgeable about the video
- 15 processes.
- 16 Q. And your store has a video surveillance system?
- 17 A. Yes.
- 18 Q. Did this video surveillance system capture the
- 19 robbery at the store?
- 20 A. Yes.
- 21 Q. Did you view this video?
- 22 A. Yes.
- 23 Q. When did you view it?
- 24 A. When I went to the store.
- 25 Q. Who all was around when you viewed it the first



1 time?

2 A. My husband, myself, my son, and the police.

3 Q. Did you recognize the man in the video?

4 A. Yes.

5 Q. What was the man doing in the video that you  
6 recognized?

7 A. He walked into the store with a gun and asked my  
8 husband for money.

9 Q. Had you seen that man before?

10 A. Yes. I've seen him before. He used to come.

11 Q. Where had you seen him?

12 A. At my store. He used to come.

13 Q. How often did he come to your store?

14 A. At least once a day.

15 Q. For how long?

16 A. I don't remember very well but around six months.

17 Q. So to be clear, your testimony is that you remember  
18 the man in the video coming to your store every day for  
19 approximately six months?

20 A. Yes, he would come regularly.

21 Q. What would he do when he would come to the store?

22 A. He would come buy Newport cigarettes, ten-dollar  
23 lottery tickets, and sometimes gas.

24 Q. Would you sell these items to him?

25 A. Yes.

1 Q. Would you ever speak with him?

2 A. Yes, I would talk to him because it is my job to  
3 check the identification of the person who buys  
4 cigarettes and I would ask him for his ID, and he would  
5 joke about Obama having signed his ID.

6 Q. Are you certain that you recognized the man in the  
7 video as the man who would buy all of these items from  
8 you at your store?

9 A. Yes.

10 Q. And when he would purchase these items from you at  
11 the store would you see his face?

12 A. Yes.

13 Q. Would you not only hear him talk but see him talk?

14 A. Yes.

15 Q. Did you have an opportunity at those times to see  
16 the man walk?

17 A. Yes.

18 Q. And is it your testimony that the man in that video  
19 was someone that you had seen often?

20 A. Yes.

21 Q. Did you recognize the man in the video as a regular  
22 customer?

23 A. Yes.

24 Q. How quickly did you recognize that fact when you  
25 saw the video the first time?

1 A. We watched the video about four or five times, me  
2 and my husband, and talked about it and then we were very  
3 sure that this was the man.

4 Q. Are you certain that the man that you saw in that  
5 video is your regular customer?

6 A. Yes.

7 Q. Is there any doubt in your mind that he was a  
8 regular customer in your store?

9 MR. GROEBER: Objection, Your Honor. Asked and  
10 answered.

11 THE COURT: I'm going to allow this question.  
12 Thank you.

13 You may answer.

14 A. He is that man.

15 Q. Is there any doubt in your mind the man that you  
16 saw on that video was the man who had joked with you  
17 about Obama having signed his license?

18 A. He is that man.

19 Q. Do you know that because your husband told you it  
20 was that man or do you know that because of your previous  
21 experience with that man?

22 MR. GROEBER: Objection, leading.

23 MR. RUTLEDGE DURANT: It's not.

24 THE COURT: Counsel. Overruled.

25 You may answer.

1 MR. RUTLEDGE DURANT: Let me repeat it.

2 BY MR. RUTLEDGE DURANT:

3 (Through the interpreter.)

4 Q. Do you know that the man in that video was your  
5 regular customer because your husband told you it was  
6 your regular customer or because of your previous  
7 experience with that man?

8 A. I realized it myself.

9 Q. Do you see your regular customer, the man that you  
10 saw in that video in this courtroom today?

11 MR. GROEBER: Objection, Your Honor, previously  
12 made.

13 THE COURT: You may answer.

14 Overruled, subject to our previous rulings.

15 THE INTERPRETER: Could you ask it again, please?

16 BY MR. RUTLEDGE DURANT:

17 (Through the interpreter.)

18 Q. Do you see the man that you recognized as your  
19 regular customer who is the same man in that video in  
20 this courtroom today?

21 A. Yes, he's here.

22 Q. Please point to him and describe what he is  
23 wearing.

24 A. (Indicated). That's him in the white shirt and  
25 tie.

1 MR. RUTLEDGE DURANT: Let the record reflect that  
2 the witness has identified the defendant.

3 THE COURT: It will.

4 I'll note your exception. Thank you.

5 BY MR. RUTLEDGE DURANT:

6 (Through the interpreter.)

7 Q. Mrs. Patel, are you certain that this man was your  
8 regular customer who bought Newport cigarettes from you,  
9 lottery tickets from you, sometimes gasoline, and joked  
10 with you that Obama had signed his license?

11 A. Yes.

12 Q. Is there any doubt in your mind?

13 A. No.

14 Q. And is that the same man that you recognize as  
15 being in that video?

16 A. Yes.

17 Q. And do you know that because your husband told you  
18 that or do you know that based on your previous  
19 experience with him?

20 MR. GROEBER: Objection, leading.

21 THE COURT: Overruled, as to leading.

22 A. I know he's my regular customer.

23 MR. RUTLEDGE DURANT: Thank you.

24 THE COURT: Mr. Groeber?

25 MR. GROEBER: Thank you, Your Honor. May it please

1 the Court.

2 CROSS-EXAMINATION

3 BY MR. GROEBER:

4 (By the interpreter.)

5 Q. Good morning, Mrs. Patel.

6 A. Good morning.

7 Q. I'd like to ask you a few questions about your  
8 testimony today.

9 A. Okay.

10 Q. You were not at the scene at the time of the  
11 robbery?

12 A. I wasn't there.

13 Q. You received a phone call from your husband that  
14 morning?

15 A. Yes.

16 Q. And he told you that there had been a robbery?

17 A. Yes.

18 Q. And he told you on the phone that he recognized the  
19 man that had robbed him?

20 A. He didn't tell me that on the phone.

21 Q. You watched the video when you got to the gas  
22 station?

23 A. Yes.

24 Q. And you were in the office in the gas station?

25 A. Yes.

- 1 Q. And your son, Dhruval, was there?
- 2 A. Yes.
- 3 Q. And your husband was there?
- 4 A. Yes.
- 5 Q. And there were two police officers there?
- 6 A. Yes.
- 7 Q. You all watched the video that morning?
- 8 A. Yes.
- 9 Q. Several times?
- 10 A. Yes.
- 11 Q. And you and your husband spoke about the video?
- 12 A. Yes. We watched it and I was sure that that was
- 13 that man.
- 14 Q. But you all discussed it together?
- 15 A. We have a business so we had to work.
- 16 Q. And my question is, you and your husband talked --
- 17 I think you testified earlier that you and your husband
- 18 looked at the video together and talked about it
- 19 together?
- 20 A. We did not have a very long discussion about it
- 21 because we have a business and we had to go back to it.
- 22 Q. But you did talk about it?
- 23 A. Yes, we did talk but not for too long.
- 24 Q. And it's your testimony that on that day you
- 25 recognized who the robber was?

1 A. Yes, I knew him.

2 Q. And you told the police that?

3 A. Yes.

4 Q. You watched the video several times that day,  
5 you've already said.

6 A. Yes.

7 Q. And you watched it several times after that day?

8 A. I didn't watch it more than four or five times  
9 because I have a business and I have housework to do.

10 Q. Okay. And I'm not asking about the day of the  
11 robbery. I'm asking the days after the robbery if you  
12 watched it anymore.

13 A. I don't remember very well how many times I watched  
14 it after that day.

15 Q. Now, you testified that you recognized my client as  
16 the customer and the person in the video, correct?

17 A. Yes.

18 Q. And the video that you watched you saw only the  
19 front door?

20 A. Yes.

21 Q. You didn't see any video other than one that showed  
22 the front door?

23 A. There was no need for me to watch any of the video  
24 because as soon as I saw this video I recognized the man.

25 Q. How did you recognize him from that video?



1 A. By his walk.

2 Q. Anything else?

3 A. His walk, his mannerisms and his body language.

4 Q. You testified about this matter under oath before,

5 correct?

6 A. Yes.

7 Q. And I asked you that same question.

8 A. Yes.

9 Q. And you said in that testimony that you recognized  
10 him by his voice.

11 A. He used to come almost every day to my store and I  
12 could make out the way he walked and talked, based on  
13 that.

14 Q. And my question to you is I asked you this -- I  
15 have asked you before about this, correct?

16 A. Yes.

17 Q. And you were under oath?

18 A. Yes.

19 Q. And you said that you recognized his voice?

20 A. Yes. I said that I recognized his voice and the  
21 way he walked.

22 Q. When you watched the video on the day of the  
23 robbery was there any sound?

24 A. I did not say that I recognized the voice from the  
25 video. I was referring to the fact that I knew how he

1 talked and how he walked when I saw the video based on my  
2 previous experience with the man.

3 Q. Okay. My question was when you watched the video  
4 on the day of the robbery did you hear any sound?

5 A. No.

6 MR. GROEBER: May I have one moment, Your Honor?

7 THE COURT: You may.

8 (PAUSE.)

9 BY MR. GROEBER:

10 (Through the interpreter.)

11 Q. Do you remember when I asked you that question  
12 before?

13 A. Yes.

14 Q. And you were under oath?

15 A. Yes.

16 Q. And you said that you could not remember if there  
17 was sound?

18 A. But now I'm saying that I am recollecting that he  
19 used to come to my store all the time and I was familiar  
20 with his voice and the way he talked. That's why I'm  
21 telling you now.

22 Q. Okay. But you did not remember the previous time  
23 that you did testify?

24 A. I did say I knew that I was familiar with the way  
25 he talked and walked based on my previous experience with

1 him.

2 Q. And you said -- and I'd like to talk a little bit  
3 about your previous experience. Do you remember what  
4 kind of shoes your regular customer who joked about Obama  
5 wore?

6 A. There are too many customers who come to my store  
7 and I don't look at all of their shoes.

8 Q. When you --

9 MR. GROEBER: May I have one moment, Your Honor?

10 THE COURT: Take all the time you need.

11 BY MR. GROEBER:

12 (Through the interpreter.)

13 Q. You testified earlier that the person who came in  
14 your store frequently, who you think is my client, would  
15 buy cigarettes?

16 A. Yes.

17 Q. And you always identified -- you asked for his ID?

18 A. Yes.

19 Q. Mrs. Patel, you testified that you recognized my  
20 client from the video?

21 A. Yes.

22 Q. And in the video the robber was wearing a hat,  
23 sunglasses, and a hoodie jacket?

24 A. Yes.

25 Q. Do you believe that you could look at a photograph

1 of a young black man wearing sunglasses and a hoodie over  
2 his head and tell if it is my client?

3 MR. RUTLEDGE DURANT: Objection.

4 THE COURT: She may answer that question.

5 A. Why would I want to see another photograph?

6 Q. Do you believe that you can look at another  
7 photograph of a young black man wearing sunglasses and a  
8 hoodie over his head and tell if it is my client?

9 A. When we are talking about this man why would I want  
10 to look at a picture of another man?

11 MR. GROEBER: One moment, Your Honor.

12 THE COURT: Yes, sir.

13 (PAUSE.)

14 BY MR. GROEBER:

15 (Through the interpreter.)

16 Q. Mrs. Patel, today you've identified my client,  
17 Marvin Green, as the person who robbed you in the store,  
18 correct?

19 A. Yes.

20 Q. And you never -- the police never gave you a set of  
21 pictures to look at, did they?

22 A. No.

23 Q. Now, I'd like you to look around in the courtroom  
24 and other than the jury box how many young black men are  
25 in the courtroom right now?

1 A. Why should I look?

2 MR. GROEBER: Your Honor, I'd ask that you instruct  
3 the witness to answer the question, please.

4 THE COURT: Mrs. Patel, I need you to answer the  
5 question.

6 A. Why are they asking me this?

7 THE COURT: Mrs. Patel, I need you to answer that  
8 question.

9 A. I do not know why you are asking me this question.  
10 If you tell me why you are asking me this question maybe  
11 I will answer it.

12 Q. It's true that there is only one young black male  
13 in the courtroom right now?

14 A. I never said that.

15 Q. You pointed out Mr. Green who's sitting at this  
16 table, correct?

17 A. Yes.

18 Q. And he's not sitting at this table where the  
19 solicitors are sitting at, is he?

20 A. No.

21 MR. GROEBER: One moment, Your Honor?

22 THE COURT: Yes, sir.

23 MR. GROEBER: No further questions.

24 Thank you, Mrs. Patel.

25 THE COURT: Mr. Durant?

1                                    REDIRECT EXAMINATION

2 BY MR. RUTLEDGE DURANT:

3 (Through the interpreter.)

4 Q.        Do you want to be tricked?

5 A.        No, I never want that.

6 Q.        Why are you here saying what you are saying?

7 A.        I don't understand you very well.

8 Q.        Are you here to tell the truth?

9 A.        Yes.

10 Q.        Are you here to tell the jury that you are certain  
11 that this is the man you recognized on the video?

12 A.        Yes.

13 Q.        If you were not certain would you tell that to the  
14 jury?

15 A.        But I have not doubts. He is that man.

16 Q.        But if you did only merely think it was your  
17 regular customer would you tell that to the jury?

18 A.        I don't even have the slightest doubt.

19            MR. RUTLEDGE DURANT: Thank you.

20            THE COURT: Mr. Groeber?

21            MR. GROEBER: Nothing further, Your Honor.

22            THE COURT: You may step down. Thank you.

23            Call your next witness.

24            MR. RUTLEDGE DURANT: Your Honor, at this time the

25 State rests its case.

1           THE COURT: Ladies and gentlemen, that indicates to  
2 the Court there's a matter of law that I must take up  
3 outside of your presence. It's also a good time for us  
4 to go ahead and take our lunch break. Do not begin your  
5 deliberations, do not discuss this case amongst  
6 yourselves. Please be back in your jury room at  
7 2:00 p.m.

8           Thank you. Please rise for the jury.

9           (WHEREUPON, the jury leaves the courtroom at  
10 approximately 12:05 p.m.)

11          THE COURT: I thought this would be an appropriate  
12 time to let the jury go and do our motions, and then take  
13 a lunch break. It just seemed appropriate, and it seems  
14 to me that we are not going to get it to the jury today.  
15 Would you agree, Mr. Durant?

16          MR. RUTLEDGE DURANT: I would agree, Your Honor.

17          THE COURT: Mr. Groeber?

18          MR. GROEBER: That it will not get to the jury?

19          THE COURT: Right.

20          MR. GROEBER: I would agree, Your Honor.

21          THE COURT: All right. I'll be happy to hear from  
22 you if there's any motions or matters before we break for  
23 lunch.

24          MR. GRIMES: Thank you, Your Honor. May it please  
25 the Court. At this time, the defense would first --

1 first we'd move for a mistrial. We believe -- we  
2 understand the Court's rulings but out of precaution  
3 preserve the record for any appeals.

4 THE COURT: She's having a hard time hearing, so  
5 maybe you need to move to the podium.

6 All right. So you're requesting a mistrial based  
7 upon my rulings on the evidentiary issues. What else,  
8 Mr. Grimes?

9 MR. GRIMES: Yes, ma'am. We'd site to the case of  
10 Gullledge vs. State, 328 S.C. 504, it was a civil -- it  
11 wasn't Gullledge vs. State, a civil case, where a police  
12 officer gave his opinions to the cause of an accident.

13 In there the Court said that the police officer may  
14 only testify as to his direct observations unless  
15 qualified as an expert.

16 We believe as Mr. Groeber moved pretrial that  
17 allowing Officer Luckadoo and Detective Lawrence to  
18 testify to the person in the video as Marvin Green was  
19 improper opinion testimony and they could have testified  
20 as to direct observation such as the walk, mannerisms,  
21 compared to mannerisms of Mr. Green but not to give their  
22 opinion that the person in the video was Mr. Green. We  
23 believe that causes -- to be grounds for a mistrial.

24 We'd also move for a directed verdict based on  
25 insufficiency --



1           THE COURT: All right. As to the mistrial, any  
2 response, Mr. Durant?

3           MR. RUTLEDGE DURANT: Well, Your Honor, I just  
4 remind the Court that we had stipulated to the personal  
5 knowledge aspect under 404(b) upon which all of these  
6 witnesses base their foundation for knowing this  
7 defendant and we agreed pretrial not to get into anything  
8 that was unnecessarily prejudicial rather than  
9 appropriate. So their foundations for knowing him then  
10 being able to pick him out of the video were already even  
11 stipulated to by the defense. The basis for their  
12 personal knowledge was stipulated to.

13           And under the analysis set forth in State V. Fripp  
14 and under 701 had every right to come in here and was  
15 relevant for the jury to determine a factual issue in  
16 this case being the identity of the robber, that's what  
17 we'd submit to the Court.

18           THE COURT: Mr. Grimes?

19           MR. GRIMES: Just to clarify my position, we  
20 weren't arguing that they didn't -- the lack of  
21 foundation. We're just arguing that the admission of  
22 their opinion testimony as a matter of law was in error  
23 and believe to be grounds for a mistrial.

24           THE COURT: All right. Your motion for a mistrial  
25 is denied. As you know, mistrial is a very extreme

1 circumstance. Based upon my rulings on all of the -- or  
2 the articulated at the time, the motions were made, I  
3 deny your motion for a mistrial at this time. Thank you.

4 MR. GRIMES: Thank you, Your Honor.

5 We also move for a directed verdict based upon  
6 insufficiency of the evidence. Again, the Patel  
7 identifications there was a lot of testimony that he was  
8 a regular customer; however, I believe it was unduly  
9 suggestive -- suggestful to our identifications.

10 You have Mrs. Patel talking to her husband about  
11 the case, watching the video four or five times, and  
12 talking among themselves. I believe that was -- given  
13 that was in the context of a police officer being there,  
14 Officer Luckadoo, Officer Kjellman, Deputy Roberson, that  
15 was kind of sort of an inherently suggestive as done as a  
16 show-up essentially. And when they talk among themselves  
17 that contradicts sort of the admonitions and sheriff's  
18 department's own policies makes their identifications  
19 unreliable as a matter of law.

20 We'd also renew as to Detective Lawrence's  
21 identification of Mr. Green. I believe he was unduly  
22 influenced by Detective Luckadoo when he said he called  
23 him, told him who it was. It was in the incident report.

24 As to Deputy Luckadoo, Detective Lawrence himself  
25 said he was, I think quote, just a road deputy and he

1 didn't rely upon his testimony. So therefore, we can't  
2 rely upon -- Deputy Lawrence can't rely upon his  
3 testimony and the Court cannot. So we'd ask for a  
4 directed verdict based on those grounds, Your Honor.  
5 Thank you.

6 THE COURT: All right. Anything further?

7 MR. GRIMES: Let me check with Mr. Groeber.

8 (PAUSE.)

9 MR. GRIMES: No, ma'am.

10 THE COURT: All right. Mr. Durant, any response?

11 MR. RUTLEDGE DURANT: May it please the Court, Your  
12 Honor. Under the any evidence standard upon which the  
13 Court is guided by and clearly there's evidence that an  
14 armed robbery occurred, clearly there's evidence that it  
15 was accomplished with a pistol during a violent crime,  
16 and that's all from the video.

17 Then as for who did it, there are four people who  
18 identified the defendant as the person who did it. Under  
19 the any evidence standard that's evidence.

20 THE COURT: And, Mr. Grimes, any response?

21 MR. GRIMES: No, ma'am.

22 THE COURT: When ruling on a motion for directed  
23 verdict the Court must view the evidence and all  
24 reasonable inferences in the light most favorable to the  
25 nonmoving party. The Court is concerned only with the

1 existence or nonexistence of the evidence and not as to  
2 its weight.

3 Mr. Patel testified that the defendant came into  
4 his store, asked for money, asked to check his wallet for  
5 money, asked for cigarettes and not to call the police,  
6 and then he left. He testified that the defendant took  
7 \$60 in cash, a pack of cigarettes when he exited the  
8 door.

9 He further testified that he recognized the  
10 defendant as a customer of the store, that he could  
11 clearly see his face and that the store was well lit.  
12 Furthermore, Mr. Patel testified that when the defendant  
13 entered the store he pointed a gun at him, what he  
14 believed to be a gun, and was pointed at him for  
15 approximately one and half minutes.

16 After receiving the photo lineup Mr. Patel then  
17 testified that he was able to recognize the defendant in  
18 one half of a second. Dhruval Patel testified that his  
19 father understood the lineup and that he circled the  
20 lineup picture immediately.

21 Deputy Luckadoo testified that after reviewing the  
22 surveillance tape he recognized the suspect as Marvin  
23 Bowens Green and that he had previous dealings with him  
24 during a traffic stop.

25 Detective Lawrence testified that he observed the

1 surveillance video December 29th. He gave explanations  
2 as to why it was four days after the incident. Once he  
3 saw the suspect he knew him to be Marvin Green.

4 He also testified that he had previously talked to  
5 Marvin Green for hours at a time, has previously viewed  
6 him face-to-face and has the ability to watch him walk  
7 and listen to him talk.

8 Detective Perkins indicated that Mr. Patel was  
9 verbally -- that he verbally indicated that he understood  
10 the admonitions before the lineup was shown to him and  
11 that when he was shown the lineup Mr. Patel immediately  
12 pointed to the photo number four, which is the defendant.

13 The defendant is currently charged on two  
14 indictments, armed robbery, possession of a pistol during  
15 a violent crime. Viewed in the light most favorable to  
16 the State the jury could find that the defendant took  
17 cash and cigarettes from Mr. Patel while armed with a  
18 deadly weapon and removed them from the store. The  
19 defendant's motion for directed verdict on both charges  
20 is denied. I note your exception for the record.

21 Any further argument or motions, Mr. Grimes?

22 MR. GRIMES: No, ma'am.

23 THE COURT: And just for the record, it was on more  
24 than one occasion testified to at Charleston County and  
25 the defendant was identified. Thank you.

1           MR. GRIMES: I just need one point of clarification  
2 on some exhibits.

3           THE COURT: Yes.

4           MR. GRIMES: I know there was an issue on the  
5 booking photo.

6           THE COURT: I have your case. I had requested a  
7 case. Based upon my understanding of the admissibility  
8 of why it was asked to be requested -- that's State's  
9 Number 5, Madam Court Reporter?

10           I thought you all were going to give me a better --

11           MR. GRIMES: Well, I believe they have rested now,  
12 Your Honor.

13           THE COURT: I'm sorry?

14           MR. GRIMES: I believe that they have rested.

15           THE COURT: No. We had talked about it yesterday  
16 that they were going to get one that was in conformity  
17 with the size. Not a different picture but in conformity  
18 with the size, after redacted pursuant to my  
19 understanding of the case, prior to giving it to me.

20           MR. GRIMES: I don't recall. Was it admitted, not  
21 allowed to be published or --

22           THE COURT: It was admitted, not published until it  
23 was redacted and --

24           MR. GRIMES: Well, at the State's case we did  
25 object to the photo coming in but do understand the

1 Court's ruled.

2 THE COURT: Do you have an objection to that  
3 photograph?

4 MR. GRIMES: Yes, ma'am.

5 THE COURT: I understand you have an objection to  
6 all of it but, Mr. Grimes, a black and white was shown  
7 yesterday now this is a color.

8 MR. GRIMES: I mean, the State's exhibit -- I  
9 forget which number it was.

10 THE COURT: Five.

11 MR. GRIMES: Five was shown to the jury.

12 THE COURT: It was not shown to the jury.

13 MR. GRIMES: And we believe we have sort of a front  
14 picture, side pictures. Any jury can -- any reasonable  
15 juror can infer that's a booking photo.

16 THE COURT: But that's not standard, is it? That's  
17 not what I'm concerned with. We can infer anything from  
18 anything and the case that you provided indicates that it  
19 was a different type of photo. It was the actual booking  
20 photo. We all know that he was arrested and there was  
21 indication that he was booked, and the case that you  
22 provided me it was from a -- the date was around his neck  
23 on his booking photo, which was prior to the arrest that  
24 he was being tried for.

25 MR. GRIMES: Yes, Your Honor. Basically, when you

1 look at the three factors in the case we don't believe  
2 the evidence need to introduce the photograph.

3 THE COURT: The reason that they indicated to the  
4 Court that they needed it is because they needed a side  
5 profile picture. When we approached at the bench there  
6 was a discussion, because I'm not sure if it was on the  
7 record, there was a discussion on what would be  
8 admissible.

9 Mr. Groeber indicated that his major objection was  
10 to the top and to the bottom row because it clearly then  
11 indicated that it came from Charleston County. There's  
12 absolutely no distinguishing marks on the remaining two  
13 photographs. There's nothing to indicate that they --  
14 he's in a jail suit or anything around the neck as in the  
15 case that you provided, and so I made the decision to cut  
16 the top and the bottom off of those pictures. So back to  
17 my initial question, Mr. Grimes.

18 MR. GRIMES: Yes, ma'am.

19 THE COURT: They have a larger picture of what I  
20 have had redacted. Okay. So it's now -- that picture is  
21 a full page. There was an objection because during the  
22 redaction now it's a smaller page.

23 MR. GRIMES: Yes, ma'am.

24 THE COURT: So which would you prefer me,  
25 preserving all of your objections, give the bigger page



1 so that it's in conformity with all the other paper page  
2 sizes or the smaller page that's black and white?

3 MR. GRIMES: Preserving everything we prefer the  
4 bigger photo to go back.

5 THE COURT: All right. If we will, just so the  
6 record is clear, we will mark that as 5-A. Five does not  
7 go back.

8 Did you understand, Mr. Grimes? Did you hear what  
9 I said?

10 MR. GRIMES: They are substituting the --

11 THE COURT: I'm not substituting because I want the  
12 record to be thoroughly preserved. This will be 5-A, and  
13 5, the redaction that I did cutting, it will not go back  
14 but it will remain as 5. The one 5-A will go back.

15 MR. GRIMES: Thank you.

16 (WHEREUPON, State's Exhibit Number 5-A, a  
17 Photograph, was marked and admitted into evidence.)

18 THE COURT: Thank you. Anything further before we  
19 break for lunch?

20 MR. RUTLEDGE DURANT: Nothing from the State.

21 MR. GROEBER: Nothing from the defense.

22 THE COURT: All right. Mr. Green, please stand.

23 Sir, I remind you that you are still under oath.

24 Do you remember me placing you under oath yesterday?

25 THE DEFENDANT: Yes, ma'am.

1           THE COURT: And I need you to speak very loudly.  
2 As you can see sometimes we have a hard time hearing when  
3 witnesses are this close. Please speak very loudly. Do  
4 you understand?

5           THE DEFENDANT: Yes, ma'am.

6           THE COURT: Did you understand when I advised you  
7 of your rights to testify or not to testify yesterday?

8           THE DEFENDANT: Yes, ma'am.

9           THE COURT: And do you have any questions for the  
10 Court concerning those rights?

11          THE DEFENDANT: No, ma'am.

12          THE COURT: And have you had an opportunity to meet  
13 with your attorneys determining whether you would  
14 testify?

15          THE DEFENDANT: Do I have to make a decision now?

16          THE COURT: I'm asking you --

17          THE DEFENDANT: Oh, yeah, yeah --

18          THE COURT: Please listen to my questions. Sir,  
19 you've sat here three days now. You know the rules. I  
20 try not to talk over you, please don't talk over me, and  
21 the reason for that is one it's very rude, but two my  
22 court reporter can't write it down. So it's very  
23 important that what you say and I say is preserved for  
24 the record. Do you understand that, Mr. Green?

25          THE DEFENDANT: Yes, ma'am.

1           THE COURT: All right. My question to you is when  
2 we broke at the evening hour and then we've had sometime  
3 today have you had an opportunity to speak with whomever  
4 you want to concerning your decision to testify or not  
5 testify?

6           THE DEFENDANT: I mean, I've been speaking to  
7 family. I don't believe that they are here or not.

8           THE COURT: I'm sorry?

9           THE DEFENDANT: I haven't spoken to anyone in my  
10 family about it. I don't even know if they are here or  
11 not.

12          THE COURT: All right. Do you need additional time  
13 to meet with your attorneys to make a decision?

14          THE DEFENDANT: I mean, we probably be able to  
15 decide from -- as the trial proceeding, yes.

16          THE COURT: Mr. Green, remember I advised you you  
17 can speak with whomever you wish to speak, your family,  
18 your friends, your attorneys, or whomever, but it is your  
19 decision. Do you understand that?

20          THE DEFENDANT: Yes, ma'am.

21          THE COURT: All right. So we are going to take our  
22 lunch break, and when we come back I'm going to go ahead  
23 and ask you before we bring the jury in if you've made a  
24 decision.

25          What do you attempt -- what conviction and do you

1 agree that the conviction, the one conviction he has will  
2 be able to be used to impeach him?

3 MR. GROEBER: I would argue that it would be more  
4 prejudicial than probative, specifically the crime  
5 itself, armed robbery.

6 THE COURT: What is it?

7 MR. RUTLEDGE DURANT: He was convicted of armed  
8 robbery last year around the same time.

9 THE COURT: All right. All right. But no doubt in  
10 your mind that's a felony that would be impeachable, so  
11 at a minimum they would be able to inquire as to whether  
12 or not he has been convicted of a felony, right?

13 MR. GROEBER: Yes, Your Honor.

14 THE COURT: You understand that, Mr. Green?

15 THE DEFENDANT: Yes, ma'am.

16 THE COURT: All right. Anything further that I  
17 need to advise your client of before we break for lunch?

18 MR. GRIMES: Maybe one thing. I know Mr. Bowens --  
19 Mr. Green has concern about probably his family. His  
20 father was a potential witness and he was here Monday but  
21 told him he was sequestered and wouldn't be allowed to  
22 talk. I don't know -- we want to abide by the  
23 sequestration order about having to talk to our client  
24 about testifying or what the testimony could be, but if  
25 it was just to talk to him about whether he wants to

1   testify and the risk of direct versus cross is that  
2   permissible?

3           THE COURT:  You may talk to him about his decision  
4   to testify or not to testify but he may not discuss the  
5   actual testifying and what he would or would not testify  
6   to, as to senior, all right.

7           MR. GRIMES:  Thank you.

8           THE COURT:  Good luck to you.  Have a nice lunch.  
9   Please be back about five until two so we can go ahead  
10  and make a determination.

11           (WHEREUPON, a lunch break was taken.)

12           THE COURT:  Mr. Groeber, are you ready for your  
13  client to tell the Court whether or not he's going to  
14  testify?

15           MR. GROEBER:  Your Honor, I'd like one more chance  
16  to talk with him during the next break, if possible.

17           THE COURT:  All right.  You have another witness?  
18  Do you have a witness?

19           MR. GROEBER:  Oh, yes, Your Honor.

20           THE COURT:  All right.  And who is your witness?

21           MR. GRIMES:  We'd call Deputy Lawrence.

22           THE COURT:  You're calling Deputy Lawrence?

23           MR. GRIMES:  Yes, ma'am.

24           THE COURT:  And then your next witness will be?

25           MR. GRIMES:  Dr. Beaudry.

1 THE COURT: All right. Then your next witness?

2 MR. GRIMES: If he decides to testify it could be  
3 Ms. Green or could be Mr. Green.

4 THE COURT: All right. I'm just attempting like --  
5 I'm just attempting to figure out, I think we may have  
6 time to do that next trial. So I'm trying to figure out  
7 just for scheduling where we are. All right.

8 Anything before we bring in the jury, from the  
9 State?

10 MR. RUTLEDGE DURANT: Nothing from the State, Your  
11 Honor.

12 THE COURT: From the defense?

13 MR. GRIMES: I think Mr. Green's parents have just  
14 got here, that's why he hasn't had a chance to talk to  
15 them, so that's why we're asking for a break at the  
16 appropriate time.

17 THE COURT: Okay. But we're ready to go forward?

18 MR. GRIMES: Yes, ma'am.

19 MR. GROEBER: Yes, ma'am.

20 THE COURT: I'm going to go check and make sure all  
21 the jurors are here so don't go far but if you need to  
22 take another break please do so. Thank you.

23 (WHEREUPON, a brief recess was taken.)

24 THE COURT: Remain standing the jury is on their  
25 way in.

1 (WHEREUPON, the jury enters the courtroom at  
2 approximately 2:02 p.m.)

3 THE BAILIFF: All seated, Your Honor.

4 THE COURT: Thank you. Please be seated.

5 Mr. Groeber, call your first witness.

6 MR. GROEBER: Thank you, Your Honor.

7 MR. GRIMES: Your Honor, we'd call Detective  
8 Lawrence.

9 THE COURT: Detective Lawrence, please come  
10 forward. You are still under oath and we know your name.  
11 Thank you.

12 DIRECT EXAMINATION

13 BY MR. GRIMES:

14 Q. Good afternoon, Detective Lawrence.

15 A. Good afternoon, Mr. Grimes.

16 Q. First I want to ask you about the 9-1-1 tape that  
17 we talked about yesterday.

18 A. Yes, sir.

19 Q. I think in your testimony yesterday we kind of  
20 agreed it would be fair to you to take the overnight  
21 break to get to tape and listen to it.

22 A. Yes, sir.

23 Q. Did you have an opportunity to listen to it?

24 A. No, sir. The tape was not available from the  
25 incident.

1 Q. Okay. Now, I want to ask you next about a weapon,  
2 if you recovered any weapons in this case. During your  
3 investigation did you recover a gun that you believe was  
4 involved in this robbery?

5 MR. RUTLEDGE DURANT: Objection.

6 THE COURT: Basis?

7 MR. RUTLEDGE DURANT: Foundation, relevance.

8 THE COURT: Overruled. You may answer.

9 A. No gun was found in reference to the armed robbery  
10 that was committed.

11 Q. Did you find -- did you find a weapon that you  
12 believe was related to this case?

13 A. For the record, I didn't find a weapon. A weapon  
14 was found on December 26th, 2010, by Deputy Parcell  
15 (phonetic).

16 Q. Okay.

17 A. And he in-turn turned it into evidence.

18 Q. Okay. And in your report you stated that weapon  
19 was identical --

20 MR. RUTLEDGE DURANT: Objection, leading.

21 THE COURT: Let him finish the question.

22 Understand that there's an objection going to be  
23 made, likely, but let Mr. Grimes finish his question.

24 THE WITNESS: Yes, ma'am.

25 BY MR. GRIMES:



1 Q. Let me see if I can rephrase the question. You  
2 have wrote a report in this case?

3 A. One more time, Mr. Grimes.

4 Q. You have wrote a report in this case?

5 A. Yes, sir. That's correct.

6 Q. How did you characterize the weapon that was turned  
7 over to you in that report?

8 A. I don't exactly remember the verbiage but it was  
9 similar or -- similar or -- what's the word you use?

10 Q. I'm not --

11 A. Similar or -- I said it was similar.

12 Q. You still have a copy of your supplemental report  
13 up there?

14 A. No, sir, I don't.

15 MR. GRIMES: May I approach the witness, Your  
16 Honor?

17 THE COURT: You may.

18 (WHEREUPON, Defendant's Exhibit Number 8, an  
19 Incident Report, was marked of identification only.)

20 BY MR. GRIMES:

21 Q. Deputy Lawrence, I want to show you what's been  
22 marked as Defendant's Exhibit 8 for identification.

23 A. Yes, sir.

24 Q. And what is that?

25 A. A copy of my incident report, a supplement. Yes,

1 sir.

2 Q. And if you reviewed it would that refresh your  
3 memory as to how you characterized the gun?

4 A. Yes, sir, sure will.

5 Q. If you'll take a minute a read to yourself and let  
6 me know when you finished it.

7 A. I'm ready.

8 Q. And did you characterize the weapon as similar?

9 A. No, sir. According to my statement it says  
10 December 26th, 2010, members of the Charleston County  
11 Sheriff's Office found a pistol --

12 THE COURT: Slow down.

13 THE WITNESS: I'm sorry.

14 THE COURT: Thank you.

15 A. On December 26th, 2010, the members of the  
16 Charleston County Sheriff's Office found a pistol that  
17 was identical to the pistol used by the defendant on  
18 December 24th, 2010 during the armed robbery.

19 Q. Did you have that pistol fingerprinted?

20 A. No, sir, it wasn't.

21 Q. And where was that pistol found at by the deputies?

22 A. It was in Charleston County. It was found in  
23 Charleston County but it was --

24 Q. Was it near a bank?

25 A. Yes, sir.

1 Q. Did you review the bank's surveillance cameras to  
2 see who may have placed the weapon there?

3 A. I did not.

4 Q. Did anyone else on your team review the bank  
5 cameras?

6 A. Not to my knowledge, sir.

7 Q. And you've given further testimony about that  
8 weapon, correct?

9 A. Meaning?

10 Q. Have you testified to the grand jury --

11 MR. RUTLEDGE DURANT: Objection.

12 THE COURT: Sustained.

13 Q. Let me see if I can rephrase the question. Have  
14 you ever testified about the serial number of that  
15 weapon?

16 A. Not to my knowledge, Mr. Grimes.

17 Q. If I showed you a copy of the grand jury form would  
18 that refresh your memory?

19 A. Yes, sir, it should.

20 MR. GRIMES: May I approach the witness, Your  
21 Honor?

22 THE COURT: You may.

23 MR. GRIMES: Thank you.

24 (WHEREUPON, Defendant's Exhibit Number 9, a Copy of  
25 an Indictment, was marked for identification only.)

1 MR. RUTLEDGE DURANT: Your Honor, may we approach?

2 THE COURT: You may.

3 (WHEREUPON, the following bench conference was  
4 reported.)

5 MR. RUTLEDGE DURANT: This is not relevant. You  
6 already redacted portions that go to the serial number.  
7 It was never linked up in this robbery. If he wants to  
8 go into there was a gun found in Charleston that was not  
9 found on this guy, it was never printed, that's the  
10 extent of it but --

11 MR. GRIMES: I'm not sure what the objection is.

12 MR. RUTLEDGE DURANT: Pursuing that is just a wrong  
13 inquiry.

14 THE COURT: What is the testimony that you are  
15 referring to?

16 MR. GRIMES: That he testified about what the  
17 serial number of the gun was, that he believed it was  
18 used in this robbery.

19 THE COURT: All right. And is that now his  
20 testimony?

21 MR. GRIMES: He said, I think, that he didn't  
22 recall if he testified. So I asked if I could refresh  
23 his memory.

24 THE COURT: Okay. Well, you can refresh his memory  
25 because you're attempting to ask him about his testimony,

1 about his previous testimony as to the serial number but  
2 that serial number is not relevant, right, related to  
3 this gun?

4 MR. GRIMES: It could be. I don't know.

5 MR. RUTLEDGE DURANT: There's no proof of that,  
6 that this gun was the gun in the robbery.

7 MR. GRIMES: The reason we believe it's relevant is  
8 it goes to identification. If he can testify to a grand  
9 jury under oath that the gun used in this robbery had a  
10 certain serial number, it was identical and he made a  
11 mistake --

12 THE COURT: Did he say to the grand jury that was  
13 the gun that was used?

14 MR. GRIMES: Yeah, I think that's what the serial  
15 number would show.

16 THE COURT: No, no, no. Did he say that that gun  
17 was used in the robbery?

18 MR. GRIMES: It's my understanding that he did.

19 THE COURT: Well, you need to be careful about that  
20 because using it to impeach does not equate -- what do  
21 you have right there, a transcript?

22 MR. GRIMES: It's the grand jury indictment.

23 THE COURT: The grand jury indictment has already  
24 been --

25 MR. RUTLEDGE DURANT: Redacted.

1 THE COURT: -- redacted.

2 MR. GRIMES: Yeah, it's the indictment.

3 THE COURT: We had a pretrial motion about it and  
4 there was no objection to redacting the serial number.

5 MR. GRIMES: That's redacted but I think we  
6 reserved at that point we could question him on it --

7 THE COURT: I don't recall that.

8 MR. GRIMES: I think the record would show that.

9 THE COURT: Well, there's been no indication --  
10 Mr. Durant, I'll allow you to speak.

11 I'm just perplexed at how you are going to impeach  
12 him with a document that he didn't prepare, that has now  
13 been redacted because he has the indictment, right?

14 MR. GRIMES: Well --

15 THE COURT: And we don't know what he testified to  
16 because as I remember there is not a transcript of the  
17 grand jury -- what he's testified to at the grand jury,  
18 correct, because they are secret?

19 MR. GRIMES: Yes --

20 THE COURT: So we don't know what he said, right?  
21 So you want to impeach him on a document that he didn't  
22 prepare that has now been redacted?

23 MR. GRIMES: Well, not exactly.

24 THE COURT: Yes or no?

25 MR. GRIMES: I want to refresh his recollection

1 with this document that apparently Mr. Durant prepared  
2 and that his name is on as the witness.

3 THE COURT: Okay.

4 MR. GRIMES: And if I refresh his memory I'll be in  
5 a better position to see whether I can impeach him or  
6 not.

7 THE COURT: What is his memory going to be  
8 refreshed about?

9 MR. GRIMES: About whether he testified to the  
10 grand jury about the serial number.

11 THE COURT: Here's the problem, Mr. Grimes, is you  
12 trying to make an issue of something that isn't the  
13 issue.

14 MR. GRIMES: What I'm trying to show is that  
15 there's mistaken identification.

16 THE COURT: The person or the gun?

17 MR. GRIMES: If he could mistake the gun he could  
18 mistake the person.

19 THE COURT: But you need to be careful and I don't  
20 think you're going to be careful. He didn't prepare that  
21 document, right?

22 MR. GRIMES: Mr. Durant did.

23 THE COURT: Well, then you call Mr. Durant. He  
24 cannot testify as to the preparation of that document.

25 MR. GRIMES: I'm not asking him to testify to that.

1 I'm asking him to refresh his memory, and for that it  
2 could be anything that will refresh your memory.

3 THE COURT: All right. And your question is going  
4 to be?

5 MR. GRIMES: I asked if I showed him the grand jury  
6 would that refresh his memory. He said, Yes. As I was  
7 getting ready to show it to him Mr. Durant asked to  
8 approach.

9 THE COURT: And what is your next question going to  
10 be?

11 MR. GRIMES: It depends on what his answer is.

12 THE COURT: Whether or not it's going to refresh  
13 his memory? Well, of course it has. So --

14 MR. GRIMES: And I'm going to say, did you testify  
15 as to what the serial number was?

16 MR. RUTLEDGE DURANT: The essence -- I'll just put  
17 it like this. The essence, obviously, of the indictment  
18 is to present a charge of the elements and that is what  
19 was passed to the jury and --

20 THE COURT: All right. I'm going to give him a  
21 little latitude and then you'll have full  
22 cross-examination of your witness because he's already  
23 testified, I think, about the gun, all right? I'm going  
24 to give you a little bit of latitude but the question is  
25 a previous hearing, Mr. Grimes, not the grand jury, all



1 right? Thank you.

2 (WHEREUPON, the bench conference was concluded.)

3 THE COURT: All right, Mr. Grimes. I'm sure that  
4 the witness needs for you to --

5 MR. GRIMES: Yes, ma'am.

6 THE COURT: -- indicate what you need from him at  
7 this point.

8 BY MR. GRIMES:

9 Q. I'm going to show you what's been marked  
10 Defendant's Exhibit 9.

11 A. Okay.

12 Q. And after you read that does that refresh your  
13 memory as to what you testified in a previous hearing  
14 about the serial number of the gun?

15 A. I'm not quite understanding what you are saying,  
16 the fact that you say that I testified about some serial  
17 number. Can you clarify that for me, Mr. Grimes?

18 Q. I'll try to. Have you testified in your previous  
19 hearing -- or in a previous hearing under oath that the  
20 gun used in this robbery had a certain serial number?

21 A. No, sir. Not to my knowledge, no, sir.

22 Q. And what is that document that I handed up to you?

23 A. It's an indictment form.

24 Q. Are you listed as a witness on that form?

25 A. I am.

1 Q. Is there a serial number listed on that form?

2 A. I see a case number but I don't see a serial  
3 number, no, sir. No, sir. It is a serial number on it,  
4 yes, it is.

5 Q. From the gun that you believe to be used in this  
6 robbery?

7 A. Again, this gun was recovered on December 26th, and  
8 the reason why the serial number is on here is because  
9 that was the gun that was recovered and it's required to  
10 put that in the article supplement because it's  
11 considered as an article.

12 Q. Let me step back. There's no doubt a gun was used  
13 in this case, correct?

14 A. Correct.

15 Q. The question I have is how were you able to tell  
16 the specific gun that was used?

17 A. I saw the video on December 29th, 2010. I was  
18 advised that a handgun was found in Charleston County on  
19 December the 26th. Okay.

20 After reviewing the video and seeing the handgun  
21 and photographing they are very -- I mean, it's  
22 identical, so that's the word that I used. So I would  
23 say for the record identical because that's the word I  
24 used. All right. And I put that in my incident report.

25 However, I never implied that the defendant used

1 that handgun because I couldn't put it on him. But for  
2 the record, the gun that was found after the crime was  
3 committed was identical to the one that was used at that  
4 time. I don't know if that clears it up.

5 Q. So if I understand your testimony, the gun used in  
6 the robbery, the gun that was found and it was testified  
7 to about in a previous hearing were identical?

8 A. Yes, sir. That's the word that I used. That's  
9 correct.

10 Q. And now it sounds like it's your position that you  
11 don't know if that gun was actually the one that was  
12 actually used after further investigation. Is that fair  
13 to say?

14 A. One more time, Mr. Grimes, please.

15 Q. As I understand your testimony now you are saying  
16 that the gun that was found by the other deputies outside  
17 the bank was not the actual gun that was used, based upon  
18 your further investigation?

19 A. Well, I'm saying that it's identical to the gun  
20 that was used. I'm not saying that it wasn't the gun.  
21 It was found after the crime was committed. It was found  
22 in Charleston County. That's what I'm saying,  
23 Mr. Grimes.

24 Q. And you are also saying that the person in the  
25 video is identical to Mr. Green?

1 A. No. I'm saying the person that's in that video is  
2 Mr. Green.

3 Q. Just like the gun, right?

4 A. You said it.

5 Q. I want to ask you a couple questions about the  
6 lineup procedures.

7 A. Yes, sir.

8 Q. After Mr. Patel picked out Mr. Green what did you  
9 tell him?

10 A. Upon completion of him picking out Mr. Green I  
11 simply advised him that I would advise -- I would inform  
12 him when an arrest was made. That was it. Nothing  
13 further.

14 Q. And it's my understanding you swore out a warrant  
15 on December 30th?

16 A. The 29th or 30th, yes, sir. I think Mr. Bowens  
17 Green was arrested on the 30th so it was either that  
18 night, the 29th, or the 30th, but he was arrested on the  
19 30th.

20 Q. I'm going to ask you a few questions about the  
21 warrant process.

22 A. Yes, sir.

23 Q. The warrant is where you tell your grounds to a  
24 judge to get -- see if there's probable cause for an  
25 arrest?

1 A. That's correct.

2 Q. When you swear out a warrant are you under oath?

3 A. I am. You are.

4 Q. Same oath as in the courtroom today?

5 A. Yes, sir.

6 Q. And when you swear out a warrant do you give the  
7 judge every little detail or sort of the highlights of  
8 the case?

9 A. You give the magistrate enough probable cause for  
10 him or her to determine whether he or she will sign the  
11 warrant.

12 Q. Would it be fair to say you give them all the  
13 important facts?

14 A. You give them enough for them to sign the warrant,  
15 him or her to sign the warrant.

16 Q. Now, we've heard some testimony about whether  
17 Mr. Green was a stranger or a regular customer in the  
18 store --

19 A. Correct.

20 Q. -- do you recall that?

21 Now, do you have a copy of your warrant up there?

22 A. I do not.

23 Q. Do you remember how you described what Mr. Patel  
24 told deputies when you were swearing out the warrant as  
25 to whether he knew the suspect?

1 A. I'll have to get a copy of yours to refresh my  
2 memory, Mr. Grimes.

3 Q. No problem.

4 MR. GRIMES: May I approach the witness?

5 THE COURT: You may.

6 MR. GRIMES: Mark as defense exhibit for  
7 identification number 10.

8 (WHEREUPON, Defendant's Exhibit Number 10, a  
9 Document, was marked for identification only.)

10 BY MR. GRIMES:

11 Q. Do you recognize what Defendant's Exhibit Number 10  
12 is?

13 A. It's a copy of the affidavit, yes, sir.

14 Q. And in the affidavit how did you describe what  
15 Mr. Patel told the deputies about the suspect? I believe  
16 it will be the third paragraph at the end.

17 A. He didn't describe him. Isn't that what you are  
18 asking me?

19 Q. I suppose so. Does he describe -- did you tell the  
20 judge that the victim either advised deputies that --

21 MR. RUTLEDGE DURANT: Objection, leading.

22 THE COURT: Let him finish his question.

23 Q. That he was a prior customer, regular customer, or  
24 an unknown assailant?

25 A. Doesn't say either in here, either of the three

1 that you just asked. It didn't specify.

2 Q. You sure about that?

3 A. You need me to read it?

4 Q. The paragraph that starts on down December 24th,  
5 2010, the members of.

6 A. Oh, okay. Correct. Here it says unknown  
7 assailant. You said third paragraph. That was October  
8 29th -- I'm sorry, December 29th. Yeah. It says unknown  
9 assailant, and I think we cleared that up yesterday that  
10 unknown assailant means he didn't know him by name.

11 Q. I understand that that's your testimony.

12 A. Yes, sir.

13 Q. When you swore out an oath to the judge  
14 approximately six days after the robbery, done your  
15 complete investigation, you used the word unknown  
16 assailant.

17 A. That was what the term that the victim used in his  
18 statement. I didn't change his words.

19 Q. Now I'm going to ask you some questions about  
20 Ms. Patel. We've heard some testimony that she told an  
21 officer that she recognized the person in the video as  
22 Mr. Green?

23 A. According to her. According to her, yes, sir.

24 Q. Did she tell you that she recognized the person in  
25 the video as Mr. Green?

1 A. No, sir. I never spoke to her in that capacity.

2 Q. And you reviewed Deputy Luckadoo's report, correct?

3 A. I did.

4 Q. There's nothing in Deputy Luckadoo's report where  
5 she told him that she recognized the person as Mr. Green,  
6 is there?

7 A. I'll have to look at his incident report again.

8 Q. And I may have misspoken. He didn't write the  
9 report but --

10 A. Right.

11 Q. Kjellman wrote and he responded?

12 A. Deputy Kjellman did write it.

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

15 THE COURT: You may.

16 (WHEREUPON, Defendant's Exhibit Number 11, a  
17 Document, was marked for identification only.)

18 BY MR. GRIMES:

19 Q. I'm going to show you what's been marked as  
20 Defendant's Exhibit 11.

21 A. Okay.

22 Q. Her name is not mentioned in that report, is it?

23 A. No, sir, it's not.

24 Q. And Deputy Roberson, I take it, didn't write a  
25 report?



1 MR. RUTLEDGE DURANT: Objection, leading.

2 MR. GRIMES: I'll rephrase, Your Honor.

3 THE COURT: Thank you.

4 BY MR. GRIMES:

5 Q. Have you reviewed a report from the Deputy  
6 Roberson?

7 A. I have not.

8 Q. Why is that?

9 A. Deputy Roberson didn't write one.

10 Q. And Investigator Milz, was her name mentioned in  
11 his report?

12 A. Again, I'll have to see his field report.

13 Q. Okay. Of course. I don't think I have a copy of  
14 that offhand.

15 MR. GRIMES: May I approach the witness, Your  
16 Honor.

17 THE COURT: You may. You have continuing  
18 permission.

19 MR. GRIMES: Thank you, Your Honor.

20 BY MR. GRIMES:

21 Q. I'll show you what's marked as State's Exhibit 7.

22 A. Thank you.

23 (PAUSE.)

24 A. Okay.

25 Q. Is her name mentioned in that report?

1 A. It is not, no, sir.

2 Q. Do you know which officer she told this to?

3 A. I didn't respond to the scene, sir. No, sir.

4 Q. And in doing your follow-up preparing for this case  
5 did you find out which officer she told this to?

6 A. No, sir, I did not. Again, I didn't speak to her  
7 in that capacity. I was focussed on her husband, who was  
8 a true victim.

9 Q. I take it you never showed her a lineup?

10 A. That's correct.

11 Q. Do you know if anyone ever read her admonition  
12 forms that were read to Mr. Patel?

13 A. No, sir, not to my knowledge, but had she had a  
14 form it would have been in evidence, also, whether she  
15 identified him or not though.

16 Q. And in your arrest warrant you don't mention her as  
17 a possible witness, do you?

18 A. No, sir.

19 MR. GRIMES: May I have one moment, Your Honor?

20 THE COURT: You may.

21 (PAUSE.)

22 MR. GRIMES: Thank you, Your Honor. I have no  
23 further questions.

24 BY MR. GRIMES:

25 Q. Thank you, Deputy Lawrence.

1 A. Yes, sir.

2 THE COURT: Mr. Durant?

3 MR. RUTLEDGE DURANT: Thank you, Your Honor. May  
4 it please the Court.

5 CROSS-EXAMINATION

6 BY MR. RUTLEDGE DURANT:

7 Q. Detective Lawrence, the fact of the matter is that  
8 you didn't know that Mrs. Patel was a witness in this  
9 case, did you?

10 A. That is correct.

11 Q. When you swore out the warrants you had not spoken  
12 to her, had you?

13 A. I had not.

14 Q. And it is your understanding that after the case  
15 came to my office that I continued the investigation,  
16 essentially?

17 A. Yes, sir.

18 MR. GRIMES: Objection, leading.

19 THE COURT: It's cross, Mr. Grimes. Thank you.

20 MR. GRIMES: Thank you, Your Honor. I apologize.

21 THE COURT: I know it gets kind of tricky  
22 sometimes.

23 You may answer.

24 A. I'm sorry. Can you give it to me again, please?

25 Q. And your understanding is that I spoke to the

1 witnesses in preparation of this case?

2 A. Yes, sir, that's correct.

3 Q. And in speaking to them I did speak to Mrs. Patel.

4 Are you aware of that?

5 A. Yes, sir, I am.

6 Q. And there was a gun that was recovered some days  
7 after this robbery, right?

8 A. Yes, sir, that's correct.

9 Q. And it was recovered at a bank on Sam Rittenburg;  
10 is that right?

11 A. Yes, sir.

12 Q. Let's see. Specifically, the Charleston Area  
13 Credit Union at 1845 Sam Rittenburg Boulevard?

14 A. Yes, sir.

15 Q. And that's over five miles, at least, away from in  
16 incident location; is that correct?

17 A. Yes, sir. Yes, sir. Around about, yes, sir.

18 Q. And the gun that was recovered there, your  
19 understanding was that it was just laying out in the bank  
20 parking lot?

21 A. That's correct.

22 Q. And you don't know how it got there, do you?

23 A. I do not.

24 Q. You don't know that it was in this defendant's  
25 hands?

- 1 A. That's correct.
- 2 Q. And you're also aware that guns are frequently  
3 brought into the Charleston County Sheriff's Office?
- 4 A. Yes, sir.
- 5 Q. In fact, they store -- well, they destroy guns  
6 every year, don't they?
- 7 A. Yes, sir.
- 8 Q. They have a destruction day?
- 9 A. Yes, sir.
- 10 Q. And pretty much at any given time they've got about  
11 a thousand guns?
- 12 A. Easily.
- 13 Q. Sitting in the evidence room?
- 14 A. Easily, yes, sir.
- 15 Q. And I think -- are you also aware that this type of  
16 gun that you saw in this video, that there are several of  
17 those guns that look just like that in that evidence  
18 locker?
- 19 A. That is correct.
- 20 Q. So you weren't able to link this gun up to this  
21 case, were you?
- 22 A. No, sir, I was not.
- 23 Q. Now, it wasn't printed, was it?
- 24 A. It was not.
- 25 Q. And that could have been done?

1 A. Yes, sir.

2 Q. And there are techniques to process a gun?

3 A. Yes, sir.

4 Q. And you didn't request that?

5 A. I did not.

6 Q. But it's been handled by too many people at this  
7 point; is that right?

8 A. Yes, sir, it was.

9 Q. And you did use the word identical?

10 A. I did.

11 Q. In your supplement?

12 A. Yes, sir, I did.

13 Q. And even though that you couldn't link that gun or  
14 this gun was never linked to this crime you did mention  
15 it in your report?

16 A. Yes, sir. I try not to withhold anything from my  
17 report.

18 Q. And you did bring it to my attention?

19 A. And I did, yes, sir.

20 Q. And turned that -- that information was turned over  
21 to defense counsel?

22 A. Yes, sir, it was.

23 Q. And identical twins are called identical as well,  
24 aren't they?

25 A. Yes, sir.

1 Q. But they are different people?

2 A. Yes, they are.

3 Q. And you were asked about this gun being identical  
4 to the one used in the robbery. Is it the same gun?

5 A. I have no idea, sir.

6 Q. Could be?

7 A. Possible, yes, sir.

8 Q. Might be the gun?

9 A. Very well possibly, yes, sir.

10 Q. Might not be?

11 A. That's correct.

12 Q. We don't know?

13 A. We do not.

14 Q. There is no way to know that right now?

15 A. Correct.

16 Q. On the video were you able to see the serial number  
17 of the gun?

18 A. I was not, no way.

19 Q. Is it even possible?

20 A. No, sir.

21 Q. But we do know what the serial number was from the  
22 gun that was collected at the bank at Sam Rittenburg some  
23 days later?

24 A. Yes, sir. That's correct.

25 Q. And it was laying out in the early morning hours?

1 A. Correct.

2 Q. Of December 26th?

3 A. Yes, sir. That is correct.

4 Q. For any of the elements to have -- in the nature  
5 environment to absorb on it, just air, just sitting out  
6 in the open air?

7 A. That's correct.

8 Q. And there's no way of knowing at this point whether  
9 when that gun was picked up by the deputy who went there  
10 whether it was in a condition to be processed?

11 A. That is correct.

12 Q. Could have been?

13 A. It could have been, yes, sir.

14 Q. Would have been nice to have known?

15 A. Yes, indeed.

16 Q. Have you always done the absolute best job you  
17 could possibly do at any given task you've ever done in  
18 your life?

19 A. Always. That is correct.

20 Q. You couldn't ever do anything a little bit better  
21 than you've done it before?

22 A. Uh...

23 Q. You think you could do things better could,  
24 couldn't you?

25 A. Yes, sir. I could, yes, sir.



1 Q. Human nature, isn't it?

2 A. Yes, sir.

3 Q. We all can do better?

4 A. I'm sure we can.

5 Q. When the gun was picked up did it come right into  
6 your hands?

7 A. No, sir.

8 Q. How was that brought to your attention?

9 A. I was informed that a revolver was found on  
10 December 26th.

11 THE COURT: Could you speak up.

12 A. I'm sorry. I was informed that the revolver was  
13 found on December 26th, and that it was similar to the  
14 handgun that was used; however, I hadn't seen the video  
15 surveillance so I had not visited the handgun.

16 After reviewing the video surveillance I went to  
17 the lab. I was at the lab, I looked at the handgun, at  
18 which point in time I saw the similarities, or the word  
19 that I used as being identical as that gun being used.  
20 So at which point in time that's -- I didn't deceive  
21 myself or anyone else, that's why I put it the incident  
22 report just documenting that it was found and it was  
23 similar -- well, identical.

24 Q. But that gun even came in under a different case  
25 number?

1 A. Yes, sir, it sure did.

2 Q. At the sheriff's?

3 A. That's correct, and I attached a copy of that case  
4 number with this incident report.

5 Q. And I didn't mean to confuse you earlier. I didn't  
6 mean to imply that you don't take your task serious and  
7 try to do the best that you can at the time, and you  
8 certainly try to do that; is that correct?

9 A. I do. That's correct.

10 Q. I think you answered this, but when it's listed in  
11 the warrant or in your report that the man who committed  
12 this robbery was an unknown assailant, you've explained  
13 that that meant that Mr. Patel didn't know his name?

14 A. That's correct.

15 Q. Did the reports -- didn't the initial reports that  
16 came into your hands tell you that Mr. Patel knew the guy  
17 as a regular customer?

18 A. It did.

19 Q. The reports that were made that day?

20 A. Yes, sir, that's correct.

21 Q. That was information that was given from Mr. Patel  
22 that day?

23 A. That is correct.

24 Q. Thank you, sir.

25 THE COURT: Mr. Grimes?

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1 MR. GRIMES: I have no questions.

2 THE COURT: You may step down. Thank you.

3 THE WITNESS: Thank you, Your Honor.

4 THE COURT: Call your next witness.

5 MR. GROEBER: Thank you, Your Honor. The defense  
6 would call Dr. Jennifer Beaudry.

7 THE COURT: Come forward and be sworn. Is it  
8 Dr. Beaudry?

9 THE WITNESS: It is.

10 DR. JENNIFER BEAUDRY, after having been duly  
11 sworn, testified as follows:

12 THE CLERK: If you'll please speak into the mic and  
13 state your full name and spell your last name for the  
14 record.

15 THE WITNESS: Jennifer Beaudry, B-e-a-u-d-r-y.

16 DIRECT EXAMINATION

17 BY MR. GROEBER:

18 Q. Good afternoon, Dr. Beaudry.

19 A. Good afternoon.

20 Q. How are you?

21 A. I'm good.

22 Q. Good. Please tell the jury what your occupation  
23 is.

24 A. I'm an assistant professor of psychology.

25 Q. Where do you Teach?

1 A. At the University of South Carolina Beaufort.

2 Q. Which campuses, are there one or two campuses?

3 A. There are two my campuses. My office is on the  
4 Bluffton Campus but I teach at both campuses.

5 Q. All right. How long you been at USC Beaufort?

6 A. Since 2008.

7 Q. Please describe for the jury your educational  
8 background.

9 A. I have my Bachelor of Arts in Psychology, and I  
10 earned that in 2000 from the Laurentian University which  
11 is in Sudbury, Ontario, Canada. Then in 2002 I started  
12 my graduate studies and I earned my Master's in Social  
13 Psychology from Queens University in 2004, and then in  
14 2008 I earned my Ph.D. in Social Psychology as well, also  
15 from Queens University.

16 Q. What did you write your dissertation about in order  
17 get your Ph.D.?

18 A. I wrote my dissertation about eyewitness  
19 identification procedures and people's perceptions of  
20 those procedures, whether they believe them or not.

21 Q. What classes do you teach at the University of  
22 South Carolina Beaufort?

23 A. I teach a number of different classes, introduction  
24 to psychology, I teach social psychology, I teach  
25 research methods, then I also teach a special topics

1 course on psychology in the law.

2 Q. What type of topics or issues do you deal with in  
3 your courses on -- well, that you deal with in your  
4 courses?

5 A. I deal with so many different topics but relevant  
6 to this issue I focus on eyewitness identifications, the  
7 different procedures police use with eyewitnesses,  
8 different tricks that our memories can play on us and  
9 also people's belief of that evidence.

10 Q. Do you supervise any students?

11 A. I do. I have a research laboratory at the  
12 University of South Carolina Beaufort and I supervise  
13 about two students every semester who conduct research  
14 with me.

15 Q. Do you have any areas of specialization in the  
16 general area of psychology?

17 A. I do. Social psychology is my general area, then  
18 specifically my research is eyewitness identifications  
19 and eyewitness memory.

20 Q. When you speak of eyewitness identification tell  
21 the jury what you mean.

22 A. Eyewitness identification refers to somebody's  
23 ability to remember somebody that they had previously  
24 seen, recall information about an event, and also  
25 recognize somebody that they may have previously seen.

1 Q. Now, does that include voice recognition by  
2 witnesses as well?

3 A. It does.

4 Q. Have you written any articles or book chapters on  
5 these topics?

6 A. I have.

7 Q. What are some of the articles that you've written?

8 A. One recent article looked at disguise and how that  
9 affects your ability to recognize somebody. Another  
10 article -- two articles, actually, looked at the  
11 difference between simultaneous and sequential lineup  
12 procedures and how they affect witnesses, and another  
13 article looked at the police procedures that were used by  
14 Ontario police and whether or not they were practicing  
15 current best standards.

16 Q. Have all of your articles been peer reviewed?

17 A. They have.

18 Q. Can you explain to the jury what peer review means.

19 A. Yeah. Basically peer reviewed means that before  
20 the manuscript is accepted for publication, right before  
21 the paper you've written is accepted for publication it's  
22 sent out to a panel of experts in your area so they can  
23 evaluate it, and they evaluate how the study was  
24 conducted, they evaluate the statistical tasks that you  
25 used in that study to make sure that was appropriate and

1 they also evaluate the conclusions that you've drawn  
2 based on that study, whether or not what you conclude is  
3 actually valid based on what the study found.

4 Q. What are some examples of original research that  
5 you've done?

6 A. I've done over two dozen studies in this area of  
7 psychology in the law looking at the effect of disguise,  
8 looking at distinguishing characteristics and how that  
9 will affect eyewitnesses.

10 I've looked at trying to determine or trying to  
11 create new ways of conducting police procedures to see if  
12 we can get even better than what we already have. I've  
13 also looked at different methodological issues regarding  
14 lineup fairness and things like that.

15 Q. Have any of your studies been funded by national  
16 agencies?

17 A. They have. My dissertation was funded -- it was  
18 conducted in Canada and it was funded by the Social  
19 Sciences and Humanities Research Counsel of Canada, and  
20 then I've also done a study funded by The National  
21 Science Foundation looking at attorneys' perceptions of  
22 eyewitness evidence and how that affects their plea  
23 bargaining decisions.

24 Q. How do you stay current in your field?

25 A. I talk with colleagues, I publish my own research,

1 I read other people's research, and I also attend  
2 conferences every year.

3 Q. Have you ever testified in court before?

4 A. I have not. This is my first time.

5 MR. GROEBER: May I approach the witness, Your  
6 Honor?

7 THE COURT: You may.

8 MR. GROEBER: May I approach, Your Honor?

9 THE COURT: You may.

10 BY MR. GROEBER:

11 Q. I'm going to hand you what's been marked as  
12 Defendant's Exhibit Number 1. Tell me if you recognize  
13 that.

14 A. I do.

15 Q. What is it?

16 A. It is my CV, which is my academic resumé.

17 Q. Does it fairly and accurately portray your  
18 educational work experience, articles you published, and  
19 the training that you described for the jury?

20 A. It does.

21 MR. GROEBER: Your Honor, I'd move to admit  
22 Dr. Beaudry's CV into evidence.

23 MR. RUTLEDGE DURANT: There is no objection, and  
24 the State would actually consent to Dr. Beaudry being an  
25 expert in this field.



1 MR. GROEBER: And that was my next question, to  
2 have her admitted as an expert in human memory and  
3 eyewitness identification.

4 THE COURT: Defense 1 into evidence without  
5 objection.

6 (WHEREUPON, Defendant's Exhibit Number 1, the CV of  
7 Dr. Beaudry, was admitted into evidence.)

8 THE COURT: And the specific area, Mr. Groeber,  
9 that you wish --

10 MR. GROEBER: Human memory and eyewitness  
11 identification.

12 THE COURT: And, Mr. Durant, you have no objection?

13 MR. RUTLEDGE DURANT: My colleague thinks that I  
14 might should but I'm going to go ahead and consent.  
15 Thank you.

16 THE COURT: All right. This witness will be  
17 qualified in those areas as an expert and is simply  
18 evidence for you to use in any way that you see fit.

19 You may continue. Thank you.

20 MR. GROEBER: Thank you, Your Honor.

21 BY MR. GROEBER:

22 Q. Dr. Beaudry, this case is about an armed robbery  
23 that took place on Christmas Eve in 2010.

24 A. It is.

25 Q. Were you present at the time?

- 1 A. I was not.
- 2 Q. Have you spoken with any of the eyewitnesses?
- 3 A. No, I haven't.
- 4 Q. Are you being paid for your testimony?
- 5 A. I am.
- 6 Q. And what is your hourly rate?
- 7 A. I'm paid \$150 an hour.
- 8 Q. How does that hourly rate compare to other experts
- 9 in your field?
- 10 A. It's a little less than other experts in the field
- 11 because you base your hourly wage on experience, and this
- 12 is my first time testifying so I can't charge as much as
- 13 somebody who's testified in 50 different cases.
- 14 Q. Okay. Does the fact that my office pays you for
- 15 your opinion in any way influence your expert opinion or
- 16 the findings that you'll have or anything that you'll
- 17 discuss today?
- 18 A. No, it doesn't. My opinion is based on the
- 19 research.
- 20 Q. Doctor, you going to give any opinions about the
- 21 accuracy of any of the witnesses today?
- 22 A. No, I won't.
- 23 Q. Is that your role?
- 24 A. No, it's not.
- 25 Q. Why not?

1 A. My role is to educate the Court on the research in  
2 this area not to comment on any of the specific  
3 witnesses.

4 Q. All right. Could you give the jury -- let's kind  
5 of get into memory.

6 A. Okay.

7 Q. Could you give the jury a general overview of how  
8 human memory works in the context of eyewitness  
9 identification?

10 A. Sure. So what we need to recognize is that memory  
11 doesn't work like a video recorder, all right. There are  
12 basically three general stages in the memory process.

13 So the first stage is acquisition. This is when  
14 you first encounter information and it's first being  
15 written into your brain. If you can think of the last  
16 time you took a test, studying for that test would be the  
17 acquisition phase.

18 The second phase would be the retention phase, it's  
19 called, and so that refers to the period between when you  
20 studied that information and -- or when you were exposed  
21 to that information and when you actually have to recall  
22 or remember that information. Okay. So thinking back to  
23 studying for a test, it's the time between when you  
24 studied that material and when you actually have to write  
25 the test. That would be your retention phase.

1           And then the third stage is the retrieval phase,  
2 when you actually try to recall or remember that  
3 information to use that information. So when you're  
4 actually writing the test, that's your retrieval stage.

5 Q.       Does your research indicate, are there any common  
6 misconceptions about how our memory works?

7 A.       Yes, it does.

8 Q.       And what are some of those common misconceptions?

9 A.       A common misconception is that your memory does  
10 work like a video camera, that you can just record  
11 something and then play it back at a later date whenever  
12 you want and have it play to the exact same thing that  
13 you saw originally.

14           Another common misconception is that a traumatic  
15 event would be more memorable to you, and it's true that  
16 you would remember that event happened. All right.  
17 You're not going to forget that somebody raped you or  
18 that you witnessed a crime but you're not necessarily  
19 going to be able to remember the details of that event as  
20 well as you would if it was a nontraumatic episode.

21 Q.       What groups of people do the studies show suffer  
22 from these misconceptions?

23 A.       Everybody who doesn't study this has these  
24 misconceptions in general. So that includes lawyers,  
25 that includes police officers who haven't taken any

1 training in memory, that includes judges, and that  
2 includes juries as well.

3 Q. Doctor, has there ever been any scientific research  
4 on eyewitness accuracy and the factors that affect the  
5 accuracy of memory?

6 A. There has been.

7 Q. And before we discuss those I want to kind of talk  
8 about how you go about doing your studies and your  
9 research and how you as scientists study this area, okay?

10 A. Okay.

11 Q. What are kind of the ways that you go about  
12 studying this?

13 A. There are three major ways that we approach the  
14 study of eyewitness identification and eyewitness memory.

15 Q. All right. What's the first one?

16 A. The first one are laboratory studies. So in  
17 laboratory studies we have generally college students.  
18 We have them act as our participants. And in those  
19 laboratory studies we try to control everything except  
20 what we are interested in.

21 So, for example, if we're interested in the effect  
22 of a weapon on your memory then we would have half of our  
23 students watch a crime video in which there's a weapon  
24 present and then half the students would watch a crime  
25 video without a weapon, and then we would compare your

1 identification rates.

2           And so if we see a difference between the  
3 identifications of somebody who watched a video without a  
4 weapon and somebody who watched a video with a weapon  
5 then because of the level of control that we have we can  
6 generally conclude that the difference is the result of  
7 the presence of a weapon.

8 Q.       Why are college students used?

9 A.       College students are used because the majority of  
10 researchers in this area are university professors and so  
11 college students are readily available to us.

12 Q.       Does that in any way limit or affect the accuracy  
13 of the tests and the research?

14 A.       It doesn't. Memory is memory. So my memory is  
15 going to be the same as your memory, or going to be the  
16 same as a college student's memory. The only time it  
17 would be an issue is if we are interested in a specific  
18 group. Like if we are interested in children's memory  
19 then we wouldn't look to college students.

20 Q.       Is there another way that you kind of go about --  
21 the science goes about studying this area?

22 A.       There is. So the second general category looks at  
23 archival studies. There's always a question as to  
24 whether or not research done with college students would  
25 actually apply to the real world and so then we go out

1 into the real world and do archival studies.

2 Q. When you say archival studies what do you mean?

3 A. So archival studies are studies that are done by  
4 looking at existing data or existing records. So an  
5 eyewitness -- an eyewitness research, the researcher  
6 would go and look at police reports and police files, and  
7 they would look at the identification patterns in those  
8 files.

9 Q. And then what would they try to do with that  
10 information?

11 A. They would try to see if we see the same general  
12 patterns in real police files with real police witnesses  
13 that we see in the lab, and in general they find that we  
14 do.

15 Q. And those are real cases, right?

16 A. Those are real cases.

17 Q. And sometimes that includes wrongful convictions?

18 A. Sometimes that includes wrongful convictions.

19 Q. All right. What's the third way that you go about  
20 studying this science?

21 A. The third way that we go about studying the science  
22 is a statistical technique called a meta-analysis. So in  
23 a meta-analysis if you are interested in, say, weapon  
24 presence, again, let's just continue with that one, then  
25 you would take all of the studies that have looked at

1 weapon presence and do an overall analysis and that way  
2 you can get a sense of the general patterns that are  
3 there in the data. So rather than dealing with the  
4 specific manipulation in each study you get an idea of  
5 how robust this finding actually is.

6 Q. So when you read -- and how broad are these  
7 meta-analyses?

8 A. They include every study that's been done on that  
9 issue. So it doesn't matter what country it was done in,  
10 it doesn't matter what year it was done in it's going to  
11 be incorporated into a meta-analysis.

12 Q. And when you read an article, or a book, or a  
13 report, something that's studying human memory and  
14 eyewitness identification one of these three methods  
15 would be used?

16 A. Yes, that's right, as long as it's an empirical  
17 study.

18 Q. Okay. Doctor, could you tell us why it is that  
19 scientists are interested in studying eyewitness  
20 identification and human memory?

21 A. Different scientists have different reasons for  
22 studying it. Some people are just simply fascinated by  
23 the process and just really want to understand how your  
24 brain works. Other scientists are interested in the more  
25 applied nature and so how this research can affect the



1 procedures that police actually use. But in general  
2 regardless of whether you're looking to just understand  
3 or whether you're looking to apply the general idea is to  
4 educate people on what's actually going on.

5 Q. And what do scientists do with this information?

6 A. Scientists publish articles, of course. They also  
7 educate juries. Some scientists teach prosecutors, and  
8 defense attorneys, and judges about these issues. I also  
9 teach all of my students in my classes about these  
10 issues.

11 Q. Has the government published any reports on -- that  
12 have used these laboratory results?

13 A. They have.

14 Q. And what's one of those?

15 A. One of the publications would be a publication by  
16 the National Institute of Justice looking at the best --  
17 the current best practice for how to conduct police  
18 procedures with eyewitnesses.

19 Q. And when you say the National Institute of Justice,  
20 who runs that?

21 A. The Department of Justice.

22 Q. The U. S. Department of Justice?

23 A. That's right.

24 Q. Why did the National Institute of Justice publish  
25 this report?

1 A. Well, in 1998 Attorney General Janet Reno was in  
2 charge and at that point I think about 28 DNA exoneration  
3 cases had come forward where people were in jail for  
4 crimes that they had not committed and that DNA evidence  
5 demonstrated that they did not commit. And in the vast  
6 majority of those cases there was a mistaken eyewitness  
7 identification. So she was concerned about eyewitness  
8 error and wanted to ensure that all of the science that  
9 had been done for the last nearly 30 years was  
10 incorporated into police procedures.

11 Q. Who did she invite to be participants in that  
12 study?

13 A. She had prosecutors, she had defense attorneys, and  
14 she had law enforcement officials, and she also had  
15 researchers from Canada and the United States.

16 Q. Did they make any suggestions about the best  
17 practices?

18 A. They did. They published an entire report on the  
19 best practices.

20 Q. And you are familiar with that report?

21 A. I am.

22 Q. And they issued it based on the science, right?

23 A. That's right. They incorporated the science into  
24 procedures that the police could actually conduct, so  
25 they wanted to make sure that it was -- that it wasn't

1 putting an undue burden on the police officers but that  
2 they could still do their job and still investigate  
3 crimes.

4 Q. Let's try to get kind of into the nitty-gritty of  
5 the three factors that you mentioned.

6 A. Okay.

7 Q. Acquisition, retention, and retrieval, right?

8 A. Yes.

9 Q. Let's talk about the first one, acquisition.  
10 Please remind the jury what acquisition is.

11 A. So acquisition is that first stage when you are  
12 first exposed to somebody or you're first studying for  
13 that test.

14 Q. Are there certain factors that affect our ability  
15 to acquire memories?

16 A. There are.

17 Q. What are some of those factors?

18 A. So the level of attention, how much attention  
19 you're paying to something affects your ability to encode  
20 that information. All right. If you're not listening to  
21 me speak, you're not paying attention to me speaking then  
22 you're not going to remember that information later  
23 because you never brought it into your brain to begin  
24 with.

25 The presence of a weapon affects your ability to

1 encode information. Whether or not somebody is wearing a  
2 disguise affects your ability to encode information  
3 because if my face is covered and you've never seen my  
4 face then you're not going to be able the encode that  
5 information into your brain.

6       How long you're exposed to something affects your  
7 ability to encode that information. Whether or not the  
8 perpetrator and the witness are of the same race affects  
9 your ability to encode that information.

10 Q.     How about the lighting?

11 A.     Lighting affects your ability to encode, distance  
12 affects your ability to encode.

13 Q.     How about stress?

14 A.     Stress affects your ability to encode. There are a  
15 number of factors. The police have no control over  
16 whether this happens. All right. This is just what  
17 happens when the crime occurs, but all of these factors  
18 play a role in your ability to acquire that information.

19 Q.     What is exposure time?

20 A.     Exposure time refers to how long you saw that  
21 information for. So remember studying for a test? If  
22 you studied for a test for half hour then your exposure  
23 time or your duration would be 30 minutes.

24 Q.     And when we talk about exposure time in the context  
25 of eyewitness identification what are we talking about?

1 A. We're talking about how long they saw that  
2 perpetrator's face for.

3 Q. Or heard their voice?

4 A. Or heard their voice.

5 Q. And how does exposure time affect accuracy?

6 A. Exposure time affects accuracy in that the longer  
7 you are exposed to something the more likely you are to  
8 remember it.

9 Q. How much -- you've watched the video in this case?

10 A. I have.

11 Q. How much exposure time did Mr. Patel have?

12 A. I know that the perpetrator was in the store for  
13 about a minute 30 seconds but you can't see Mr. Patel on  
14 the video the entire time, so I don't know if Mr. Patel  
15 was looking at the perpetrator for the whole time. So I  
16 can't tell how long his exposure time was.

17 Q. Let's talk about weapon focus now. Does it matter  
18 if the perpetrator has a weapon?

19 A. It does.

20 Q. Okay, and how?

21 A. Some remember you have to pay attention to  
22 something to encode that information. Well, it turns out  
23 that a weapon draws your attention and so you focus your  
24 attention on the weapon rather than focussing your  
25 attention on the perpetrator's face, and so the presence

1 of a weapon actually reduces your ability to then  
2 identify somebody.

3 Q. Does weapon focus affect only the person at the  
4 scene of the crime?

5 A. It doesn't. So in our studies we can't put a -- we  
6 can't put a weapon in our students' faces. We can't  
7 threaten our students with a gun so we just show them  
8 videos of people who have guns, and even in that  
9 situation, even when there's no personal threat to you  
10 whatsoever that weapon still draws your attention.

11 Q. All right. Let's talk about stress. I think most  
12 people would think that when we're stressed we have  
13 stronger memories. What does the science say about that?

14 A. The science says that that's not right.

15 Q. Okay.

16 A. So that is a general belief but it's an erroneous  
17 belief. It's not supported by the science. So just like  
18 the presence of a weapon reduces your identification  
19 accuracy your ability to later recognize somebody's face,  
20 stress has the same effect.

21 Q. Do you know of any particular studies of stress?

22 A. I do.

23 Q. Okay. What study was that?

24 A. There was a study -- well, stress is difficult to  
25 study in the laboratory because we can't put our students

1 under these really stressful situations that would mimic  
2 the type of stress that you would feel if somebody was  
3 threatening you with a weapon, or raping you, or  
4 something to that effect. All right. We just can't  
5 recreate that in the lab.

6 But what we can do is partner up with people who do  
7 put people under that level of stress. And so one of  
8 those partners was the Army and the researchers got  
9 involved in prisoner of war simulations where military  
10 personnel were going through these training simulations  
11 to make sure that they wouldn't crack during a prisoner  
12 war interrogation.

13 And so in this Morgan 2004 study what they did is  
14 they had military personnel undergo two types of  
15 interrogations. One was a low stress interrogation, and  
16 one was a high stress interrogation in which there was  
17 even a physical confrontation between the interrogator  
18 and the prisoner of war. And in this 40-minute  
19 interrogation they were obviously exposed to their  
20 interrogator for a long period of time.

21 A day later researchers presented them with a  
22 lineup and asked them to pick out their interrogator and  
23 in the low stress conditions people were pretty good at  
24 that. Seven out of 10 of the prisoners of war were able  
25 to recognize their interrogator.

1 But under those high stress conditions when there  
2 was a lot of physiological arousal their ability to later  
3 recognize their interrogator actually decreased quite a  
4 bit to 37 percent. So less than 4 out of 10 of those  
5 people were able to recognize somebody that was in their  
6 face interrogating them, involved in a physical  
7 confrontation with them for 40 minutes.

8 Q. And even when it was low stress only 7 out of 10  
9 picked out their interrogator?

10 A. That's right, 7 out of 10.

11 Q. So that's a 40-minute interrogation?

12 A. That's right.

13 Q. All right. Let's talk about cross-racial issues.

14 You said that cross-racial identification affects  
15 accuracy. What do you mean when you talk -- when you say  
16 cross-racial identifications?

17 A. So the research shows that we're much better at  
18 identifying someone of our own race than identifying  
19 somebody of a different race, and this has been  
20 repeatedly shown regardless of what races we're taking  
21 about, so it's been shown with white witnesses to black  
22 perpetrators, black witnesses to white perpetrators.  
23 It's been shown with whites and Asians, and it's also  
24 shown with whites and Hispanics.

25 Q. Have there ever been any specific studies about the



1 situation we have in this case where there's an Indian  
2 and an African American?

3 A. There haven't been any specific studies looking at  
4 the ability of an Indian witness to pick out a black  
5 witness.

6 Q. But it's fair to say that in all the studies where  
7 they have had some kind of cross-racial identification  
8 that it has affected accuracy?

9 A. That's right. And more than that, it's not just  
10 that it affects your ability to recognize somebody, it  
11 also increases your chances of falsely identifying  
12 somebody else.

13 Q. All right. Let's talk about disguises and how they  
14 might affect your acquisition of memory. Are you  
15 familiar with any studies about that?

16 A. I am. I've done one.

17 Q. All right. How did you do the study?

18 A. So in this study that we did, again, it was a  
19 laboratory study so we were able to create the crime  
20 videos and we had four different. We had the no-disguise  
21 conditions, so you could see the person's face perfectly.  
22 We had a condition in which they wore a toque. I'm from  
23 Canada. So hat or beanie. All right. Something  
24 covering their full -- forehead then also their hairline,  
25 or they were wearing sunglasses. So that was a third

1 condition. So you could see their hair but you couldn't  
2 see their eyes. Or the fourth condition was they had the  
3 hat on and they were also wearing sunglasses. And so we  
4 looked at all those four conditions in one study.

5 We also did a second study looking at the effect of  
6 a stocking. So a woman's nylon pulled over your head to  
7 varying degrees, and we looked to see whether  
8 participants exposed to various videos could later  
9 recognize the person from a lineup.

10 Q. All right. How did people do?

11 A. Well, they had a good exposure to our targets.  
12 They saw a head-on shot. They were exposed to them for  
13 about 30 seconds, clear perfect shot, and immediately  
14 after that video they were asked to make their lineup  
15 identification. So in the no-disguise condition they did  
16 great. About 87 percent were able to recognize the  
17 person that they saw.

18 Q. How about wearing the beanie?

19 A. With the beanie the -- sorry. Beanie just -- toque  
20 sounds much more reasonable to me, but with the beanie  
21 when they could not see their hairline their  
22 identification accuracy dropped to 78 percent, so still  
23 pretty good.

24 Q. How about when they were wearing glasses? And what  
25 kind of glasses were they wearing? You say glasses?

1 A. Wearing sunglasses, so glasses that hid their eyes.

2 Q. All right.

3 A. When they were wearing glasses their identification  
4 accuracy dropped even more, now to 69 percent.

5 Q. All right. How about when they are wearing glasses  
6 and the toque or beanie?

7 A. When they wore the glasses and the hat their  
8 identification accuracy dropped to the lowest rate which  
9 was 55 percent.

10 Q. And you published that study?

11 A. We did.

12 Q. Okay. Where did you publish it?

13 A. We published it in Law and Human Behavior, which  
14 was the journal for the American Psychology Law Society.

15 Q. And that you say was peer reviewed?

16 A. It was.

17 Q. Now, you studied you said with the hat and the  
18 hairline. Tell the jury why that's important.

19 A. Well, those are important cues that we rely on when  
20 we're trying to recognize somebody. All right. So in  
21 general we find that you look to the outside of the face  
22 then to the interior of the face. Specifically, you  
23 spend a lot of time looking at somebody's eyes and you  
24 use that information to then recognize them.

25 So the hat and sunglasses was actually more

1 effective as a disguise than simply pulling the stocking  
2 over your face, and that we think is a really effective  
3 disguise. All right. Our common sense belief is that if  
4 you cover your face with a stocking and totally smush up  
5 your face and obscure the cues that that would be more  
6 effective. In fact it's not. The hat and sunglasses  
7 were more effective.

8 Q. Okay. We talked a lot about factors that affect  
9 the ability to kind of grab the memory. Let's talk about  
10 some factors that affect our ability to hold onto it.  
11 What's the second phase called again, of memory?

12 A. The second phase was our retention stage.

13 Q. And what's that again?

14 A. So that's the time between when you're exposed to  
15 that event or that information and when you later try to  
16 remember that information.

17 Q. Does the length of interval between the event and  
18 the identification affect accuracy?

19 A. It does.

20 Q. How?

21 A. Basically we have what's called our forgetting  
22 curve, and this applies to any type of memory that you  
23 are thinking of. So we're pretty accurate immediately  
24 after the event but then our accuracy drops off very  
25 sharply and you see this huge decline, and that's called

1 the forgetting curve.

2 Q. How fast is this decline?

3 A. In a meta-analysis on identification accuracy  
4 specifically Steve Penrod and his colleagues actually  
5 found that it drops off after about two hours?

6 Q. How about the length of time -- or the length of  
7 time between the event and the court case?

8 A. The same forgetting curve applies.

9 Q. Now, it makes sense that our memories get weaker  
10 over time. I think probably everybody would agree with  
11 that. Can they change over time?

12 A. They can change over time.

13 Q. How does that happen?

14 A. Basically any information that your are exposed to  
15 during that retention interval can be incorporated into  
16 your memory. So not only does your memory get weaker  
17 over time but if you accept other information that's been  
18 presented to you then you can actually change what you  
19 think or what you remember.

20 Q. Is there a term that you use when you talk about  
21 this other information?

22 A. There is. Post-event information is a general  
23 term. So it's information that you've experienced after  
24 the event.

25 Q. What are some sources of post-event information?

1 A. Post-event information can really come from  
2 anywhere. It can come from discussions that you've had  
3 with other people, it can come from reading something, it  
4 can come from watching something on TV, it can even come  
5 from questions that are being asked of you.

6 Q. What kind of effect does it have on memory?

7 A. It can change your memory. You can incorporate  
8 somebody else's piece of information into your own  
9 memory, and if that information is inaccurate, or wrong,  
10 or misleading then it can change what was originally an  
11 accurate memory and change it into an inaccurate memory  
12 or a memory that contains inaccurate details.

13 Q. Do people realize that that's happened?

14 A. No. We have no idea. Our mind plays so many  
15 tricks on us and we are never even aware that this is  
16 happening.

17 Q. Can people recognize where the information even  
18 comes from?

19 A. No, they can't. So in one famous study  
20 participants looked at different scenes, and in one scene  
21 there was a car pulled up to a stop sign. Later on  
22 participants were asked -- some participants, about half,  
23 were asked, Did you see the car at the yield sign?

24 All right. So we've changed one detail of the  
25 event from a stop sign to a yield sign. And then later

1 on they are asked, Did you see a stop sign or did you see  
2 a yield sign? And the participants who were exposed to  
3 information asking about the yield sign reported the  
4 wrong information about -- I think about 60 percent of  
5 the time. So to further figure out if they realized that  
6 their information -- or if they realized that their  
7 memory has changed they asked, Did you actually see that  
8 stop sign in the crime -- or in the slide? Did you see  
9 it in the questionnaire or see it in both, and people  
10 would report that they saw it in both.

11 So they actually believed. Not only did they just  
12 incorporate that information but they believed that  
13 that's what they had originally seen in the first place.

14 Q. Okay. I think I'm going to ask you to give us an  
15 everyday example.

16 A. Okay.

17 Q. If you can.

18 A. I can. So I'm sitting back here trying to think  
19 about what everyday event I would give because some of  
20 this is esoteric and isn't necessarily real world or  
21 isn't necessarily common sense, and so thinking about my  
22 family, and my parents got divorced when I was very young  
23 and my brother went and lived with my father. And so I  
24 was two years old when this happened but this is a story  
25 that my mother has told over, and over, and over again,

1 all right, but I am two.

2 The science says I could never remember what  
3 happened at that time. But I picture myself sitting in  
4 this orange rocking chair that we had, my blue shag rug  
5 carpet because it's the 1970's, and my brother is walking  
6 out dragging this garbage bag of his belongings. There's  
7 no way I could remember that but because she has told it  
8 so many times this is now the image I have in my head.

9 Q. When you think about that you picture yourself --

10 A. I picture myself sitting in this chair, exactly,  
11 but there's no way that that's my memory.

12 Q. This post event information, it can affect the  
13 reliability of eyewitness identifications?

14 A. It can.

15 Q. Could you give an example -- well, let's move on to  
16 recalling the memory, and what's that called again?

17 A. Okay. That would be our retrieval phase, when  
18 we're trying to remember something or use that  
19 information.

20 Q. All right. And when does the retrieval stage  
21 happen?

22 A. The retrieval stage happens in an eyewitness case  
23 when they are trying to report that information, when you  
24 are up on the stand testifying about that information or  
25 when the police are presenting you with an identification



1 procedure, with a lineup.

2 Q. How about if you look at pictures from the event or  
3 watch video from the event?

4 A. Yep, sure. That would be part of their -- well,  
5 that's not necessarily the retrieval phase unless you are  
6 being asked to make a decision about that.

7 Q. Okay. In psychological terms how do you retrieve  
8 memory?

9 A. Basically every time you try to remember something  
10 you're reconstructing that memory. You're bringing all  
11 of information that you have about it, whether you  
12 actually experienced it or whether it was presented to  
13 you at some other point you're bringing that all in and  
14 you are kind of reconstructing that event.

15 Q. All right. What are some of the factors that  
16 affect retrieval?

17 A. So all of these factors that we've talked about,  
18 anything that affects acquisition, all right, anything  
19 that affects your ability to encode that information  
20 affects your ability to then use that information.

21 Retention interval also affects your retrieval as  
22 well. But additional factors play a role in that. So  
23 the types of questions that you are being asked, that can  
24 affect your retrieval. The types of pictures that are  
25 being presented to you in a lineup can affect your

1 retrieval. How those pictures are presented to you can  
2 affect your retrieval.

3 Q. All right. Now, has there been any studies about  
4 the confidence of witnesses?

5 A. There have been.

6 Q. Okay. Is there any relationship between how  
7 confident a witness is and how accurate they are?

8 A. There is a relationship but it's a weak  
9 relationship. So there's a weak correlation or a weak  
10 association between how confident somebody is and how  
11 accurate they are. You can be very confident and be  
12 wrong. You could also be right but not be very  
13 confident.

14 Q. Are there any factors that can affect the  
15 relationship between confidence and accuracy?

16 A. There are.

17 Q. Okay. What are those?

18 A. Simply being asked questions about your memory can  
19 influence your confidence. You can become more confident  
20 the more times you say something. That's part of why we  
21 rehearse speeches before we have to give them. You can  
22 also become more confident by receiving confirmation. By  
23 realizing that somebody else thinks you're right you can  
24 become more confident in your decision.

25 Q. Can you tell the jury about any real life cases

1 you've studied in which confirmation played a role?

2 A. Sure. There is the well known case of Jennifer  
3 Thompson and Ronald Cotton. Jennifer Thompson --

4 MR. RUTLEDGE DURANT: Objection. May we approach?

5 THE COURT: You may.

6 (WHEREUPON, the following bench conference was  
7 reported.)

8 THE COURT: What's your objection?

9 MR. RUTLEDGE DURANT: Is this a criminal case? I  
10 think the case law is pretty clear we don't get into  
11 specific cases or wrongful convictions.

12 MR. GROEBER: There's what?

13 MR. RUTLEDGE DURANT: The case law is pretty  
14 specific we don't get into wrongful convictions on a  
15 specific case. Is that where this is going?

16 MR. GROEBER: Yeah. So what's the case law?

17 MR. RUTLEDGE DURANT: I'll go get it so we're all  
18 on the same page.

19 MR. GROEBER: And just for scheduling, I'm about  
20 halfway through if you want to take a break now.

21 THE COURT: I'm sorry? What did you say?

22 MR. GROEBER: I said I don't know if you wanted to  
23 see if the jury wanted to take a break now or --

24 THE COURT: Okay. Do you have the case?

25 MR. RUTLEDGE DURANT: I don't have it right now

1 but, I mean, maybe that shuts me down because I really  
2 thought we were all on the same page with that.

3 THE COURT: It's going to take Mr. Durant a minute  
4 to look for that then.

5 (WHEREUPON, the bench conference was concluded.)

6 THE COURT: Do you all need a break?

7 THE FOREMAN: Yes, ma'am.

8 THE COURT: I could see that note. Please remember  
9 all of my admonitions. We are going to take about 15  
10 minutes. My chambers is on the fourth floor so it takes  
11 me a long time to get up and down, up and down. So we're  
12 going to take 15 minutes this time. Please remember all  
13 my admonitions.

14 Please rise for the jury. Thank you.

15 (WHEREUPON, the jury leaves the courtroom at  
16 approximately 3:25 p.m.)

17 THE COURT: Thank you. Be seated.

18 You may not discuss your testimony with anyone.  
19 That includes anyone on defense or with the State; you  
20 understand?

21 THE WITNESS: I do.

22 THE COURT: All right. Thank you. You may step  
23 down.

24 Fifteen minutes.

25 MR. RUTLEDGE DURANT: Thank you, Your Honor.

1 (WHEREUPON, a brief recess was taken.)

2 THE COURT: Mr. Durant, do you have case law for  
3 me?

4 MR. RUTLEDGE DURANT: Your Honor, I do not. I went  
5 back over to the office. I don't have the law in front  
6 of me. We would simply contend that real life examples,  
7 unless the doctor would be able to link it up to some  
8 type of empirical research that would be used by not only  
9 herself but others like her in that profession, as she  
10 indicates, I believe that she could.

11 If she could lay that foundation I think it might  
12 be proper at that point, but simply just to let die in  
13 the courtroom that people are wrongfully convicted based  
14 on eyewitness identifications and give examples of people  
15 and how long they've been in prison because of it, it  
16 really goes to sentencing, which is not a proper  
17 consideration for the jury.

18 And we do have a case that's similar in vein, it's  
19 State V. Myers, 359 S.C. 40, which essentially discusses  
20 limiting the expert in the realm of false confession  
21 expert testimony, which the Court viewed there and  
22 limited specifics about specific cases because there was  
23 no need, it wasn't relevant, didn't talk about sentencing  
24 and the repercussions of a conviction, or a false  
25 conviction, wrongful conviction, if you will; simply the

1 expert, I believe, is called upon to educate the Court,  
2 felt what is reliable, what seems to be more accurate and  
3 what is not in the realm of eyewitness identifications  
4 and not give any anecdotal accounts unless they are  
5 factually similar to our case.

6 THE COURT: All right. Anything? I don't need  
7 anything because there's not an objection before me but I  
8 think I just needed to know. My actual question to  
9 Mr. Durant was do you have any case law. So there is no  
10 case law so --

11 MR. BRUCE DURANT: Your Honor, we would ask you to  
12 read the Myers case dealing with that issue.

13 THE COURT: We're pulling it up. Thank you.

14 Please feel free to object at the appropriate time  
15 that she has testified to that you feel is inappropriate.

16 All right. Let's bring in the jury.

17 (WHEREUPON, the jury enters the courtroom at  
18 approximately 3:45 p.m.)

19 THE COURT: Thank you. Be seated.

20 Yes. You may continue.

21 MR. GROEBER: Thank you, Your Honor.

22 BY MR. GROEBER:

23 Q. All right, Dr. Beaudry. We were talking about the  
24 factors that affect the relationship between confidence  
25 and accuracy, right?

1 A. We were.

2 Q. Part of your study includes studying real life  
3 cases, right?

4 A. It does.

5 Q. And a lot of the articles and studies take real  
6 life cases and draw conclusions from studying them; is  
7 that correct?

8 A. They do. They take real life cases and then often  
9 try to study those in the lab so that we can take from  
10 one example and see if this pattern holds.

11 Q. Are there any examples that you studied and other  
12 people have studied about the effect of the relationship  
13 between confidence and accuracy?

14 A. Yeah. Basically every study done with eyewitness  
15 identification takes a measure of confidence. So that  
16 relationship is studied in every study.

17 Q. Is there a specific case example that you could  
18 discuss that would help the jury understand that better?

19 A. I could.

20 Q. Okay. What would that be?

21 A. That would be the case of Jennifer Thompson and  
22 Ronald Cotton. So Jennifer Thompson was a college  
23 student in North Carolina, and in 1984 she was raped.  
24 Somebody had broken into her apartment and raped her, and  
25 while she was being raped she studied his face. She

1 wanted to study his face in case she had the chance to  
2 later identify him she wanted to be able to do it.

3 So at a certain point, after about an hour and a  
4 half, she convinced him to let her go and get him a glass  
5 of water or something to drink, and then she ran out of  
6 the house, and that's how she got away from him.

7 They created a composite so -- like a sketch of  
8 the perpetrator's face, and they put that out. And based  
9 on that composite somebody said, Oh, Ronald, Ronald  
10 Cotton, that looks like you. You should go clear your  
11 name. You should go see the police and let them know  
12 that wasn't you.

13 And the investigation continued. Jennifer Thompson  
14 was shown a lineup, a six-person lineup, simultaneous,  
15 like you saw in this case, and from that lineup she  
16 identified Ronald Cotton. And then the police brought  
17 her to do a live lineup where everybody was in person,  
18 and when she picked Ronald Cotton from that photo the  
19 police said, You got him. That's the same guy that you  
20 picked out of the photo lineup.

21 And based on that she said, I knew it. That's when  
22 I knew I got the guy.

23 So Ronald Cotton immediately went to jail and at a  
24 certain point another person was convicted of rapes. His  
25 name was Bobby Pool, and he was brought into the same



1 prison as Ronald Cotton. People were confusing them.  
2 People would call Ronald Cotton Pool or Bobby and based  
3 on that --

4 MR. RUTLEDGE DURANT: Objection, Your Honor.

5 THE COURT: Sustained. Let's move on.

6 BY MR. GROEBER:

7 Q. All right. Let's talk about expectancy. Can you  
8 tell the jury what that means.

9 A. Sure. Perceptual expectancy just has to do with  
10 the fact that if you expect something to happen you  
11 actually believe that it is happening. So if you expect  
12 your phone to be ringing, sometimes you might be in the  
13 other room and you hear the phone ring. Then you rush to  
14 the phone and it's not ringing at all. So that's  
15 expectancy or expectation.

16 Q. And how does that affect accuracy for  
17 identifications?

18 A. Well, that can affect identifications in that if  
19 you are looking at something and you expect to see  
20 something there it can actually change your perception of  
21 it.

22 Q. Okay. How about have you ever heard the term  
23 unconscious transference?

24 A. I have.

25 Q. All right. What does that mean?

1 A. Unconscious transference is just a fancy term to  
2 say you that you can transfer somebody's face from one  
3 event to another event. So you could have encountered  
4 somebody in one situation and then later you believe that  
5 you had actually seen them at some other point.

6 Q. And so we can transfer familiar faces from one  
7 memory to the next?

8 A. That's right.

9 Q. Can we do that without knowing it?

10 A. We can. That's why it's called unconscious  
11 transference. So we're not actually conscious of it or  
12 aware that this is happening.

13 Q. All right. You've talked to us about different  
14 factors that can affect the accuracy of eyewitness  
15 identifications and our memory. Are there certain  
16 guidelines that you are aware of for law enforcement as  
17 to how to get eyewitness identification info and how to  
18 avoid some of these problems?

19 A. There are. There's that National Institute of  
20 Justice Eyewitness Evidence Guide for Law Enforcement  
21 that we talked about.

22 Q. And when was that published?

23 A. That was published in 1999.

24 Q. And how did they disseminate that study. Did they  
25 just put it online or...

1 A. It's online but they also mailed a hardcopy to  
2 every police agency in the United States.

3 Q. Let's talk about some of those best practices for  
4 lineups specifically.

5 A. Okay.

6 Q. What's the whole point of doing a lineup?

7 A. The whole point of doing a lineup is to gather  
8 evidence. It's basically a test of the witness's memory  
9 to see if the person that they saw, all right, the person  
10 that they have a memory of, to see if whether that is the  
11 actual suspect that the police have in mind. All right.  
12 So the police have a suspect and it's a test of whether  
13 or not that person is actually the perpetrator that the  
14 witness viewed originally.

15 Q. Are there any studies about photo lineups?

16 A. There are.

17 Q. Are you familiar with those?

18 A. I am.

19 Q. What do the studies suggest about how photo lineups  
20 relate to the accuracy of eyewitness identification?

21 A. Basically the way the lineup was presented, the  
22 instructions that are given with that lineup and who is  
23 in that lineup can affect your accuracy.

24 Q. What is the difference between a simultaneous  
25 lineup and sequential lineup?

1 A. Okay. So a simultaneous lineup is the lineup that  
2 you traditionally see. So if you picture a lineup you  
3 might picture six people presented on one sheet of paper  
4 presented to the witness all at once.

5 A sequential lineup is a different technique  
6 completely. In a sequential lineup each lineup photo is  
7 presented to the witness one at a time. The witness  
8 doesn't know how many lineup photos they are going to see  
9 and that way they don't feel any pressure to choose, they  
10 don't know that they are coming to the end and have to  
11 make a choice.

12 So for each photo that's presented the witness has  
13 to make a yes or no decision. Yes, that is the guy I  
14 saw, or no, it's not. And they can't see the photos  
15 again, and the sequential lineup is presented by an  
16 independent investigator, somebody separate from the case  
17 who has no idea who the suspect is.

18 Q. Which one is better?

19 A. The sequential lineup has been found to be better.

20 Q. Why?

21 A. Because it reduces false identifications. In a  
22 simultaneous lineup basically what the witness tends to  
23 do is they tend to compare all of the lineup members to  
24 each other and see who best matches their memory, and  
25 then if that person is a good enough match, if they

1 closely resemble them enough then think they'll choose  
2 that person.

3 In a sequential lineup rather than comparing the  
4 lineup members to each other people compare each face  
5 that's being presented to their memory of the  
6 perpetrator. And so it's a better test of their -- or  
7 it's a better indicator of reliability.

8 Q. Are you familiar with the Steblay, Dysart and Wells  
9 Study?

10 A. I am.

11 Q. Did I pronounce those right?

12 A. Steblay, Dysart and Wells.

13 Q. Who were they?

14 A. So Nancy Steblay is an eyewitness researcher in  
15 Minnesota. She is an eyewitness expert but also an  
16 expert in meta-analysis, that statistical technique that  
17 I told you about.

18 Jennifer Dysart went to graduate school with me,  
19 and she is now at the John Jay College of Criminal  
20 Justice in New York and she is also an eyewitness  
21 identification researcher.

22 And Gary Wells is perhaps the best known eyewitness  
23 researcher, and he is at Iowa State.

24 Q. All right. And what is their study?

25 A. In 2011, they published meta-analysis. So again,

1 it's that statistical summary that's showing us the  
2 general pattern of the results. And in that  
3 meta-analysis they compared 72 different tests of the  
4 difference between simultaneous lineups and sequential  
5 lineups.

6 Q. And where are those tests from?

7 A. From any journal article that examined simultaneous  
8 and sequential lineups.

9 Q. In the U. S., Canada?

10 A. Around the world.

11 Q. What did they find in their meta-analysis of  
12 simultaneous versus sequential lineups.

13 A. In their meta-analysis they found that the  
14 sequential lineup is superior, that there are similar  
15 correct identification rates for the simultaneous and  
16 sequential lineup; meaning, if that perpetrator is in the  
17 lineup then people are going to generally pick him out at  
18 the same rate. But if that perpetrator is not in the  
19 lineup, if the lineup is made up of completely innocent  
20 people who were not in that crime video then the  
21 simultaneous lineup produces a higher false  
22 identification rate than the sequential lineup.

23 Q. Okay. I'm going to try to slow it down a little.

24 What do you mean when you say that the perpetrator is not  
25 in the lineup?

1 A. Okay. So one of the benefits of doing these  
2 laboratory studies is that we can control who's in that  
3 lineup. We can control if the perpetrator is in that  
4 lineup or if the perpetrator is replaced with an innocent  
5 person, somebody that looks like him but isn't actually  
6 him. And that way we can look at accurate decisions,  
7 correct identifications. All right. So you saw the guy  
8 in the video and he's in the lineup and you picked him  
9 out. That's a correct identification.

10 But we can also look at false identifications. You  
11 saw this guy in the lineup, we put this other guy -- or  
12 sorry. You saw this guy in the video and we put this  
13 other guy in the lineup. Are you still going to pick  
14 somebody from that lineup even though the perpetrator  
15 isn't there? If you do that's a false positive or a  
16 false identification.

17 Q. So when the perpetrator is not in the lineup --

18 A. Right.

19 Q. -- what's an accurate answer?

20 A. To say that he's not there, to reject that lineup.

21 Q. And when the perpetrator is not there people got it  
22 correct how much of the time?

23 A. So in a sequential procedure people rejected that  
24 lineup 68 percent of the time.

25 Q. Okay. So in a sequential lineup with the best

1 practice when only innocent people were in the lineup  
2 people still got it wrong three out of ten times?

3 A. That is right. So three out of ten people still  
4 chose an innocent person even when it was presented  
5 sequentially.

6 Q. And when it was a simultaneous lineup five out of  
7 those times they picked out a totally innocent person?

8 A. That's right. They did. So the false  
9 identification rates were higher with the simultaneous  
10 lineup.

11 Q. Okay. Let's move on to the instructions in the  
12 lineups. We've discussed the factors that affect  
13 accuracy and retrieval. Let's talk about those and how  
14 they affect the instructions of an identification. Okay?

15 A. Okay.

16 Q. How important are the instructions that are given  
17 to the witness before they look at the lineup?

18 A. Those instructions are extremely important.

19 Q. Okay. How can they affect accuracy?

20 A. They can affect accuracy because they can affect  
21 whether or not you're going to choose from that lineup.  
22 If you feel pressured in some way to choose from that  
23 lineup and the perpetrator isn't there then you are going  
24 to be more likely to make a false identification.

25 Q. Okay. How about whether or not there's an



1 independent administrator?

2 A. That can also have an effect.

3 Q. Tell the jury what an independent person or  
4 administrator is?

5 A. So an independent administrator would be somebody  
6 who is uninvolved in the case in that they have no idea  
7 who that police suspect is, and that's important because  
8 you don't want people to have intentional or  
9 unintentional influence on that witness. You want that  
10 witness to make that decision based on only their memory,  
11 not based on any outside factors.

12 Q. Okay. Let's talk a little bit about documenting  
13 the procedure itself, the lineup procedure itself. Are  
14 there any recommendations from the publications that we  
15 discussed before or from the studies about how police  
16 should document the lineup?

17 A. There are. In those National Institute of Justice  
18 guidelines they recommend that at the very least that  
19 procedure be audio recorded but ideally that the  
20 procedure be video recorded.

21 Q. Why?

22 A. Basically we want a record of what happened during  
23 that event. We want to know who was there. We want to  
24 know not only what was said to the witness but also what  
25 the witness said, and we want to have an idea of how

1 quickly the witness made their decision and whether they  
2 received any feedback or any confirmation of their  
3 identification.

4 Q. Okay. What is the difference between an  
5 out-of-court identification and an in-court  
6 identification?

7 A. So an out-of-court identification would be these  
8 lineup procedures that we are talking about, when police  
9 have a suspect and they bring the witness a lineup and  
10 ask them if they can recognize anybody in that lineup.  
11 That would be an out-of-court identification.

12 An in-court identification would be when a witness  
13 sits here in court and makes an identification, makes a  
14 determination that they recognize somebody.

15 Q. Which of the two is preferred?

16 A. The out-of-court identification is preferred.

17 Q. Why?

18 A. Because that out-of-court identification if done  
19 properly is actually a test investigating the witness's  
20 memory, all right, whether or not that police suspect  
21 matches the witness's memory. And so that's preferred  
22 because that's less suggestive. It's going to be more  
23 reliable than an in-court identification in which the  
24 suspect is obvious.

25 Q. When you say suggestive what do you mean by that?

1 A. Suggestive refers to the fact that it's obvious to  
2 the witness who the police the suspect is -- who the  
3 police believe committed that crime.

4 Q. Are you aware of any studies about our ability to  
5 recognize people from pictures or videos?

6 A. I am.

7 Q. What do those studies suggest about our ability to  
8 do that?

9 A. The studies generally suggest that we are not very  
10 good at picking out people who are unfamiliar to us.

11 Q. Okay. And what about studies with people that are  
12 familiar to us?

13 A. When we are familiar with somebody we are pretty  
14 good at recognizing them.

15 Q. Okay. When you say familiar, how do they define  
16 familiar in those studies?

17 A. Generally what they do is they would show people  
18 that the witnesses really know or the participants really  
19 know. So in one study I'm thinking of they used their  
20 professors. So these were college students and they  
21 showed them videos of their professors walking into the  
22 building and the video was, like, the security footage of  
23 them walking through the building.

24 Q. Okay. Are there any studies about -- are there any  
25 studies that would -- about the effect of a disguise on

1 our ability to recognize someone familiar with us?

2 A. There are no studies looking at our ability to  
3 recognize somebody that we know but is wearing a  
4 disguise.

5 Q. Okay. What about any studies where a face would be  
6 hidden?

7 A. There are.

8 Q. Okay.

9 A. So in one study the researchers used familiar  
10 people and they showed them under a variety of  
11 conditions. So they either showed them with nothing  
12 affected whatsoever, it was just that video of them  
13 walking through, or they disguised their body and showed  
14 just their face. All right.

15 So they put this big black box around their body  
16 and showed just their face walking through or they  
17 covered their face and showed just their body walking  
18 through. And they found that accuracy was very good when  
19 you could see the entire person, when nothing was blocked  
20 whatsoever. People were performing about the 80 or 90  
21 percent when their body was covered but they could still  
22 see their face, they were again about 80 or 90 percent.

23 But when their face was covered and they could only  
24 see their body and they could only see them walking  
25 through this hallway accuracy dropped to 30 percent. So

1 they were much less accurate when they could not view a  
2 person's face.

3 Q. Has there been any research done that looks at  
4 people's ability to recognize voices?

5 A. There has been.

6 Q. And has the research studied people's ability to  
7 recognize voices of people that they are familiar with?

8 A. There has been.

9 Q. Please tell the jury about that research.

10 A. Okay. So a study was done with four different  
11 levels of familiarity. So people that you were  
12 completely unfamiliar with, a strangers voice talking and  
13 there's low familiarity. Moderate and high familiarity  
14 they defined as either your neighbor or an associate of  
15 yours. Moderate familiarity was a friend of the  
16 participant or a teammate of the participant, and then  
17 high familiarity was a family member.

18 And so they played varying clips, various clips of  
19 these people talking and asked people to identify who  
20 they were. And they found that with the moderate  
21 familiarity, so a friend, and also the high familiarity  
22 with a family member people were pretty good at this.  
23 About eight out of ten of the participants could identify  
24 who that was that the speaking to them.

25 But with the low familiarity, a neighbor or an

1 associate, people were performing at the same level as a  
2 total stranger. So they were about five out of ten  
3 people who got their choices right.

4 And then even more concerning was what they did  
5 when they were wrong. All right. So they could say, I  
6 have no idea who this person is, or they could say, Yeah,  
7 I know that voice. It's John. But, in fact, it was Joe.  
8 All right. So they said that they recognized them but  
9 they got the source wrong, and they did that -- I believe  
10 with the low familiarity condition they did that about  
11 four out of ten times.

12 Q. Okay. I'm going try break that up a little bit.

13 A. Okay.

14 Q. People who could recognize the voice of people that  
15 they were very familiar with, and what is very familiar  
16 defined as in the study?

17 A. The high familiarity was a family member.

18 Q. Okay. And eight of ten people could identify the  
19 voice?

20 A. That's right.

21 Q. But two times they got it wrong?

22 A. Two times got it wrong. Twenty percent of the time  
23 they got it wrong.

24 Q. And then some people with some familiarity, what  
25 was the number on that?

1 A. So people that they knew, the low familiarity, they  
2 knew them but they hadn't had a lot of experience with  
3 them, they were able to correctly identify their voice  
4 five times out of ten.

5 Q. And so five times they got it wrong?

6 A. So five times they got it wrong.

7 Q. Did this study examine the confidence and accuracy  
8 relationship that we talked about when we were talking  
9 about eyewitness identification?

10 A. They did, and they found the same weak correlation,  
11 that you could be very confident but still be wrong.

12 Q. And this study was published in the applied  
13 cognitive -- I'm sorry. Did they study whispering  
14 voices?

15 A. Oh, they did study whispering voices. So that was  
16 another study that they did and they manipulated now  
17 whether people were talking normally or whether they were  
18 whispering, and people performed generally worse when  
19 they were whispering. But the figures that I reported  
20 have to do with the normal tone voices.

21 Q. Where was this study published?

22 A. It was published in Applied Cognitive Technology, I  
23 believe, or Applied Cognitive Psychology.

24 Q. Okay. And is that a peer review journal?

25 A. That is.

1 Q. And you relied on it in your testimony?

2 A. I have.

3 Q. Would you say that it's reliable authority in your  
4 field?

5 A. I would.

6 MR. GROEBER: Okay. May I have a moment, Your  
7 Honor?

8 THE COURT: You may.

9 BY MR. GROEBER:

10 Q. Who wrote that study? Yarmey, Yarmey and Yarmey?

11 A. Oh, yeah. Daniel Yarmey and his two daughters, and  
12 then a coauthor or parliament.

13 (WHEREUPON, Defendant's Exhibit Number 12, a  
14 Document, was marked for identification only.)

15 Q. I'm going to hand you what's been marked --

16 MR. RUTLEDGE DURANT: Your Honor, may we approach?

17 THE COURT: You may.

18 (WHEREUPON, the following bench conference was  
19 reported.)

20 MR. GROEBER: I intend to ask her to read one  
21 paragraph from this.

22 THE COURT: State your objections.

23 MR. RUTLEDGE DURANT: This is irrelevant and has  
24 nothing to do with this case. It's on a whisper and it's  
25 merely one person on what they did on a specific incident



1 in time. It's not --

2 MR. BRUCE DURANT: Actually, it's not --

3 THE COURT: One at a time. One at a time.

4 MR. GROEBER: It comes in under rule --

5 THE COURT: That's not my issue, whether it comes  
6 in or not --

7 MR. GROEBER: Sure.

8 THE COURT: -- because I'm sure she's going to say  
9 her view on this as an expert. I got that. It's the  
10 testimony about whispering, whispering and --

11 MR. GROEBER: Well, I'm fine -- okay. I'm fine  
12 taking out the sentence on whispering. I understand that  
13 objection. I would ask that she read, Another  
14 participant listening to an identical twin normal --

15 THE COURT: This is talking about whispering.

16 MR. GROEBER: Not in that sentence.

17 THE COURT: Okay.

18 MR. RUTLEDGE DURANT: So you're talking about  
19 something different now than you have highlighted.

20 MR. GROEBER: I'll redact the part about  
21 whispering.

22 THE COURT: What is whispering in relation to?

23 MR. GROEBER: They've presented evidence that he  
24 recognized voices, and I presented expert testimony  
25 through her about voice identification. This is a study

1 specifically on that and people's ability to do so and I  
2 believe I'm entitled to have her read from this, and it's  
3 Rule 803-18.

4 MR. RUTLEDGE DURANT: I mean it's laughable,  
5 actually. Actually it's hearsay --

6 THE COURT: Well, that's not the -- she's been  
7 qualified as an expert so she says relying on everything.  
8 This is a study and I haven't read it but it's a study  
9 that is about -- during whispering.

10 MR. GROEBER: Yeah, it's a study and it has two  
11 separate witnesses. One it's about whispering. It's  
12 about voice recognition. One of the studies focused on  
13 whispering and one focused on normal tones.

14 THE COURT: All right. But it's about a high  
15 familiarity and a known familiarity, right?

16 MR. GROEBER: Yes.

17 THE COURT: And what you want to say is -- you want  
18 to say -- we don't have a high familiar here, right? So  
19 why are you getting into high familiar?

20 MR. GROEBER: Well, I think it shows that even high  
21 familiar people make mistakes.

22 THE COURT: I understand that but has she described  
23 for me the difference here, and I've given you extreme  
24 latitude.

25 MR. GROEBER: Even people that were highly familiar

1 make mistakes and that is what this --

2 THE COURT: I don't care about high familiar people  
3 because we don't have high familiar people here. All  
4 right. I haven't heard her tell me that high familiar  
5 people make the same amount of mistakes as non familiar  
6 people.

7 MR. GROEBER: No. She testified that higher  
8 familiar people make mistakes 20 percent of the time, two  
9 out of 10 times.

10 THE COURT: All right. Well, what's -- I'm sorry?

11 MR. RUTLEDGE DURANT: And that's the basis of what  
12 she's allowed to get into. She's testified to that. Now  
13 it's basically getting into what this doctor, what this  
14 research said happened. One time here on earth has  
15 nothing to do with anything and it is hearsay.

16 THE COURT: It may be hearsay but it's in this  
17 courtroom because she's going to rely on it as an expert,  
18 over that hump. My hump is further than that because now  
19 we are beyond -- we are comparing things that are not in  
20 this case.

21 MR. GROEBER: And that would be great for them to  
22 argue in closing.

23 THE COURT: I'm sorry?

24 MR. GROEBER: And that's great for them to argue in  
25 closing. I think that would be a perfect time for them

1 to do that.

2 THE COURT: No. I'm the gatekeeper.

3 MR. GROEBER: I understand that, Your Honor.

4 THE COURT: And so we can sit here for the next 20  
5 weeks and have her come up with hypotheticals, but if  
6 they are not pertinent to this case I'm not letting them  
7 in. I've given you extreme latitude to lay it out. I  
8 haven't heard, and maybe I missed it because my retention  
9 isn't so good right now, but let me just tell you, I  
10 haven't heard it.

11 If you want to lay a foundation as to how low and  
12 high are similar, if you want to make a record for me  
13 that's fine, or if you want to tell me what we had here  
14 was a high frequency then that's fine. All right?

15 MR. GROEBER: Okay.

16 THE COURT: But I think you're trying to get in  
17 something, have her say something that is not in this  
18 case. All right. You cannot compare apples and oranges  
19 and try and convince the jury that you have an apple when  
20 it's truly an orange.

21 MR. GROEBER: I understand your ruling.

22 (WHEREUPON, the bench conference was concluded.)

23 THE COURT: Thank you.

24 BY MR. GROEBER:

25 Q. Okay. Just a few more questions, Dr. Beaudry.

1 A. Okay.

2 Q. Are you against the use of photo lineups in police  
3 procedures?

4 A. No. I'm not against the use of properly conducted  
5 photo lineups.

6 Q. Why not?

7 A. Because they can offer us some evidence.

8 Q. Okay. Are you against eyewitness identifications  
9 being allowed in the justice system?

10 A. No, I'm not.

11 Q. Why not?

12 A. We have to rely on eyewitnesses. It's a major  
13 piece of evidence. The issue is whether that's the only  
14 piece of evidence, and so we would argue that that  
15 evidence needs some corroboration.

16 Q. Why have you sought out to study and testify in  
17 this area?

18 A. I think this is a fascinating area. Any dad is a  
19 police officer so I've been brought up in the law  
20 enforcement tradition all my life, and also because many  
21 of these findings are so counter intuitive I think  
22 that --

23 MR. RUTLEDGE DURANT: Objection. This is not  
24 relevant.

25 THE COURT: Overruled. I'll give her a little

1 leeway. Thank you.

2 A. I think that it's important to educate people on  
3 these issues.

4 MR. GROEBER: No further questions.

5 Q. Thank you, Dr. Beaudry.

6 A. Thank you.

7 Q. Please answer any questions that the State may  
8 have.

9 THE COURT: Mr. Durant?

10 MR. RUTLEDGE DURANT: Thank you, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. RUTLEDGE DURANT:

13 Q. Good evening, Doctor.

14 A. Good evening.

15 Q. All right. I want to start with -- well, I guess  
16 start with the premise for you being here.

17 A. Okay.

18 Q. And that is not to tell the Court whether any of  
19 the witnesses who testified in this trial knew this man  
20 before the crime that we are here to talk about on  
21 December 24th, right?

22 A. Right.

23 Q. Because you can't say anything about that?

24 A. No, I can't.

25 Q. And you don't know.

1 A. No, I don't.

2 Q. And I think it's been well gone over but you were  
3 contacted by the defense and you've been assisting them  
4 in this trial, right?

5 A. I was contacted by the defense, yes.

6 Q. And you've been here all week?

7 A. I have.

8 Q. And, of course, you're being paid. You're a  
9 professional, right?

10 A. Right.

11 Q. And this is your first time as an expert witness?

12 A. This is my first time.

13 Q. On the stand?

14 A. That's right.

15 Q. Congratulations.

16 A. Thank you.

17 Q. And you've never met the victim in this case?

18 A. No, I haven't.

19 Q. Or had a conversation with him?

20 A. No, I haven't.

21 Q. And you've never met the witnesses in this case or  
22 had conversations with them?

23 A. No.

24 Q. And I think you would agree with me that despite  
25 all the research in this area for just eyewitness

1 identification that there is no way you can predict how  
2 accurate any specific eyewitness is?

3 A. I would agree with that.

4 Q. And I want to talk about ecological validity.

5 A. Okay.

6 Q. I don't think that's a term you've addressed yet,  
7 is it?

8 A. No, it's not.

9 Q. But that is a term that is relevant in your field?

10 A. It is.

11 Q. And if you would, could you tell the jury what  
12 ecological validity means.

13 A. I can. So ecological validity basically refers to  
14 whether or not those studies in the laboratory actually  
15 generalize or apply to the real world settings.

16 Q. And it's that degree of studying this research in,  
17 like a lab, and how that situation is accurately --

18 A. Yes.

19 Q. -- in the real world?

20 A. Right. So, like I mentioned, we couldn't recreate  
21 these really stressful experiences for our participants.  
22 That is an issue for ecological validity.

23 Q. And so obviously to you and your colleagues in this  
24 area it's important to really avoid big sweeping  
25 generalities. Would you say that's correct?



1 A. To a certain extent I would.

2 Q. And most of the studies in this area are conducted  
3 or they involve simulation research?

4 A. Most of those studies do involve simulation  
5 research which is why we also rely on archival studies to  
6 demonstrate that the same patterns hold.

7 Q. And you've said this but, of course, you aren't  
8 actually able to create an event where you can determine  
9 the accuracy of someone who has had a gun in their face?

10 A. Right.

11 Q. And made to feel like they could die?

12 A. That's true.

13 Q. And then able to determine whether the person who  
14 was two and a half feet away from them was a person that  
15 they saw in a lineup?

16 A. That's right.

17 Q. That cannot be done?

18 A. Ethically it cannot be done.

19 Q. And so your studies often times are with college  
20 students, right?

21 A. That's right.

22 Q. And they occur in a classroom, usually?

23 A. Or a lab, yep.

24 Q. Or a lab. And it would be common in some of these  
25 studies that say somebody runs into a room of psychology

1 students and takes the teacher's purse and runs out?

2 A. Right.

3 Q. And so the classroom is unsuspected of when this  
4 event is going to happen, right?

5 A. That's right.

6 Q. And then they are asked later, at a later time,  
7 either immediately after or another day, if they could  
8 identify that person?

9 A. That's one of the ways that we do those studies.  
10 That's right.

11 Q. And that's one of the ways it's relied upon for  
12 this type of research?

13 A. Uh-huh.

14 Q. And, I mean, usually in that situation the teacher  
15 is not in on it; is that correct?

16 A. No. Often the teacher is in on it.

17 Q. The teacher is in on it. So the teacher know's  
18 what's going to happen?

19 A. Right.

20 Q. So you are measuring the witness's ability to be  
21 accurate?

22 A. You are measuring the witnesses, not the teacher's  
23 ability but the witness's.

24 Q. The witnesses. And these are witnesses who are not  
25 victims?

1 A. That's right.

2 Q. That the event didn't happen to them?

3 A. That's right.

4 Q. That they had no stress of actually thinking their  
5 life could end?

6 A. In some of the cases that's right.

7 Q. In some of the cases?

8 A. Well, I would say that in that Morgan study I  
9 described.

10 Q. The Morgan study?

11 A. With the prisoner of war simulation.

12 Q. Yeah, what was going on with that? Let's talk  
13 about that.

14 A. Okay.

15 Q. What did that involve again?

16 A. It's military personnel, and those were the  
17 participants. All right. So they are going through  
18 training and they underwent a prisoner of war simulation  
19 where they were being interrogated for 40 minutes to see  
20 if they would crack under that pressure.

21 Q. And so those participants knew that this was part  
22 of their training?

23 A. They knew it was part of their training but it  
24 still is a stressful interrogation with physical  
25 confrontation between the interrogator and the prisoners.

1 Q. Sure. But they didn't think that they were

2 undergoing a crime, did they?

3 A. They didn't.

4 Q. And a person, you would agree with me, I believe,

5 who is actually being robbed at gunpoint at a convenience

6 store, let's say, they might actually be under the

7 impression that they are living through a crime?

8 A. Definitely.

9 Q. And so that is a different situation than a

10 prisoner of war and the stress at the prisoner of war

11 training -- prison; is that correct?

12 A. Yes. It would be a different situation.

13 Q. So these are different factors, right?

14 A. Uh-huh.

15 Q. And you do your best to control your factors when

16 you study this type of ability to identify someone,

17 right?

18 A. Right.

19 Q. But you just can't -- I think we keep coming back

20 to just can't recreate what it is actually like to be

21 looking down the other end of a gun and being robbed.

22 A. That's right. So probably our studies

23 underestimate the impact that the presence of that gun

24 has on the witness's ability to remember.

25 Q. That they may underestimate it?

- 1 A. Underestimate the impact. That's right.
- 2 Q. That's possible?
- 3 A. Uh-huh.
- 4 Q. And so it's possible that a real life event might
- 5 actually cause someone to be more accurate in their
- 6 identification?
- 7 A. I guess it's possible.
- 8 Q. It's possible because you aren't able to study
- 9 that, are you?
- 10 A. That's right. We're not.
- 11 Q. Are there any studies that take into account
- 12 individual characteristics of the witness, and
- 13 specifically look into that, like level of education?
- 14 A. Not that I'm aware of, no.
- 15 Q. There's no research that indicates that somebody
- 16 who's got more of an education would be more accurate or
- 17 less accurate?
- 18 A. Not that I'm aware of, no study that's specifically
- 19 designed to test how a level of education affects
- 20 eyewitness accuracy.
- 21 Q. What about race?
- 22 A. The cross-race situation that we talked about.
- 23 Q. Well, are there any racial groups of people that
- 24 are better than others at picking people out?
- 25 A. No.

1 Q. No. Has that ever been studied?

2 A. It's compared. So what matters is the race of the  
3 witness and the race of perpetrator in that interaction.

4 Q. And you're talking about cross-racial  
5 identification?

6 A. I am.

7 Q. And isn't it true that the less often someone has  
8 to interact with a member of another race lowered their  
9 accuracy, maybe, on identifying someone?

10 A. With relation to the cross-race scenario  
11 specifically?

12 Q. Right. Right.

13 A. That has been put forth. It's called the contact  
14 hypothesis, that basically the more contact you have with  
15 somebody of another race the more accurate you should be,  
16 but that hasn't actually held up.

17 Q. Have there been professionals in your field who  
18 have written about that?

19 A. Yeah. That was one explanation for why the  
20 cross-race effect occurs.

21 Q. And so I believe that there is literature by  
22 professionals in your field also that indicates that the  
23 more contact a particular person from a particular racial  
24 group has with an individual from a different racial  
25 group or people from the other racial group the higher

1 their ability to be accurate becomes?

2 A. There have been, I think, one of two studies that I  
3 have found that, but in the general meta-analysis that  
4 was done, again, analyzing all of the studies in the area  
5 the contact hypothesis could not explain the data. So  
6 familiarity with another race didn't remove the  
7 cross-race effect from occurring.

8 Q. So you are just saying that members of different  
9 races are not good at picking out members of another  
10 race?

11 A. That's right.

12 Q. Can't be done?

13 A. No. Not that it can't be done. That we're worse  
14 at it than picking out somebody of our own race.

15 Q. But very well can be done, right?

16 A. Yeah. Some people can do it.

17 Q. And, in fact, I think research has shown that some  
18 people are actually very good at picking out members of a  
19 different racial group?

20 A. Compared to picking out people of their own racial  
21 group?

22 Q. No, just in general, just picking out somebody of a  
23 different racial group. Some people are really pretty  
24 good at that?

25 A. Yeah, it can be done.

1 Q. It can be done. And some people are not so good?

2 A. And some people are not so good. On average we're  
3 worse if somebody is of a different race than us.

4 Q. Because I think the fact of the matter is some  
5 people do quite well in making identifications; is that  
6 right?

7 A. Nobody has been found to be a super identifier but  
8 we can be -- we can be out there.

9 Q. So are you saying that there are not studies that  
10 show and people involved in these studies who weren't a  
11 lot better than other people involved in the studies at  
12 making identifications?

13 A. Generally in identification research people make  
14 one decision. So some people are accurate and some  
15 people are inaccurate. Do you know what I mean? It's  
16 not that one person who is consistently accurate and  
17 really good at doing this.

18 Q. But nevertheless, some people are very good at  
19 making identification, right?

20 A. Some people can make an accurate identification.

21 Q. In the experiments or studies conducted by you or  
22 others would you agree that accuracy rates depend heavily  
23 on the conditions of the experiment?

24 A. They depend on things like exposure, duration,  
25 retention interval, yep.



- 1 Q. Lighting conditions?
- 2 A. Lighting conditions, certainly.
- 3 Q. And exposure to the person they are trying to
- 4 identify?
- 5 A. That's right.
- 6 Q. The length of viewing?
- 7 A. That's right.
- 8 Q. A lot of different factors go into --
- 9 A. That's right.
- 10 Q. -- these conditions, right, the conditions of the
- 11 experiment?
- 12 A. Uh-huh.
- 13 Q. And these experiments are all different?
- 14 A. Right.
- 15 Q. And isn't it also true that these conditions are
- 16 generally deliberately arranged so that accuracy is low?
- 17 A. No, that's not true.
- 18 Q. No?
- 19 A. No.
- 20 Q. And there are conditions when people are given the
- 21 opportunity to see people for a good length of time, say
- 22 a minute and half, see their total face and then asked to
- 23 see if they can identify them later --
- 24 A. Sure.
- 25 Q. -- in good lighting conditions? And those people

1 do generally pretty well?

2 A. Pretty well.

3 Q. And isn't it true that many subjects make accurate  
4 identifications even under difficult situations such  
5 as --

6 A. Can you define difficult situations?

7 Q. Well, such as poor lighting conditions or a low  
8 exposure rate, like maybe just a split second?

9 A. The worse the exposure the worse your  
10 identification accuracy in general.

11 Q. And nevertheless, in some of those what we would  
12 call difficult situations where the lighting is low and  
13 the exposure is low some people are able to make accurate  
14 identifications?

15 A. That's right.

16 Q. Can be done?

17 A. Can be done.

18 Q. You talked about weapon focus, and that's an area  
19 of study by you and others?

20 A. That's right.

21 Q. But you are not telling the jury that a person who  
22 has a gun pointed at them would not be able to identify  
23 the person who pointed it at them, are you?

24 A. No. What I'm telling you is are less accurate than  
25 if there was no gun there.

1 Q. But I thought that you said that you couldn't  
2 actually recreate the actual event of a victim being  
3 under that kind of situation when they thought they were  
4 going to die?

5 A. The gun is present, is what -- I'm sorry. I  
6 misspoke. You're right because I don't know. That study  
7 has not been done if a gun is pointed directly at you and  
8 your life is being threatened.

9 Q. So it's possible, and I think you testified  
10 earlier, that because that study hadn't been done it's  
11 entirely possible that accuracy could be even better in  
12 that situation?

13 A. We don't know.

14 Q. So it's possible?

15 A. It's possible.

16 Q. Because I believe you testified that the situations  
17 that you are describing of gun presence, and correct me  
18 if I'm wrong, but I thought you said that there was a  
19 classroom where half were able to watch a video where  
20 there was a gun present and the other half were able to  
21 watch a video where there was no gun present?

22 A. That's right.

23 Q. And that was the example that you gave to this  
24 jury?

25 A. That's right.

1 Q. And from that you said that accuracy got lower in  
2 that situation of people just watching a video with gun  
3 presence?

4 A. That's right.

5 Q. And that is an entirely different situation than  
6 actual real life crime, right?

7 A. Yes.

8 Q. And you would agree that a person who knows  
9 somebody would be more likely to make an accurate  
10 identification of that person than someone who does not  
11 know the person who is pointing a gun at them?

12 A. I would.

13 Q. That's something we can agree to?

14 A. It is.

15 Q. And you would agree that the more opportunities  
16 someone has to interact with someone the more likely they  
17 would be to make an accurate identification?

18 A. I would.

19 Q. So there is a correlation between the amount of  
20 time someone has to interact with someone and the  
21 accuracy of their ability to identify that person?

22 A. Yes.

23 Q. So it is entirely possible that a victim who is  
24 robbed at gunpoint would be able to identify the person  
25 who robbed him?

1 A. It is possible.

2 Q. And that's possible even if that person had never  
3 seen the robber previous to the robbery?

4 A. That's right.

5 Q. But if the victim had known the gunman previously  
6 the reliability of that identification would go up  
7 accordingly?

8 A. Yes. We would imagine. The study hasn't been  
9 done.

10 Q. And identifications made by people who know people,  
11 there has been some research in this area. But I think  
12 you did say there have been no studies on the ability to  
13 recognize someone we know wearing a disguise?

14 A. That's right. I haven't read anything. I haven't  
15 been able to find anything.

16 Q. You're married, right?

17 A. I'm sorry?

18 Q. You're married, right?

19 A. I was married.

20 Q. And not to put you in a different position, I'm  
21 married, too. If I guess the person you had been married  
22 to was standing two and a half feet away from you with a  
23 hood up over their head and with sunglasses for a minute  
24 and a half --

25 MR. GROEBER: Objection, Your Honor.

1 THE COURT: Sustained.

2 BY MR. RUTLEDGE DURANT:

3 Q. Is it possible -- you're not telling this jury they  
4 wouldn't be able to recognize their child or their loved  
5 one or somebody if they are standing --

6 MR. GROEBER: Objection, Your Honor.

7 Q. -- two and a half feet in front of them wearing --

8 MR. GROEBER: Objection. Objection.

9 Q. -- a hood over their head and sunglasses over their  
10 head --

11 THE COURT: Counsel. Approach.

12 (WHEREUPON, the following bench conference was  
13 reported.)

14 THE COURT: Just like I had them wait until  
15 Mr. Grimes finished his I need him to finish it so I have  
16 a proper diagnosis of hearing it the first time. All  
17 right. Now, it's getting very late. I understand that,  
18 but I think we are all under the same spoon method. And  
19 so every time you objected and it wasn't exactly as to  
20 the occasion or the case you gave me I interjected. And  
21 it totally applies to why I did what I did, all right?

22 MR. GROEBER: Okay.

23 THE COURT: What are your objections to this?

24 There was so much going on you're going to need to tell  
25 me again.

1 MR. GROEBER: I mean, she's not supposed to testify  
2 about particular facts of this case and that's exactly  
3 what he's trying to do, put her in the facts of this  
4 case.

5 MR. RUTLEDGE DURANT: Absolutely not. It is her  
6 opinion which is exactly why she's been called to  
7 testify. She's been more than qualified to say this.

8 MR. BRUCE DURANT: It's a hypothetical question,  
9 Judge. That's what you use with experts.

10 THE COURT: All right. I was very careful in my  
11 ruling when you objected as to outside and didn't give  
12 the specifics, okay? Then I sustained your objection and  
13 told him to move on. Okay. All right?

14 MR. RUTLEDGE DURANT: Right, but he covered this  
15 disguise stuff.

16 THE COURT: I haven't ruled on that one yet. Just  
17 making sure because it's not just as to hypothetical  
18 because if it's any hypothetical we need to let him go  
19 back and have another crack at it.

20 MR. BRUCE DURANT: Your Honor, he gets another  
21 crack anyway.

22 THE COURT: He gets another crack at redirect,  
23 which is different.

24 All right, Counsel. What was your question --

25 MR. RUTLEDGE DURANT: I was saying --

1 THE COURT: -- that he objected to three times.

2 MR. GROEBER: I'll try not to do that again.

3 MR. RUTLEDGE DURANT: Well, I was saying you're not  
4 telling this jury that they wouldn't be able to recognize  
5 someone that they know who are two and a half feet in  
6 front of them in light talking to them for a minute and a  
7 half with only sunglasses on and a hood over their head.

8 MR. GROEBER: That's asking her something personal  
9 as to her.

10 MR. RUTLEDGE: I'm asking a hypothetical question.

11 THE COURT: All right. I'm going to allow it  
12 because she said -- testified and that's what she said,  
13 in a nutshell. So you may object. I'm going to sustain  
14 your objection. Thank you.

15 (WHEREUPON, the bench conference was concluded.)

16 THE COURT: Mr. Groeber, I'm going to sustain --  
17 overrule your objection one time. Thank you. You may --  
18 you probably need to ask your question again.

19 MR. RUTLEDGE DURANT: Thank you, Your Honor.

20 THE COURT: Thank you.

21 BY MR. RUTLEDGE DURANT:

22 Q. I'm going to rephrase it slightly.

23 A. Okay.

24 Q. Would you expect someone who had been married 20  
25 years with all their faculties that are registered



1 right -- I mean, there's nothing wrong with their  
2 hearing, there's nothing wrong with their sight, just a  
3 regular person, would you expect a person married 20  
4 years to their spouse to be able to make an accurate  
5 identification regarding whether it was their spouse they  
6 were talking to for a minute and a half standing  
7 approximately two and a half feet from each other,  
8 looking at each other if the spouse was wearing a hoodie  
9 up over the top of their head, sunglasses over their eyes  
10 and you could see the bottom of their face from under  
11 their eyes, including their nose?

12 A. I would imagine that they could.

13 Q. You would expect that they could make that  
14 identification. I would, too.

15 The sequential -- I want to talk about the photo  
16 lineup procedures now.

17 A. Okay.

18 Q. There are a lot of different ones that have been  
19 studied by you and others in the field?

20 A. Yes.

21 Q. If terms of what's reliable and what seems to  
22 produce more accurate results?

23 A. Right.

24 Q. And again, I believe it's in the very end of your  
25 testimony on direct examination that I think you said --

1 I think you said exactly, Not against the use of photo  
2 identifications, not against the use of eyewitnesses?

3 A. Right.

4 Q. But you said that you would argue for  
5 corroboration?

6 A. Corroboration of that evidence, yeah.

7 Q. Corroboration of that eyewitness?

8 A. That's right.

9 Q. And corroboration of one eyewitness could be  
10 another eyewitness?

11 A. An independent eyewitness.

12 Q. An independent eyewitness. Certainly one  
13 eyewitness is corroborated by someone else who's an  
14 eyewitness, that's corroborative evidence; isn't that  
15 right?

16 A. If it's independent.

17 Q. If it's independent. And the more eyewitnesses you  
18 have the more corroboration you have of one eyewitness;  
19 isn't that right?

20 A. The more independent witnesses you have.

21 Q. The more independent witnesses.

22 A. As long as they haven't influenced one another,  
23 that's right.

24 Q. But nevertheless, the more eyewitnesses you have  
25 after one eyewitness independently --

1 A. Independently.

2 Q. -- that's corroboration, that's just the essence of  
3 corroboration, right?

4 A. Correct.

5 Q. And so in regard to the different ways that  
6 procedures can be given you say that accuracy goes up and  
7 it is desirable when the procedure is administered by  
8 somebody who knows nothing about the case?

9 A. Right.

10 Q. Who knows that the suspect -- who does not know the  
11 identity of the suspect?

12 A. Right.

13 Q. Which is the situation in this case with Mr. Patel.  
14 You've been in the courtroom this whole week, right?

15 A. I have.

16 Q. And you said that it's good, it's a better thing,  
17 it's more ideal in terms of the accuracy increasing when  
18 officers don't comment or make any comments after a  
19 witness has made or not made an identification?

20 A. It doesn't affect the accuracy because they've  
21 already made that decision. All right. They've already  
22 made the identification or not, but it can affect their  
23 confidence.

24 Q. And that's in terms of being able to come to court  
25 and make the in-court identification?

1 A. That's in terms of their testimony, certainly.

2 Yes.

3 Q. And you argue that the sequential photo lineup, you  
4 say it's better?

5 A. Right.

6 Q. But really, that's an unsettled kind of opinion in  
7 the field; isn't that correct?

8 A. Some argue against it, that's right.

9 Q. I mean, equally educated experts in the field such  
10 as yourself have an opposite opinion about this; isn't  
11 that correct?

12 A. They have a slightly different opinion.

13 Q. Well, they argue, do they not, that sequential  
14 lineups are not just the best procedure available?

15 A. They argue that they want to know why. So I  
16 explained the sequential lineup and that there were  
17 multiple components to it, all right, not feeling that  
18 pressure to choose, having to make a decision for each  
19 picture. So there are several different factors that  
20 might affect identification accuracy different than the  
21 simultaneous lineup. And so Roy Malpass, if that's who  
22 you are referring to, I assume it is --

23 Q. That might be the guy.

24 A. -- he argues that we need to understand what it is  
25 that works before we recommend this as an ideal

1 procedure.

2 Q. Yes. Roy Malpass?

3 A. Yes. Okay.

4 Q. Does he critique your work?

5 A. Yes, he has.

6 Q. And actually wrote a response to your sequential  
7 lineup presentation fact and policy?

8 A. Yeah. We both wrote two articles against one  
9 another over it, discussing this issue.

10 Q. And so the opinion in the field is mixed?

11 A. It's mixed.

12 Q. And there are opinions in the field by experts such  
13 as yourself that a six-pack photo array is a legitimate  
14 means and procedure for determining whether a witness  
15 make be accurate?

16 A. There are some that believe that.

17 Q. And you don't argue that it's not accurate?

18 A. I don't argue that it's not accurate. I argue that  
19 the sequential lineup is more reliable.

20 Q. Just superior because we're working in a society  
21 where we're trying to do better and better?

22 A. That's right.

23 Q. Always. And so the work in this field is not going  
24 to stop after today?

25 A. No, it's not.

1 Q. Keep looking into it?

2 A. That's right.

3 Q. Because it's unsettled?

4 A. Because we want to get even better than the  
5 sequential.

6 Q. We want to get better.

7 A. So three out of ten is still three out of ten  
8 making a wrongful or a mistaken identification. So we're  
9 trying to get even better than that.

10 Q. I think I understood what you said.

11 A. The sequential lineup isn't the best that's out  
12 there. We need to design something that's even better  
13 than that, but the sequential lineup is the best we've  
14 got right now.

15 Q. Okay. And you've studied memory and you've  
16 testified about how memory works and the three phases;  
17 the acquisition phase, the retention phase, and the  
18 retrieval phase?

19 A. Yes.

20 Q. And certainly we've all experienced a situation  
21 where we've forgotten something?

22 A. Right.

23 Q. We wish we could remember?

24 A. Right.

25 Q. And certainly we've all experienced memories that

1 are actually very true and very real, and actually very  
2 well did happen --

3 A. Sure.

4 Q. -- and we remember them accurately?

5 A. Right.

6 Q. And it is entirely possible and indeed likely that  
7 we would remember an event that for whatever reason is  
8 more memorable, such as a wedding day; you would agree?

9 A. Sure. Compared to an everyday event?

10 Q. Compared to walking in the hall at 2:30 yesterday?

11 A. Yes. Yes.

12 Q. And because we are stimulated by certain events as  
13 humans?

14 A. Yes.

15 Q. And certainly a stimulating event would be being  
16 robbed by a man who's pointing a gun at your face two and  
17 a half feet away?

18 A. It would be.

19 Q. And with regard to memory, and regarding specific  
20 events, sometimes you may remember one thing about a  
21 specific event much more than something different from  
22 that event. An example -- I guess you need an example?

23 A. I do need an example.

24 Q. Like we've agreed that a wedding day would be a  
25 memorable event.

1 A. Sure.

2 Q. You might remember getting married but you might  
3 not necessarily remember who made the shoes you wore?

4 A. Sure.

5 Q. Or you know different smaller things like that; is  
6 that right?

7 A. That's right.

8 Q. Or what kind of belt you wore?

9 A. Right.

10 Q. Or exactly who made the jewelry -- I don't know,  
11 maybe a woman would remember that.

12 A. They probably would.

13 Q. I mean no offense by that. But there are things  
14 about memorable events that are more memorable than  
15 others?

16 A. Yes.

17 Q. Such as it's entirely possible for somebody who's a  
18 victim of an armed robbery, entirely possible to remember  
19 a face rather than to remember if a hood was up over  
20 their head or not; possible?

21 A. Possible.

22 Q. All right. Doctor, I'm about done.

23 A. Okay.

24 Q. Just a few more. Would the fact that the victim in  
25 this case knew or said he knew the person who robbed them



1 for approximately a year increase his ability to  
2 accurately identify the man?

3 A. I would expect that it would.

4 Q. And would the fact that he not only knew him for a  
5 year but possibly for two to three times per week he came  
6 to his store and had face-to-face conversations with him  
7 each and every week increase the ability of him to  
8 accurately identify him?

9 A. I would expect that it would.

10 Q. Would the fact that for over a year and two to  
11 three times a week that all of these conversations that  
12 the victim said he had with the defendant occurred in a  
13 well lit environment increase his ability to accurately  
14 identify the man who robbed him?

15 A. I would agree.

16 Q. And that all of that occurred at close range?

17 A. Yes.

18 Q. And the fact if he could identify his voice, would  
19 that increase, under all those other circumstances, his  
20 ability to accurately identify him?

21 A. Well, according to that study I would think that he  
22 would still fall under that low familiarity, and so we  
23 performed -- participants in that study performed at the  
24 same level as somebody who they were unfamiliar with.

25 Q. And the fact of the matter is, like we said in the

1 beginning, you can't say whether or not the  
2 identifications in this case were accurate or not?

3 A. No, I can't. That's not my role.

4 MR. RUTLEDGE DURANT: Thank you.

5 THE COURT: Mr. Groeber, Redirect?

6 MR. GROEBER: Thank you.

7 REDIRECT EXAMINATION

8 BY MR. GROEBER:

9 Q. Just a few short questions. I know you're tired.  
10 I know the jury is tired. When is it important to  
11 document the confidence of the witness?

12 A. It's important to document the confidence of the  
13 witness right after that identification decision.

14 Q. Okay.

15 A. So they make an identification and then you are  
16 supposed to ask them how confident they are in that  
17 identification.

18 Q. And how important is it to show someone a photo  
19 lineup quickly after the event?

20 A. Yep. As soon as you can show that photo lineup you  
21 should show that photo lineup. All right. So we had our  
22 forgetting curve, so you want to stop that forgetting  
23 curve as soon as possible.

24 Q. So if you could show the same day that would be  
25 better than five days later?

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1 A. That would be.

2 Q. The prosecutor also asked you about corroborative  
3 evidence and how separate witnesses could be -- could  
4 corroborate other witnesses, correct?

5 A. Right, separate and independent witnesses.

6 Q. And when you say independent what do you mean?

7 A. I mean that the memories of each witness are their  
8 own. They haven't be influenced by discussion with other  
9 witnesses or discussion with the police or seeing  
10 something in the newspaper. All right. It's their  
11 uncontaminated memory of what happened.

12 Q. How about watching the video together, could that  
13 contaminate it?

14 A. That could contaminate your memory.

15 Q. The prosecutor also asked you about how difficult  
16 it was to recreate stress and that you can't -- you  
17 really can't do that in the real word, right?

18 A. Right.

19 Q. And that's why scientists like yourself do these  
20 archival studies, right?

21 A. Right.

22 Q. And remind the jury again what archival studies do.

23 A. Archival studies allow researchers to look at real  
24 police cases, real police files with real witnesses and  
25 to look at how the witnesses behaved in those cases.

1 Q. Would those cases include armed robberies?

2 A. They would.

3 Q. Would they include murders?

4 A. They would.

5 Q. Would they include rape?

6 A. They would.

7 Q. Stressful cases.

8 A. Yes.

9 Q. And the archival studies, how do they match up to  
10 the lab studies?

11 A. They match up pretty well to the lab studies. The  
12 problem with archival studies is we don't know if that  
13 suspect is the guilty. All right. They are a police  
14 suspect whereas in the lab we can control whether or not  
15 the perpetrator is actually in that lineup so we can look  
16 at accuracy.

17 With archival studies what we have to rely on are  
18 people's identifications of other people in the lineup,  
19 so you have one suspect who may or may not be the actual  
20 perpetrator then you have usually five other people who  
21 are innocent, and the police know they are innocent and  
22 that's why they put them in the lineup.

23 And so what they can do in archival studies is look  
24 at identification rates of those known innocent people,  
25 and we see very similar identification rates. In the lab

1 about 20 percent of people choose these fillers, choose  
2 these known innocents, and in archival studies about 20  
3 percent also choose the fillers. And so that's how we  
4 can compare lab studies to archival studies.

5 MR. GROEBER: Thank you. No further questions.

6 THE COURT: Mr. Durant?

7 RECROSS-EXAMINATION

8 BY MR. RUTLEDGE DURANT:

9 Q. Doctor, isn't it true that none of your research in  
10 this area applies to facts of this case because the  
11 witnesses in this case know the defendant?

12 MR. GROEBER: Objection, commenting on the facts.

13 THE COURT: Overruled. You may answer.

14 A. That's right. My research is not with the people  
15 who are familiar with perpetrators.

16 MR. RUTLEDGE DURANT: Thank you very much.

17 THE COURT: You may step down. Thank you.

18 Just for scheduling approach.

19 (WHEREUPON, a bench conference was had, not on the  
20 record.)

21 THE COURT: Mr. Foreman, we've got just a quick  
22 matter of law that I need to take up outside of your  
23 presence. I'd like to go until six tonight. So I'm  
24 going to excuse you. If there's anybody that cannot stay  
25 until six if you'll immediately alert the bailiff and

1 we'll address that. Okay?

2 Please rise for the jury.

3 (WHEREUPON, the jury leaves the courtroom at  
4 approximately 5:08 p.m.)

5 THE COURT: While we wait for the solicitor,  
6 Mr. Groeber, do you know and does your client need any  
7 additional time to meet with you as to whether or not he  
8 is going to testify?

9 MR. GROEBER: He does not need any additional time.

10 THE COURT: All right. I remind you that you are  
11 still under oath. Have you reached an opportunity -- or  
12 have you reached a decision about whether or not you will  
13 testify.

14 THE DEFENDANT: Yes, ma'am.

15 THE COURT: And what is that decision?

16 THE DEFENDANT: I will not testify.

17 THE COURT: Do you understand that I will instruct  
18 the jurors that they are to give no consideration  
19 whatsoever about the fact that you have not testified; do  
20 you understand that, sir?

21 THE DEFENDANT: Yes, ma'am.

22 THE COURT: Is this your own decision not to  
23 testify?

24 THE DEFENDANT: Yes, ma'am.

25 THE COURT: Have you had an opportunity to speak

1 with Mr. Groeber and Mr. Grimes concerning this issue?

2 THE DEFENDANT: Yes, ma'am.

3 THE COURT: And I understand your mother is also in  
4 the courtroom. Have you had an opportunity to speak with  
5 anyone you wish to speak concerning this matter?

6 THE DEFENDANT: Yes, ma'am.

7 THE COURT: Any questions about the way that -- or  
8 concerns about the way that your attorneys have handled  
9 this matter so far?

10 THE DEFENDANT: No, ma'am.

11 THE COURT: All right. Have you been pleased with  
12 the way they have counseled you about your decision to  
13 testify or not testify?

14 THE DEFENDANT: Yes, ma'am.

15 THE COURT: All right. Thank you.

16 All right. So now the only issue is?

17 MR. GRIMES: We'd call Ms. Green.

18 THE COURT: All right. Thank you. Please come  
19 forward and be sworn, Ms. Green.

20 TONYA VICTORIA GREEN, after having been duly  
21 sworn, testified as follows:

22 THE CLERK: Speak into this mic. You got to get  
23 pretty close to it. Please state your full name and then  
24 spell your last name for the record.

25 THE WITNESS: Tonya Victoria Green, G-r-e-e-n.

1 THE COURT: Mr. Grimes?

2 MR. GRIMES: Thank you, Your Honor.

3 DIRECT EXAMINATION

4 BY MR. GRIMES:

5 Q. Ms. Green, how do you know Marvin Green?

6 A. He is my son.

7 Q. And how many brothers sisters does he have?

8 A. He has three brothers and one sister.

9 Q. With you or with total?

10 A. Total of -- there's a total of 13 in all but I have  
11 five.

12 Q. And does he have a brother that goes by the name of  
13 Marvin Bowens?

14 A. Yes, he does.

15 THE COURT: Mr. Grimes, I'm sorry. The door was  
16 closing. Could you repeat your question.

17 Q. Does he have a brother who goes by the name Marvin  
18 Bowens?

19 A. Yes.

20 Q. Is he in the courtroom today?

21 A. Yes.

22 Q. Is he on the front row?

23 A. Yes.

24 Q. Do you know his brother, Marvin Bowens, has a  
25 pending charge?



1 A. Yes.

2 Q. Is that from an armed robbery at the Bank and Trust  
3 in Walterboro from December 17th, 2010?

4 A. Yes.

5 Q. I'm going to show you what's been marked  
6 Defendant's Exhibit 7. Take a good look at that. Are  
7 you able to recognize the person who's in that picture?

8 A. Yes.

9 Q. Who is that?

10 A. That's Marvin Gerald Bowens, my son.

11 Q. Okay. Is that a fair and accurate representation  
12 of bank video surveillance from December 17th, 2010?

13 A. Yes.

14 MR. GRIMES: Thank you, Your Honor. I think for  
15 purposes of the proffer we can establish foundation that  
16 it is Mr. Bowens.

17 THE COURT: All right.

18 MR. GRIMES: I don't know if the State has some  
19 cross or not.

20 THE COURT: Do you have any additional questions?

21 MR. GRIMES: Not for laying a foundation. I think  
22 that was just my understanding was the Court's concern  
23 about whether we could lay a foundation.

24 THE COURT: All right. What is she going to tell  
25 you? What else is she going to tell you?

1           MR. GRIMES: I think we were going to connect that  
2 with Mr. Groeber's prior questioning of the witness about  
3 being able to tell Mrs. Patel the difference between  
4 whether -- excuse me, whether someone else could pick out  
5 or distinguish between another black male wearing a  
6 hoodie and glasses from Mr. Bowens and Mr. Green. I  
7 think that it's relevant to show ID, and I think whoever  
8 identifying him could have mixed the brothers up.

9           THE COURT: So you want to call this witness so  
10 that you can admit that picture; is that correct?

11          MR. GRIMES: Yes, ma'am.

12          THE COURT: And then you're going to ask for what  
13 about the picture?

14          MR. GRIMES: I probably wasn't going to ask her too  
15 much about the picture itself. I think we will leave  
16 that for closing argument. But basically our point, we  
17 believe it's relevant to this case to show how witnesses  
18 could have confused brothers or confused Mr. Green with  
19 somebody else or just how it's impossible for them to  
20 pick out somebody who is wearing a hoodie and glasses.

21          THE COURT: All right. Mr.. Durant, do you have  
22 questions for this witness?

23          MR. BRUCE DURANT: I have no questions for her on  
24 this issue, Your Honor. I have plenty to say on this  
25 theory of the case. We would argue that any evidence

1 along these lines is completely irrelevant. There's been  
2 no testimony whatsoever that this person involved in this  
3 picture had anything to do with this particular crime.

4 THE COURT: I'm sorry. You may step down. They  
5 have indicated to me they don't have any more questions  
6 for you. I'm going to let you remain in the courtroom so  
7 if there's any further testimony needed from you. I  
8 don't think what we're about to argue is going to affect  
9 what you would testify to.

10 Any objection to allowing her to remain in,  
11 Mr. Grimes?

12 MR. GRIMES: No, ma'am.

13 MR. BRUCE DURANT: And additionally, Your Honor,  
14 this is no more than a third party or attempted third  
15 party guilt on the part of the defense. Our Supreme  
16 Court has imposed strict limitations on the admissibility  
17 of third party guilt. Evidence offered by a defendant as  
18 to the commission of a crime by another person is limited  
19 to facts which are inconsistent with defendant's guilt.  
20 The evidence must raise a reasonable inference as to --

21 THE COURT: We're all getting tired, Mr. Durant,  
22 and when you're speaking into the paper it's very hard  
23 for my court reporter to write it down.

24 MR. BRUCE DURANT: I would quote our Supreme Court,  
25 and this is out of State V. Myers case, Your Honor, that

1 I handed up to you previously. Our Supreme Court has  
2 imposed strict limitations on the admissibility of third  
3 party guilt. Evidence offered by a defendant as to  
4 commission of the crime by another person is limited to  
5 facts which are inconsistent with the defendant's guilt.  
6 The evidence must raise a reasonable inference as to the  
7 accused's innocence.

8 THE COURT: Would you give me the citation again?  
9 I don't have it.

10 MR. BRUCE DURANT: It's South Carolina cite --

11 MR. GRIMES: 359 S.C. 40.

12 THE COURT: Thank you.

13 MR. BRUCE DURANT: Evidence which casts a mere bare  
14 suspicion on another man, the fact that the other man  
15 generally fit the description of the perpetrator and  
16 lived in the apartment complex does not show his guilt  
17 nor is it inconsistent with the defendant's guilt.  
18 Because the evidence was not inconsistent with the  
19 defendant's own guilt the trial court exercised sound  
20 discretion in excluding it.

21 This is basically what we have here, Your Honor.  
22 There's been absolutely no testimony in front of this  
23 jury that anybody other than Marvin Bowens Green was the  
24 person that went into that convenience store and robbed  
25 that person, and they are just trying to throw a picture

1 up of the brother, that there's been no testimony that  
2 the brother was involved in this at all, to confuse and  
3 mislead this jury.

4 THE COURT: Your response, Mr. Grimes?

5 MR. GRIMES: Thank you, Your Honor. The question  
6 in this case is identification, and the State's witnesses  
7 have all identified that they -- would testify that they  
8 know Mr. Green either through prior law enforcement  
9 experience with him or prior dealings with him at the  
10 store. And we have a right to confront the witnesses to  
11 try to test their ability to tell differences in  
12 Mr. Green and someone else.

13 As far as the right to confront the witnesses doing  
14 that, using the backdoor way to impeach him through, I  
15 guess a third party just as we do with the officers to  
16 lack of stuff in the incident report or something in the  
17 incident report that he testifies to is different.

18 And we're basically trying to -- I think  
19 Mr. Groeber, once the witness is refusing to answer his  
20 questions about whether she could identify someone else,  
21 you know, distinguish between Mr. Green and someone else  
22 who is dressed in a similar manner, and given her refusal  
23 to answer the questions we should be given some leeway  
24 under the Sixth Amendment Right to present our defense in  
25 cross-examination to show the jury that this is why she's

1 not answering questions because she knows she made a  
2 mistake or she knows she can't make that -- tell that  
3 difference, and therefore it goes to assess her  
4 credibility why she's refusing to answer questions.

5 THE COURT: Well, didn't everyone you show the  
6 picture to except for the defendant's mother say they  
7 couldn't even make out the picture because it was so  
8 blurry?

9 MR. GRIMES: I believe I only showed the picture to  
10 one person, and it was Detective Lawrence, and that's  
11 what he testified to.

12 THE COURT: All right. Keep going. Do you have  
13 more argument?

14 MR. GRIMES: No, ma'am.

15 THE COURT: So, Mr. Grimes, you wish to only offer  
16 this witness to introduce that photograph?

17 MR. GRIMES: Yes, ma'am, and to testify a little  
18 bit about the background. I think Detective Lawrence  
19 testified he wasn't sure of the brother's names, what  
20 they looked like.

21 THE COURT: What's the relevance of the brother in  
22 this case?

23 MR. GRIMES: That maybe she mixed the brother up.  
24 He may have been a prior customer at the store.

25 THE COURT: Has there been any testimony of that?

1 MR. GRIMES: Not at this point.

2 THE COURT: Doesn't the law require that you have a  
3 little bit more than just he may have been there?

4 MR. GRIMES: We were trying to argue that the  
5 brother did it, yes, ma'am, it would, but we're not  
6 making that argument.

7 THE COURT: If you just want to do that then why  
8 can't you put any blurry black male in a hoodie in a  
9 picture? Why is it that it's got to be the brother's  
10 picture?

11 MR. GRIMES: That's sort of what they can't tell us  
12 in our case, during our investigation. Perhaps it might  
13 be a good question that future counsel may ask us in  
14 later proceedings, that it was something we should have  
15 done that didn't do, but this is what we have --

16 THE COURT: Because it seems to me from where I'm  
17 sitting, Mr. Grimes, that you are attempting to use that  
18 picture to get in the fact in tying in with a bank and  
19 the gun was found at a bank, that you are attempting to  
20 use the brother as the third party.

21 MR. GRIMES: I understand why the State may think  
22 that and I think why the Court may think that but that's  
23 not what we are doing.

24 THE COURT: Well, if I think it and you think the  
25 State -- you understand why the State thinks it don't you

1 think that allowing that picture is going to give that  
2 inference to the jury and you haven't laid the foundation  
3 for third party guilt?

4 MR. GRIMES: Well, if that was an inference the  
5 jury would draw that could simply be cured by a curative  
6 instruction as to purpose of the admissibility, just as  
7 in a prior conviction coming in we get curative  
8 instructions for that. Prior bad acts get curative  
9 instructions. And as the Court knows, juries have  
10 generally followed the curative instructions. That's  
11 what the case law says. So that could be cured if that  
12 was our main concern.

13 THE COURT: Well, then I guess we need to go back  
14 to if I'm going to have to give a curative instruction  
15 than it needs to be more probative than prejudicial, and  
16 I don't know what we are, again, using that photograph or  
17 her testimony to be probative of.

18 MR. GRIMES: Well, I believe it's probative because  
19 it goes to test, show the jury that this witness,  
20 Mrs. Patel, and other witnesses simply can't under the  
21 facts of this case cannot identify the person who robbed  
22 them, that they are just getting a black male mixed up --

23 THE COURT: So what else other than that  
24 photograph, what else do you plan to have Ms. Green  
25 testify to?



1           MR. GRIMES: Generally about family, you know, he  
2 has a total of 12 brothers and sisters, they may resemble  
3 each other, that people may have mixed them up, and then  
4 the photograph.

5           THE COURT: All right. I am not allowing her to  
6 testify as to the photograph. I am not allowing the  
7 admission of the photograph. I am not allowing any  
8 testimony of the brother being arrested or pending  
9 charges for a bank robbery. Are you still planing on  
10 calling her? Do you need a moment?

11           MR. GRIMES: No, ma'am. We would not plan to call  
12 her.

13           THE COURT: All right. So what I'm going to do is  
14 bring the jury in and allow you to rest.

15           MR. GROEBER: Okay.

16           THE COURT: Do you have any rebuttal witnesses?

17           MR. RUTLEDGE DURANT: No, Your Honor.

18           THE COURT: All right. So then I will ask that  
19 question. We will begin at -- I'll tell the jury to come  
20 back at 9:30 in the morning, unless you need some  
21 additional time. Does that work for everyone?

22           MR. GROEBER: Yes, Your Honor, that's fine.

23           MR. RUTLEDGE DURANT: Good with the State.

24           THE COURT: All right. Anything before I bring in  
25 the jury?

1 MR. RUTLEDGE DURANT: No, Your Honor.

2 THE COURT: All right. Let's bring in the jury.

3 Let's do it this way, Counsel, I'm going to tell  
4 them to come back at 9:45 and we'll begin at 10:00. I  
5 want you here at 9:45 just to go over in case there's  
6 something that happens over the evening hour.

7 MR. RUTLEDGE DURANT: Great.

8 MR. GROEBER: Thank you, Your Honor.

9 THE COURT: No lesser includedes?

10 MR. RUTLEDGE DURANT: No lesser includedes from the  
11 State.

12 MR. GRIMES: We would ask you to consider strong  
13 armed robbery.

14 THE COURT: All right. Let me hear you on that  
15 after the jury comes in.

16 MR. GRIMES: Thank you.

17 THE COURT: Thank you.

18 (WHEREUPON, the jury enters the courtroom at  
19 approximately 5:28 p.m.)

20 THE BAILIFF: All seated, Your Honor.

21 THE COURT: Thank you. Please be seated.

22 Mr. Groeber, does the defendant have an  
23 announcement?

24 MR. GROEBER: The defense rests.

25 THE COURT: All right. Thank you.

1           Ladies and gentlemen, and now the State, do you  
2 have any rebuttal witnesses?

3           MR. RUTLEDGE DURANT: We're not presenting any  
4 rebuttal witnesses. Thank you, Your Honor.

5           THE COURT: Ladies and gentlemen, what that means  
6 is you have heard all the testimony in this case and  
7 received into evidence all the exhibits that will be made  
8 part of the record in this case. As I indicated to you,  
9 all of those exhibits will go back to you in your jury  
10 deliberation room.

11           So we've now reached the part of the trial where  
12 you will hear closing arguments on behalf of counsel and  
13 I will instruct you on the law applicable to this case.  
14 Ladies and gentlemen, we cannot do that before 6:00 p.m.  
15 and so I do not cut off an attorney typically while they  
16 are giving their closing argument so we will break for  
17 the evening.

18           Ladies and gentlemen, please be back in your jury  
19 room at 9:45 in the morning. You will then hear closing  
20 arguments on behalf of counsel and I will instruct you on  
21 the law applicable to this case. And after that is done  
22 you will retire to consider your verdict.

23           Ladies and gentlemen, please remember all of my  
24 admonitions. You have not been instructed on the law  
25 applicable to this case, so even though you have received

1 into evidence all of the testimony do not consider any  
2 issue in this case, do not do any independent  
3 investigations, do not discuss this case with anyone and  
4 that includes your fellow jurors.

5 Ladies and gentlemen, please be back in your jury  
6 room at 9:45 in the morning. Have a wonderful evening.  
7 I'll see you back in the morning. Thank you.

8 (WHEREUPON, the jury leaves the courtroom at  
9 approximately 5:32 p.m.)

10 THE COURT: Thank you. Be seated.

11 All right. Mr. Grimes, you want strong armed?

12 MR. GRIMES: Yes, ma'am.

13 THE COURT: All right. Let me hear from the State.

14 MR. RUTLEDGE DURANT: No evidence in this case that  
15 was anything other than an armed robbery. The video  
16 shows there was a gun. Absolutely no evidence that there  
17 was anything other than a gun.

18 THE COURT: Mr. Grimes or Mr. Groeber, what's your  
19 position as to that statement? How can I charge strong  
20 armed?

21 MR. GRIMES: The State hasn't produced a gun, would  
22 be one factor.

23 THE COURT: Is that a requirement of the elements?

24 MR. GRIMES: No, ma'am.

25 THE COURT: And didn't the victim testify that it

1 was always his belief that it was a gun and isn't that  
2 what the required element is?

3 MR. GRIMES: I believe he said he wasn't sure if it  
4 was a real gun or a fake gun.

5 THE COURT: Does it matter?

6 MR. GRIMES: It can matter if he thought it was a  
7 fake gun and he was never really in fear for his life, or  
8 under that type of stress, and it could be accused of the  
9 use of a water pistol. I mean, it's obvious it could be  
10 considered a strong arm.

11 THE COURT: But the testimony was that he believed  
12 it was a gun, and then on cross, correct, Mr. Durant?

13 MR. RUTLEDGE DURANT: He absolutely said nothing  
14 different than it was a gun. There was no indication or  
15 no inference ever slight that this was anything other  
16 than a gun. And even if it was a fake gun the armed  
17 robbery statute says armed robbery.

18 THE COURT: The dialogue I remember was that his  
19 confusion between what was a gun and a revolver. That's  
20 what I remember it to be; is that correct?

21 MR. BRUCE DURANT: Your Honor, my recollection is  
22 he was asked if he thought it was a real gun. He said,  
23 Yes.

24 THE COURT: Yes. Then there was the discussion --  
25 some discussion that he had -- I have already put away my

1 notes but there was some discussion it was one or the  
2 other and he didn't know but that it was a gun or a  
3 revolver.

4 MR. BRUCE DURANT: Yeah, he said he didn't know  
5 anything about guns, he didn't know what revolvers were  
6 but in his mind it was a real gun.

7 THE COURT: Mr. Grimes, if the victim says it is a  
8 real gun how can I charge strong arm.

9 MR. GRIMES: May I have a moment to review my  
10 notes?

11 THE COURT: You may.

12 MR. GRIMES: Thank you, Your Honor.

13 (PAUSE.)

14 THE COURT: Does the State object to strong arm?

15 MR. RUTLEDGE DURANT: Absolutely.

16 THE COURT: Mr. Grimes, we'll do this. I already  
17 have the charge ready. It does not include it. It would  
18 be easy to include. It's easy to include it if you  
19 provide case law to me that indicates that I should  
20 include it in light of the fact that my notes and a check  
21 over with the court reporter indicates that my notes are  
22 at least accurate on the fact that he did say it was a  
23 real gun but if you can give me some case law that  
24 indicates that I should charge strong armed robbery I'll  
25 be more than happy to review that issue and we could put

1 it in.

2 Anything else that you are requesting? Any other  
3 lesser includes? I cannot think on the possession of a  
4 firearm if it's of a lesser included.

5 MR. GRIMES: No. No lesser included. The charges  
6 that I emailed Your Honor and copied Mr. Durant on from  
7 Utah and identification we would like to have. I'm not  
8 sure if every factor applies but a large degree of those  
9 factors charged, and I would think -- I was thinking  
10 allowing it would sort of be like a self defense case  
11 where you look at various factors. It's case specific as  
12 to whatever is testified to by an expert or by witnesses  
13 should be included in the Utah --

14 THE COURT: Are you saying Utah?

15 MR. GRIMES: Yes, ma'am.

16 THE COURT: All right. Thank you. Anything  
17 further?

18 MR. RUTLEDGE DURANT: I just haven't had a chance  
19 to look over the email that Mr. Grimes sent this morning.

20 THE COURT: All right. I'm charging my standard  
21 identification charge which lists all of those elements,  
22 Mr. Grimes, that those are factors that may be considered  
23 among others. All right.

24 MR. GRIMES: Yes, ma'am.

25 THE COURT: Thank you. Anything else?

1 MR. RUTLEDGE DURANT: Not from the State.

2 THE COURT: I think the only issue at this point is  
3 the strong armed. We're at ease. So 9:45 to be here  
4 then we'll begin at 10:00, unless there are some other  
5 issues. Please just come look at the verdict form.  
6 We're at ease.

7 (WHEREUPON, the trial of this case was recessed for  
8 the day.)

9 Thursday, June 14, 2012

10 THE COURT: Mr. Grimes, I have received your email  
11 this morning. You have requested jury charges. I'm  
12 going to mark it as Court's Number 9, just for the  
13 record. They are printed out. So that will be Court's  
14 9. I have reviewed them and I will again be charging the  
15 standard charges that we discussed. Thank you.

16 MR. GRIMES: Thank you Your Honor.

17 (WHEREUPON, Court's Exhibit Number 9, Defense's  
18 Request for Charges, was marked and made a part of the  
19 record.)

20 THE COURT: And my understanding is, Mr. Grimes,  
21 that you have withdrawn your request for --

22 MR. GRIMES: Strong armed robbery.

23 THE COURT: Yes.

24 MR. GRIMES: Yes, ma'am.

25 THE COURT: So you are no longer requesting a



1 strong armed robbery; is that correct?

2 MR. GRIMES: Yes, ma'am.

3 THE COURT: Any objection, Mr. Durant?

4 MR. RUTLEDGE DURANT: No, Your Honor.

5 THE COURT: Thank you. All right. Any matters  
6 before we bring in the jury?

7 MR. RUTLEDGE DURANT: Not from the State.

8 MR. GROEBER: I think the only thing we forgot to  
9 do this yesterday was the profer of the paragraph that I  
10 was going to ask Dr. Beaudry to read. It is one of my  
11 defense exhibits.

12 THE COURT: All right. Just mark it and I believe  
13 it was highlighted.

14 MR. GROEBER: It is highlighted.

15 THE COURT: We could even mark it as now Court's  
16 10. How about that?

17 MR. GROEBER: Sure. Thank you, Your Honor.

18 THE COURT: So it will be now Court's 10. And I  
19 think we got a little rushed. I don't recall you  
20 renewing your -- because we did it then we broke, so if  
21 you need to renew any of your motions or have any  
22 additional motions I'll allow you to do that at this  
23 time.

24 MR. GRIMES: May it please the Court?

25 THE COURT: Yes.

1 MR. GRIMES: We would renew our motions for a  
2 mistrial that we made at the directed verdict stage, and  
3 in addition we would add an additional ground that the  
4 Court's refusal to admit Defendant's Exhibit Number 7 for  
5 identification also to provide us with a fair trial.

6 THE COURT: And again, that was the photograph?

7 MR. GRIMES: Yes, ma'am.

8 THE COURT: The blurry photograph. Thank you.

9 MR. GRIMES: Yes, ma'am. The blurry photograph of  
10 someone robbing a bank.

11 THE COURT: Of what?

12 MR. GRIMES: Someone robbing a bank.

13 THE COURT: All right.

14 MR. GRIMES: The problem is the right to present a  
15 defense under the Sixth Amendment right for due process  
16 for a fair trial and right to cross-examine under the  
17 Sixth Amendment. Thank you, Your Honor.

18 THE COURT: All right. And you are renewing your  
19 motions for a directed verdict as to both indictments; is  
20 that correct?

21 MR. GRIMES: Yes, ma'am.

22 THE COURT: Mr. Durant, anything additional from  
23 the State?

24 MR. RUTLEDGE DURANT: No, Your Honor.

25 THE COURT: Even with the additional grounds,

1 Mr. Grimes, I do not feel that the defendant has been  
2 deprived of a fair trial that would necessitate a  
3 granting of a mistrial. I deny your motion for a  
4 mistrial even with the addition of the additional ground.

5 Also, I have heard nothing that would change my  
6 ruling as to the existence or nonexistence of the weight  
7 that was presented and both indictments will be presented  
8 to the jury. I note your exception for the record.  
9 Thank you.

10 MR. GRIMES: And just to be clear -- I've had this  
11 issue happen before, but the Court's denial on all  
12 grounds of the Sixth Amendment, cross-examination and due  
13 process?

14 THE COURT: Yes.

15 MR. GRIMES: Thank you, Your Honor.

16 THE COURT: Thank you.

17 And just one more time, gentlemen, if you will come  
18 and review these verdict forms for me.

19 (PAUSE.)

20 THE COURT: Mr Durant, you are doing both?

21 MR. RUTLEDGE DURANT: Both?

22 THE COURT: Both closings or are you waiving one?

23 MR. RUTLEDGE DURANT: Oh, opening on the law.

24 THE COURT: Yes.

25 MR. RUTLEDGE DURANT: No. We're not opening on the

1 law.

2 THE COURT: All right. So Mr. Groeber will go  
3 first?

4 MR. RUTLEDGE DURANT: That's correct, Your Honor.

5 THE COURT: And do I need to limit either one of  
6 you?

7 Mr. Groeber, do I need to limit you on your  
8 closing?

9 MR. GROEBER: I don't believe so, Your Honor.

10 THE COURT: I think after an hour I'll start  
11 tapping lightly.

12 MR. RUTLEDGE DURANT: I really hope I don't go  
13 anywhere near an hour.

14 MR. BRUCE DURANT: I'll start tapping myself if he  
15 does.

16 MR. GROEBER: Same for me.

17 THE COURT: All right. Thank you.

18 All right. Well, Mr. Groeber, we'll have plenty of  
19 time to mark that while the jury is deliberating, just  
20 remember that will be Court's 10.

21 MR. GROEBER: It was Defendant's 12. We can add  
22 Court's 10, if you'd like. That's fine.

23 THE COURT: If you've already marked it then it was  
24 referred to during your doctor's testimony maybe she took  
25 it with her? But I do remember you showing me the

1 highlighted portion so I do remember seeing it,  
2 Mr. Groeber, so it will be defendant's whatever at that  
3 time, to mark.

4 All right. Anything before we bring in the jury?

5 MR. RUTLEDGE DURANT: Nothing from the State, Your  
6 Honor. Well, Your Honor, the victims are on their way  
7 down.

8 THE COURT: All right.

9 (PAUSE.)

10 THE COURT: And, Mr. Durant, go ahead and get this  
11 ready. I anticipate that they are going to want to see  
12 the video again.

13 MR. BRUCE DURANT: And that's what I was just going  
14 to point out to the Court. I know that Mr. Durant is  
15 going to use the video during his closing. So we're  
16 going to need just a second to drag the TV out.

17 THE COURT: All right. And then if you will make  
18 arrangements -- Mr. Groeber, do you object to the TV  
19 going back so they can watch the video?

20 MR. GROEBER: No, Your Honor.

21 MR. BRUCE DURANT: That's why we brought a TV. We  
22 actually brought a TV in from home so we wouldn't have to  
23 give them a computer. It's just a DVD and a TV so...

24 THE COURT: And, Mr. Groeber, before the video goes  
25 back I just want you to on the record to check the cart

1 and make sure that both of you are happy with what is on  
2 the cart and what is going back and then we will just  
3 take the video back with the -- because it's admitted,  
4 then the TV and the video can go back.

5 MR. BRUCE DURANT: Very good, Your Honor.

6 MR. GROEBER: That's fine, Your Honor.

7 THE COURT: All right. Mr. Durant, is the State  
8 ready?

9 MR. RUTLEDGE DURANT: Your Honor, I don't know if  
10 the victims are going to be able to be here for the  
11 defense attorney's closing argument. I just ask that  
12 after the defense attorney finishes I can maybe step out  
13 in the hallway to see if they are here.

14 THE COURT: Well, it's going to take you some time  
15 to get your equipment set up so you can use whatever time  
16 is appropriate.

17 MR. RUTLEDGE DURANT: That's correct.

18 THE COURT: All right. Counsel, just each of you  
19 know what my policy is. You have spent a lot of time  
20 preparing for your closing and so out of courtesy to you  
21 I'd ask that members of the audience, other members  
22 seated at your table not move around while the attorney  
23 is giving their closing. It's very distracting to them.

24 We will take, as you heard, a short break between  
25 Mr. Groeber's closing and Mr. Durant's closing. So if

1 you need to leave that would be the appropriate time to  
2 do so. I understand that there may be some emergencies  
3 that would necessitate some movement but please try to  
4 take care of your any movement during the breaks, and  
5 then, of course, there will be time after your closing,  
6 Mr. Durant, before I begin my charge on the law.

7 Please be respectful. I've indicated to you  
8 several times this is a very serious matter and both the  
9 State and the defense attorneys deserve total quiet and  
10 respect while they were giving their closing arguments to  
11 the jury. Any questions about that?

12 MR. RUTLEDGE DURANT: No, Your Honor.

13 THE COURT: Any questions?

14 MR. GROEBER: No, Your Honor. Thank you.

15 THE COURT: Mr. Durant, if you see the victims and  
16 you can bring them in quietly you may do so during  
17 Mr. Groeber's closing but please be respectful. Thank  
18 you.

19 MR. RUTLEDGE DURANT: All right. I have  
20 Ms. Medlock in the hallway. Can I just let her know  
21 about that, when they get here they can come in very  
22 quietly?

23 THE COURT: If they can come in quietly or  
24 Mr. Durant they may use the room, the counsel room and  
25 view from that as well.

1 MR. RUTLEDGE DURANT: Thank you, Your Honor.

2 (WHEREUPON, the jury enters the courtroom at  
3 approximately 10:00 a.m.)

4 THE BAILIFF: All seated, Your Honor.

5 THE COURT: Thank you. Please be seated.

6 Good morning, ladies and gentlemen. We have now,  
7 as I indicated to you last evening, we've reached the  
8 stage of the trial where you will hear closing arguments  
9 on behalf of counsel. Just as I indicated to you, what  
10 was contained in their opening statements is not evidence  
11 neither is what is contained in closing arguments. It is  
12 simply their contention as to what the evidence has shown  
13 you.

14 Ladies and gentlemen, please give your attention.  
15 After you have heard closing arguments I will then  
16 instruct you on the law applicable to this case.

17 Mr. Foreman, an appropriate time for a break would  
18 be after closing arguments.

19 So if you feel like you need a break if you'll let  
20 your foreperson know we can take a break before the  
21 charge on law, but otherwise we will just go straight  
22 through then you will retire to consider your verdict.

23 Mr. Groeber?

24 MR. GROEBER: Yes, Your Honor. Thank you. May it  
25 please the Court.



1           There's nothing worse than a guilty man going free,  
2 except an innocent man taking his place.

3           Now, it's been a long slog through a lot of facts  
4 and I know that as you deliberate that you'll keep that,  
5 the serious weight of your decision in your mind.

6           Now, this case is really about memory testing.  
7 Now, there is a video and the video does not lie but it  
8 does not tell the whole truth. What are some things  
9 that would help you find the whole truth in this case?  
10 Fingerprints. Now, Investigator Milz told you that he  
11 did take fingerprints. He told you that he took some at  
12 the register and he said that they didn't come back to  
13 my client.

14          Now, he also said that he watched the video and he  
15 watched as the robber came in the door, that his hand  
16 appeared to be in his sleeve, and I think that's what  
17 that shows. I agree with him. But he didn't take the  
18 extra step to watch the end of the video because when the  
19 robber leaves you can't see where his hand is and what he  
20 touches as he leaves the shot.

21          He could have taken an extra step to dust that  
22 area. They also could have taken an extra step to dust  
23 or to set up crime scene tape around the door or at least  
24 around the register to prevent contamination,  
25 contamination from customers who could have come in and

1 out of the store and from the police officers who were in  
2 the store.

3           They could have taken an extra step when they found  
4 the gun. One of the steps they could have taken was to  
5 fingerprint it. Another step they could have taken would  
6 have been to run it to see who maybe owned it. Perhaps  
7 they could have taken the extra step to look at the bank  
8 videos from where that gun was found.

9           The prosecutor told you, Well, it might be the gun,  
10 might not be. We don't know. Don't you want to know?  
11 Wouldn't you think that was important?

12           They could have taken an extra step to get a search  
13 warrant from my client's mom's house once he was the  
14 suspect. Detective Lawrence knew where he was. He  
15 decided not to take that step.

16           They could have taken an extra step to get a search  
17 warrant at his dad's house, where Detective Lawrence knew  
18 where he lived. They didn't take that step. In fact,  
19 Detective Lawrence even told you his dad would have let  
20 him probably searched without a warrant, and he didn't  
21 take that step.

22           They didn't take an extra step by getting a photo  
23 lineup as soon as possible. They waited five days to do  
24 one. They didn't take an extra step to show a photo  
25 lineup to Mrs. Patel.

1           Now, don't you want to see how she would have  
2 performed with a six-pack photo lineup, at the very  
3 least, perhaps a simultaneous one. They failed to take  
4 those extra steps.

5           Now, the prosecutor might say that he wishes the  
6 officers had done a better job. No one wishes that more  
7 than Marvin Green, but we don't have that evidence. So  
8 we have to deal with memories. We have to deal with  
9 memories of people that we have left; Mr. Patel,  
10 Mrs. Patel, Detective Lawrence, and Deputy Luckadoo.

11           Now, how do we test -- how do we test the memories?  
12 In a trial we test it by what people say here in the  
13 witness stand, compare it to what people said before,  
14 what they didn't say before. We compare what one person  
15 in the witness stand says against what another person in  
16 the witness stand says. That's your whole job, is to  
17 test the witnesses, and in this case it's about testing  
18 their memories. Now, that is a hard job because you've  
19 got to get inside people's minds and that is difficult.

20           Let's talk about Mr. Patel's memory. And let's  
21 test his memory with the video that doesn't lie.  
22 Mr. Patel said in his testimony that the robber did not  
23 have a hoodie on top of the hat. The video shows that he  
24 did. Mr. Patel said in his testimony that he was wearing  
25 a small hat, the robber was. That's not what the video

1 shows. It's a pretty big hat.

2 Mr. Patel said that he could see the ears of the  
3 robber, and when you watch that video you see the hood  
4 pulled up on top of the hat. You'll see he couldn't have  
5 seen his ears. Mr. Patel said that he saw the robber's  
6 eyes because at one point the glasses slipped and he  
7 could see down and see his eyes. Watch that video. It  
8 is not there.

9 Now, why would he make those mistakes and why would  
10 he make them despite the fact that he has watched that  
11 video who knows how many times? It is because his memory  
12 remembers what he thinks it is.

13 Science gives us an answer as to why he remembers  
14 things that way. Weapon focus. Mr. Patel gave you the  
15 very same answer that science does. He said, and I'll  
16 quote it, A gun was pointed at me. I could not remember  
17 the details. And who could blame him?

18 Now, there are other ways that we can evaluate  
19 memory, his memory. What was documented that he said  
20 when the initial report was made? Did you hear anything  
21 in the initial report about lottery tickets, about an  
22 Obama joke, about Newports, about recognizing the voice?  
23 No. What you have in the incident report is he was a  
24 customer. These later details come out after he's had an  
25 opportunity and he's been talking with his wife and they

1 are trying to figure out who it was.

2 Now, if he had said to the responding officer, Man,  
3 I think it's that customer who joked about Obama, that is  
4 such a unique thing to remember. Okay. And that is why  
5 the prosecutor is going to point that out to you a lot  
6 and why he did so. All right. Don't you think if he had  
7 told the officers that that day that fact would have made  
8 it in a report? It is so unique, but it's not there.

9 The truth is that Mr. Patel wanted and he needed to  
10 find out who it was and after watching the video four,  
11 five times with his wife that morning he needed it, he  
12 needed to know who it was, and so his mind shows a  
13 familiar face to put behind those sunglasses and  
14 underneath that hat.

15 Now, how does the lineup fit in all this? We know  
16 that lineups are important and we know that not only  
17 because Dr. Beaudry came here and testified about it but  
18 we know because the Charleston County Sheriff's Office  
19 has an entire policy dedicated to it, dedicated to the  
20 proper way of doing a lineup.

21 We also know it's important because the U. S.  
22 Department of justice issued a study that Dr. Beaudry  
23 told you about. And that study, as she told you, was  
24 issued because people had been exonerated through DNA and  
25 many of those cases were based on faulty eyewitness

1 identifications. That's why it's important.

2 Now, in this case they did some things right, okay,  
3 with the lineup. The main thing they did right was get  
4 the Detective Perkins, who didn't know who the suspect  
5 was, to do the lineup procedure. Okay. I'll give them  
6 credit for that, but there are some problems.

7 First of all, translation. Now, when Mr. Patel and  
8 Mrs. Patel sat on this witness stand and testified they  
9 had a translator behind them to make sure that what they  
10 said was accurately interpreted to you. That was not  
11 done with the photo lineup. Now, the police tried. They  
12 had Dhruval there, a 12-year-old boy who tried his best  
13 to interpret the instructions.

14 Now, let's talk a little bit about those  
15 instructions and how it went. They read the right  
16 instructions. They read some good instructions but they  
17 were poorly given. Now, how do we know that?

18 Detective Perkins testified that it took four  
19 minutes from the time that he began to read those  
20 instructions, and that included what happened was he  
21 would read a paragraph, stop, Dhruval would interpret it.  
22 He would ask Mr. Patel if he understood, Mr. Patel would  
23 initial it. They would go to the next one. He would  
24 read the paragraph, it would have to be interpreted, he  
25 would ask him if he understood it and would go to the

1 next one. There's seven of those. Okay.

2 When they finished that Mr. Patel would get the  
3 paper, he had to print his name, he had to sign it.  
4 Detective Perkins had to print his name and he had to  
5 sign it. After that he looked at the photo lineup. He  
6 circled one. He circled number four. He had to circle,  
7 initial, date, time. Do you really think that that took  
8 four minutes? And if it did what does that tell you  
9 about the quality of the understanding of the translation  
10 of the instructions themselves?

11 Another problem. Why do they wait five days?  
12 Dr. Beaudry testified that our memories drastically  
13 deteriorate after only two hours. They waited five days.  
14 That was five days that Mr. Patel had to sit around and  
15 talk with his wife about what happened, to watch the  
16 video again and again over the phone and to try to figure  
17 out who it was.

18 Dr. Beaudry also told you that the preference would  
19 be for sequential, not simultaneous. That's because when  
20 you get a simultaneous one you try to pick out the one  
21 who looks the most likely.

22 One of the biggest problems with that lineup is  
23 that there's only one person in the whole lineup that's a  
24 customer, and that's my client. So of course he's going  
25 to pick out the only one regular customer he has.

1           Finally, what detective told Mr. Patel after he had  
2 finished, Detective Lawrence testified that he said, I  
3 will let you know when an arrest is made.

4           What does that communicate to Mr. Patel? It means  
5 you did right, you did good and I'll let you know when we  
6 go arrest him. That kind of confirmation, as Dr. Beaudry  
7 testified to, affects confidence. That's part of the  
8 reason that he says he's so confident that it was Marvin  
9 Green.

10          How about Mrs. Patel? How about her memory? Now,  
11 she testified that my client came in every day for six  
12 months. Now, Mr. Patel said something different. He  
13 said two or three times a week.

14          You heard from Detective Lawrence that my client  
15 lived in Jacksonboro with his mom. That's 14 miles away  
16 from the gas station. You heard that he lived in Adams  
17 Run with his dad. Now, if he lives 14 miles away why in  
18 the world would he be a daily customer at that particular  
19 gas station?

20          Now, Detective Lawrence also said, Well, he jumps  
21 around a lot. Okay. Let's take that one. If he jumps  
22 around a lot and lives at different places why would he  
23 be going into the same store every single day? What that  
24 tells us is that her memory about how frequent he was  
25 there is probably incorrect because, first of all,



1 Mr. Patel says it's different. So we don't know for sure  
2 how frequent of a customer my client was.

3 What else did she say to you about when he came in  
4 the store? One of the things I thought was very  
5 interesting was that she came into court and she  
6 testified that she recognized him in the video. She's  
7 sure of that. She's a hundred percent sure.

8 If she's so sure that she can recognize him why  
9 would she card him for cigarettes every single time he  
10 came in? Maybe it's because she couldn't recognize him  
11 that well, and maybe it's because that store has about 80  
12 percent customers who are African American, maybe it's  
13 because a lot of black men come in wearing a hoodie or  
14 sunglasses?

15 She also testified that the only video that she saw  
16 was the one that showed the door. That means that she  
17 saw only the person coming in and the person coming out.  
18 And if that's all she saw how can she testify that she  
19 remembers the way he talked? There's a snippet of some  
20 words said by the robber but it's a little bit. She did  
21 not watch the video where the robber is at the cash  
22 register, and she couldn't have seen him talk.

23 I want to talk a little bit about what Dr. Beaudry  
24 testified about. And what struck me about some of the  
25 figures is not necessarily how bad people were when the

1 certain factor was present, when a weapon was present, or  
2 when stress was present, or when it was cross-racial.  
3 What affected me is that even in those studies when a  
4 weapon wasn't present, for example, she said, Well,  
5 people did pretty good. Then she said like 80 percent.  
6 Well, that means two people got it wrong.

7           So what's the margin of error? What's the margin  
8 of error in a criminal case when you have to believe that  
9 someone is guilty beyond a reasonable doubt? Two of 10  
10 people getting it wrong might be enough for a non  
11 conviction.

12           I want to talk a little bit about stress and the  
13 Morgan study that she discussed. Okay. Now, the  
14 solicitor will argue, and he did argue with her a little  
15 bit, that there's no way that you can recreate a  
16 stressful event, at least this particular stressful event  
17 that Mr. Patel went through, and that is absolutely true.  
18 But we can study how stress affects our memory.

19           And the Morgan study that took two groups of  
20 people, half of them had a high stress interrogation for  
21 40 minutes and they were shown a photographic lineup  
22 right after, the other half had a low stress  
23 interrogation for 40 minutes, face-to-face, and then they  
24 were shown a photo lineup.

25           And what were the results? For the low stress 3

1 out of 10 people still picked the wrong person. And for  
2 the high stress 6 out of 10 people got the wrong person.  
3 Now, that confirms that stress affects our memory. It  
4 affects our ability to grab data and to accurately  
5 acquire.

6 Now, there was some critique, there was a critique  
7 by this, by the prosecutor, but what the studies show  
8 when they do a meta-analysis, where they look at all the  
9 studies and average them out, is that this is a problem,  
10 and it's a problem that you should consider in your  
11 deliberations.

12 Now, let's talk a little bit about what really  
13 happened in this case. Mr. Patel was robbed. He was  
14 terrified. He saw a weapon. He was stressed but he  
15 can't remember the details that well. He said that.

16 He called his wife. She came to the store. They  
17 watched the video and they tried to figure out who it  
18 was. They decided together that it was a customer.  
19 Their minds place that customer's face behind the  
20 sunglasses and underneath the hat.

21 In the days after the robbery and before the lineup  
22 they kept talking about which customer it was, which  
23 customer. It must be the one, the Obama joker. It must  
24 be the one who buys the Newport cigarettes all the time.  
25 And they spoke to each other, and that speaking is called

1 contamination. It is a source that affects our memory.

2 Now, when Mr. Patel was shown the lineup there was  
3 not a pure translation and he probably struggled to  
4 understand it. He picked out the only person in that  
5 lineup that he has seen as a customer before and he did  
6 that because, as he told you, he thought it was his job  
7 to pick that out and to help the police.

8 Now, Deputy Luckadoo also took a look at that video  
9 and he made a guess that it was Marvin Bowens. That's  
10 what he said. And Lawrence discredited what he said.  
11 How do we know that? First of all, Lawrence told you.  
12 Second of all, they didn't do a search warrant that day.  
13 Deputy Lawrence or Detective Lawrence did not do it the  
14 day he was assigned the case.

15 They didn't look to see if there were fingerprints  
16 on the gun that was found. They didn't make an arrest  
17 warrant that day. And when Detective Lawrence looked at  
18 the video he'd already had planted in his mind who it was  
19 because he read the incident report and it said Marvin  
20 Bowens Green. So he had an expectation of who he was  
21 going to see and that was it. That was all they needed.  
22 They were satisfied with what they had done. Detective  
23 Lawrence said, I closed my case, and when I do that I  
24 have all the facts I need.

25 What facts didn't they have? The fingerprints, the

1 door on the inside or outside, no attempt to get DNA.

2           They found a gun that matched, looked like the gun  
3 in the robbery. They didn't do fingerprints, they didn't  
4 run it to see who owned it, didn't do a search warrant at  
5 the mom's house. Lawrence knew where that was. They  
6 didn't do a search warrant at the dad's house. Lawrence  
7 knew where that was.

8           They waited five days to do a photographic lineup,  
9 and they didn't do a photo lineup for Mrs. Patel. And  
10 don't you want to see how she would have done? Wouldn't  
11 you like to see if she can accurately identify my client  
12 from a photo of a young black man in sunglasses and with  
13 a hoodie on?

14           That was not a trick question. There's nothing  
15 tricky about that question. That question asks her if  
16 she could do in court what she has already done, look at  
17 photograph or a video and say if it's Marvin Green. She  
18 would not even look at the photograph. What does that  
19 say about her belief about her own memory? It shows that  
20 she doubts it.

21           Ladies and gentlemen, these memories are too prone  
22 to error, too prone to manipulation, too prone to  
23 contamination to trust them to convict in this case.

24           The State wants you to believe that you should  
25 convict because the witnesses corroborated each other.

1 They have no hard evidence to corroborate but they want  
2 you to believe because they've got a parade of witnesses  
3 coming up here to testify that you should convict. The  
4 problem is that there is so much contamination of  
5 memories in this case that you cannot believe which  
6 memory came from where.

7 And as Dr. Beaudry said, we are not all that good  
8 at recognizing people on a video, and when a face is  
9 obscured we are not even good at recognizing familiar  
10 people. In the study she talked about when the face was  
11 obscured of a familiar person walking into a room shown  
12 from a surveillance video only 3 out of 10 people could  
13 identify the familiar person. That means 7 out of 10  
14 could not.

15 This doubt that is raised is reasonable and it's  
16 significant and Mr. Green deserves the benefit of it,  
17 just like anyone else who would be sitting in his place.  
18 We ask you to send this innocent man home. Thank you.

19 THE COURT: Mr. Durant?

20 MR. RUTLEDGE DURANT: Thank you, Your Honor. May  
21 it please the Court.

22 Ladies and gentlemen, this didn't take much  
23 planning. It wasn't intricately planned out. It's just  
24 a gun, a hood pulled up over a ball cap on a head, a man  
25 wearing sunglasses. It's pretty easy to commit a crime

1 and who cares that someone is terrified? Who cares if  
2 someone thinks they will die, never see their family  
3 again? Just a simple act of terror.

4 And that's not all this case is about. It's  
5 certainly about what Mr. Patel went through that morning  
6 from a man that wore a thin disguise, and he doesn't get  
7 the benefit of that thin disguise.

8 But maybe the thinking was who would believe this  
9 immigrant anyway. Who would believe this man who  
10 couldn't even come into this courtroom and couldn't speak  
11 English. I don't know if that's what was thought but if  
12 that was he is dead wrong.

13 He was a customer at my store. He was a customer  
14 at my store. Mr. Patel told the first officers at the  
15 scene that morning, that very morning, He was a customer  
16 at my store. He did not mince his words, and those words  
17 were not lost in translation to officers who did not  
18 speak Hindi.

19 He did not say he thought the man had been a  
20 customer that morning. He did not say the man may have  
21 been a customer that morning. He was my customer. That  
22 is all Mr. Patel knew that morning. And he was specific  
23 and he was certain about that.

24 And, ladies and gentlemen, as much as the defense  
25 has tried to cast doubt on anything and everything in

1 this case to make you think you cannot trust memories, to  
2 make you think people don't know people, when you go back  
3 there and you think about all this you will find you will  
4 reach the right decision and it really will be easy  
5 because you will think about all of it, everything you've  
6 been told from that witness stand from every witness.

7           You will take into conversation defense counsel's  
8 words and I think you'll take into consideration my  
9 words. I'm confident you'll reach the right decision  
10 here. I'm confident you'll think about all that, and I  
11 have a lot more to say.

12           The essence of this case is not about people  
13 identifying strangers, about people identifying people  
14 they don't know. This case is about people who do know  
15 this man and they know him for a variety of reasons in a  
16 whole lot of ways, unlike you because you don't know him.

17           You haven't interacted with him, you haven't had  
18 conversations with him. These witnesses have. All of  
19 them have. Not one and not two. You heard them all.  
20 There were four. Four people who knew him. They told  
21 you they knew him.

22           And this case is about people who knew this man,  
23 and because they knew this man they were able to tell you  
24 that it was this man who came into the store at 7:45 on  
25 December 24th and for a minute and 32 seconds held a gun



1 at Mr. Patel, a citizen of Charleston, husband and a  
2 father, a man who speaks Hindi, a recent immigrant to the  
3 Country, just a simple citizen doing a simple job making  
4 money at his store that he owns with his wife.

5 And he's here in the courtroom right now. He's  
6 anxious about this case. His wife would like to be here  
7 as well but they both can't be here because one of them  
8 has to be at the store, but they are anxious to know if  
9 you will believe them. These identifications are only  
10 possible because these people knew this man. They are  
11 not based on anything else.

12 So let's talk about what we know in this case. I'm  
13 going to start with the video. We know from the video  
14 that Mr. Patel was there alone at the register. There  
15 wasn't anybody else in there. We know from the video  
16 obviously that the store is equipped with a video  
17 surveillance system and captured the incident on video.

18 We know that the man walked in with a cap over his  
19 head, with a hood over that cap and he was wearing  
20 sunglasses. The man was not wearing a hockey mask, or a  
21 gas mask, or a Halloween mask, nothing that covered his  
22 entire face.

23 It is clear that the only thing covering any part  
24 of his face is a simple pair of sunglasses. Other than  
25 that his entire face is exposed. His lips are exposed,

1 his cheeks are exposed, his chin is exposed, his mouth is  
2 exposed. His face is entirely exposed except for a  
3 simple pair of sunglasses. It was exposed from the  
4 second he walked in that door.

5 Now, as defense counsel said, it is very clear on  
6 that video that that man never touched that door on the  
7 way in, and that he wiggled his hand out of his left  
8 sleeve as soon as he got in that door. He was careful  
9 about that. So that door wasn't dusted.

10 And on the way out you'll see that you can't tell.  
11 You cannot tell whether he touched the door or not. You  
12 know he was careful getting in but all you have to do is  
13 push it to get out.

14 Would we have liked to done more in this case? You  
15 bet. You can always do more. There's always another  
16 step. There is no end to trying to take another step, to  
17 trying to make things better and it should be done in  
18 every single case. And just because everything that you  
19 can think of that we would like to do in all the cases  
20 that we have doesn't mean that he is any less guilty.

21 After the man entered the store for the next minute  
22 and 32 seconds there was a gun pointed directly at  
23 Mr. Patel. It is right up in his face, two and a half  
24 feet away from him. The hammer is back. It's a  
25 revolver. It was careless, it was reckless.

1           For those of you that don't know, I'm sure some do,  
2 a revolver is a lot easier to fire when the hammer is  
3 back because it pulls the trigger back even more and  
4 makes it easier to shoot. And that hammer was back and  
5 it was pointed right at him, right at Dhruval's dad.  
6 That's very real. It's a very real matter.

7           You can see him move. This isn't just still  
8 photos, but you have still photos of this video. The man  
9 is moving on this video. He's moving his face, he's  
10 moving his body. He's walking. His mouth is moving.  
11 People who have seen it before have seen him move his  
12 mouth before. People who have talked to him have seen  
13 him talk before. Not only have they seen him talk but  
14 they've heard him talk.

15           And I want you to see this video. I'm going play  
16 it for you now. You're going to have it with you back in  
17 the jury room. I don't know if you will initially have  
18 this TV back in the jury room. Request it, ask for it,  
19 get it and take it back there.

20           Before I show it to you though I don't think all of  
21 you are going to be able to identify this man, obviously.  
22 I don't think that can be done, and that is just what  
23 Dr. Beaudry was telling you about. Strangers have a  
24 lower level of being able to identify somebody. So just  
25 because all of you can't, and some of you may, does not

1 mean you have reasonable doubt. This case is based on  
2 the witnesses who knew him, not on your ability to look  
3 at this video and determine if it is him.

4 I'm going to start when he comes in. Maybe you can  
5 see it now, maybe you can't. Maybe when you see it later  
6 you'll see that the hammer is back on this gun. You can  
7 clearly see the man has the hood pulled up over his head.

8 The defense counsel made a big deal that Mr. Patel  
9 couldn't tell you whether that hat was on his head or  
10 not. Dr. Beaudry said between big events you may not  
11 remember all the other details. You remember being  
12 involved, you remember seeing that man's face that's  
13 clearly exposed.

14 And you know what? Just because defense counsel  
15 says that Mr. Patel didn't say it it wasn't on that  
16 video, and that is ridiculous. That is about two and a  
17 half feet from Mr. Patel.

18 Watch it as much as you want. It's a conscious  
19 deliberation. That's what people do when they are  
20 seeking the truth. They don't just watch it once.  
21 Mrs. Patel didn't just watch it once, Mr. Patel didn't  
22 just watch it once.

23 Why would you do that? If you'd been robbed you'd  
24 watch this. You'd watch it as many times as you wanted  
25 to because you own this, because you put a video

1 surveillance camera in your store for this reason, not  
2 because you would never use it.

3 And there are a lot of things I've got written down  
4 that I want to cover with you, but defense counsel got up  
5 here and he's parading numbers and he's parading this  
6 defense expert and he threw out a number of 80 percent  
7 were able to accurately identify somebody, 20 weren't.  
8 So 20 percent means some people couldn't do it and  
9 therefore you should have reasonable doubt.

10 So if 10 people came in here and were telling you  
11 that this was the man you would have eight people who  
12 actually knew it was him and two people who didn't,  
13 according to just that statistic. And statistics can  
14 tell you anything you want them to, but there would be  
15 eight people, even according to that doctor, who knew, if  
16 you want to use that statistic.

17 There are four people in this case who told you  
18 they know. If you want to take off 20 percent take one  
19 and a half people. They are all telling you they know.  
20 They are not all mistaken. They are actually all  
21 correct.

22 And that statistic that she was telling you was  
23 based on people who don't know the person they are trying  
24 to identify. They are trying to identify a person  
25 they've never seen before, a stranger. Those were her

1 statistics. Dr. Beaudry told you throughout her whole  
2 examination that her research is based on strangers. The  
3 fact that people know somebody does not apply to anything  
4 she was telling you. Listen to her testimony again, if  
5 you need to, you can request that.

6 She's a perfectly nice lady. It was good enough to  
7 have a good psychological discussion with her but it does  
8 not apply in this case. Nothing she said about  
9 identifications apply in this case.

10 She can possibly tell you about what she knows  
11 about procedures for a lineup. And as defense counsel  
12 told you there were plenty of things about this procedure  
13 with Mr. Patel five days later that were very good, in  
14 her opinion. One of them was that there was an  
15 independent administrator, Detective Perkins, who didn't  
16 know the suspect. It's an extra precaution. He  
17 administered the lineup, and it was told to him.

18 Dhruval told you he told his dad exactly what was  
19 on this form. Dhruval testified for you. Mr. Patel said  
20 I understood. They all testified about this procedure.  
21 And he picked him right out. And the interesting thing  
22 that defense counsel says is -- now, the one flaw defense  
23 counsel says is that the only person they put in this  
24 photograph that was a regular customer was my client.

25 The problem with that logic is that the police

1 didn't know he was a regular customer when they put him  
2 in that lineup. Only Mr. Patel could confirm that once  
3 he identified him. Think about that. That is logical.

4       The police recognized him as somebody they knew.  
5 They had no idea if he was the regular customer or not.  
6 They wanted to know if Mr. Patel could tell him that, and  
7 so they had an independent administrator come out and  
8 administrate the lineup.

9       And Mr. Patel is not an idiot, obviously. Of  
10 course he speaks Hindi but he understands and he was able  
11 to understand this and he pointed over and over, and over  
12 again, and he circled. This is my regular customer. And  
13 he told you details how he knows him. And he said from  
14 the very beginning this is my regular customer. This is  
15 my customer, to the first officers at the store that day.  
16 He didn't know his name, didn't know if he would ever be  
17 shown a photograph with this man's picture in it.

18       If Detective Lawrence or Deputy Luckadoo had not  
19 recognized the man as somebody they knew he may have  
20 never been in a lineup and Mr. Patel may never have had  
21 the opportunity to say that's my customer, that's the  
22 man. I told you the man that did this to me was my  
23 customer. This is my customer. This is the man.

24       And he is not mincing his words, and you do not  
25 just have Mr. Patel telling you that. You have three

1 other people telling you that with specificity and  
2 certainty and they look you in the eye and they told you  
3 what they know, and you can believe it. And they know  
4 they have the foundation for how they know it.

5 And just because they weren't able to take an exact  
6 translation there that day at the scene about this is the  
7 man who comes in and buys Newport cigarettes, usually a  
8 lottery ticket, sometimes gas and he jokes with us about  
9 Obama does not mean it didn't happen.

10 You judge their credibility and you determine if  
11 they are lying to you, and they are not. Why would they?  
12 Why would they go through a lie to frame somebody and say  
13 things they don't know? This isn't about their  
14 credibility. They are telling you the truth.

15 They want you to just think that they are mistaken,  
16 and they are not. There's a lot to think about, and when  
17 you sort it out you'll arrive at the right conclusion and  
18 you will know beyond a reasonable doubt.

19 You don't have to see all of somebody to know  
20 exactly who they are, people that you know well. If your  
21 mother or father was standing two and a half feet away  
22 from you with sunglasses on and a hood over their head  
23 and speaking to you for a minute and 32 seconds in a well  
24 lit area you would be under no false impression there.  
25 You would know exactly who it was, and it would be easy.



1           And this is ridiculous, too. Nobody is thinking  
2 this is anything other than the statute of liberty  
3 because you can't see her face. You don't have to see  
4 her face to know exactly what that is. It is not  
5 reasonable doubt that you cannot see all of this person.

6           Just because you don't see all of my pen doesn't  
7 mean you don't know exactly what this is. It is a pen  
8 even though you can't see the bottom. These aren't any  
9 tricks. These are just what we know. This is what we  
10 bring to the table as people. It's what you bring to the  
11 table with what you naturally have, your common sense.  
12 You're able to sort this through.

13          And I'm going to talk about all these eyewitnesses.  
14 Maybe I don't need to but I am. They are very important  
15 to the case because they know him. They've told you they  
16 know him. So we'll start with the first one, Deputy  
17 Dustin Luckadoo. He was a first responding officer along  
18 with Deputy Donald Kjellman.

19          He saw the video. He told you he knew the man in  
20 the video as the defendant and he told you he was  
21 certain. He based his identification on his knowing him,  
22 on personal interaction with him. And he is the entire  
23 reason that this man was ever listed in the reports in  
24 the very beginning. He knew it. He was certain. He  
25 identified him in this courtroom.

1           He is not lying to you. He's telling you about  
2 something he knows. Not because he recognized him from a  
3 fleeting moment, because he knows him. That's Deputy  
4 Luckadoo, the first responding officer, the first  
5 responding officer who understood from Mr. Patel that the  
6 man who robbed him was a customer.

7           Detective Lawrence, he's been in this trial every  
8 day, his case, detective with the sheriff's office. He  
9 tries to do the best job he can as we would expect,  
10 admits you can always do better. You can always do more.  
11 He told you he saw the video. He told you, I knew that  
12 man. No bones about it. I knew that man.

13           He said, I understood that Deputy Luckadoo said it  
14 was him in the report. It's not good enough for me. I  
15 need to see it. I know him, had personal experience with  
16 him, spent hours talking to him, knowing him for years,  
17 had plenty of opportunities in my life to know this man.  
18 He told you he was not mistaken. He was certain. And he  
19 didn't stop there. He wanted more. He called the South  
20 Carolina Law Enforcement Division and arranged for them  
21 to assemble a photographic lineup.

22           Detective Lawrence did not know that this man was a  
23 customer at the store. That is not something he knew.  
24 What he knew was this was the man he recognized in the  
25 store. He knew him as a man at that moment, as a man he

1 knew and a man who robbed the store, clearly not a  
2 customer. Only Mr. Patel could say if this was the  
3 customer or not. They admit he was a customer.

4       There's no suggestive intent to put a customer of  
5 Mr. Patel's in this lineup so that he can pick him out  
6 because the detective didn't know that.

7       And you judge for yourself, but I think that's a  
8 fairly good representation of people with similar  
9 characteristics, and they have intentionally taken the  
10 color off, it's a black and white photo, to give it even  
11 more of a bare bones generality.

12       So at that point Deputy Luckadoo knew him. That's  
13 in the report. Detective Lawrence who's known him for  
14 years sat with him for hours, seen his face for a  
15 significant amount of time, had the opportunity to see  
16 him walk, talk, move, move his lips, see his cheeks, see  
17 his nose, see all of that. He even knows his family,  
18 talked with his father, put him in the lineup to see if  
19 we get more, see what Mr. Patel does.

20       He had Detective Perkins come with him. I need you  
21 to help me. I need you to be an independent  
22 administrator, didn't know the person in the lineup. No  
23 other reason for Detective Perkins to be in this case,  
24 independent, didn't know, and Mr. Patel picked him right  
25 out with Dhruval right beside him.

1           So you have three people, and that case made its  
2 way to my office. Three people who knew him. But you  
3 heard from a fourth person. You heard from Mrs. Patel,  
4 and you'll decide to believe her or not. There's every  
5 reason in the world to believe her.

6           She told you she was certain. We know that. She  
7 told you she was sure. We know that. She told you why  
8 she knew him. We know all those reasons and they pretty  
9 much mirror Mr. Patel's except she says she thought it  
10 was about six months before the incident that she had  
11 known him; two, three times a week, sometimes every day.  
12 Mr. Patel said for about a year. She knew him as a  
13 customer. She came and she told you that.

14           There was no Hindi translator out there that day.  
15 There was no officer who spoke Hindi out there that day.  
16 You decide for yourself what happened. Does she know or  
17 is she lying? She is not.

18           It is the search for truth. She came in here and  
19 she was positive. She came in here and I pointed at this  
20 man. I wanted to know absolutely sure if she could look  
21 at you and say this with as much meaning and conviction  
22 as she could. Could she tell you that? Could she look  
23 at you and say that? And that's important. And she did.

24           You'll sort all that out. You'll go through that,  
25 confident of that. You can believe all those witnesses

1 and you can believe the truth in this case. And it's  
2 beyond a reasonable doubt, and that's my burden. My  
3 burden is not an absolute certainty. It's beyond a  
4 reasonable doubt, as it should be.

5 If you knew with certainty what happened in this  
6 case you wouldn't be sitting where you are. You would  
7 have taken the witness stand, told the jury what you  
8 knew. People who are certain have certain information.  
9 They know. And certain people take that stand.

10 Reasonable people listen to what the State's  
11 evidence is and they decide if that's reasonable, and  
12 that's what we want. And it should come with a  
13 meaningful deliberation where you think about all of it,  
14 and I know you will, and you go over all of it, and I  
15 know you will. And I'm confident you'll reach the right  
16 decision because you all took an oath at the beginning of  
17 this case, and raised your right hand, took an oath to  
18 find the truth.

19 And the truth in this case is simple. This man was  
20 known and because he was known people were able to see  
21 him and know who he was through his thin disguise, and  
22 sunglasses do not cut it. I ask you to return verdicts  
23 of guilty on armed robbery and possession of a pistol  
24 during a violent crime.

25 THE COURT: Mr. Durant, if you could move the

1 podium back.

2 We could take a break now. Does anyone need a  
3 break?

4 THE FOREMAN: Yes, ma'am.

5 THE COURT: All right. Do not begin your  
6 deliberations. Do not discuss this case amongst  
7 yourselves. Please let the bailiffs know when you're  
8 ready to return.

9 Please rise for the jury.

10 (WHEREUPON, the jury leaves the courtroom at  
11 approximately 11:10.)

12 THE COURT: Please be seated. Mr. Durant,  
13 Mr. Groeber, please go ahead and stack up the evidence to  
14 go back so that we can get that done quickly. And make  
15 sure this video, the CD is not in the player.

16 Mr. Groeber, any objection to putting the evidence  
17 on the bottom of that cart and wheeling the whole thing  
18 in?

19 MR. GROEBER: No, Your Honor.

20 THE COURT: All right. Take five minutes.

21 (WHEREUPON, a brief recess was taken.)

22 THE COURT: Anything before we bring in the jury?

23 MR. RUTLEDGE DURANT: I think we have all the  
24 exhibits marked.

25 THE COURT: And if you can just put them on the

1 bottom of your cart. Fabulous. And then we can just  
2 wheel that whole cart in.

3 MR. GROEBER: Your Honor?

4 THE COURT: Yes.

5 MR. GROEBER: I'm still yet unable to find the  
6 exact copy of the Yarmey report, it's the highlighted  
7 portion we proffered. What I've done is I have another  
8 copy. I've highlighted and bracketed the same exact  
9 sections and I would ask that we mark it as 12-A, Defense  
10 12-A, for the record.

11 (WHEREUPON, Defendant's Exhibit Number 12-A, the  
12 Yarmey Report, was marked and made a part of the record.)

13 THE COURT: Thank you. And, Mr. Groeber, those are  
14 the exhibits and you had no objection to the exhibits  
15 going back?

16 MR. GROEBER: Correct.

17 THE COURT: All right. Let's bring in the jury.  
18 Thank you.

19 (WHEREUPON, the jury enters the courtroom at  
20 approximately 11:20 a.m.)

21 THE BAILIFF: All seated, Your Honor.

22 THE COURT: Ladies and gentlemen, we have now  
23 reached the stage of the trial where I will instruct you  
24 on the law applicable to this case.

25 I remind you that during this trial you and I have

1 had certain duties to perform. As the trial judge it is  
2 my responsibility to preside over the trial of this case  
3 and I also have the duty to rule on the admissibility of  
4 the evidence that has been offered throughout this trial.

5         You are to consider only the confident evidence  
6 before you. If there was any testimony ordered stricken  
7 from the record you must disregard that testimony. You  
8 are to consider only the testimony which has been  
9 presented from the witness stand, as well as the exhibits  
10 that have been admitted, as well as any stipulations of  
11 counsel.

12         I have the additional duty to charge you the law  
13 applicable to this case. As the presiding judge, I am  
14 the sole judge of the law of this case. It is your duty  
15 as jurors to accept the law and apply the law as I state  
16 it to you now.

17         If you have any idea as to what the law is or what  
18 the law ought to be and it does not agree with what I  
19 tell you now you must abandon your own idea because you  
20 were sworn to accept the law and apply the law exactly as  
21 I state it to you now.

22         In every case tried in this Court before a jury the  
23 jury becomes the sole and exclusive judges of the facts.  
24 A trial judge may not make any comment regarding the  
25 facts in this case.



1           Do not think that anything that I have said or done  
2 throughout the progress of this trial or during the  
3 charge on the law that I have any opinion about the facts  
4 in this case. The law does not allow me to have an  
5 opinion about the facts in this case.

6           Ladies and gentlemen, that becomes a matter solely  
7 for you to determine. As jurors it is your duty to  
8 determine the effect, value and weight, and the truth of  
9 the evidence that is presented during this trial.

10           The indictments in this case charge the defendant  
11 with armed robbery and possession of a firearm during the  
12 commission of a violent crime. I remind you that the  
13 fact that the defendant was arrested, charged and  
14 indicted in this case is not evidence in this case and  
15 cannot be considered by you as evidence of guilt in this  
16 case, nor does it create any presumption or inference of  
17 guilt. An indictment is simply the formal written  
18 instrument which contains the charge made against the  
19 defendant. It is the formal document by which this case  
20 is brought into this Court.

21           Just as the indictments in this case are not  
22 evidence any terminology or labels used to refer to the  
23 individuals in this case cannot be considered as  
24 evidence. For example, the use of the words defendant  
25 and victim are merely formal labels and may not be

1 considered by you as evidence in this case.

2           The defendant has pled not guilty to each  
3 indictment. The burden is on the State to prove the  
4 defendant guilty. A person charged with committing a  
5 criminal offense in South Carolina is never required to  
6 prove himself innocent.

7           I charge you it is an important rule of the law  
8 that the defendant in a criminal trial no matter what the  
9 seriousness of the charge may be will always be presumed  
10 to be innocent of the crime for which the indictment was  
11 issued unless guilt has been proven by evidence  
12 satisfying you of that guilt beyond a reasonable doubt.

13           This presumption of innocence does not end when you  
14 begin your deliberations but it accompanies the defendant  
15 throughout the trial until you reach a verdict of guilt  
16 based upon evidence satisfying you of that guilt beyond a  
17 reasonable doubt.

18           The presumption of innocence is like a robe of  
19 righteousness that is placed around the shoulders of the  
20 defendant which remains with the defendant until it has  
21 been stripped from the defendant by evidence satisfying  
22 you of the defendant's guilt beyond a reasonable doubt.

23           This presumption of innocence is not a mere legal  
24 theory, it is not just a legal phrase. It is a  
25 substantial right to which every defendant is entitled

1 unless you, the jury, are satisfied of the evidence from  
2 the defendant's guilt beyond a reasonable doubt.

3         The State has the burden of proving the defendant  
4 guilty beyond a reasonable doubt. Some of you may have  
5 served as jurors before in civil cases where you were  
6 told it was only necessary to prove that a fact is more  
7 likely true than not true, such as by a greater weight or  
8 preponderance of the evidence. In criminal cases the  
9 State's proof must be more powerful than that. It must  
10 be beyond a reasonable doubt.

11         Proof beyond a reasonable doubt is proof that  
12 leaves you firmly convinced of the defendant's guilt.  
13 There are very few things in this world that we know with  
14 absolute certainty and in criminal cases the law does not  
15 require proof that overcomes every possible doubt.

16         If based upon your consideration of the evidence  
17 you are firmly convinced that the defendant is guilty of  
18 the crime charged you must find the defendant guilty.  
19 If, on the other hand, you think there is a real  
20 possibility that the defendant is not guilty you must  
21 give the defendant the benefit of the doubt and find him  
22 not guilty.

23         There are two types of evidence which are generally  
24 presented during a trial; direct evidence and  
25 circumstantial evidence.

1           Direct evidence is the testimony of a person who  
2 claims to have actual knowledge of a fact such as an  
3 eyewitness. It is evidence which immediately establishes  
4 the main fact to be proved.

5           Circumstantial evidence is proof of a chain of  
6 facts and circumstances indicating the existence of a  
7 fact. It is evidence which immediately establishes  
8 collateral facts from which the main fact may be  
9 inferred. Circumstantial evidence is based on inference  
10 and not on personal knowledge or observation.

11           The law makes absolutely no distinction between the  
12 weight or value to be given either direct or  
13 circumstantial evidence, nor is a greater degree of  
14 certainty required of circumstantial evidence than that  
15 of direct evidence.

16           You should weigh all of the evidence in this case  
17 and after weighing all of the evidence if you are not  
18 convinced of the guilt of the defendant beyond a  
19 reasonable doubt you must find the defendant not guilty.

20           Necessarily, you must determine the credibility of  
21 the witnesses who have testified in this case.

22 Credibility simply means believability. It bottoms your  
23 duty as jurors to analyze and to evaluate the evidence  
24 and determine which evidence convinces you of its truth.

25           In determining the believability of the witnesses

1 who have testified in this case you may believe one  
2 witness over several witnesses or several witnesses over  
3 one witness. You may believe a part of the testimony of  
4 a witness and reject the remaining part of the testimony  
5 of that same witness.

6       You may believe the testimony of a witness in its  
7 entirety or reject the testimony of a witness in its  
8 entirety. You may consider whether the witness has  
9 exhibited to you any interest, bias, prejudice or other  
10 motive in this case. You may also consider the  
11 appearance and manner of a witness while on the witness  
12 stand.

13       The rules of evidence ordinarily do not permit  
14 witnesses to testify to opinions or to conclusions. An  
15 exception to this rule exists for witnesses we call  
16 expert witnesses.

17       A witness who by education and experience has  
18 become expert in some art, science, profession or calling  
19 may state an opinion as to relevant and material matter  
20 in which the witness claims to be an expert and may also  
21 state the reasons for that opinion.

22       You should consider any expert opinion received in  
23 evidence in this case and like any other evidence give it  
24 the weight you think it deserves. If you decide that the  
25 opinion of an expert witness is not based on sufficient

1 education and experience or if you conclude that the  
2 reasons given in support of the opinion are not sound, or  
3 that the opinion is outweighed by other evidence you may  
4 disregard the opinion entirely.

5 An expert witness's testimony is to be given no  
6 greater weight than that of other witnesses simply  
7 because the witness is an expert. Further, you are not  
8 required to accept an expert's opinion even though it is  
9 not contradicted.

10 I instruct you and emphasize, the fact that the  
11 defendant did not testify is not a factor to be  
12 considered by you in any way in your deliberation and in  
13 your consideration on the question of the guilt of the  
14 defendant. It must not be considered by you in any way  
15 whatever. A defendant has the constitutional right to  
16 remain silent and the assertion of this right must not be  
17 considered by you in your deliberations.

18 I repeat, under your oath you are to draw no  
19 conclusion whatsoever from the fact that the defendant in  
20 this case did not testify. The fact that this defendant  
21 did not testify should not even be discussed in the jury  
22 room. The burden of proof as I have stated to you is on  
23 the State. The defendant is not required to prove his  
24 innocence. The burden of proof remains on the State to  
25 prove guilt beyond a reasonable doubt.

1           In order to establish criminal liability criminal  
2 intent is required. For example, the mental state  
3 required to be proven by the State for a particular crime  
4 might be purpose, intent, knowledge, recklessness or  
5 criminal negligence.

6           Criminal intent must be proven by the State beyond  
7 a reasonable doubt. Criminal intent is always a matter  
8 that must be determined by the jury from the  
9 circumstances surrounding the situation.

10           There is no way to prove intent to a mathematical  
11 certainty. There is no way medical science can dissect a  
12 person's brain and determine what the person has in mind.  
13 So the law says that criminal intent may be inferred from  
14 the circumstances shown to have existed. This is how you  
15 make a determination of whether or not the element  
16 requiring intent was present.

17           It is not necessary to establish intent by direct  
18 and positive evidence but intent may be established by  
19 inference in the same way as any other fact by taking  
20 into consideration the acts of the parties and all the  
21 facts and circumstances of the case.

22           Criminal intent is a mental state, a conscious  
23 wrongdoing. It is up to you to determine what the  
24 defendant intended to do based upon the circumstances  
25 shown to have existed. Criminal intent can arise from

1 action or a failure to act. It may arise from  
2 negligence, recklessness or an indifference to duty or to  
3 consequences that is considered by law to be the  
4 equivalent of criminal intent.

5 An issue in this case is the identification of the  
6 defendant as the person who committed the crime charged.  
7 The State has the burden of proving identity beyond a  
8 reasonable doubt. You must be satisfied beyond a  
9 reasonable doubt of the accuracy of the identification of  
10 the defendant before you may convict the defendant.

11 Identification testimony is an expression of belief  
12 or impression by a witness. You must determine the  
13 accuracy of the identification of the defendant. You  
14 must consider the believability of each identification  
15 witness in the same way as any other witness.

16 You may consider whether the witness had an  
17 adequate opportunity to observe the offender at the time  
18 of the offense. This will be affected by things like how  
19 long or short a time was available, how far or close the  
20 witness was, the lighting conditions, and whether the  
21 witness had a chance to see or know the person in the  
22 past.

23 Once again, I instruct you, the burden of proof on  
24 the State extends to every element of the crime charged  
25 and this specifically includes the burden of proving



1 beyond a reasonable doubt the identity of the defendant  
2 as the person who committed the crime.

3 If after examining the testimony you have a  
4 reasonable doubt as to the accuracy of the identification  
5 you must find the defendant not guilty.

6 The indictments in this case allege two different  
7 offenses against the defendant. The charges are  
8 indictment number one, in no particular order, armed  
9 robbery; and indictment number two, possession of a  
10 firearm during the commission of a violent crime.

11 Each indictment charges a separate and distinct  
12 offense. You must decide each indictment separately on  
13 the evidence and the law applicable to it uninfluenced by  
14 your decision as to any other indictment. The defendant  
15 may be convicted or acquitted on any or all of the  
16 offenses charged.

17 You will be asked, Mr. Foreperson, to write a  
18 separate verdict of guilty or not guilty for each  
19 indictment.

20 The defendant is charged with armed robbery.  
21 In order to prove this offense the State must first prove  
22 beyond a reasonable doubt that the defendant took  
23 personal property from the person or presence of another  
24 person.

25 Property is in the presence of a person if it is

1 within the person's reach, inspection, observation or  
2 control so that the person could if not overcome with  
3 violence or prevented by fear keep possession of the  
4 property.

5         The State must also prove beyond a reasonable doubt  
6 that the defendant carried the property away intending to  
7 permanently deprive the owner of the property and to keep  
8 the property for the defendant's own use.

9         The slightest removal of the property with the  
10 complete possession of the property even for an instant  
11 by the defendant is sufficient to show a taking and  
12 carrying away of the property. The taking and carrying  
13 away of the property must have been done with violence or  
14 by putting the owner of the property in the fear of the  
15 violence.

16         Finally, the State must prove beyond a reasonable  
17 doubt that the defendant was armed with a deadly weapon  
18 during the robbery. A deadly weapon is any article,  
19 instrument or substance which is likely to cause death or  
20 great bodily harm. Whether an instrument has been used  
21 as a deadly weapon depends on the facts and circumstances  
22 of each case.

23         The following are examples of instruments which may  
24 be deadly weapons; a pistol, a shotgun, a rifle, a dirk,  
25 a dagger, a knife, a fire bomb or Molotov cocktail. A

1 gun may be a deadly weapon even if it is not operating.

2 The defendant is also charged with possession of a  
3 firearm during the commission of a violent crime. The  
4 State must prove beyond a reasonable doubt that the  
5 defendant was in possession of a firearm or visibly  
6 displayed what appeared to be a firearm during the  
7 commission of a violent crime.

8 A firearm means a machine gun, automatic rifle,  
9 revolver, pistol or any weapon which is designed to or  
10 may be readily converted to expel a projectile.

11 In order to find the defendant guilty of possession  
12 of a weapon during the commission of a violent crime you  
13 must first find the defendant guilty of either committing  
14 a violent crime or attempting to commit a violent crime.  
15 For purposes of this offense armed robbery is a violent  
16 crime.

17 Ladies and gentlemen, I'll now go over the verdict  
18 forms with you.

19 Mr. Foreman, it is your responsibility to sign and  
20 date the verdict form once you have -- once the jury has  
21 reached a unanimous decision, meaning all 12 of you must  
22 agree on the verdict.

23 As I indicated to you there are two indictments.  
24 Each must be considered separately of each other. Ladies  
25 and gentlemen, please also know that there's no

1 significance in the way I read either indictment first or  
2 how the decisions are placed on the paper. It's simply  
3 something must go on the paper first.

4 Ladies and gentlemen, in the Court of Common Pleas  
5 -- excuse me. In the Court of General Sessions, Ninth  
6 Judicial Circuit, 2011-GS-10-2338, State of South  
7 Carolina vs. Marvin Bowens Green. On the indictment for  
8 armed robbery we, the jury, find the defendant not guilty  
9 or we, the jury, find the defendant guilty.

10 Again, once you have reached a unanimous decision  
11 on that indictment you will sign the verdict form  
12 indicating all 12 of you have reached the verdict, and  
13 sign it and date it.

14 In the Court of General Sessions, Ninth Judicial  
15 Circuit, 2011-GS-10-2339. On the indictment for  
16 possession of a firearm during the commission of a  
17 violent crime we, the jury, find the defendant not guilty  
18 or we, the jury, find the defendant guilty.

19 Once again, once you have reached a unanimous  
20 decision you will sign and date that verdict form. Once  
21 you have completed both of the verdict forms you will  
22 alert the bailiff that you have reached a decision and we  
23 will receive you back into the courtroom.

24 Ladies and gentlemen, this will be the last time I  
25 say this to you; do not begin your deliberations, do not

1 discuss this case amongst yourselves. We will be  
2 gathering the verdict forms and the evidence to go back  
3 to you. We're going to send the television so that you  
4 may watch the video if you need to do so. Once all that  
5 has been gathered the bailiff will instruct you when you  
6 may begin your deliberations.

7 Madam alternate, this completes your service to  
8 this case but I ask until you are released do not discuss  
9 this case with anyone and do not begin thinking about  
10 anything in case that I would need you before -- at some  
11 point to put you in with the other jurors. But at this  
12 time please remember all the admonitions and I will  
13 release you at the appropriate time.

14 Please rise for the jury.

15 (WHEREUPON, the jury leaves the courtroom at  
16 approximately 11:38 a.m.)

17 THE COURT: Thank you. Be seated.

18 From the State, any objection to the charges read?

19 MR. RUTLEDGE DURANT: No, Your Honor.

20 THE COURT: Reserving all your previous objections  
21 that I have marked as a court's exhibit, your proposed  
22 jury charges, anything as read, Mr. Grimes?

23 MR. GRIMES: Yes, ma'am. I think I'm a little  
24 confused. I think for the record I need to state the  
25 grounds as to why we're requesting these charges. I'd

1 like to have a few minutes to be able to do that.

2 THE COURT: All right.

3 MR. GRIMES: Thank you, Your Honor. We did submit  
4 request to charge number one on identification. And on  
5 the second paragraph of that charge the Court erred in  
6 not charging that. Specifically the language, You don't  
7 have to believe that the identification witness was lying  
8 or not sincere to find the defendant not guilty. It's  
9 enough that --

10 THE COURT: You may need to come to the podium,  
11 Mr. Grimes.

12 MR. GRIMES: Thank you, Your Honor.

13 As highlighted by the closing arguments in this  
14 case Mr. Groeber testified -- well, argued that this was  
15 a tested memory, witness making an honest mistake.  
16 Mr. Durant basically implied that we said the witnesses  
17 were lying. And as Dr. Beaudry testified witnesses can  
18 make honest mistakes and just not realize that they are  
19 mistaken. They have an honest sincere belief that what  
20 they saw was accurate.

21 And given Dr. Beaudry's testimony and as issues  
22 were presented in this case I believe the admission of  
23 this charge provides Mr. Green a right to a fair trial  
24 and by a jury of his peers.

25 As to paragraph one on the bottom of that page, I

1 believe the Court charged the length of time the witness  
2 observed the person, the distance between the witness and  
3 the person. I do not recall the Court charging factor C  
4 to the extent that the person's features were visible and  
5 undisguised. Again, that given Dr. Beaudry's testimony,  
6 and the video, cross-examination of the witnesses I  
7 believe that charge is supported and should be given.

8 I believe the Court did charge lighting conditions.  
9 Paragraph E, whether there were any distractions  
10 occurring during observation. That would be some of what  
11 Dr. Beaudry testified about weapons focus.

12 And if you watch in the video when the robber asked  
13 for money out of the wallet he's looking down. Mr. Patel  
14 is looking down looking in the cash register. He is  
15 distracted, and I believe there's evidence in the record  
16 to support that charge. Again, the omission of those  
17 three deprived Mr. Green to the right to a fair trial,  
18 the Sixth Amendment right to a jury trial by his peers.

19 I don't believe the Court charged paragraph two. I  
20 do note that the fact they had listed and italicized C, D  
21 and E I don't think applied to this case. There's no  
22 testimony that Mr. Patel or any other witness had  
23 uncorrected visual defects, they were either fatigued or  
24 injured, or under the influence of any drug or alcohol.

25 However, there was testimony from Mr. Patel that he

1 was under stress or fright at the time of his  
2 observation. As Mr. Durant eloquently argued, he  
3 believed his life was in fear and, you know, went to the  
4 emotion of the case rather than so much the facts of the  
5 case. So we believe in personal motivations, biases or  
6 prejudices I believe when Mr. Patel testified his job was  
7 to help the police catch the person that showed personal  
8 motivation in this case and I believe that should be  
9 charged.

10 If the Court wanted to admit biases or prejudices  
11 or clarify that, and we're not arguing he was racially  
12 prejudiced or had any ongoing animist with Mr. Green or  
13 any motive bias, creating a bias of wanting to catch  
14 somebody that could be corrected.

15 Paragraph three on the cross-racial, that was  
16 elicited by both the State and through their questions of  
17 Mr. Patel talking about Mr. Patel's customer base 80  
18 percent African Americans, where most of their clients  
19 come from. Dr. Beaudry testified that race is a factor,  
20 and we believe that charge is supported by the evidence  
21 in the record.

22 As to paragraph four, I don't recall that being  
23 charged. As Mr. Groeber argued and brought out during  
24 trial, on paragraph A there was at least five days that  
25 passed in this case, and Dr. Beaudry testified memory



1 loss happens rather quickly after an incident.

2 I don't believe there's any evidence on Mr. Patel's  
3 mental capacity as being -- perhaps that could be struck  
4 but the state of mind at the time of the identification I  
5 think may need to go in there, especially with sort of  
6 the translation issues and his wanting to help the police  
7 catch the robber.

8 Paragraph C, the exposure of witnesses to opinions;  
9 there's ample testimony in the record that Mr. Patel and  
10 Mrs. Patel talked about the case for a week after the  
11 incident and they watched the video at least four or five  
12 times for identification, and then evidence in the record  
13 that Mr. Durant was interviewing Mrs. Patel and talked  
14 with her about the case as his role as an investigator,  
15 and I believe that would go to that part of it.

16 I don't believe there's any information about the  
17 photographs, never shown any photograph of Mr. Green, so  
18 that could be stricken. And the part about any other  
19 information or influence that may have affected  
20 independence, that identification of the defendant by the  
21 witness could go to perhaps them overhearing the officers  
22 in the hallway talking. Again, goes to his talking to  
23 Mrs. Patel.

24 Paragraph D, I don't believe there weren't any  
25 instances where there would be misidentification.

1           Paragraph E, there's ample testimony that there was  
2 never a description of the person that was given and we  
3 have testimony that's sort of inconsistent. There was  
4 the pointy nose issue, the walk issue, mannerisms.

5           You know, there was a change of testimony  
6 throughout the trial, sort of the one witness like  
7 Mr. Patel, for example, during direct never said he could  
8 clearly see Mr. Green's face. He never said he could  
9 testify -- he never testified that he could see his eyes  
10 over the glasses. That came out in cross. So that shows  
11 an evolving just change of description, and the truth  
12 simply doesn't evolve. So we believe that should be  
13 charged.

14           And paragraph F, the circumstances under which the  
15 defendant was presented to the witness for  
16 identification. Given the translation issues and the  
17 child, the youngest Patel basically not being able to  
18 translate everything, for example, he didn't know what an  
19 array was, and sort of the other rights. And Officer  
20 Perkins testified he didn't know what was said. They  
21 could be talking about anything.

22           Then you have the four-minute issue, as Mr. Groeber  
23 pointed out with that, sufficient evidence for that to be  
24 charged.

25           I believe paragraph five should be charged.

1 Paragraph six should be charged, especially since three  
2 of the witnesses only saw this on the video recording.

3 Paragraph seven should be charged. Dr. Beaudry  
4 testified that a witness's level of confidence, it really  
5 isn't relevant to whether they observed accurately. You  
6 can be a hundred percent sure something happened and be  
7 wrong. I know I've had that happen to me several times.

8 That would complete my argument on the  
9 identification charges as our major argument.

10 THE COURT: All right. Mr. Grimes, I believe you  
11 have thoroughly articulated the basis and they are marked  
12 as a court's exhibit, and I believe that by doing so we  
13 have preserved any argument and objection to the Court's  
14 charge. Thank you.

15 MR. GRIMES: Thank you, Your Honor. We also  
16 requested charge number two.

17 THE COURT: I understand. They are all marked,  
18 Mr. Grimes. You've made your argument. I am not  
19 changing my charge. My charges are law. I have, again,  
20 marked your charges, your proposed charges as a court's  
21 exhibit. I understand that you have objected to the  
22 charge as given by the Court and these are the proposed  
23 charges. Thank you.

24 MR. GRIMES: I don't mean -- my concern is that if  
25 I don't state my grounds for the record the appellate

1 court is not going to know why I'm arguing. And if you  
2 say well, we've reviewed the charge, and they say well,  
3 Mr. Grimes never said, you know, what basis on the record  
4 supported this --

5 THE COURT: Mr. Grimes, you have thoroughly  
6 articulated and all of your charges are interrelated. So  
7 I believe that you have thoroughly articulated the  
8 grounds and the basis for your objection. Thank you.

9 MR. GRIMES: Thank you, Your Honor.

10 THE COURT: All right. Anything further from the  
11 State?

12 MR. RUTLEDGE DURANT: No, Your Honor.

13 THE COURT: All right. We're at ease.

14 (WHEREUPON, the jury was instructed to begin their  
15 deliberations at approximately 11:50, and court was in  
16 recess while awaiting a verdict from the jury.)

17 THE COURT: All right. Mr. Durant, you ready by  
18 yourself?

19 MR. DURANT: Yes, Your Honor.

20 THE COURT: All right. I received a note. Juror  
21 95 has met Detective Lawrence before on another case.  
22 She didn't realize until he said what job he had. She  
23 met him in April 2012 and do you need to talk to her?  
24 Signed the foreperson.

25 MR. RUTLEDGE DURANT: I'm not requesting any

1 individual voir dire. I know that there is case law,  
2 directly on point about a mistake, that it's just that,  
3 the jury can continue in that fashion.

4 THE COURT: All right. Mr. Groeber?

5 MR. GROEBER: Can I just have one moment, Your  
6 Honor?

7 THE COURT: You may have all the time you need,  
8 Mr. Groeber.

9 (PAUSE.)

10 MR. GROEBER: It was nine-five, Your Honor?

11 THE COURT: Nine-five, Ms. Gallo.

12 MR. GROEBER: I certainly think at the very least  
13 it would be appropriate to ask if that would affect her  
14 ability but --

15 THE COURT: I'm going to bring her out and  
16 individually voir dire her. Thank you.

17 MR. GROEBER: And I guess -- well, I guess we can  
18 address it depending on what she says.

19 THE COURT: I need juror 95, and I also need you to  
20 inform them that they must cease deliberations until she  
21 is returned. Thank you.

22 (WHEREUPON, Juror 95, Ms. Gallo, enters the  
23 courtroom at approximately 12:55 p.m.)

24 THE COURT: Good afternoon, Ms. Gallo. That's  
25 fine. I just needed to ask you a few questions.

1 JUROR GALLO: Okay.

2 THE COURT: The foreperson has given me a note and  
3 we're going to mark it, just for the record, as Court's  
4 Exhibit Number 10, that you have met Detective Lawrence  
5 before on another case; is that correct?

6 JUROR GALLO: I believe so.

7 THE COURT: And you said you didn't realize until  
8 he said --

9 JUROR GALLO: And I'm still not a hundred percent  
10 sure but I think so.

11 THE COURT: Tell me, remind me, Ms. Gallo, what it  
12 is that you do for a living.

13 JUROR GALLO: I work for Bishop Gadsden. I am a  
14 human resources director there.

15 THE COURT: Is that how you know --

16 JUROR GALLO: Uh-huh.

17 THE COURT: You said on another case. Was he --

18 JUROR GALLO: He came to Bishop Gadsden.

19 THE COURT: Regarding something unrelated to this  
20 case?

21 JUROR GALLO: Yes, totally unrelated.

22 THE COURT: Doing another investigation?

23 JUROR GALLO: Yep.

24 THE COURT: And is there anything about your  
25 involvement with Detective Lawrence, assuming that it's

1 the same detective, that would affect your ability to be  
2 fair and impartial in this case?

3 JUROR GALLO: No, not at all.

4 THE COURT: And then I'm going to ask the next  
5 question. Is there anything about us pulling you out of  
6 the of the jury room that is going to affect your ability  
7 to be fair and impartial in this case?

8 JUROR GALLO: No.

9 THE COURT: All right. And, Counsel, is there  
10 any --

11 And I apologize. I just need to make the record  
12 clear.

13 Is there any further questions of this witness --  
14 or juror? If so, I need you to approach the bench.

15 MR. RUTLEDGE DURANT: No, Your Honor.

16 MR. GROEBER: I'd like to approach.

17 THE COURT: All right. Both of you need to.

18 (WHEREUPON, the following bench conference was  
19 reported.)

20 MR. GROEBER: Whether or not and under what context  
21 in which she had this interaction with Detective  
22 Lawrence.

23 THE COURT: He was investigating a crime that  
24 occurred there.

25 MR. GROEBER: Was she the victim of that crime?

1 THE COURT: She's the human resource manager.

2 MR. DURANT: She's answered the requisite question.

3 THE COURT: And I agree so I'm not going to keep  
4 her out, but I'll hear you. I'll hear from defense.

5 (WHEREUPON, the bench conference was concluded.)

6 THE COURT: Ms. Gallo, if you have indicated to the  
7 Court that you can continue deliberating in this case and  
8 listen to the facts from the witness stand and apply the  
9 law as the Court has charged you and continue your  
10 deliberations to reach a fair and impartial verdict, can  
11 you do that, Ms. Gallo?

12 JUROR GALLO: Yes.

13 THE COURT: All right. I'm going to return you.

14 The bailiff needs to escort juror 95 back to the  
15 jury room, and once she is in the jury room they may  
16 continue their deliberations. Thank you.

17 (WHEREUPON, Juror 95 leaves the courtroom.)

18 (WHEREUPON, Court's Exhibit Number 10, the Note  
19 from the Jury, marked and made a part of the record.)

20 THE COURT: All right. Mr. Groeber, you had  
21 indicated that you wished to ask some other questions,  
22 and basically whether she was the victim of the crime  
23 that was being investigated and something else?

24 MR. GROEBER: And really just the general context  
25 of interaction with Detective Lawrence. We think it



1 would be appropriate to ask her about that, and those  
2 would have been questions that we would have asked to be  
3 revealed during the voir dire process. If she was the  
4 victim there was a specific question about that, that was  
5 asked. So we would ask given all this, this new  
6 information that she be stricken -- or that she be  
7 removed from the jury and --

8 THE COURT: And, Mr. Groeber --

9 MR. GROEBER: -- an alternate be seated in her  
10 place.

11 THE COURT: Well, I released the alternate. They  
12 have been now deliberating for approximately an hour and  
13 20 minutes or just 20 minutes?

14 MR. GROEBER: I think an hour and 20.

15 THE COURT: An hour and 20 minutes. So even if I  
16 still had the alternate I think there would be some  
17 objection as to placing the alternate in at this late  
18 time. All right. Assuming that I were to remove her  
19 what's your position on going forward with less than 12?

20 MR. GROEBER: No, Your Honor. We want 12 and we  
21 wouldn't.

22 THE COURT: All right. Mr. Durant, do I need to  
23 hear from you?

24 MR. RUTLEDGE DURANT: I don't think you do, Your  
25 Honor.

1           THE COURT: All right. Just for the record, and  
2 I'm sure that the record is abundantly clear, but at this  
3 time I want the record to reflect how I recall voir dire  
4 going. It is my recollection that Detective Lawrence was  
5 seated where he is currently still seated and has been  
6 seated throughout the trial.

7           I recall Mr. Durant introducing Detective Lawrence  
8 during his introduction and introduction of the case. Is  
9 that correct, Mr. Durant? Do you remember that?

10          MR. RUTLEDGE DURANT: That's correct.

11          THE COURT: Mr. Lawrence, Detective Lawrence, do  
12 you remember being introduced?

13          DETECTIVE LAWRENCE: Yes, ma'am.

14          THE COURT: And then I also specifically remember  
15 when I read the list of potential witnesses that I had  
16 you stand throughout the entire list of witnesses. Is  
17 that your recollection, Detective Lawrence?

18          DETECTIVE LAWRENCE: Yes, ma'am, that's correct.

19          THE COURT: Is that your recollection, Mr. Durant?

20          MR. RUTLEDGE DURANT: Yes, Your Honor.

21          THE COURT: And, Mr. Groeber, I don't know that you  
22 would specifically remember but do you recall that at  
23 all?

24          MR. GROEBER: I do remember that Detective Lawrence  
25 was standing during his introduction.

1           THE COURT: And the reason I'm going through this  
2 is I just want the record to reflect how much attention  
3 was given to Detective Lawrence. The fact that he was  
4 physically present, introduced on two separate occasions  
5 and stood throughout what the Court considers a rather  
6 lengthy witness list and no one indicated at that time,  
7 Ms. Gallo indicated.

8           I reference that because during the Court's  
9 inquiry, during the note issue she indicated that she's  
10 not even sure, that that may be him, and so I just wanted  
11 to point that out.

12           And again, Mr. Groeber, that was why the Court  
13 didn't go into any further matters. I do not recall that  
14 Ms. Gallo came up when asked if she was the victim of a  
15 crime or had any interaction with any of those  
16 individuals on the witness list or with the solicitor's  
17 office.

18           So for all of those reasons she indicated to the  
19 Court, that her involvement with the person that may or  
20 may not be Detective Lawrence in her mind was solely as  
21 her occupation and her employment with Bishop Gadsden, so  
22 I will not be removing juror 95 pursuant to that note.

23           She answered the question that even that her  
24 relationship or her involvement with Detective Lawrence  
25 and that issue would not affect her ability to be fair

1 and impartial and nothing about the dialogue about  
2 bringing her back in would affect her ability to continue  
3 her deliberations. Thank you.

4 MR. GROEBER: If I may, just for the record. You  
5 know, since the alternate has been released I think the  
6 appropriate remedy at this time would be a mistrial, if  
7 she would be removed. So we would ask for that, just for  
8 the record.

9 THE COURT: You are still asking for me to remove  
10 her even after me ruling; is that correct?

11 MR. GROEBER: That's correct. We'd ask that you  
12 remove her. Because there is no alternate available we  
13 move for a mistrial. We would have struck her had we  
14 known this information. Thank you, Your Honor.

15 THE COURT: Thank you. All right. Just so the  
16 record is clear, your request for a mistrial is denied  
17 based upon all the reasons articulated why I'm leaving  
18 her. Thank you.

19 We're at ease. Thank you.

20 (WHEREUPON, court was in recess while awaiting a  
21 verdict for the jury.)

22 (WHEREUPON, the following occurred at approximately  
23 2:50 p.m.)

24 THE COURT: Anything before we bring in the jury,  
25 Mr. Durant?

1 MR. RUTLEDGE DURANT: No, Your Honor.

2 THE COURT: Mr. Groeber?

3 MR. GROEBER: No, Your Honor.

4 THE COURT: And, Mr. Groeber, I understand there  
5 are some -- assuming, I don't know what the verdict is,  
6 but there may be a sentencing issue, we'll need to have a  
7 hearing?

8 MR. GROEBER: Yes, Your Honor. We may need to  
9 delay sentencing for the reasons that we would argue.

10 THE COURT: All right, thank you.

11 Please rise for the jury.

12 (WHEREUPON, the jury enters the courtroom at  
13 approximately 2:52 p.m.)

14 THE BAILIFF: All seated, Your Honor.

15 THE COURT: Thank you. Please be seated.

16 Mr. Foreman, I understand the jury has reached a  
17 verdict. If you'll hand the verdict forms to the  
18 bailiff. Thank you.

19 Mr. Green, please rise.

20 THE CLERK: The verdict in the matter of the State  
21 of South Carolina vs. Marvin Bowen Green, defendant, on  
22 the indictment for possession of a firearm during the  
23 commission of a violent crime we, the jury, find the  
24 defendant guilty. Signed by the foreperson of the jury  
25 on June 14, 2012.

1           Ladies and gentlemen of the jury, if this was your  
2 verdict please raise your right hand.

3           Thank you. Please let the record reflect that all  
4 12 jurors raised their right hand.

5           On the indictment for armed robbery, we, the jury,  
6 find the defendant guilty. Signed by the foreperson of  
7 the jury on June 14, 2012.

8           Ladies and gentlemen of the jury, if this was your  
9 verdict please raise your right hand.

10          Thank you. Please let the record reflect that all  
11 12 jurors raised their right hand.

12          THE COURT: Thank you. You may be seated, unless,  
13 Mr. Groeber, you have any further requests of the jury.

14          MR. GROEBER: We'd ask that the jury be polled,  
15 Your Honor, please.

16          (WHEREUPON, the jury was polled.)

17          THE CLERK: Your Honor, the jury has been polled  
18 and the verdicts stand.

19          THE COURT: Thank you.

20          Mr. Groeber, anything further required of this  
21 jury?

22          MR. GROEBER: No, Your Honor. Thank you.

23          THE COURT: Anything further required of this jury?

24          MR. RUTLEDGE DURANT: No, Your Honor.

25          THE COURT: Is the State prepared to go forward

1 with sentencing at this time?

2 MR. RUTLEDGE DURANT: Yes, Your Honor.

3 THE COURT: Is the defendant ready to go forward  
4 with sentencing at this time?

5 MR. GRIMES: No, ma'am.

6 THE COURT: And, Mr. Grimes, when will the  
7 defendant be ready for sentencing?

8 MR. GRIMES: It's my understanding that the United  
9 States Supreme Court is considering the Eighth Amendment  
10 Challenge to imposing a life sentence on juveniles.  
11 Given that impact of this case, we'd prefer to wait for  
12 that case to come out.

13 It's argued, I think, in February or January.  
14 Usually the court's term ends in June. I can't think  
15 when that would come out. The decision should come out  
16 in the next few weeks. That should provide guidance. As  
17 of now the United States Court has held that a juvenile  
18 can not get life without parole for a non murder offense.

19 THE COURT: All right. Mr. Durant, how old is the  
20 defendant?

21 MR. RUTLEDGE DURANT: Your Honor, he was born on  
22 [REDACTED] of 1991.

23 THE COURT: And so, Mr. Grimes, how old is the  
24 defendant currently?

25 MR. GRIMES: He's 20. And the basis of our

1 challenge, the prior conviction he has, which is serving  
2 as the mechanism for the State to give him life without  
3 parole, occurred when he was 17. And given that that's  
4 the juvenile aspect of it, and before that prior  
5 sentencing he'd only be looking at 10 to 30, we believe a  
6 life sentence would violate the Eighth Amendment under  
7 impartiality clause per se the Eighth Amendment, and we  
8 want some more time to see what that case says. As of  
9 now they are considering whether you can give a juvenile  
10 life without parole for a murder offense.

11 THE COURT: But your client is currently not a  
12 juvenile and was not a juvenile when this crime was  
13 committed; is that correct, Mr. Grimes?

14 MR. GRIMES: Yes, ma'am.

15 THE COURT: All right. We'll go forward with  
16 sentencing today. Do you have your sentencing sheets  
17 prepared?

18 MR. RUTLEDGE DURANT: We do, Your Honor.

19 THE COURT: Ladies and gentlemen of the jury, I am  
20 about to impose sentence on Mr. Green. You are released  
21 from service, if there's anyone who wishes to be released  
22 at this time. Sentencing, we will just go on to  
23 sentencing. Is there anyone that wishes to leave?

24 (There was no response.)

25 THE COURT: All right. Thank you.



1 All right. Mr. Durant, I have listened to the  
2 facts over the past four days. I do not need to hear the  
3 facts again. Does the victim wish to address the Court?  
4 Is there anything, victim impact statement or anything of  
5 that nature?

6 MR. BRUCE DURANT: Your Honor, the victim is at his  
7 store. We were not able to get him here in time. So we  
8 wish to proceed.

9 THE COURT: All right. As the record is clear,  
10 we've had a pretrial hearing and he testified, as did his  
11 wife and his son. I have an understanding of the impact  
12 of this crime on the victim.

13 Let me hear the prior history, the prior criminal  
14 convictions from Mr. Green.

15 MR. RUTLEDGE DURANT: Your Honor, he was convicted  
16 this same month last year of a different armed robbery in  
17 front of a different jury, and that is his only  
18 conviction. There is another pending armed robbery in  
19 our office. There is another pending armed robbery  
20 against this defendant in Colleton County as well.

21 THE COURT: Well, as we know, Mr. Durant, he is  
22 presumed innocent of those two. What did he receive on  
23 the conviction? What was the sentence?

24 MR. RUTLEDGE DURANT: He was sentenced to 20 years  
25 for the conviction last year, and as we've gone over, the

1 State had made an offer of concurrent time, that he would  
2 do absolutely no more time than what he had been  
3 sentenced to on the prior armed robbery, and in light of  
4 that he understood well that the State was serving a  
5 notice of life without parole.

6 THE COURT: And, Mr. Durant, it's your position  
7 that the possession of weapon during a crime is to be  
8 served consecutive to the life sentence or may I run them  
9 concurrent?

10 MR. RUTLEDGE DURANT: I think you can run them  
11 concurrent, Your Honor.

12 THE COURT: What are you requesting?

13 MR. RUTLEDGE DURANT: Concurrent is fine.

14 THE COURT: Anything further from the State?

15 MR. RUTLEDGE DURANT: No, Your Honor.

16 THE COURT: Mr. Groeber, I'll be happy to hear from  
17 you regarding sentencing. The jury has spoken. There is  
18 a notice for life without parole. Based upon my review  
19 of the previous conviction, which was most serious and  
20 this being a most serious as well, the imposition will be  
21 life without parole pursuant to the notice.

22 You indicated there was no challenge to the notice  
23 portion of that and my understanding is the only  
24 challenge that you have at this point is to the  
25 constitutionality of the prior conviction, and as such I

1 am continuing with sentence. So I'll be happy to hear  
2 from you.

3 MR. GROEBER: Okay. Could I have one moment, Your  
4 Honor, please?

5 THE COURT: You may. And, Mr. Groeber, I'll be  
6 happy to hear from you as to whether or not the  
7 possession -- at some point it becomes really a moot  
8 issue but whether or not the possession of a weapon must  
9 run consecutive or concurrent. Thank you.

10 MR. GROEBER: Thank you, Your Honor.

11 (PAUSE.)

12 MR. GRIMES: I apologize, Your Honor. I'm trying  
13 to find a research email on this.

14 THE COURT: Concerning?

15 MR. GRIMES: The Eighth Amendment Challenge. It  
16 should take about two minutes, at the most.

17 THE COURT: All right. Thank you.

18 (PAUSE.)

19 MR. GROEBER: Thank you, Your Honor. I think that  
20 you heard the Eighth Amendment argument. I want to  
21 preserve that. Grand V. Florida is the case, a United  
22 States Supreme Court case. He was 17 at the time he was  
23 convicted of a prior charge. He was 19 at the commission  
24 of this charge. He's 20 now.

25 You saw his mother and father were in the

1 courtroom, and his brothers. He's grown up in the area,  
2 grew up in Jacksonboro. He lived there most of his life,  
3 in Colleton County, in there and around Ravenel.

4 I don't know that Your Honor has discretion when it  
5 comes to sentencing but he's been a great client. He's  
6 always been easy to work with for me. And I think what  
7 we'll do is that we will try to draft a memo maybe as  
8 part of our motion to reconsider, to preserve that issue  
9 with the Court.

10 THE COURT: And, Mr. Groeber, am I correct in  
11 assuming that you have advised Mr. Green not to address  
12 the Court?

13 MR. GROEBER: That is correct, Your Honor. And I'm  
14 sorry. On the concurrent I do think that when a life  
15 sentence is imposed it should be run concurrent. That's  
16 my understanding.

17 THE COURT: It is within my discretion so I am  
18 going to, just for simplicity sake, run them concurrent.

19 Mr. Groeber, you have advised your client of his  
20 right to appeal and he must do so within ten days?

21 MR. GROEBER: Yes, Your Honor.

22 THE COURT: You advised him of that?

23 MR. GROEBER: Yes, Your Honor.

24 THE COURT: Have you advised also your client that  
25 the armed robbery is considered a violent and a most

1 serious offense?

2 MR. GROEBER: Yes, Your Honor.

3 THE COURT: Did your client appear to understand  
4 his appellate rights?

5 MR. GROEBER: Yes, Your Honor.

6 THE COURT: Thank you.

7 Mr. Green, please rise. I'm going to impose  
8 sentence. Mr. Green, at this time the State, as you know  
9 prior to entering into and beginning this trial the State  
10 has filed, based upon your prior record, a notice to seek  
11 life without the possibility of parole. The jury has  
12 spoken. They have listened to the facts and you have  
13 been convicted of both armed robbery and possession of a  
14 weapon during a crime.

15 It's the order of the Court on indictment  
16 2011-GS-10-2339 that you be committed to the State  
17 Department of Corrections for a term of five years. I'll  
18 give you credit for any time that you have served. That  
19 is concurrent to the controlling indictment,  
20 2011-GS-10-2338, that you be sentenced to the South  
21 Carolina Department of Corrections for a term of life  
22 without the possibility of parole. Good luck to you,  
23 sir.

24 THE DEFENDANT: Thank you.

25 THE COURT: Ladies and gentlemen, this completes

1 your matters. If you would please go to your jury room.

2 I will be in there in just a few moments. Thank you.

3 (WHEREUPON, the jury leaves the courtroom at  
4 approximately 3:10 p.m.)

5 THE COURT: They took your client away before I  
6 addressed you about some things. That's fine,  
7 Mr. Groeber. I just wanted to take this opportunity to  
8 let you know and to express, Mr. Durant, Mr. Durant,  
9 Ms. McCoy, Mr. Groeber, and Mr. Grimes, I know that this  
10 was a very difficult and emotionally charged trial as  
11 well. All of you were extremely prepared and  
12 professional to the Court and I think you set a really  
13 good example for the multitude of 403s that have been in  
14 and out of this courtroom and for that I thank you.

15 You both zealously represented your clients to the  
16 best of your ability, and I think that both sides did a  
17 wonderful job in your representation. So thank you for  
18 that. On behalf of the State of South Carolina and on  
19 behalf of my courtroom I appreciate everything that all  
20 five of you have done in representing the State of South  
21 Carolina.

22 So I appreciate that, and I just wanted to let you  
23 know in no way, either way the verdict had come out,  
24 neither one of you -- no one should walk out of here  
25 feeling that they did a poor job. Everyone has been

1 exceptionally prepared. 'I know that every time I've  
2 asked you, I've emailed you at nine or ten o'clock in the  
3 evening and there has been responses as well. So I  
4 appreciate your very, very hard work.

5       So I will await your motion to reconsider, and with  
6 that I'm going to excuse the jury. Thank you. Good luck  
7 to you all.

8       (WHEREUPON, trial of this case was concluded.)

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## 1 C E R T I F I C A T E

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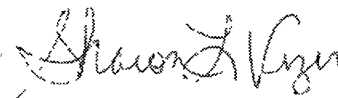
3 I, Sharon L. Vizer, Official Court Reporter for the  
4 Ninth Judicial Circuit of the State of South Carolina, do  
5 hereby certify that the foregoing is a true, accurate and  
6 complete transcript of record of all the proceedings had  
7 and the evidence introduced in the trial of the captioned  
8 case in Circuit Court on the 11th, 12th, 13th and 14th  
9 day of June 2012.

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

12

13 February 23, 2013

14



15

SHARON L. VIZER

16

CIRCUIT COURT REPORTER

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## FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF CharlestonMarvin Bowens-Green #346650  
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

2015-CP-10-6855  
IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

FILED  
2015 DEC 18 PM 4:41  
JULIE J. HENSTRONG  
CLERK OF COURT**INSTRUCTIONS - READ CAREFULLY**

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

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

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

1. Place of detention Lee Correctional Institution
2. Name and location of Court which imposed sentence Charleston County Court of General Session
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) Armed Robbery; 2011 GS 100 2338
  - (b) Poss. of A Firearm During the Commission of a Violent Crime; 2011 GS 100 2339
  - (c) \_\_\_\_\_
5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) June 14, 2012
  - (b) Armed Robbery; life, Poss. of Firearm; 5 years

Revised 3/2003

- (c) \_\_\_\_\_
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty \_\_\_\_\_
- (b) after a plea of not guilty ☒ \_\_\_\_\_
- (c) after a plea of nolo contendere \_\_\_\_\_
7. Did you appeal from the judgment of conviction or the imposition of sentence?  
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. Applicant's conviction were affirmed
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- (c) the date of each such result:
- i. March 16, 2015
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Opinion No. 5302
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) ineffective assistance of trial counsel  
 (b) ineffective assistance of trial counsel  
 (c) \_\_\_\_\_

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

- (a) See attachments  
 (b) See attachments  
 (c) \_\_\_\_\_

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

- (a) any petition in a State Court under South Carolina Law? yes  
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? 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? yes

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. motion for resentencing  
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_

iv. petition for writ of certiorari with South Carolina Supreme Court

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

- i. Courts of General sessions of South Carolina, Charleston County  
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_

iv. South Carolina Supreme Court

(c) the disposition thereof:

- i. petition filed September 28, 2015  
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_

- iv. petition denied
- (d) the date of each such disposition:
- i. September 28, 2015
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. May 21, 2015
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. petition dismiss
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- NO
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. N/A
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- (b) the proceedings in which each ground was raised:
- i. N/A
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) This is first PCA filing
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? NO
- (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? NO
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. Cody Grober, 101 Meeting St. Fifth Floor, Charleston SC, 29401
- ii. Susan B. Hackett, P.O. Box 11589, Columbia SC, 29211
- iii. \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
- i. Trial and sentencing
- ii. direct appeal
- iii. \_\_\_\_\_
19. State clearly the relief you seek in filing this application:  
Conviction to be vacated or reversed and remanded for a new trial
20. Are you now under sentence from any other court that you have not challenged?  
yes

STATE OF SOUTH CAROLINA )

VERIFICATION

County of )

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

Maria B. Guir

SWORN to and subscribed before me this 9<sup>th</sup>  
day of December, 2015

Larry D. Cohen (L.S.)  
Notary Public

My Commission Expires: 12-10-15

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

I, , hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Martin B. Gledhill  
Applicant

SWORN or affirmed to and subscribed before me this  
9<sup>th</sup> day of December, 2015.

Larry D. Cohen  
Notary Public

My Commission Expires: 12-10-2015

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

- a. Ineffective assistance of trial counsel
- b. Ineffective assistance of trial counsel.
- c. Ineffective assistance of trial counsel.

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

ANSWERS TO QUESTION 10 and 11 are below as follows

Counsel rendered ineffective assistance by failing to object to solicitor's comments vouching for the credibility of the State's witnesses. A solicitor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness.... improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony. Because a jury must make it's own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness's credibility. During closing arguments the solicitor vouched for the State's witnesses several times; "Before I show it to you though I don't think all of you are going to be able to identify this man, obviously. I don't think that can be done, and that is just what Dr. Beaudry was telling you about.

Strangers have a lower level of being able to identify somebody. So just because all of you can't, and some of you may, does not mean you have reasonable doubt. This case is based on the witnesses who knew him, not on your ability to look at this video and determine if it is him." "There are four people in this case who told you they know. If you want to take off 20 percent take one and a half people. They are all telling you they know. They are not all mistaken. They are actually all correct." "And just because they weren't able to take an exact translation there that day at the scene about this is the man who comes in and buys Newport cigarettes, usually a lottery ticket, sometimes gas and he jokes with us about Obama does not mean it didn't happen. You judge their credibility and you determine if they are lying to you, and they are not. Why would they? Why would they go through a lie to frame somebody and say things they don't know?

This isn't about their credibility. They are telling you the truth." "There was no officer, of 3



who spoke Hindi out there that day. You decide for yourself what happened. Does she know or is she lying? She is not." (Solicitor vouching for credibility of Mrs. Patel, witness of surveillance video)

Due Process requires the prosecution prove every element of the charged offense beyond a reasonable doubt - including the element that the defendant is the actual perpetrator. During closing arguments the solicitor stated "Before I show it (video) to you though I don't think all of you are going to be able to identify this man, obviously. I don't think that can be done" The comment itself is prejudicial because it gives inference to the jury that their own assessment should not be relied on. The single largest issue in the case was the identification of applicant being the robber of a gas station made by one eyewitness and three witnesses of a surveillance video. There's a reasonable probability that the outcome of the proceeding would have been different absent counsel's omissions, applicant was denied effective assistance of counsel and is entitled to relief. Strickland v Washington 406 U.S. 568 (1972).

Counsel rendered ineffective assistance by failing to object to the perjured testimony of Charles Lawrence and Deputy Dustin Luchadoo. Lawrence claimed he "had the opportunity to talk with [applicant] for hours at a time while patrolling." He claimed that he had interactions with applicant "not because he was in trouble or anything." Lawrence claimed that the December 20, 2008 interview was "approximately two or three hours long." However during applicant's June 22-24, 2011 trial, Lawrence claimed that the December 20, 2008, interview was "approximately an hour or an hour and a half long." Trial counsel was ineffective for failing to object to Lawrence's testimony after applicant advised him that the testimony was inaccurate. Deputy Luchadoo claimed to have recognized applicant as the robber, based on general dealings including a traffic stop. Luchadoo also claimed to have seen applicant on wanted posters prior to the incident. Counsel was ineffective for failing to object to the testimony of Luchadoo. After applicant advised counsel that he'd never met Deputy Luchadoo and had not been featured on any wanted posters prior to the incident. Since applicant's conviction Lawrence has been terminated from Sheriff's office (A.L. 9 2011) for lying to superiors. The Sheriff's office revealed findings dating back 2 of 3

to 2007. Where Lawrence was found to be untruthful. Furthermore Lawrence had at least three findings of conduct unbecoming of an officer. Clearly Lawrence is not the credible witness the court presumed him to be. There's a reasonable probability the outcome of the proceeding would have been different absent counsel's omissions. Applicant was denied effective assistance of counsel and is entitled to relief. Strickland v. Washington 416 U.S. 668 (1984)

Counsel rendered ineffective assistance by advising applicant not to testify. Counsel's advice not to testify went against applicant's intended trial strategy. Because applicant did not testify he was not able to challenge Lawrence nor Luchado's accounts of how they knew him. There's a reasonable probability that had applicant testified the outcome of the proceeding would have been different absent counsel's omissions. Applicant was denied effective assistance of counsel and is entitled to relief. Strickland v. Washington 416 U.S. 668 (1984).

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

Marvin Bowens-Green, #346650

2015-CP-10-6855

Applicant,

v.

**RETURN AND MOTION TO  
DISMISS**

State of South Carolina,

Respondent.

In response to the post-conviction relief application filed December 18, 2015, the Respondent would show this Court:

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the July 2009 term of the Charleston County Grand Jury for armed robbery (2009-GS010-5376). The Applicant was represented by Rodney Davis, Esquire.

On June 24, 2011, the Applicant proceeded to trial and was convicted. The Applicant was sentenced by the Honorable R. Markley Dennis to confinement for a period of twenty (20) years.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Breen Stevens and Benjamin Tripp, Esquire, of the Office of Appellate Defense. The Applicant's convictions and sentences were affirmed by the Court of Appeals on July 31, 2013, after review pursuant to Anders v. California. The Remittitur was issued on August 16, 2013.

**2013-CP-10-6492**

Applicant filed his first PCR on November 1, 2013.

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

1. Ineffective assistance of counsel.
  - a. Failure to challenge defective indictments.
  - b. Failure to have offense dismissed because State like subject matter jurisdiction.
  - c. Failure to adequately prepare a defense.
2. Denied his constitutional right to subject matter jurisdiction.

An evidentiary hearing was convened on July 23, 2014. The Applicant was presented and represented by Jim Falk, Esquire. The Honorable Roger E. Henderson denied and dismissed the Applicant's application with prejudice by Order dated October 15, 2015.

A timely Notice of Appeal was filed and an appeal was perfected. This appeal is currently pending.

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

1. "Ineffective Assistance of trial Counsel"
2. "ineffective assistance of trial counsel"

For the purpose of this Return, the Respondent incorporates the Applicant's application, the Clerk of Court's Records, and the Applicant's prior PCR records by reference. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

### III.

The Court should summarily dismiss the current Application because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id., 305 S.C. at 450, 409 S.E.2d at 394. If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, 274 S.C. 243, 262 S.E.2d 735 (1980).

The Applicant could have raised the new grounds for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications. Accordingly, Respondent moves for a summary dismissal of the application because it is successive.

#### IV.

The Respondent submits that this Application for Post-Conviction Relief should also be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense(s) he challenges in this Application on June 24, 2011. The Remittitur after the Applicant's unsuccessful appeal was issued on August 16, 2013. Therefore, the Applicant was required to file his application by April 17, 2014. This Application was filed on December 18, 2015, which was well after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, the Respondent requests that this Court summarily dismiss the application for post conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act.

#### V.

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

#### VI.

WHEREFORE, Respondent moves to summarily dismiss the application because it is successive to the Applicant's prior PCR action and was filed after the statute of limitations had expired.

Respectfully submitted,

ALAN WILSON  
Attorney General

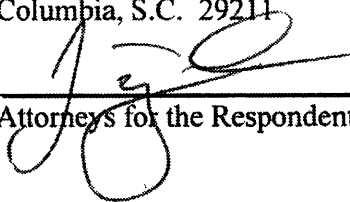
JOHN W. McINTOSH  
Chief Deputy Attorney General

JOHANNA C. VALENZUELA  
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON  
Assistant Deputy Attorney General

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

By:

  
Attorneys for the Respondents

Columbia, South Carolina  
September 1, 2016

STATE OF SOUTH CAROLINA )

COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS

2015-CP-10-6855

MARVIN BOWENS GREEN,  
#346650 )

Applicant, )

vs )

AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA, )

Respondent. )  
\_\_\_\_\_ )

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return and Motion to Dismiss in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Marvin Bowens Green, #346650  
 Lee Correctional Institution  
 990 Wisacky Hwy  
 Bishopville, South Carolina 29010

DATED this 7<sup>th</sup> day of September, 2016.

  
 Brianna Arnone, Legal Assistant  
 For Respondent



STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

**Marvin Bowens-Green, #346650**

2015-CP-10-6855

Applicant,

V.

State of South Carolina,

Respondent.

## CONDITIONAL ORDER OF DISMISSAL

FILED  
2016 OCT -4 AM 11:34  
JULIE A. ARMSTRONG  
CLERK OF COURT  
MISSISSAUGA

This matter comes before this Court by way of an application for post-conviction relief filed December 18, 2015.

## Procedural History

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the July 2009 term of the Charleston County Grand Jury for armed robbery (2009-GS-10-5376). The Applicant was represented by Rodney Davis, Esquire.

On June 24, 2011, the Applicant proceeded to trial and was convicted. The Applicant was sentenced by the Honorable R. Markley Dennis to confinement for a period of twenty (20) years.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Breen Stevens and Benjamin Tripp, Esquire, of the Office of Appellate Defense. The Applicant's convictions and sentences were affirmed by the Court of Appeals on July 31, 2013, after review pursuant to Anders v. California. The Remittitur was issued on August 16, 2013.

**2013-CP-10-6492**

Applicant filed his first PCR on November 1, 2013.

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

1. Ineffective assistance of counsel.
  - a. Failure to challenge defective indictments.
  - b. Failure to have offense dismissed because State like subject matter jurisdiction.
  - c. Failure to adequately prepare a defense.
2. Denied his constitutional right to subject matter jurisdiction.

An evidentiary hearing was convened on July 23, 2014. The Applicant was presented and represented by Jim Falk, Esquire. The Honorable Roger E. Henderson denied and dismissed the Applicant's application with prejudice by Order dated October 15, 2015.

A timely Notice of Appeal was filed and an appeal was perfected. This appeal is currently pending.

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

1. "Ineffective Assistance of trial Counsel"
2. "ineffective assistance of trial counsel"

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to his prior application for post-conviction relief. S.C. Code Ann. §17-27-90 provides that:

All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in

the conviction or sentence or in any other proceeding Applicant has taken to secure relief, may not be the basis for a subsequent Application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended Application.

Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

This Court finds that the current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief, and thus the current application is successive and barred under S.C. Code § 17-27-90. Applicant has failed to establish sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief; therefore, he has failed to meet the burden imposed upon him. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 420 S.E.2d 834 (1992).

This Court additionally finds that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. S.C. Code Ann. § 17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgement of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The

Applicant was convicted of the offense(s) he challenges in this Application on June 24, 2011. The Remittitur after the Applicant's unsuccessful appeal was issued on August 16, 2013. Therefore, the Applicant was required to file his application by April 17, 2014. This Application was filed on December 18, 2015, which was well after the statutory filing period had expired.

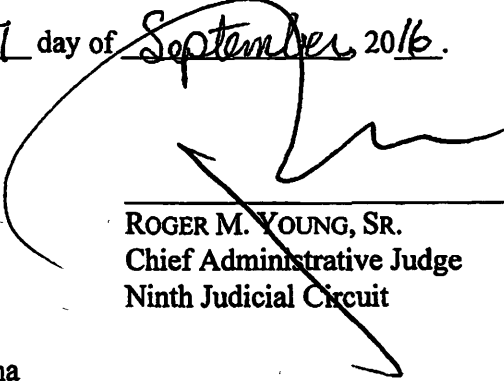
A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute and for being successive.

### CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the Charleston County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Attn: J. Rutledge Johnson, Esquire  
P.O. Box 11549  
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 27 day of September, 2016.



\_\_\_\_\_  
ROGER M. YOUNG, SR.  
Chief Administrative Judge  
Ninth Judicial Circuit

Charleston, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

Marvin Bowens-Green #346650  
Applicant,

v.  
State of South Carolina  
Respondent,

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

2015-CP-10-6855

2013-CP-10-6492

Response To: CONDITIONAL ORDER OF  
DISMISSAL

I write to you, J. Rutledge Johnson, in regards to the above listed Post Conviction Relief applications (2015-CP-10-6855, 2013-CP-10-6492). You filed a Conditional Order of Dismissal, citing that, "the current application for Post conviction Relief must be summarily dismissed because it is successive to his prior application for post-conviction relief." On September 27, 2016, Charleston County Chief Administrative Judge Roger M. Young, Sr. granted the Conditional Order of Dismissal. However you've misconstrued the facts of the case(s) and the Conditional order of dismissal has no applicability in Applicant's case(s). Applicant had multiple armed robbery offenses in Charleston County. Applicant was tried twice in Charleston County for two separate unrelated armed robbery charges. Applicant was convicted twice and applicant filed two separate Post Conviction relief applications, one for each conviction.

1. Applicant was indicted at the July 2009 term of the Charleston County Grand Jury for armed robbery (2009-GS-10-5376). Applicant was represented by Rodney Davis. On June 24, 2011, applicant proceeded to trial and was convicted. Applicant was sentenced by the honorable R. Markley Dennis to confinement for a period of twenty (20) years. Applicant filed a timely Notice of Appeal. His appeal was perfected by Breen Stevens and Benjamin Tripp, Esquire, of the Office of Appellate Defense. Applicant's convictions and sentences were affirmed by the Court of Appeals on July 31, 2013, after review pursuant to Anders v. California. The Remittitur was issued on August 16, 2013. Applicant filed the PCR (2013-CP-10-6492) regarding this conviction on November 1, 2013. Applicant clearly complied with the one year statute of limitations for filing Post Conviction Relief Applications.

2. Applicant was also indicted at the April 2011 term of the Charleston County Grand Jury for armed robbery (2011-GS-10-2339) and Poss. of weapon during crime (2011-GS-10-2338). Applicant was ~~represented~~ represented by Cody Grober. On June 14, 2012 applicant proceeded to trial and was convicted. Applicant was sentenced by the honorable Kristi Lea Harrington to confinement for a period of Life without the possibility of parole and five (5) years concurrent. Applicant filed a timely Notice of Appeal. His appeal was perfected by Susan Hackett, Esquire, of the Office of Appellate Defense. Applicant's convictions and sentences were affirmed by the Court of Appeals on March 11, 2015, in a published opinion, State v. Green Opinion No. 5302 (S.C. Ct. App. filed March 11, 2015). Applicant filed the PCR (2015-CP-10-6855) regarding this conviction on December 18, 2015. Again applicant clearly complied with the one year statute of limitations for filing Post-Conviction Relief applications.

From the evidence in the record it's clear that you've misconstrued the facts of the case(s). Your error has prejudice applicant greatly. As applicant's application has been dismissed unlawfully. The State clearly had no power to act under law nor statute. Applicant has been denied his right to Due Process of Law protected by the Fifth <sup>(5th)</sup> and Fourteenth <sup>(14th)</sup> amendment of the United States Constitution. The accusation against applicant is without foundation of law and you have not complied with law, procedure and form in bringing this claim. Therefore applicant respectfully request that the Conditional order of dismissal be made null and voided. I've already taken the liberty of writing the Supreme Court of South Carolina and request that the high Court reinstate my PCR application (2015-CP-10-6855). I've provided them with Conditional Order of Dismissal, Return and Motion to dismiss, PCR application; 2013-CP-10-6492, and PCR application; 2015-CP-10-6855. I request that you personally file a motion to REINSTATE my PCR application (2015-CP-10-6855). I will also write to Charleston County Chief Administrative Judge Roger M. Young Sr and South Carolina Attorney General, Alan Wilson. Please provide me with your disposition at your earliest convenience, thanking you in advance.

  
 Martin B. Green #346650  
 November 1, 2016.



|                              |   |                                  |
|------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA      | ) | IN THE COURT OF COMMON PLEAS     |
|                              | ) | IN THE NINTH JUDICIAL CIRCUIT    |
| COUNTY OF CHARLESTON         | ) |                                  |
| Marvin Bowens-Green, #346650 | ) | Case No.: 2015-CP-10-6855        |
|                              | ) |                                  |
| Applicant,                   | ) |                                  |
|                              | ) | <b>AMENDED RETURN AND MOTION</b> |
| v.                           | ) | <b>TO VACATE CONDITIONAL</b>     |
|                              | ) | <b>ORDER OF DISMISSAL</b>        |
| State of South Carolina,     | ) |                                  |
|                              | ) |                                  |
| Respondent.                  | ) |                                  |

---

Respondent, making its Amended Return to the Application for Post-Conviction Relief ("PCR") filed December 18, 2015, respectfully requests that this Court vacate the Conditional Order of Dismissal filed October 4, 2016, and allow the PCR action to proceed to an evidentiary hearing. Respondent would respectfully show this Court:

**I.**

In its original Return to the instant Application, Respondent inadvertently alleged it was successive to Applicant's 2013 PCR action.<sup>1</sup> Applicant's current appellate counsel brought this to Respondent's attention. Respondent makes this Amended Return to address its error in filing the original Return and Motion to Dismiss, which resulted in the Conditional Order of Dismissal filed October 4, 2016. Respondent submits the filing of the Conditional Order of Dismissal was erroneous and respectfully requests that this Court vacate the order and allow the PCR action to proceed to an evidentiary hearing.

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<sup>1</sup> Applicant was previously convicted for a separate armed robbery offense (2009-GS-10-5376) and was convicted of that offense following a jury trial on June 24, 2011. Applicant appealed the conviction and the appeal was dismissed. Thereafter, Applicant filed a PCR application with respect to that conviction (2013-CP-10-6492). Following an evidentiary hearing, the PCR judge denied that application. Applicant filed a timely notice of appeal and that appeal is currently pending before the South Carolina Supreme Court.

## II.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Applicant was indicted at the April 2011 term of the Charleston County Grand Jury for armed robbery (2011-GS-10-2338) and possession of a firearm during the commission of a violent crime (2011-GS-10-2339). Applicant was represented by Andrew D. Grimes, Esquire, and Cody J. Groeber, Esquire.

Applicant proceeded to trial June 11-14, 2012, before the Honorable Kristi L. Harrington and a jury, following which the jury found Applicant guilty as indicted. Judge Harrington sentenced Applicant to imprisonment for life without parole.

Following trial, a Motion to Vacate Sentence was filed on Applicant's behalf. By written Order dated July 31, 2012, Judge Harrington denied the Motion for Mistrial and Motion to Vacate Sentence.

A timely notice of appeal was filed on Applicant behalf. Susan B. Hackett, Esquire, of the Office of Appellate Defense, perfected the appeal. The Court of Appeals affirmed Applicant's conviction and sentence by published opinion filed March 11, 2015. State v. Green, 412 S.C. 65, 770 S.E.2d 424 (Ct. App. 2015). Applicant filed a timely Petition for Rehearing. By Order dated April 21, 2015, the Court of Appeals denied the Petition. Applicant then filed a Petition for Writ of Certiorari in the South Carolina Supreme Court, which was denied by Order dated September 3, 2015. The Remittitur was returned on September 16, 2015.

## III.

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

1. "Ineffective Assistance of trial Counsel," in that:

- a. Counsel failed to object to the solicitor's comments vouching for the credibility of State's witnesses during closing arguments when he stated:
  - i. "Before I show it to you though I don't think all of you are going to be able to identify this man, obviously. I don't think that can be done, and that is just what Dr. Beaudry was telling you about. Strangers have a lower level of being able to identify somebody. So just because all of you can't and some of you may, does not mean you have reasonable doubt. This case is based on the witnesses who knew him, not on your ability to look at this video and determine if it is him."
  - ii. "There are four people in this case who told you they know. If you want to take off 20 percent take one and a half people. They are all telling you they know. They are not all mistaken. They are actually all correct."
  - iii. "This isn't about their credibility. They are telling you the truth."
  - iv. "I don't think all of you are going to identify this man, obviously. I don't think that can be done."
- b. Counsel failed to object to the perjured testimony of Charles Lawrence and Deputy Dustin Luckadoo.
  - i. Lawrence claimed he "had the opportunity to talk with Applicant for hours at a time while patrolling."
  - ii. Lawrence claimed the December 20, 2008, interview was "approximately two or three hours long." However, during Applicant's June 22-24, 2011, trial, Lawrence claimed that the December 20, 2008, interview was "approximately an hour or an hour and a half long."
  - iii. Deputy Luckadoo claimed to have recognized Applicant as the robber based on general dealings including a traffic stop and had seen him on wanted posters prior to the incident. Applicant informed Counsel that he'd never met Luckadoo and had not been featured on any wanted posters prior to the incident.
  - iv. Since Applicant's conviction, Lawrence has been terminated from the Sheriff's Office for lying to superiors.
- c. Counsel was ineffective for advising Applicant not to testify.

- i. Counsel's advice not to testify went against Applicant's intended trial strategy. Because Applicant did not testify he was not able to challenge Lawrence nor Luckadoo's account of how they knew him.

Attached herewith and incorporated herein by reference are the records of the Charleston County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, the trial transcript, and the pleadings. Respondent reserves the right to amend its return upon the receipt of other relevant records.

#### IV.

Respondent submits Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286

S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, Counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

#### V.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRPC.

## VI.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

## VII.

WHEREFORE, having made its Amended Return and Motion to Vacate the Conditional Order of Dismissal, Respondent requests that the Conditional Order of Dismissal be vacated and that a hearing be held on the claims of ineffective assistance of counsel.

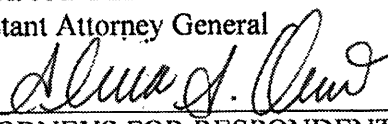
Respectfully submitted,

ALAN WILSON  
Attorney General

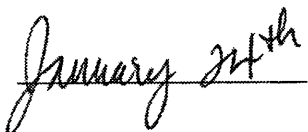
ROBERT BOLCHOZ  
Chief Deputy Attorney General

JOHANNA VALENZUELA  
Senior Assistant Deputy Attorney General

ALICIA A. OLIVE  
Assistant Attorney General

By:   
ATTORNEYS FOR RESPONDENT

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

 January 24<sup>th</sup>, 2017

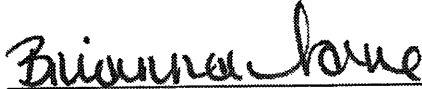
|                               |   |                              |
|-------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA       | ) |                              |
|                               | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF CHARLESTON          | ) |                              |
|                               | ) |                              |
|                               | ) | 2015-CP-10-6855              |
| MARVIN BOWENS-GREEN, #346650, | ) |                              |
|                               | ) |                              |
| Applicant,                    | ) |                              |
|                               | ) |                              |
| vs                            | ) | AFFIDAVIT OF SERVICE BY MAIL |
|                               | ) |                              |
| STATE OF SOUTH CAROLINA.      | ) |                              |
|                               | ) |                              |
| Respondent.                   | ) |                              |

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1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Amended Return and Motion to Vacate Conditional Order of Dismissal** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Marvin Bowens-Green, #346650  
Broad River Correctional Institution  
4460 Broad River Road  
Columbia, SC 29210**

DATED this 24<sup>th</sup> day of January, 2017.

  
Brianna Arnone, Legal Assistant  
For Respondent

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

Marvin Bowens-Green, #346650

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
IN THE NINTH JUDICIAL CIRCUIT

Case No.: 2015-CP-10-6855

ORDER VACATING CONDITIONAL  
ORDER OF DISMISSAL

FILED  
2017 FEB -3 PM 12:11  
JULIE J. ARMSTRONG  
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief ("PCR") filed December 18, 2015. Respondent made its Return and Motion to Dismiss on September 7, 2016, asking this Court to dismiss the application as successive and untimely. This Court issued a Conditional Order of Dismissal, which was filed October 4, 2016. Based on the following facts, this Court hereby vacates the Conditional Order of Dismissal of October 4, 2016.

#### PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Applicant was indicted at the April 2011 term of the Charleston County Grand Jury for armed robbery (2011-GS-10-2338) and possession of a firearm during the commission of a violent crime (2011-GS-10-2339). Applicant was represented by Andrew D. Grimes, Esquire, and Cody J. Groeber, Esquire. Applicant proceeded to trial June 11-14, 2012, before the Honorable Kristi L. Harrington and a jury, following which the jury found Applicant guilty as indicted. Judge Harrington sentenced Applicant to imprisonment for life without parole.



Following trial, a Motion to Vacate Sentence was filed on Applicant's behalf. By written Order dated July 31, 2012, Judge Harrington denied the Motion for Mistrial and Motion to Vacate Sentence.

A timely notice of appeal was filed on Applicant behalf. Susan B. Hackett, Esquire, of the Office of Appellate Defense, perfected the appeal. The Court of Appeals affirmed Applicant's conviction and sentence by published opinion filed March 11, 2015. State v. Green, 412 S.C. 65, 770 S.E.2d 424 (Ct. App. 2015). Applicant filed a timely Petition for Rehearing. By Order dated April 21, 2015, the Court of Appeals denied the Petition. Applicant then filed a Petition for Writ of Certiorari in the South Carolina Supreme Court, which was denied by Order dated September 3, 2015. The Remittitur was returned on September 16, 2015. Applicant filed the instant application for PCR challenging that conviction on December 18, 2015.

Respondent initially filed a Return and Motion to Dismiss this application on the basis that the application was untimely and successive to Applicant's 2013 PCR action which arose from a separate 2011 armed robbery conviction.<sup>1</sup>

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

In its original Return dated September 7, 2016, Respondent inadvertently alleged it was successive to Applicant's 2013 PCR action, which arose from a separate 2011 conviction (2009-GS-10-5376). Applicant's current appellate counsel brought this to Respondent's attention. As a result, Respondent made an Amended Return and Motion to Vacate the Conditional Order of Dismissal asking this Court to vacate the Conditional Order of Dismissal on the basis that Respondent erroneously moved to dismiss the December 18, 2015, application. In the Amended

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<sup>1</sup> Applicant was previously convicted for a separate armed robbery offense (2009-GS-10-5376) and was convicted of that offense following a jury trial on June 24, 2011. Applicant appealed the conviction and the appeal was dismissed. Thereafter, Applicant filed a PCR application with respect to that conviction (2013-CP-10-6492). Following an evidentiary hearing, the PCR judge denied that application. Applicant filed a timely notice of appeal and that appeal is currently pending before the South Carolina Supreme Court.

Return, Respondent requested that an evidentiary hearing be held on Applicant's allegations of ineffective assistance of counsel related to his 2012 armed robbery conviction.

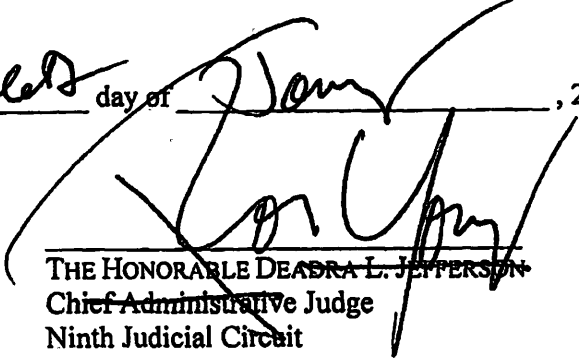
### CONCLUSION

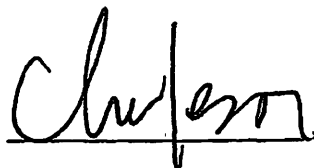
Based on the foregoing, this Court finds that the Conditional Order of Dismissal filed October 4, 2016, must be vacated. Clerk of Court is directed to appoint PCR counsel for Applicant and the evidentiary hearing should be scheduled for the next appropriate term for PCR hearings in the Ninth Judicial Circuit.

### IT IS THEREFORE ORDERED THAT:

1. The Conditional Order of Dismissal of October 4, 2016, is hereby **VACATED**;
2. The Clerk of Court is directed to appoint PCR counsel for Applicant;  
and
3. The evidentiary hearing should be scheduled for the next appropriate term for PCR hearings in the Ninth Judicial Circuit.

AND IT IS SO ORDERED this 22<sup>nd</sup> day of January, 2017.

  
THE HONORABLE DEADRA L. JEFFERSON  
Chief Administrative Judge  
Ninth Judicial Circuit

  
Clerk of Court, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

COURT OF COMMON PLEAS  
2015-CP-10-06855

MARVIN BOWENS-GREEN,

Applicant,

-VS-

STATE OF SOUTH CAROLINA,

Respondent.

TRANSCRIPT OF RECORD

May 21, 2018

Charleston, South Carolina

B E F O R E:

The Honorable Roger M. Young, Sr., Judge.

A P P E A R A N C E S:

Christopher Murphy, Esquire  
Attorney for the Applicant

Kelly Oppenheimer, Esquire  
Attorney for the Respondent

Amanda K. Haffenden, RPR, CRR  
Circuit Court Reporter

## E X A M I N A T I O N S

| <u>WITNESS</u>      | <u>DIRECT</u> | <u>CROSS</u> | <u>REDIRECT</u> | <u>RECROSS</u> |
|---------------------|---------------|--------------|-----------------|----------------|
| Marvin Bowens-Green | 5             | 24           | 28              | --             |
| Cody Groeber        | 30            | 39           | 43              | --             |

## E X H I B I T S

| <u>COURT'S</u> | <u>DESCRIPTION</u>                             | <u>MARKED</u> | <u>ADMITTED</u> |
|----------------|------------------------------------------------|---------------|-----------------|
| 1              | Transcript and notes<br>from Applicant's trial | 5             | --              |

1 (May 21, 2018.)

2 MS. OPPENHEIMER: The next, Your Honor, is  
3 Marvin Bowens-Green versus the state of South Carolina,  
4 docket number 2015-CP-10-6855.

5 During its April 2011 term, the Charleston  
6 County grand jury indicted applicant for armed robbery  
7 and possession of a firearm during the commission of a  
8 violent crime. Cody J. Groeber, Esquire represented him  
9 on these charges.

10 On June 11 through 14 of 2012, applicant  
11 proceeded to a jury trial before the Honorable Kristi  
12 Harrington. The jury convicted applicant as indicted on  
13 both counts, and Judge Harrington sentenced applicant to  
14 a term of imprisonment of life without the possibility of  
15 parole for armed robbery and a concurrent five years  
16 imprisonment for the weapons charge.

17 Applicant filed a timely notice of appeal,  
18 and appellate defender Susan B. Hackett of the South  
19 Carolina Commission of Indigent Defense, department of  
20 appellant defense, perfected an appeal on applicant's  
21 behalf. Following briefing and oral argument, the court  
22 of appeals affirmed applicant's conviction and the  
23 sentences in a published opinion.

24 Applicant petitioned for a rehearing, which  
25 was denied on April 21, 2015. Applicant then petitioned

1 the South Carolina Supreme Court for writ of certiorari.  
2 Supreme court denied the petition by written order dated  
3 September 3, 2015. The remittitur was issued on  
4 September 16, 2015. On December 18, 2016 applicant filed  
5 an application for post-conviction relief, alleging  
6 ineffective assistance of counsel for failing to object  
7 to the solicitor's comments vouching for the credibility  
8 of the State's witnesses; for failing to object to  
9 proffered testimony of Charles Lawrence and Justin  
10 Luckadoo; and for advising applicant not to testify.

11 The State made its return and motion to  
12 dismiss on September 7, 2016, requesting the application  
13 being summarily dismissed as excessive and untimely.  
14 This Court in its capacity as chief administrative judge  
15 for the ninth circuit signed a conditional order of  
16 dismissal, provisionally dismissing the application on  
17 September 27, 2016.

18 Thereafter, on January 24th, 2017, respondent  
19 submitted its amended return and motion to vacate the  
20 conditional order of dismissal, requesting the  
21 conditional order be vacated, and requesting an  
22 evidentiary hearing on the application. This Court  
23 signed an order vacating the conditional order of  
24 dismissal on January 26, 2017. Thereafter, through his  
25 counsel, applicant amended his application to include

1 various allegations concerning the State's closing  
2 argument.

3 Applicant is representing by Chris Murphy,  
4 and both he and Mr. Cody Groeber are present today.

5 THE COURT: All right. Mr. Murphy?

6 MR. MURPHY: Thank you, Your Honor. May it  
7 please the Court: I had sent -- and this might make  
8 things easier. I sent Ms. Oppenheimer a list of the  
9 specific instances of errors that we allege in the  
10 closing argument. We may want to make it a Court's  
11 exhibit, and you can look at it and read the closing to  
12 make a determination whether or not he was prejudiced,  
13 and that will help move things along, Your Honor.

14 THE COURT: All right.

15 (Court's Exhibit No. 1 was marked for  
16 identification.)

17 MR. MURPHY: And, Your Honor, we would simply  
18 rest on the record with those portions of the transcript  
19 as to the first part. We would then call Mr. Green to  
20 testify.

21 THE COURT: Okay. Come on up.

22 MARVIN BOWENS-GREEN,

23 having been first duly sworn,

24 was examined and testified as follows:

25 DIRECT EXAMINATION

1 BY MR. MURPHY:

2 Q. Mr. Green, you recall being charged with armed  
3 robbery here in Charleston County?

4 A. Correct.

5 Q. And you were represented by Mr. Cody Groeber?

6 A. Initially, Mr. Rodney Davis.

7 Q. Mr. Rodney Davis first represented you?

8 A. Correct.

9 Q. And then Mr. Groeber and Mr. Grimes took over?

10 A. About two months prior to the trial.

11 Q. Okay. And you understand Mr. Grimes has passed  
12 away; is that correct?

13 A. Correct.

14 Q. And you see Mr. Groeber in the audience here?

15 A. I see him.

16 Q. All right. Now, at the time of your charges, did  
17 you have any other pending charges against you?

18 A. Yes, sir, another robbery in Charleston County and  
19 one more in Colleton County.

20 Q. Were you serving time for any charges?

21 A. Yes, sir. I was already convicted of a 20-year  
22 sentence.

23 Q. All right. So you faced a 20-year sentence, and  
24 then this charge was coming up on the trial docket; is  
25 that correct?



1       A.   Subsequently, yes, sir.

2       Q.   With regard to Mr. Groeber, how many times did you  
3 meet with him to discuss your case?

4       A.   Meeting?

5       Q.   Yes.

6       A.   Physically?

7       Q.   Yes.

8       A.   Never. Excuse me. We met once. That's when he  
9 came to Lee correctional.

10      Q.   And in terms of talking on the phone, how many  
11 times did you talk to him about your case on the phone?

12      A.   The first call was to advise me he was replacing  
13 Mr. Davis. The second call was to offer me a State's  
14 20-year plea for the other subsequent charges, and the  
15 third was to make sure that I understood -- when I  
16 refused the 20-year plea on the second call, the third  
17 was to make sure I understood the fact that  
18 consecutive -- the difference between consecutive and  
19 concurrent.

20      Q.   All right. Now, let's talk about -- did you  
21 have -- so you had three conversations that you recall on  
22 the phone; is that correct?

23      A.   More or less, yes.

24      Q.   What about letters? Did you have any  
25 correspondence, that you were writing letters or he was

1 writing letters?

2 A. No, sir, not -- no, sir.

3 Q. All right. Let's talk about the second phone call  
4 where you testified that you had a plea offer of 20 years  
5 of concurrent. Was that the case?

6 A. Yes, sir.

7 Q. And what was your understanding? If you were  
8 serving a 20-year sentence at the time of that call, what  
9 did you think Mr. Groeber was telling you?

10 A. Concurrent means that you're going to plead,  
11 accept responsibility to the charge, but my release date  
12 doesn't change.

13 Q. And you understood your release date wasn't going  
14 to change?

15 A. Correct.

16 Q. And what was your response? You still wanted to  
17 go forward with trial?

18 A. Yes, sir.

19 Q. And why did you still want to go forward with  
20 trial?

21 A. When I was convicted of the 20 years, I had three  
22 charges pending, okay? At the initial trial, the State  
23 attempted to try me for two robberies, but I was before  
24 Markley Dennis, Your Honor, Markley Dennis, Jr., and he  
25 dismissed the offer of -- it was up to me whether I

1 wanted to be charged as one charge or two charges, and I  
2 chose one because we wanted a motion to sever the charges  
3 because the ruling was you couldn't identify the gender  
4 of the suspect on the film, or you couldn't tell the  
5 race.

6 Q. Okay. And you're talking specifically about the  
7 video camera?

8 A. Yes, sir, on one of the robberies.

9 Q. Now, let's get to -- and my question is, at this  
10 point, did you understand that if you pled guilty you  
11 were going to be released as you were currently serving  
12 that 20-year sentence?

13 A. Yes, sir. The release date would not change.

14 Q. So tell the Court why you wanted to go to trial,  
15 knowing that you weren't going to serve any additional  
16 time if you pled.

17 A. Namely because I was not guilty of the charges.

18 Q. All right. And that was your defense, that you  
19 were not guilty of the charges?

20 A. Correct.

21 Q. I assume you discussed issues that would support  
22 your defense with Mr. Groeber?

23 A. We did, shortly.

24 Q. What were those issues that you raised? Did you  
25 talk about alibi?

MARVIN BOWENS-GREEN - DIRECT EXAMINATION

1       A. Yes, sir. There was an alibi that you could go --  
2 there were three people who could place me outside of the  
3 robbery at the time of the robbery.

4       Q. And those three people, do you know who they are  
5 right now?

6       A. One was -- it's a store employee named -- from the  
7 Sunoco somewhere in Jacksonboro, South Carolina, not  
8 Ravenel, South Carolina. I entered that store -- I  
9 entered that store on the morning of the robbery, and the  
10 cook, Ms. Marian Grant, she's aware that I came in the  
11 store, and my father. I had to deal with him shortly  
12 after I left that store.

13       Q. So what you're saying is prior to the robbery that  
14 we're here about today, you were at a Jacksonboro store  
15 earlier that day?

16       A. Witnesses saw me in the store, but he had an  
17 opportunity to interview the witnesses to see the story  
18 they would give.

19       Q. And, to your knowledge, did Mr. Groeber interview  
20 these witnesses at all?

21       A. He did not.

22       Q. And did you discuss him not interviewing these  
23 witnesses prior to going to trial?

24       A. We did, and him and Mr. Grimes, they were more  
25 focussed on the fact that Lawrence gave false testimony

1 under the grand jury, according to them, by stating the  
2 serial number of the gun in the indictment.

3 Q. All right. You're talking about Lawrence.  
4 Lawrence was a police officer; is that correct?

5 A. Detective Charles Lawrence.

6 Q. We'll go back to him, but let's specifically talk  
7 about these witnesses, potential alibi witnesses. Prior  
8 to going to trial, you knew they were not going to be  
9 called, correct?

10 A. Not necessarily that they weren't going to be  
11 called.

12 Q. Well, were they --

13 A. They were not available. He did not take the time  
14 to have them present at the trial, and that was disclosed  
15 at the trial.

16 Q. All right. And had you -- did you know prior that  
17 they were not available or they were not going to be  
18 called?

19 A. Well, I mean, they were accessible, so I wouldn't  
20 imagine them not being available.

21 Q. All right. And do you know if the offer for 20  
22 years was still on the table at that point when you found  
23 out that they were not available?

24 A. Yes, sir. The 20-year sentence was on the table  
25 up until the trial began.

MARVIN BOWENS-GREEN - DIRECT EXAMINATION

1 Q. So once the trial started, it was off?

2 A. It was voided.

3 Q. Do you know of any other investigation into these  
4 witnesses that Mr. Groeber did or did not do?

5 A. He did no investigations into the witnesses.

6 Q. All right. And what do you think these witnesses  
7 would have shown or demonstrated had this investigation  
8 been done?

9 A. Possibly, like I said, they could vouch for me not  
10 being at that robbery, at that scene of the location at  
11 the time of the robbery.

12 Q. Okay. Now, anything else with regard to the alibi  
13 witnesses?

14 A. I mean -- and it should be noted that I was under  
15 a GPS ankle monitoring system at the time.

16 MS. OPPENHEIMER: Objection. There's no  
17 evidence of that, Your Honor.

18 THE APPLICANT: Your Honor, I was -- can I  
19 speak, Your Honor?

20 THE COURT: Hold on.

21 MR. MURPHY: He is testifying, and I've let  
22 the attorney general know that he says that he was under  
23 GPS monitoring at the time of this crime. I have not  
24 been able to find any evidence that that is true;  
25 however, he keeps saying it, and that would show, if

1 those records still exist, where he was at the time.

2 THE COURT: Well, do you have any evidence,  
3 though, that you intend to present?

4 MR. MURPHY: Judge, what I was planning to do  
5 was ask for 30 days to keep the record open to track this  
6 down, but, again, I've been told this -- I've talked to  
7 Mr. Groeber who didn't know anything about this, and I  
8 have seen nothing that exists, but, to me, that would be  
9 the whole case, if it does exist and if it shows where he  
10 was.

11 THE COURT: I'll allow it. Go ahead.

12 BY MR. MURPHY:

13 Q. Now, let's talk about GPS monitoring. Did you  
14 have an ankle bracelet on at the time?

15 A. I did. I was -- in 2009, in October, I can't  
16 remember the specific date, I was charged with a robbery  
17 in Colleton County. It was dropped, but I was charged  
18 with a robbery in Colleton County. The conditions of  
19 that bond required me to wear a GPS ankle monitor system.  
20 My bondsman -- if I'm not mistaken, I think his name was  
21 Larry Bodison.

22 Q. And I've asked you for information about this GPS  
23 monitoring, haven't I?

24 A. Yes, sir. We're under lockdown at the institution  
25 I'm at. I don't have access to a telephone. We're being

## MARVIN BOWENS-GREEN - DIRECT EXAMINATION

1 kept in a room with the canteen. Once I ordered  
2 envelopes, but because we aren't allowed out of the room  
3 and the officers won't even allow canteen bags or our  
4 canteen list, my envelopes were not provided to me, so I  
5 wasn't able to write you, but I have told you about this.

6 Q. You have.

7 A. Maybe three months prior.

8 Q. Yes, sir.

9 A. So you had an opportunity also to investigate.

10 Q. Yes, sir. Now, we are talking about the alibi.  
11 We talked about the ankle monitoring, and any other  
12 issues? You talked about Detective Lawrence.

13 A. Yes, sir.

14 Q. Okay. Specifically, what did Cody -- or do you  
15 allege Cody did incorrectly with regard to Lawrence?

16 A. All right. It started off with Deputy Justin  
17 Luckadoo. When he testified that the identity of knowing  
18 who -- that he knew who the suspect was because of  
19 newspapers, seeing him on the news, and just being in the  
20 general area, he knew the suspect as a Melvin Bowens.

21 Q. Now, that suspect that he was talking about was  
22 you; is that correct?

23 A. No, sir.

24 Q. It was not. And who was it?

25 A. Evidently, he says -- evidently, he was not



1 questioned to the extent to get a full understanding, but  
2 evidently he said he knew the suspect from the newspaper  
3 and the news, seen him in the area.

4 My brother Melvin Bowens, he was charged with a  
5 robbery December 17, 2010 at the Bank of Walterboro in  
6 Walterboro, Colleton County, South Carolina, Walterboro.  
7 He was seen in several news clippings following -- from  
8 the 17th of December all the way up until the -- I want  
9 to say the 27th of December. He may have been featured  
10 three or four times in theses news clippings, the Post &  
11 Courier, the Press & Standard. The Post & Courier,  
12 that's the Charleston-based newspaper; the Press &  
13 Standard is the Colleton County-based newspaper.

14 Deputy Luckadoo himself said he saw this person,  
15 Melvin Bowens, in the newspaper and on the news. That's  
16 how he became aware to the suspect. The person that he  
17 saw in the clipping -- because, Your Honor, it was  
18 discovered at the trial -- I informed Mr. Cody Groeber  
19 and Andrew Grimes that I had never been featured in any  
20 wanted posters, newspaper clippings, or on the television  
21 pertaining to a robbery until the actual incident itself,  
22 and we got -- not into an argument, but we debated back  
23 and forth, and they used their laptop and attempted to  
24 Google what he was speaking on. They could not produce  
25 it.

## MARVIN BOWENS-GREEN - DIRECT EXAMINATION

1 I asked them to search Melvin Bowens, bank robbery  
2 suspect before it came up, and Mr. Grimes stated that  
3 that's what Deputy Luckadoo was speaking on, that person  
4 in the photo, and when I told him that was not me, he was  
5 in disbelief because he said the resemblance was so  
6 uncanny, he could not believe that wasn't me.

7 He had showed it to Mr. Groeber and told him at  
8 the table, We have a new defense. The photo isn't him,  
9 but Deputy Luckadoo was never questioned to the extent on  
10 whether he understood that Marvin Bowens-Green and Melvin  
11 Bowens were two different people.

12 Q. All right. Now, other than that testimony, we've  
13 talked about the alibi, the GPS, and now Luckadoo, is  
14 there any other errors that you allege?

15 A. Okay. And it goes -- like, the Detective Lawrence  
16 part, he was testifying he was assisting in the  
17 allegation that he interviewed me in 2008 in an  
18 interview, maybe two or three possible hours long. At my  
19 trial, prior to -- at the trial, I was convicted and  
20 sentenced to 20 years. We had a Biggers hearing about a  
21 statement I was giving, and there was no start time --  
22 there was a start time, excuse me. There was a start  
23 time on the form, but there was no finish time on the  
24 form, so it was -- he testified prior to me in Biggers,  
25 and I testified after him, and it came down to the ruling

1 of the voluntariness of the statement, and one of the  
2 elements was the time length.

3 He said that the interview at the 2011 trial, when  
4 I was convicted and sentenced to 20 years, Detective  
5 Lawrence testified that the December 28, 2008 interview  
6 was one hour or an hour-and-a-half long. He was positive  
7 of that. Less than a year later, when where I was  
8 sentenced to life, he gave testimony regarding the same  
9 situation. He said that it was two or three hours long,  
10 and he was positive of that. At that time, I informed  
11 him then that the testimony was -- it was inconsistent.  
12 He said something different at the first trial, and we  
13 had the record, which I had my transcript from the first  
14 trial with me, and I told him we could review it and they  
15 would see, but they didn't review it because his  
16 testimony to the grand jury was first, so he would not be  
17 a credible witness in the eyes of the jury or the judge.

18 Q. And would that be the extent of your allegations  
19 against Mr. Groeber?

20 A. As far as preparations or the investigation of  
21 the --

22 Q. Yes, sir.

23 A. Yes.

24 Q. And are you alleging any other errors that he did?

25 A. Other than -- I want to get into the bolstering.

MARVIN BOWENS-GREEN - DIRECT EXAMINATION

1       Q. I have marked that as an exhibit, that letter that  
2 you sent me, and the Court is going to review that.  
3 We're resting on the record, okay, about the bolstering  
4 and those issues that you raised, okay?

5       A. I would like to go into it to explain to Your  
6 Honor my belief that --

7       Q. Okay. If I could --

8               THE COURT: Let your lawyer speak for just a  
9 second.

10              MR. MURPHY: Right. If I could give the  
11 witness Exhibit 1 to look at and make sure those are the  
12 issues he wanted to raise.

13 By MR. MURPHY:

14       Q. Here's Exhibit 1, sir, and these are remarks that  
15 you took issue with during the closing argument; is that  
16 true?

17       A. Excuse me?

18       Q. These are remarks that were made during the  
19 closing argument that Mr. Groeber did not object to, and  
20 they're in orange.

21       A. Yes, sir.

22              MR. MURPHY: And, Your Honor, we would rest  
23 on that.

24              THE APPLICANT: Your Honor, I would kindly  
25 request that you let me explain why it's my belief that

1 some of these statements amount to improper bolstering.

2 THE COURT: Well, that sounds like another  
3 argument, which is what your lawyer makes. I just need  
4 to have it in the record. Your lawyer does the arguing  
5 about why it's considered bolstering.

6 THE APPLICANT: Your Honor, with all due  
7 respect, I'm not too confident in his interpretation. I  
8 understand he went to school and everything of that  
9 nature for it, but, please can I explain it?

10 THE COURT: Go ahead.

11 THE APPLICANT: Line 1, page 75, the  
12 bolstering, a statement to me, which amounts to improper  
13 bolstering to me; page 725, bolstering, inflammatory  
14 statement that was meant to appeal to the jurors'  
15 emotion, and the statement is, But maybe the thinking was  
16 who would believe this immigrant anyway? Who would  
17 come -- excuse me. Excuse me. Who would believe this  
18 man who couldn't even come into this courtroom and  
19 couldn't speak English?

20 Your Honor, you know, it's improper for the  
21 prosecutor to appeal to the racial or ethical and --  
22 racial ethical epithets or remarks, and he highlighted  
23 the fact that the victim was an immigrant of the crime,  
24 trying to produce a passion from the jury.

25 We are not aware of who feel -- what person

1 on the jury felt what type of way toward an immigrant  
2 sort of thing, whether they're going to be sympathetic  
3 toward them or not, whether they're going to be partial  
4 or impartial. Like, page 729, bolstering: I believe  
5 that he undermined the severity of the necessity for  
6 making a positive identification by stating before I show  
7 it to you, though, meaning the videotape, I don't think  
8 all of you are going to be able to identify this man.

9 Obviously, I don't think that can be done,  
10 and that this is what Dr. Beaudry was telling you about,  
11 so just because all of you can't and some of you may does  
12 not mean you have a reasonable doubt.

13 It runs on to page 730, continues: This case  
14 is based on the witnesses who knew him, not on your  
15 ability to look at this video and determine if it's him.  
16 To me, it seems that the evidence isn't being given its  
17 fair weight because interpreting to -- the jury can  
18 interpret that, so there's no need for them to view the  
19 film, period. Even though they feel that it isn't me,  
20 he's saying there's no need -- that's not the reasonable  
21 doubt. Just believe what the witness says.

22 Okay. Page 730, bolstering: This case is  
23 based on witnesses who knew him, not on your ability to  
24 look at the video and determine it is him. That's  
25 explicit vouching for the witness. Page 731, again

1 explicit vouching: They are all telling you they know.  
2 They are all not mistaken. They are all actually  
3 correct. That's error of law.

4 Page 734, bolstering personal opinion, and,  
5 as he stated, just because they weren't able to take an  
6 exact translation that day at the scene about this is the  
7 man who comes in and buys Newport cigarettes, usually a  
8 lottery ticket, and sometimes gas and he jokes with us  
9 about Obama does not mean it didn't happen. That's a  
10 personal opinion because he was not at the crime to  
11 determine what actually did happen. He made himself a  
12 witness.

13 Page 734, explicit vouching: You judge their  
14 credibility, and you determine that they are lying to  
15 you, and they are not. Why would they? This isn't about  
16 their credibility. They are telling you the truth. The  
17 statement, that statement right there, this isn't about  
18 their credibility. That's error because the assessment  
19 of witness credibility is within the exclusive province  
20 of the jury, so therefore that's an error.

21 Page 738, explicit vouching: You heard from  
22 Ms. Patel, and you decide to believe her or not. There's  
23 every reason in the world to believe her. Does she know  
24 or is she lying? She is not; again, vouching for the  
25 witness, becoming a witness. Page 738, explicit personal

MARVIN BOWENS-GREEN - DIRECT EXAMINATION

1 assurance of witness veracity: You can believe all those  
2 witnesses and you can believe the truth in this case.  
3 Page 739, placing the government prestige behind the  
4 witness, stating if you knew with certainty what happened  
5 in this case, you wouldn't be sitting where you are. You  
6 would have taken the witness stand and told the jury what  
7 you know.

8 People who are certain have certain  
9 information. The jury can interpret that several ways,  
10 but I think people who take the stand are certain. They  
11 have certain information. There's no room for any  
12 consideration of the jury. They cannot even fathom the  
13 idea of all the witnesses even being truthful.

14 That would be all for the list, Your Honor,  
15 the exhibit, but, basically, Your Honor --

16 THE COURT: It's already admitted.

17 THE APPLICANT: Excuse me?

18 THE COURT: It's already admitted.

19 THE APPLICANT: Thank you, Your Honor. There  
20 are at least ten instances of improper bolstering  
21 committed by the prosecutor that trial counsel failed to  
22 object to. These repetitive errors unduly influenced the  
23 jury who could easily interpret the many instances of  
24 vouching as an official endorsement of the witness by the  
25 prosecutor's office.



1           The Court did instruct the jury the law does  
2 not allow me to have an opinion about the facts in this  
3 case. Ladies and gentlemen: It is your duty to  
4 determine the effect, value, and the weight and truth of  
5 the evidence that is presented during a trial, but then  
6 the instruction did not identify the prosecutor's comment  
7 as improper statements that should be disregarded, and  
8 that's more so because trial counsel failed to object to  
9 the statement itself.

10 BY MR. MURPHY:

11       Q. All right, sir. Is there any other errors you  
12 allege? We've talked about a lot so far. Does that wrap  
13 them up?

14       A. I wouldn't say it wraps it up. Because of the  
15 situation I'm in, a life sentence, I want to present the  
16 best case possible. As I said, just -- Your Honor, me  
17 and Mr. Groeber -- like I said, I don't know how many  
18 years he had experience at the time of him representing  
19 me, but I feel like he was -- I may have been the first  
20 case, I feel, because that's -- we had no decent -- the  
21 case went south once they could not prove -- they  
22 couldn't get a photo admitted of the defendant who was  
23 the bank robber from Colleton County that resembled the  
24 person in the photo of the surveillance tape from the  
25 robbery which I was convicted of. When he wasn't able to

## MARVIN BOWENS-GREEN - CROSS-EXAMINATION

1 complete that, of getting that photo admitted and  
2 presenting to the Court that Lawrence's testimony to the  
3 grand jury by saying that the serial number -- stating  
4 the serial number in the indictment in the case, there  
5 was no defense.

6 MR. MURPHY: All right. That would be all.  
7 Please answer any questions the attorney general has.

8 CROSS-EXAMINATION

9 BY MS. OPPENHEIMER:

10 Q. Do you recall reviewing the discovery with  
11 Mr. Groeber and Mr. Grimes?

12 A. Do I recall the discovery?

13 Q. Do you recall reviewing it?

14 A. Not sure.

15 Q. Okay. And you allege there were several alibi  
16 witnesses that could put you elsewhere at the time of  
17 this crime. Did you ever give Mr. Groeber -- did you  
18 ever give Mr. Groeber the names of any those people?

19 A. I gave Mr. Groeber a letter which I believe my  
20 trial counsel has -- I mean, my PCR representative has.

21 Q. A letter giving those names of the alibi  
22 witnesses? You just said it was a store employee.

23 A. The letter kind of detailed the events of that  
24 morning. I went into the Sunoco in Jacksonboro, South  
25 Carolina, and Ms. Marian Wigfall, her -- Ms. Marian, the

1 cook, which would be Hazel, Vinny would be -- Vinny is  
2 the clerk who worked the register. He was in the store.  
3 The cook was in the store who also saw me, and, as I  
4 stated, I had to do some running for my father that  
5 morning.

6 Q. Are any of those people at the Sunoco here today?

7 A. No, ma'am.

8 Q. Have you talked to them at all?

9 A. No, ma'am.

10 Q. So you don't know, really, what they could say  
11 about where you were.

12 A. As of today, no, I don't know. I didn't know what  
13 they would say then, but I know it would be that they  
14 would have testified to my whereabouts. I can't put  
15 words in their mouth, no.

16 Q. Okay. You weren't just identified by Deputy  
17 Luckadoo, correct?

18 A. No, ma'am. Are you speaking on the trial?

19 Q. Correct. At the trial, the victim got up and IDed  
20 you, right?

21 A. Yes, ma'am.

22 Q. And that was based on prior dealings with you in  
23 his store?

24 A. So he says, yes, ma'am.

25 Q. And his wife identified you as well, correct?

1       A. She testified that her and her husband discussed  
2 the case, and then they were able to come to the  
3 conclusion that it was the man. So her testimony, her  
4 own words, show her testimony was influenced by her  
5 husband's decision.

6       Q. But your attorney asked her that on  
7 cross-examination, right?

8       A. I think because they were immigrants, and I don't  
9 know if they really understood the actual process of what  
10 he was trying to get them to understand, but she says  
11 herself, me and my husband watched the video a couple of  
12 times, and I discussed it with him, and he was the same  
13 customer who jokes about the ID, and then we finally  
14 realized that it was the man.

15             Did you know it was the man? When I saw the video  
16 I realized it. Are you certain that this man in the  
17 video is him? Yes. Is there any doubt? I don't think  
18 so.

19       Q. Well, she also said she would recognize you by  
20 your walk and mannerisms after Detective Lawrence  
21 testified.

22       A. Yes, ma'am.

23       Q. And she also knew you from prior dealings in the  
24 store?

25       A. Excuse me. Matter of fact, to be more precise,

1 she said the walk and the mannerisms, but that was also  
2 an issue, and when she testified on direct, she never  
3 spoke on the mannerisms, and then she tried to allege  
4 that she recognized the mannerisms, and that was the  
5 issue at trial, and Cody Groeber, he didn't address that.

6 Q. Now, going back to Detective Lawrence, you don't  
7 deny you were interviewed by him, do you?

8 A. In 2008, no, ma'am.

9 Q. Okay. So you dispute how long the interview  
10 lasted?

11 A. No, only his testimony.

12 Q. Okay. But you were interviewed by Detective  
13 Lawrence?

14 A. Yes, ma'am, for an unrelated event.

15 MS. OPPENHEIMER: I have no further  
16 questions.

17 MR. MURPHY: Nothing further, Your Honor.

18 THE COURT: You can step down.

19 THE APPLICANT: Your Honor, he doesn't want  
20 to present a whole defense for me.

21 THE COURT: Well, he asked you all the  
22 questions. He just doesn't need to ask you any more.

23 THE APPLICANT: Your Honor, could I point out  
24 for the record, Madame attorney general, when she asked  
25 Ms. Patel, wife, was she able to identify me on her own?

1 Page 404, the question is: Did you and your husband both  
2 know that he was a regular customer independent of each  
3 other? When we saw the video, we talked and we finally  
4 realized, we would be plural, so she's admitting she  
5 colluded with her husband in producing in identification.

6 MS. OPPENHEIMER: Your Honor, that's -- the  
7 questioning has ended at this point, and I would ask  
8 that --

9 THE APPLICANT: Excuse me, Your Honor. I was  
10 only --

11 THE COURT: I'll tell you what: Let's take a  
12 five-minute break. You can talk with your lawyer, see if  
13 you need to ask any more questions.

14 THE APPLICANT: Thank you, Your Honor. I  
15 really appreciate that.

16 THE COURT: I don't need that. It stays  
17 right there.

18 (Recess taken.)

19 THE COURT: All right. We're back.  
20 Mr. Stucky {sic}, do you have any questions you want to  
21 ask Mr. Green?

22 MR. MURPHY: One question. May it please the  
23 Court, Mr. Green:

24 REDIRECT EXAMINATION

25 BY MR. MURPHY:

1 Q. During cross-examination it was implied that the  
2 victim's wife independently recognized you. Do you  
3 recall that line of questioning?

4 A. Yes. Are you talking about from the attorney  
5 general?

6 Q. Yes.

7 A. Yes, sir.

8 Q. I would like you to point out on the record  
9 instances where that wasn't the case for the Court to  
10 consider.

11 A. As far as the identification being independent?

12 Q. That's correct.

13 A. Page 444 -- excuse me, 440.

14 Q. What line?

15 A. Line 12, question.

16 Q. To what line? Line 12 to what?

17 A. 15.

18 Q. And your issue is that Cody did not object to that  
19 answer at all?

20 A. That's correct.

21 MR. MURPHY: That would be all we have, Your  
22 Honor.

23 THE COURT: You want to ask him anything  
24 based on that?

25 MS. OPPENHEIMER: No, Your Honor.

CODY GROEBER - DIRECT EXAMINATION

1 THE COURT: All right. You may step down.  
2 Do you have any other witnesses?

3 MR. MURPHY: We would call Mr. Groeber.

4 THE COURT: All right.

5 CODY GROEBER,  
6 having been first duly sworn,  
7 was examined and testified as follows:

8 DIRECT EXAMINATION

9 THE WITNESS: My name is Cody Groeber,  
10 G-r-o-e-b-e-r.

11 BY MR. MURPHY:

12 Q. Mr. Groeber, I apologize if I mispronounced your  
13 name during the course of this hearing. Let me ask you  
14 this: At the time you were handling Mr. Green's case,  
15 how much experience had you had?

16 A. That was in 2010, 2011? I started with the state  
17 public defender's office in January of 2008.

18 Q. And were you the primary attorney on this case or  
19 was Mr. Grimes?

20 A. I was the primary attorney.

21 Q. Now, you've heard -- let me ask you this: How  
22 many times did you meet with Mr. Green to discuss the  
23 case?

24 A. We met in person at Lee correctional once before  
25 the trial. We spoke on the phone at least three times,



1 as he indicated.

2 Q. All right. And I understand that he testified  
3 there was an offer for a 20 year concurrent sentence; is  
4 that correct?

5 A. That's correct.

6 Q. And did you convey that offer to Mr. Green?

7 A. I did, both on the phone and in person.

8 Q. And let me ask you this, because it sounds odd  
9 that he would have turned that down. Was there any issue  
10 communicating with him what was being offered and what  
11 his sentence would be?

12 A. No.

13 Q. Okay. Did you have any understanding or any  
14 concerns about why he would decide to go to trial rather  
15 than -- and face a life sentence rather than accept a  
16 concurrent 20-year sentence?

17 A. I always am concerned when someone is facing a  
18 life sentence, but I felt confident that he understood it  
19 and he wanted a trial because he was innocent.

20 Q. And did you ever have the mental evaluation done  
21 of Mr. Green?

22 A. No.

23 Q. Was there any reason to have one done?

24 A. I didn't have any reason to feel one was needed.

25 Q. When talking to him he seemed lucid and understood

1 everything you were talking about?

2 A. Yes.

3 Q. Now, you heard testimony about him being under GPS  
4 monitoring at the time of this crime. Do you recall  
5 that?

6 A. I do.

7 Q. Did you know anything about any GPS monitoring?

8 A. I did not.

9 Q. Did you talk with Mr. Bowens's father about this  
10 case prior to trial?

11 A. Yes.

12 Q. And did he ever mention anything about GPS  
13 monitoring?

14 A. No.

15 Q. Is it possible that someone would have talked to  
16 Mr. Grimes about GPS monitoring?

17 A. I'm sure that if either Mr. Grimes or I heard he  
18 was on the GPS monitor that is something we would have  
19 investigated.

20 Q. Now, you also heard about some possible alibi  
21 witnesses that were discussed.

22 A. Yes.

23 Q. Did you have any investigation into these possible  
24 alibis?

25 A. Yes, we did.

1 Q. What did you do?

2 A. My investigator at the time was named Lee Ginn.  
3 He worked for us at the public defender's office, and  
4 based on the information that Mr. Bowens-Green gave me  
5 and the names, specifically, and locations that he gave  
6 me, Mr. Ginn went and interviewed some of the people of  
7 the names that Mr. Bowens-Green gave me.

8 Q. And what did his interviews turn up?

9 A. If I may refer to my file, on -- so I'm reading a  
10 report from Mr. Ginn that on Friday, May 18th of 2012 at  
11 8:15 a.m., he drove to a Sunoco on the -- excuse me. So  
12 initially Mr. Ginn went and interviewed Mr. Patel, the  
13 victim of the robbery in this case, and that was on the  
14 18th, and on the same day Mr. Ginn went to the Sunoco  
15 convenience store in Jacksonboro, South Carolina at 16812  
16 ACE Basin Parkway, and he was trying to speak with  
17 someone about a telephone call placed to their store from  
18 the store in Ravenel.

19 My memory of this is Mr. Bowens-Green said he  
20 overheard that there was some kind of relationship  
21 between Mr. Patel, the victim in the case of the armed  
22 robbery in Ravenel, with a Mr. Patel, different  
23 Mr. Patel, who ran the gas station in Jacksonboro and  
24 that there was a call made letting them know from one of  
25 the Patels to the other about this is a person who did

1 this robbery.

2 So -- I'm happy to read this report if need be --

3 Q. Let me ask you this: For a timeline, was it Mr.  
4 Bowens's position he was in the Jacksonboro Sunoco  
5 earlier this the day than the crime?

6 A. You know, in my experience, people's memories of  
7 exact times and places is not always accurate, and so  
8 my -- once he told me that he was in a different store  
9 during that day, I wanted to see if that could be a valid  
10 alibi for us. So that was our whole purpose for  
11 investigating this, for talking with these witnesses, and  
12 I don't remember exactly what time he told me. He just  
13 told me he was there that day.

14 Q. Let me ask you this: Did you determine whether or  
15 not it was a valid alibi or not?

16 A. No, and when I say that, I mean that we did not  
17 develop from those witnesses a strong alibi, either  
18 because they didn't remember or they did not do the  
19 things that were said that they had done.

20 In other words, I felt it would have been -- if we  
21 had tried to present it, it would have been, at best, a  
22 weak alibi and may have distracted from our -- a stronger  
23 presentation of what our defense would be.

24 Q. Now, you've also heard about a picture that he  
25 mentioned at trial that was -- you attempted to get

1 submitted into evidence.

2 A. Yes.

3 Q. And I believe, and I want you to correct me if I'm  
4 wrong, you were cross-examining the mother?

5 A. We attempted to -- so Mr. Bowens-Green's brother,  
6 half brother, I'm not quite sure the relationship, I  
7 think his name was Melvin Bowens, was arrested for a  
8 robbery of a bank in Walterboro, and the photographs that  
9 we saw from that bank robbery looked similar to the  
10 photographs of the person that was seen in this case.

11 Q. Right.

12 A. And so we were -- and we attempted to introduce  
13 that photograph of this other person to the trial to  
14 discredit Mrs. Patel's ability to identify people from a  
15 video or on a photograph. We attempted to do it. We  
16 were unable to do it. We also attempted and I believe we  
17 proffered the picture and/or testimony from Tanya Green,  
18 who is the mother of, I think, both of the gentlemen,  
19 about this picture and also attempting to introduce it is  
20 possible it is someone else that committed this robbery.

21 Q. And when you say attempted, you moved, and the  
22 judge sustained an objection to admitting that into  
23 evidence?

24 A. Yes.

25 Q. Now, there's some questions about either Detective

CODY GROEBER - DIRECT EXAMINATION

1 Lawrence or Detective Luckadoo giving inconsistent  
2 testimony. Do you recall that at all?

3 A. Yes.

4 Q. And can you explain why there was no objection  
5 made to this inconsistent testimony?

6 A. Well, there was in -- I mean, I guess it depends  
7 on what types of inconsistencies you're talking about.

8 Q. Specifically, Mr. Bowens testified that the  
9 interview that, I believe it was Luckadoo, had lasted one  
10 hour versus two-and-a-half hours that he testified to.

11 A. So our position on that was that there was no way  
12 to verify the exact length of time that this particular  
13 interview happened. That was a really delicate subject,  
14 at least for our purposes for trial, because part of our  
15 strategy was to keep out all of the references to the  
16 other armed robberies that Mr. Bowens-Green was either  
17 charged with or had been convicted of, and to go into  
18 those realms, either through questioning or through  
19 presentation of additional testimony, was risky, in our  
20 opinion.

21 And, also, I don't know -- there was no evidence  
22 to challenge Mr. -- was it Lawrence, I believe, that  
23 you're asking about?

24 Q. Yes, either Lawrence or Luckadoo.

25 A. We don't have any evidence to contradict that

1 except for what Mr. Bowens-Green told us, and that means  
2 the only way to introduce that evidence was for him to  
3 testify. So --

4 Q. Now, I believe it was Detective Lawrence mentioned  
5 a video that had an unusual walk or shuffle by  
6 Mr. Bowens. You recall that?

7 A. Yes.

8 Q. And did you have a copy of that video that he  
9 alluded to?

10 A. Well, are you talking about the video that -- the  
11 main video in this case or a different video?

12 Q. There was a separate video other than what was  
13 introduced. Do you know anything about that?

14 A. I don't remember that.

15 Q. Do you have any names of any witnesses, alibi  
16 witnesses, that your investigator spoke with?

17 A. Yes.

18 Q. And please tell the Court those names.

19 A. One of the people's names that we were given was  
20 Tyrone Patel, and Mr. Ginn looked -- asked the owner of  
21 the Ravenel store if he knew of anyone named Tyrone  
22 Patel, and he said no. Another person that we were  
23 looking for was Vinny. Mr. Ginn spoke with a cook at the  
24 Jacksonboro store, and that cook said there was a Vinny  
25 that worked as a clerk in the store back in 2010 and

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1 thought his last name might be Brown. Mr. Ginn also  
2 spoke with Ms. Lena V. Simms. She said she was the  
3 mother of Vinny Simms and that he lived with her.

4 Q. And you have some notes there?

5 A. I do.

6 Q. And what I would ask is to mark those as a Court's  
7 exhibit.

8 A. Sure.

9 Q. Let me ask you this question, sir: Did Mr. Green  
10 give you any specific witnesses to interview in  
11 preparation for trial?

12 A. Only those that I'm mentioning now.

13 Q. Would Mr. Grimes have talked to Mr. Bowens outside  
14 of your presence that you know of?

15 A. It's possible. I do think at some point at least  
16 during the trial, not before the trial. I don't know  
17 that they had any contact before the trial.

18 Q. Let me ask you this: It was talked about Rodney  
19 Davis had some involvement in this case at the beginning.  
20 Do you know what Mr. Davis's role was in this trial?

21 MS. OPPENHEIMER: Objection. No personal  
22 knowledge of what another attorney did on this case.

23 MR. MURPHY: I'm not asking what he did, I'm  
24 just asking his involvement.

25 THE COURT: If he has any knowledge, he can



1 tell him.

2 THE WITNESS: Mr. Davis represented  
3 Mr. Bowens-Green initially. They did get a severance and  
4 tried the other case, and Mr. Bowens-Green lost that  
5 case.

6 BY MR. MURPHY:

7 Q. And that was the original charge?

8 A. So that was trial one, and then I came in.  
9 Mr. Davis left the office at that time, and I was  
10 appointed to take over the case.

11 Q. You inherited the case?

12 A. Yes.

13 Q. Fair enough.

14 MR. MURPHY: That's all the questions I have.  
15 Thank you.

16 THE COURT: Cross?

17 CROSS-EXAMINATION

18 BY MS. OPPENHEIMER:

19 Q. Did you file any Brady or Rule 5 motions?

20 A. I don't know that I personally filed them. I  
21 think they had already been filed when I got the case.

22 Q. And would you have received whatever was obtained  
23 through those --

24 A. Yes.

25 Q. -- from Mr. Davis? And did you review that with

1 Mr. Bowens-Green?

2 A. Yes.

3 Q. And can you give the Court a general overview of  
4 what the State alleged occurred.

5 A. That Mr. Bowens-Green went into a gas station in  
6 Ravenel, presented a revolver, got money, and then left.

7 Q. Okay. Now, there were several witnesses who could  
8 ID Mr. Bowens-Green, right?

9 A. Yes.

10 Q. And did you have a Biggers hearing to try and  
11 suppress those?

12 A. Yes.

13 Q. And what was their basis for that?

14 A. There were two officers who testified that they  
15 recognized Mr. Bowens-Green from different interactions  
16 with him or from seeing things with his picture on it,  
17 and so we challenged those identifications. There were  
18 also two eyewitnesses who were -- one of whom was the  
19 victim of the actual armed robbery, and the other was his  
20 wife who also was regularly in the store and watched the  
21 video itself.

22 Q. Okay. Now, there's been some discussion that  
23 Ms. Patel might not have -- she might only have IDed Mr.  
24 Bowens-Green after watching the video with her husband.  
25 Did you highlight that fact during cross-examination?

1       A.   I believe I did.

2       Q.   And did she -- do you recall her testifying that  
3 she had independent knowledge of the applicant from the  
4 Obama joke, from coming into the store?

5       A.   Yeah. She testified that she recognized him as a  
6 regular customer.

7       Q.   Okay. And you investigated these potential alibi  
8 witnesses, correct?

9       A.   Yes.

10      Q.   And nothing really came of it?

11      A.   Correct.

12      Q.   And you had no information that Mr. Bowens-Green  
13 was on an ankle monitor?

14      A.   No.

15      Q.   Now, with this picture from the Walterboro bank  
16 robbery, you attempted to introduce that, right?

17      A.   Yes.

18      Q.   And do you recall why it was excluded?

19      A.   I don't recall off the top of my head. One of the  
20 problems was -- I believe that one was that the photo  
21 itself was fuzzy, the one that we had, and then there was  
22 an objection that we were attempting to introduce the  
23 photograph as evidence of third party guilt, so that was  
24 another basis for us being unable to introduce it.

25      Q.   Now, did you, prior to trial, discuss with the

1 applicant the elements of each charge and what the State  
2 would have to prove?

3 A. Yes.

4 Q. And did you discuss his version of the facts?

5 A. Yes.

6 Q. And what did he say happened?

7 A. He was not there. It was not him.

8 Q. Okay. And was that your primary defense?

9 A. Yes.

10 Q. And did you discuss that -- well, you discussed  
11 that at length before trial with Mr. Bowens-Green?

12 A. Yes.

13 Q. Okay. Did you see anything objectionable in the  
14 State's closing?

15 A. I've been -- I've talked with a few and Mr. Murphy  
16 about some of the instances, and I did think there were a  
17 couple places where I probably should have objected.

18 I think that the two that come to mind, for me, is  
19 one was the comment about the victim being an immigrant,  
20 and I think that arguably could be inflammatory and  
21 should have been objected to, and then there was at least  
22 one point where the prosecutor said they're telling the  
23 truth, and so that was another part where I felt like,  
24 looking back, I should have objected.

25 Q. But at the time, you didn't see that it was

1 objectionable?

2 A. Correct. I did not object then.

3 Q. And if you had objected, do you feel like you  
4 would have been successful? Like, do you think the Court  
5 would have sustained your objection?

6 A. I'm not sure how I can answer that question.

7 Q. Okay.

8 MS. OPPENHEIMER: Beg the Court's indulgence.  
9 I have no further questions.

10 MR. MURPHY: Very briefly, Your Honor.

11 REDIRECT EXAMINATION

12 BY MR. MURPHY:

13 Q. You talked about on direct his defense that he  
14 didn't do it. Did you discuss his taking the stand in  
15 his own defense in this case?

16 A. Yes, we did.

17 Q. And what was your recollection of that  
18 conversation?

19 A. My concern with him testifying -- well, first of  
20 all, our entire defense was that it was a mistaken  
21 identification, and we hired an expert who testified and  
22 raised -- at least I believed some of the concerns that  
23 we had were this particular identification, and so I did  
24 not feel that Mr. Bowens-Green needed to testify to say  
25 he was not there and that there were other concerns for

CODY GROEBER - REDIRECT EXAMINATION

1 him testifying, mainly that either directly his  
2 conviction for armed robbery would come out or perhaps  
3 that he might open the door through his testimony.

4 So I did not believe that he needed to testify  
5 because we felt that we had done a good job getting out  
6 our defense and attacking the government's case, but I  
7 certainly advised him that he had a right to do that. It  
8 was his decision whether or not he did testify.

9 Q. And, ultimately, the Court would have questioned  
10 him as to his right to testify in his own defense,  
11 correct?

12 A. The Court normally does. I don't remember if that  
13 happened in this case, but certainly it's the regular  
14 practice.

15 Q. Did you have the conversation with  
16 Mr. Bowens-Green about whether or not he should testify  
17 in his own defense?

18 A. I know that he and I talked about it. I know  
19 Mr. Grimes was present. It's possible he and Mr. Grimes  
20 also spoke about it outside of my presence, but I don't  
21 know that for 100 percent.

22 MR. MURPHY: Thank you. That's all I have.

23 MS. OPPENHEIMER: Nothing further.

24 THE COURT: You may step down.

25 THE WITNESS: Thank you.

1 THE COURT: Any other witnesses?

2 MR. MURPHY: Nothing, Your Honor. We rest.

3 THE COURT: Anything from the State?

4 MS. OPPENHEIMER: State has no witnesses,  
5 Your Honor.

6 THE COURT: All right. You're asking for 30  
7 days to look into whether or not there was a GPS?

8 MR. MURPHY: I've been given a name of a  
9 Mr. Bodison that was on the bond, and I believe he would  
10 have known who the ankle monitoring company was, if there  
11 was one. I don't know if those records exist or not, but  
12 I would ask for 30 days to get that information, to let  
13 you know if it exists or not, or if I can even get it,  
14 and I might not be able to.

15 MS. OPPENHEIMER: Your Honor, we would object  
16 because it seems like Mr. Murphy has done his due  
17 diligence in investigating whether or not the applicant  
18 was on ankle monitoring at the time. Mr. Groeber  
19 testified that he had no information whatsoever about Mr.  
20 Bowens-Green being on an ankle monitor, so we find at  
21 this point in time it's been thoroughly investigated.  
22 It's been thoroughly presented to the Court, and an extra  
23 30 days would be fruitless.

24 MR. MURPHY: And by way of background, Judge,  
25 briefly, full disclosure, I have had a lot of

1 conversations with Mr. Green's father. At the last  
2 hearing when I requested a continuance, he indicated that  
3 he was going to hire new counsel. I asked for additional  
4 information to track down this ankle monitoring. I did  
5 not get any information until today, so, in fairness to  
6 the client, I have not done a thorough investigation that  
7 I would at least like to make some calls to this bondsman  
8 now to see if he would have that information.

9 THE COURT: All right. Well, I'll give you  
10 30 days. Report to me and to the State what your  
11 findings are, and we'll determine whether or not we need  
12 to have any more hearing on that.

13 MR. MURPHY: Yes, sir.

14 THE COURT: All right. Anything else then on  
15 this?

16 MS. OPPENHEIMER: The State would just like  
17 to present a little bit of argument especially --

18 THE COURT: That will be fine because if they  
19 don't have any GPS testimony, then we won't need to  
20 reconvene.

21 MS. OPPENHEIMER: Okay.

22 THE COURT: Go ahead.

23 MS. OPPENHEIMER: May it please the Court,  
24 Your Honor: When we're looking at vouching or  
25 bolstering, specifically the case of Donnelly v.



1     DiChristoforo, United States Supreme Court. The cite is  
2     416 U.S. 637. It's a 1974 case. In that case, there  
3     were two specific statements made by a prosecutor in  
4     closing argument.

5             One in particular relates to this. It's  
6     cited at footnote six and seven. The remark was I  
7     honestly and sincerely believe that there is no doubt in  
8     this case, none whatsoever, and the court of appeals on  
9     the lower level said that at least the jury knows that  
10    the prosecutor is an advocate and it may be expected, to  
11    some degree, to discount such remarks as sellers' talk.

12            We would argue that that's the exact same  
13    case we have here. The State's credibility was the sole  
14    issue in this case. The State argued that these are the  
15    reasons you should believe these four different  
16    ID witnesses and so we would argue that it's not  
17    bolstering or vouching on the part of the State.

18            And then in State vs. New, that's the court  
19    of appeals of South Carolina, cite is 338 SC 313, it's a  
20    1999 case, the test of granting a new trial based on  
21    these improper comments would be whether the defendant  
22    was prejudiced to the extent he was denied a fair trial.  
23    And, in concluding that in this case the State's comment  
24    on the credibility of the State's witnesses was based  
25    upon the trial record and its reasonable inferences, they

1 upheld the conviction. They upheld the sentence.

2 We would -- all of the solicitor's comments  
3 in this case and his argument were based off the record.  
4 Mr. Groeber and Mr. Grimes did a very good job attacking  
5 the credibility of these identification witnesses, and  
6 the State was going off -- they were trying to explain to  
7 the jury that these witnesses are credible, based on the  
8 evidence. They knew Mr. Marvin Bowens-Green from prior  
9 dealings with him. They knew his walk. They knew his  
10 mannerisms. They knew from talking to him, so we argue  
11 that that would not be sufficient to grant a new trial.

12 MR. MURPHY: We would allege error for  
13 failure to call the alibi witnesses that would place him  
14 at a scene in Jacksonboro constituted prejudicial error.  
15 We also allege that maybe not one remark in closing, but  
16 the repeated errors, or the repeated remarks without  
17 objection certainly prejudiced him. Third issue would be  
18 the extent that there wasn't any cross-examination or  
19 there was -- allows the testimony without objection of  
20 both Luckadoo and Lawrence who were giving testimony or  
21 describing, I guess, identification on issues other than  
22 the actual video that was shown.

23 And, Judge, as I hear this whole case, and  
24 I've talked to Mr. Green about this is this entire case  
25 revolves around the victim, Mr. Patel, identifying him.

1 All of the other information is unnecessary for the  
2 conviction. Judge, we have testimony he was already  
3 serving a 20-year sentence and that the pending charges  
4 would be concurrent against him. As I listened to  
5 evidence, there wasn't any doubt in my mind that he was  
6 going to get convicted, if for nothing else solely  
7 because of the testimony of the victim in this case.  
8 Therefore, we think that there would be some error in  
9 communication or failure to request a mental evaluation  
10 between Mr. Groeber and Mr. Green as well.

11 I think if there was a proper communication,  
12 he certainly would have taken a plea deal and pled to a  
13 concurrent sentence rather than get a life sentence for  
14 this conviction, and that would be all, Your Honor.

15 THE COURT: Well, I will leave the record  
16 open for 30 days so you can follow up on that issue about  
17 GPS. Let us know what your findings are, and we'll  
18 decide if we need to reconvene for another hearing at  
19 that point after reviewing what your investigation  
20 determines. All right.

21 - - -

22 (Whereupon, the proceedings were concluded.)

23 - - -

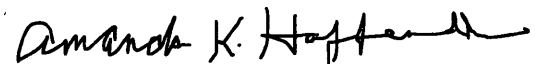
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25

I, the undersigned, Amanda Kelly Haffenden, RPR, CRR, Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 21st of May 2018.

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

December 16, 2018



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Circuit Court Reporter

**Christopher Murphy**

---

**From:** Christopher Murphy <cmurphy@rlattorneys.com>  
**Sent:** Wednesday, May 9, 2018 5:09 PM  
**To:** Kelly Oppenheimer  
**Cc:** Jodi Hanshaw; 'Chris Murphy'  
**Subject:** FW: Marvin Green

Kelly – here are the specifics defendant wants me to argue. He says that Green was under ankle monitoring at the time which would be a good issue. However, I do not have any evidence of that. Below are excerpts of what I will use and ask to amend application to include these.

p. 725 Blostering: Inflammatory statement meant to appeal to jurors emotions. But maybe the thinking was who would believe this immigrant anyway. Who would believe this man who couldn't even come into this courtroom and couldn't speak English.

p. 729 Blostering: Before I show it to you though I don't think all of you are going to be able to identify this man. Obviously, I don't think that can be done, and that's just what Dr. Beaudry was telling you ... So just because all of you can't, and some of you may, does not mean you have reasonable doubt.

p. 730 Blostering: This case is based on the witnesses who knew him, not on your ability to look at this video and determine if it is him.

p. 731 Explicit vouching: They are all telling you they know. They are not all mistaken. They are actually all correct.

p. 734 Blostering personal opinion: And just because they weren't able to take an exact translation there that day at the scene about this is the man who comes in and buy Newport cigarettes, usually a lottery ticket, sometimes gas and he jokes with us about Obama does not mean it didn't happen.

p. 734 Explicit vouching: You judge their credibility and you determine if they are lying to you, and they are not. Why would they? This isn't about their credibility. They are telling you the truth.

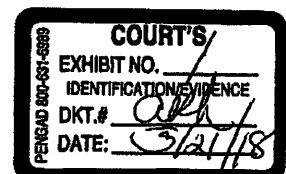
p. 738 Explicit vouching: You heard from Mrs. Patel, and you'll decide to believe her or not. There's every reason in the world to believe her. Does she know or is she lying? She is not.

p. 738 Explicit personal assurance of witnesses' veracity: You can believe all those witnesses and you can believe the truth in this case.

p. 739 Placing Government's prestige behind witnesses; if you knew with certainty what happened in this case you wouldn't be sitting where you are. You would have taken the witness stand, told the jury what you knew. People who are certain have certain information.

Jodi Hanshaw  
 Paralegal

[jhanshaw@rlattorneys.com](mailto:jhanshaw@rlattorneys.com)



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Charleston County Ninth Circuit  
Public Defenders Office  
Investigative Report  
Confidential Attorney Work Product

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State of South Carolina vs. Marvin Bowens-Green

**Date:** Friday, May 18, 2012

**Case Number:** 2010-021305-B

**Warrant Number:** K-684608-09

**To:** Cody J. Groeber, Esquire  
Assistant Public Defender

**From:** Inv. E. Lee Ginn, Jr.

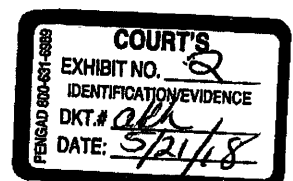
On Friday, May 18, 2012, approximately 8:15 A.M., I drove to 5737 Savannah Hwy. (Hwy 17- S.); location of the Sunoco - Ravenel Quick Stop convenience store (843-889-6363) and spoke with Mr. Neutubhai Patel.

[Note: It should be noted that throughout my conversation with Mr. Patel, his English was very broken and difficult to understand. The following is what I gleaned from our conversation.]

Mr. Patel said his store was robbed; been awhile. Said he knew the face; a regular customer. Seemed to have a hard time understanding my question regarding type gun used by the robber, so, I drew two sketches. One sketch was of a shotgun and the other of a pistol, and Mr. Patel indicated with his hand a few inches below his wrist meaning a pistol.

Mr. Patel said subject who robbed him had his face covered when he first entered store, but the cover fell and he knew the face then as a customer. He said the subject had a ball cap on.

When asked if he knew someone by the name of Tyrone, he seemed confused, or just did not understand what I was saying. I then asked if his son went by the name Tyrone; he still seemed confused, but did say no. [Note: I subsequently discovered from a different witness that Tyrone is the owner of the Sunoco Convenience Store in Jacksonboro, South Carolina and went by the name of Tyrone Patel.]



I asked Mr. Patel if he recalled the photo line-up provided by the police. He nodded as if he understood. I then asked if he recalled how the photo array was presented; how he identified the person who robbed him. He said the cover fell from the person's face and he knew the face and pointed him out in the line-up.

I thanked Mr. Patel for his time and provided him with my business card.

I next drove to the Sunoco Convenience Store (843-889-6363 or 843-893-3345) located at 16812 Ace Basin Parkway in Jacksonboro, South Carolina to speak with someone about a telephone call placed to their store from the store in Ravenel. I spoke to a black male who said he cooked for the store, but did know Vinnie who worked as a clerk in the store back in 2010. He said he thought his last name might be Brown but was not positive. He said Vennie has a brother named Lonnie Brown and they both lived across the street in a small brick home located on Hope Plantation Road just before the railroad tracks. At the store I attempted to speak with a short Indian male and female. Neither seemed to know what I was talking about and when asked, indicated they did not know Vinnie's last name. I thanked everyone for their time and drove next to Hope Plantation Road.

At 375 Hope Plantation Road in Jacksonboro, I spoke with Ms. Lina B. Sims (04/06/1935), who said she was the mother of Vincent "Vinnie" Sims and he lived with her. At the time of my visit, Ms. Sims said her son was at work, but could not recall the name of the business. Ms. Simms provided two telephone numbers (843-908-8474 and 843-475-3574) so I could contact Vinnie. I thanked Ms. Sims for speaking with me and reassured her Vinnie was not in any kind of trouble; just a witness in a case.

[Note: Witness named "Vinnie" is: Vincent "Vinnie" Levi Sims, DOB: [REDACTED] SSN: [REDACTED] who lives with his mother Lina B. Sims, and has a P.O. Box 234, Jacksonboro, SC 29452-0234).]

I called Vinnie at 843-908-8474, and although he was at work at time of my call, he agreed to speak with me about this case. Vinnie works at the Wyndham Ocean Ridge Resort (877-296-6335) located at 1 King Cotton Road, Edisto Island, SC 29438.

Once I explained to Vinnie why I was calling him, he said he did work at the Sunoco in Jacksonboro and his boss was known as Tyrone Patel. Vinnie said he does not recall talking to anyone about the robbery from the store in Ravenel, although he did hear about the robbery. Vinnie went on to say he knew of client and that he (client) had at one time lived in Jacksonboro and a customer of the store. Vinnie said he never told anyone that client was probably the robber of the store in Ravenel and sounded confused as to why anyone would make that statement.

When asked if he knew someone named Hazel Green, he said he did; she use to come to the store in Jacksonboro. He said Hazel married someone named Wilson. I



asked Vinnie if he remembers talking to Hazel, or if she was in the store the day the Ravenel store was robbed. Vinnie said he had absolutely no idea.

I asked Vinnie if he knew how to contact Ms. Wilson. Vinnie said he did not know where she was now living.

[Note: Earlier this morning, after speaking with Mr. Patel at the Ravenel store, I placed a call to a Ms. Hazel Green-Wilson who now lives in Tucker, Georgia; formerly of Jacksonboro, South Carolina. When a female answered, I asked for Ms. Green. The woman on the telephone said I had the wrong number, and when I asked if I dialed (770) 934-1595, the woman replied I had the wrong number. When I asked again for Ms. Hazel Green-Wilson, she again said I had the wrong number and would no longer speak. I then apologized for disturbing her so early in the morning and disconnected the call.]

This call was placed at 0836 hours to Hazel Green-Wilson, DOB: [REDACTED] SSN: [REDACTED], and resides at [REDACTED] Quailbrook Court, Tucker, Georgia 30084-7600. There is also a subject who resides there named Marion Green ([REDACTED]) and a Lesia Green ([REDACTED]). Unable to confirm if this is the Hazel Green who was in the store in Sunoco Convenience Store in Jacksonboro on December 24<sup>th</sup>, 2010.

End of Report.

872  
cc  
TG  
AT  
JS  
DL

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

Marvin Bowens-Green, #346650,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2015-CP-10-6855

ORDER OF DISMISSAL

FILED  
2018 AUG 24 PM 12:42  
CLERK OF COURT

### PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed December 18, 2015, by Marvin Bowens-Green (Applicant). The State (Respondent) submitted its Return and Motion to Dismiss on September 7, 2016, requesting the application be summarily dismissed as successive and untimely. This Court, in its capacity as Chief Administrative Judge for the Ninth Judicial Circuit for the Court of Common Pleas, Charleston County issued a Conditional Order of Dismissal provisionally dismissing the application on September 27, 2016. Thereafter, on January 24, 2017, Respondent submitted its Amended Return and Motion to Vacate the Conditional Order of Dismissal, requesting the Conditional Order be vacated and requesting an evidentiary hearing on the application<sup>1</sup>. This Court issued an Order vacating the Conditional Order of Dismissal on January 26, 2017. An evidentiary hearing was convened on May 21, 2018, at the Charleston County Courthouse. Applicant was present at the hearing and was represented by Christopher L. Murphy, Esquire. Respondent was

<sup>1</sup> In its original Return and Motion to Dismiss to this application for post-conviction relief, Respondent inadvertently indicated this current application was successive to his 2013 post-conviction relief action. That 2013 action arose from a separate armed robbery offense (2009-GS-10-5376), of which Applicant was convicted following a jury trial one June 24, 2011. Applicant appealed that conviction, which was dismissed. Thereafter, he filed a post-conviction relief application challenging that armed robbery conviction. Following an evidentiary hearing into that matter, the post-conviction relief court denied that application, and Applicant appealed.



represented by Assistant Attorney General Kelly Oppenheimer of the South Carolina Attorney General's Office.

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its April 2011 term, the Charleston County Grand Jury indicted Applicant for armed robbery (2011-GS-10-02338), possession of a firearm during the commission of a violent crime (2011-GS-10-02339). Cody J. Groeber, Esquire, represented him on these charges. On June 11-14, 2012, Applicant proceeded to a jury trial before the Honorable Kristi L. Harrington. The jury convicted Applicant as indicted on both counts, and Judge Harrington sentenced Applicant to a term of imprisonment of life without the possibility of parole for armed robbery and a concurrent term of five years imprisonment for the weapons charge.

Applicant filed a timely notice of appeal, and Appellate Defender Susan B. Hackett, of the South Carolina Commission on Indigent Defense, Office of Appellate Defense, perfected an appeal on Applicant's behalf. On appeal, Applicant raised the following issues:

1. Violating [Applicant's] Sixth Amendment right to a fair trial, the trial judge erred in failing to provide the jury with specific instructions concerning how to analyze the evidence presented concerning the identification of [Applicant] as the perpetrator, including expert testimony on the subject, significant language barriers between the police officers and the eyewitness who participated in the photographic line-up, and the use of surveillance video to make an identification[;]
2. The trial judge erred in allowing the prosecution to introduce [Applicant's] mug shot where no demonstrable need of the mug shot was established, the mug shot was unnecessary and cumulative to the prosecution's case, and the mug shot prejudiced [Applicant] by suggesting to the jury that [Applicant] had a prior criminal record[; and]
3. Violating the Eighth Amendment's ban on cruel and unusual punishment, the trial court erred in sentencing [Applicant] to life imprisonment without the possibility of parole pursuant to the state's recidivist statute because

[Applicant's] prior conviction was committed when he was seventeen-years old.

Following briefing and oral argument, the South Carolina Court of Appeals issued a published opinion affirming Applicant's conviction and sentence on March 11, 2015. *State v. Green*, 412 S.C. 65, 770 S.E.2d 424 (Ct. App. 2015). Applicant then petitioned the Court of Appeals for a rehearing on March 26, 2015. On April 21, 2015, the Court of Appeals issued a written order denying the petition for rehearing. Applicant then petitioned to the South Carolina Supreme Court for a writ of certiorari, which was denied by written order on September 3, 2015. The Remittitur was issued on September 16, 2015.

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

1. Ineffective Assistance of Counsel:

- a. "Counsel rendered ineffective assistance by failing to object to solicitor's comments vouching for the credibility of the State's witnesses;"
- b. "Counsel rendered ineffective assistance by failing to object to the perjured testimony of Charles Lawrence and Deputy Dustin Luckadoo;" and
- c. "Counsel rendered ineffective assistance of by advising applicant not to testify."

At the hearing, Applicant proceeded forward on the claims in his original application, as well as allegations that Counsel was ineffective for failing to investigate and present an alibi defense, and for failing to have Applicant evaluated by a mental health professional.

**STATEMENT OF FACTS ADDUCED AT TRIAL**

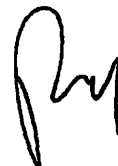
At 7:45 a.m. on December 24, 2010, a man entered Natubhai Patel's (Victim) convenience store and robbed him at gunpoint. Tr. 289. Victim called the police immediately, and the police arrived and viewed the surveillance video with Victim. Tr. 291. Victim told the

police he recognized the robber as a regular customer but did not know his name. Tr. 294. On December 29, 2010, police met with Victim and showed him a six-person photo lineup from which he chose a photo of the man who robbed him. Tr. 296-300.

At trial, the State called Victim, who described what happened the day of the robbery. Tr. 286-91. Victim testified that the man who entered his store with a gun on December 24, 2010, was a regular customer he had known for approximately one year. Tr. 289. The man came into the store approximately three times a week to buy cigarettes, gas, and lottery tickets. Tr. 290. Victim explained he and the man had a running joke about Obama's signature being on the man's identification. Tr. 290. Victim identified the robber in court as Applicant. Tr. 290-91. He was able to recognize Applicant by his voice and by seeing his face, despite the fact he was wearing sunglasses and holding a gun during the robbery. Tr. 302-03. Victim testified regarding his selection of Applicant out of a six-person lineup. Tr. 296-300. He explained that he does not read English well, so his son read and explained the lineup procedure. Tr. 297. He verified he was one hundred percent positive when he circled Applicant's photo in the lineup and was able to identify Applicant within a half second. Tr. 298, 300.

Deputy Dustin Luckadoo, of the Charleston County Sheriff's Office, testified he responded to the scene, talked to Victim, and viewed the video tape from the scene. Tr. 326-27, 332-34. He recognized Applicant as the robber, based on general dealings with him including a traffic stop, and identified him in court with one hundred percent certainty. Tr. 334-36, 345.

Detective Charles Lawrence of the Charleston County Sheriff's Office testified he was brought on to investigate the crime after it had occurred. Tr. 346-49. When Lawrence viewed the video from the crime scene on December 29, 2010, he recognized Applicant as the perpetrator based on having dealt with him before. Tr. 351-52. Lawrence testified he had the



opportunity to observe Applicant's face, mannerisms, voice, and gait for hours at a time. Tr. 352-53. He testified he recognized Applicant's walk in the video because it was distinctive; he also was able to identify Applicant's distinctive nose, as well as his height and weight. Tr. 353-54. Lawrence testified he was one hundred percent positive that the man pointing the gun at Victim in the video was Applicant. Tr. 354-55.

Once Detective Lawrence identified Applicant in the video, he generated a six-person photo lineup through SLED. Tr. 355. He then arranged to meet with Victim to see if he could pick out the man who robbed him. Tr. 356. Lawrence took Detective James Perkins with him to conduct the actual lineup with Victim because policy prohibits an officer from performing the lineup identification if he knows who the suspect is. Tr. 356-57. On December 29, 2010, Lawrence and Perkins met Victim outside a Sears store and Perkins conducted the lineup while Lawrence stayed away from the procedure. Tr. 357-58. Lawrence testified Victim made an identification and Lawrence then generated an arrest warrant for Applicant based on that identification. Tr. 359.

Next, the State requested to approach the bench and the trial court held the following bench conference:

[The State]: I think we probably are going to have a matter of law outside the presence of the jury on the booking photo.

The Court: On the booking photo? Why?

[The State]: Because we want to put the booking photo in because it's relevant. It shows his side profile, it's from when he was arrested from this instance so it's not a prior incident. It has nothing to do with 404(b) but it's relevant so the jury can see him and be able to look at this and look at the video.

The Court: Let me see.  
What's your objection?

[Applicant]: The booking photo. I was researching lineups last night - -

The Court: Which is different - -

[Applicant]: I understand, and I was going through some South Carolina cases on booking photos - -

....

[The State]: I don't have a problem if you want me to cut those photos, cut the top half off.

[Applicant]: Yeah, but, I mean, it still shows it's a booking photo.

The Court: Let's just mark it for identification.

Tr. 359-60. Immediately following the bench conference, the State moved to admit the booking photo, State's Exhibit #5, and Applicant objected under Rule 404(b). Tr. 361. The trial court overruled the objection but did not allow the State to publish the exhibit at that time. Tr. 361.

Joseph L. West, a SLED investigator, testified regarding his role in obtaining still photographs from the video captured at the scene. Tr. 450-52. Applicant objected to the still photos, State's Exhibit #6, being admitted. Tr. 456-57. After hearing arguments, the trial court admitted State's #6 over Applicant's objection. Tr. 490-94.

Jagruti Patel, Victim's wife, testified that she recognized the man in the store video as a regular customer who often came in to buy Newport cigarettes, lottery tickets, and gas. Tr. 532-35. She recounted him joking about Obama signing his identification when she would ask for it. Tr. 536. Patel positively identified Applicant in court as the man in the video. Tr. 538, 539.

Next, the trial court addressed the booking photo again. Tr. 556. The trial court noted that the booking photo was admitted earlier, but was not published yet, and discussed the size of the photo after redaction. Tr. 556-57. The following exchange took place:

[Applicant]: And we believe we have sort of a front picture, side pictures. Any jury can - - any reasonable juror can infer that's a booking photo.

The Court: But that's not standard, is it? That's not what I'm concerned with. We can infer anything from anything and the case that you provided indicates that it was a different type of photo. It was the actual booking photo. We all know that he was arrested and there was indication that he was booked, and the case that you provided me it was from a - - the date was around his neck on his booking photo, which was prior to the arrest that he was being tried for.

[Applicant]: Yes, Your Honor. Basically, when you look at the three factors in the case we don't believe the evidence need [sic] to introduce the photograph.

The Court: The reason that they indicated to the Court that they needed it is because they needed a side profile picture. When we approached at the bench there was a discussion, because I'm not sure if it was on the record, there was a discussion on what would be admissible.

Mr. Groeber indicated that his major objection was to the top and to the bottom row because it clearly then indicated that it came from Charleston County. There's absolutely no distinguishing marks on the remaining two photographs. There's nothing to indicate that they - - he's in a jail suit or anything around the neck as in the case that you provided, and so I made the decision to cut the top and the bottom off of those pictures. So back to my initial question, Mr. Grimes.

[Applicant]: Yes, ma'am.

The Court: They have a larger picture of what I have had redacted. Okay. So it's now - - that picture is a full page. There was an objection because during the redaction now it's a smaller page.

[Applicant]: Yes, ma'am.

The Court: So which would you prefer me, preserving all of your objections, give the bigger page so that it's in conformity with all the other paper page sizes or the smaller page that's black and white?



[Applicant]: Preserving everything we prefer the bigger photo to go back.

The Court: All right. If we will, just so the record is clear, we will mark that as 5-A. Five does not go back.

Did you understand, Mr. Grimes? Did you hear what I said?

[Applicant]: They are substituting the - -

The Court: I'm not substituting because I want the record to be thoroughly preserved. This will be 5-A, and 5, the redaction that I did cutting, it will not go back but it will remain as 5. The one 5-A will go back.

[Applicant]: Thank you.

(Whereupon, State's Exhibit Number 5-A, a Photograph, was marked and admitted into evidence.)

Tr. 557-59.

The State rested, and Applicant then presented his case. After recalling Detective Lawrence, Applicant called Dr. Jennifer Beaudry, an assistant professor of psychology at the University of South Carolina Beaufort. Tr. 593-94. Dr. Beaudry testified that she wrote her dissertation about eyewitness identification procedures and people's perceptions of those procedures. Tr. 594. The trial court admitted her as an expert in human memory and eyewitness identification without objection. Tr. 599. Dr. Beaudry testified that factors such as the presence of a weapon, whether someone is wearing a disguise, and whether a perpetrator and witness are of the same race, can affect an observer's ability to encode information. Tr. 609-10. She admitted there are no studies regarding one's ability to recognize somebody one already knows but who is wearing a disguise. Tr. 642.

Applicant requested jury charges via electronic mail, marked as Court's Exhibit #9, which included a specific request as to identification as it relates to expert testimony based on

*State v. Long*, 721 P.2d 483 (Utah 1986). Tr. 701-02. The trial court informed Applicant it would be charging its standard identification charge, which lists all elements and factors that may be considered. Tr. 701, 702. The portion of the jury charges in regard to identification stated:

An issue in this case is the identification of the defendant as the person who committed the crime charged. The State has the burden of proving identity beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict the defendant.

Identification testimony is an expression of belief or impression by a witness. You must determine the accuracy of the identification of the defendant. You must consider the believability of each identification witness in the same way as any other witness.

You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense. This will be affected by things like how long or short a time was available, how far or close the witness was, the lighting conditions, and whether the witness had a chance to see or know the person in the past.

Once again, I instruct you, the burden of proof on the State extends to every element of the crime charged and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the crime.

If after examining the testimony you have a reasonable doubt as to the accuracy of the identification you must find the defendant not guilty.

Tr. 750-51. Specifically as to expert witnesses, the trial court charged:

The rules of evidence ordinarily do not permit witnesses to testify to opinions or to conclusions. An exception to this rule exists for witnesses we call expert witnesses.

A witness who by education and experience has become expert in some art, science, profession or calling may state an opinion as to relevant and material matter in which the witness claims to be an expert and may also state the reasons for the opinion.

You should consider any expert opinion received in evidence in this case and like any other evidence give it the weight you think it deserves. If you decided that the opinion of an expert

witness is not based on sufficient education and experience or if you conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence you may disregard the opinion entirely.

An expert witness's testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert. Further, you are not required to accept an expert's opinion even though it is not contradicted.

Tr. 747-48.

After the trial court instructed the jury, Applicant asked that he be permitted to place on the record the reasons he requested certain charges. Tr. 755. He then went through each portion of the specific charges he requested and how he believed the trial court's charges did or did not comply with what he requested. Tr. 756-61. The trial court recognized the preservation of his argument and objection and ruled that it would not change the charge given. Tr. 761.

#### TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf and presented the testimony of trial counsel, Cody J. Groeber, Esquire (hereinafter "Counsel"). This Court also had before it a copy of Applicant's trial transcript, the records of the Charleston County Clerk of Court, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

Applicant first testified on his own behalf. Applicant testified he was initially represented by Rodney D. Davis, Esquire, and then Counsel Andrew Grimes, Esquire represented him. He elaborated that Counsel and Mr. Grimes were assigned his case two months prior to trial. He testified during this time, that he was charged with armed robberies out of both Charleston and Colleton counties. He explained that he was convicted of the Colleton robbery and sentenced to twenty years imprisonment.

He further testified that he met with Counsel once while he was incarcerated in Lee Correctional Institute. He testified that he was not sure whether or not he and Counsel reviewed the discovery. He elaborated they discussed a plea offer to this Charleston County armed robbery for twenty years imprisonment. He elaborated that he refused the offer. Applicant also testified that he and Counsel had three conversations over the phone, and that he did not receive any letters from Counsel. He testified that during their second phone conversation, Counsel informed him the plea offer was for a concurrent term of imprisonment of twenty years. He elaborated that under this offer, he would accept responsibility, but that his release date would not change. He further elaborated that he wanted to proceed to trial because he was not guilty of these charges. He explained that he had three charges pending, and two of the armed robbery charges were dismissed. He further explained that there was a video of one of the associated armed robberies, but there was no identification of the gender or race of the suspect.

Applicant also testified that he and Counsel discussed an alibi defense, and that he wrote a letter to Counsel detailing the events of the morning of the robbery. He elaborated that three people could place him elsewhere during the commission of this armed robbery. He further elaborated that a store employee at a Sunoco in Jacksonboro, South Carolina could testify he was at that store the morning of this robbery. He also testified that Marian Grant and his father could also testify as to his alibi. Applicant testified that Counsel did not interview these witnesses, which they discussed prior to trial. He testified that these alleged witnesses were not present to testify at the evidentiary hearing, but that they would testify to his whereabouts. He further testified, however, that Counsel and Mr. Grimes were focused on the serial number of the gun. He further elaborated that Counsel did not take the time to have these witnesses present at trial, even though they were accessible. He further testified that these witnesses would have vouched



for the fact he was not present during the commission of this robbery. He explained that he was also on an ankle monitor at the time, which his bondsman, in Colleton County, required him to wear. He further explained that he told Counsel he was on GPS monitoring.

He testified that Deputy Luckadoo identified the suspect and indicated that he knew the suspect from the news and the area. He elaborated, however, that Deputy Luckadoo knew his brother, Marvin Bowens, not Applicant. He further elaborated his brother was charged on December 17, 2010, for a robbery in Walterboro, which was covered in the news. Applicant testified he told Counsel he was not in the news, and they debated this. He explained Counsel did not believe his brother was not him. He also testified Deputy Luckadoo was never questioned about whether he identified Applicant or his brother, and it was not brought out that they are two different people.

He further testified Detective Lawrence interviewed him in 2008, which he did not deny, and Detective Lawrence testified to this interview during the *Neil v. Biggers*<sup>2</sup> hearing prior to his trial. He elaborated that Detective Lawrence gave a start time for the interview but did not give a finish time. He further elaborated in 2011, Detective Lawrence testified the 2008 interview lasted approximately one to one-and-a-half hours, whereas in 2012, Detective Lawrence testified the interview lasted between two and three hours. Applicant explained this testimony was inconsistent; and, therefore, Detective Lawrence was not a credible witness.

Applicant testified that Victim identified him based on prior dealings Victim's prior dealings with Applicant. He further testified that Ms. Patel discussed the robbery with Victim, which influenced the identification. He elaborated that Ms. Patel knew him from his walk and mannerisms, but only after talking with Detective Lawrence. He further elaborated that Ms. Patel independently recognized him, but that Counsel made no objection to her in-court

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<sup>2</sup> 409 U.S. 188 (1972).

identification of him.

Applicant also testified that he took issue with multiple comments made during the solicitor's closing argument. He elaborated that his comments served to bolster his personal opinion, vouch for the witnesses presented at trial, put the weight of the government behind the witnesses, and appeal to the racial and ethnic biases of the jurors. In particular, Applicant believed some of the solicitor's comments during closing were intended to produce passion in the jury and to make the jurors sympathetic towards Victim, who was an immigrant. Applicant also testified there were ten instances during the closing argument in which Counsel should have objected, but did not. He explained that Counsel's failure to object influenced the jury, as it appeared Counsel was endorsing the witness.

Applicant ultimately testified that he believed he was Counsel's first case. He explained that Counsel failed to admit the photograph of the bank robber in Colleton County and failed to present a defense.

Following Applicant's testimony, Counsel testified. Counsel testified he began working as a State Public Defender in January 2008, and he was the primary attorney on Applicant's case. He also testified Mr. Davis initially represented Applicant and after a motion for severance, tried the other armed robbery case. He further testified that after Mr. Davis left the Public Defender's Office, he inherited Applicant's case. He testified that by the time he had been assigned Applicant's case, he had already received the discovery materials, and he and Applicant reviewed the materials. He testified that he met Applicant in person at Lee Correctional Institute<sup>3</sup> once, and spoke on the phone with him at least three times. He elaborated that he discussed with Applicant the plea offer for a concurrent term of twenty years both in person and over the phone.

<sup>3</sup> As aforementioned, Applicant was convicted of a separate armed robbery offense in 2011. When Counsel represented him on this current armed robbery charge, Applicant was already serving a sentence at Lee Correctional Institute for that 2011 conviction.

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He further elaborated that he is always concerned with proceeding to trial when the client is facing a life sentence, and that Applicant understood his concerns. He also testified that they discussed the elements of the charges, and Applicant's version of the facts. He explained based on these conversations, their defense was that Applicant was not present at the robbery.

Counsel also testified that he had no issues communicating with Applicant. He further testified he did not have a mental evaluation performed on Applicant, as he had no reason to have Applicant evaluated.

He testified that he had no information Applicant was on GPS monitoring at the time of the commission of these crimes. He also testified he discussed Applicant's case with his father, who never mentioned GPS monitoring. He elaborated that if he, or Mr. Grimes, had knowledge Applicant was on GPS monitoring at the time, they would have investigated it.

Counsel also testified that he had his private investigator conduct an investigation into the alibi. He elaborated that he provided his investigator with the names and locations of the alleged alibi witnesses, and the investigator interviewed these individuals. He further elaborated that Applicant provided him with the following names: Tyrone Patel, who the investigator attempted to contact, but could not find someone who knew him; Vinny, who was a clerk; Jen, who was a cook in Jacksonboro; and Lina Sims, who was the mother of Vinny Sims. He also testified that the investigator met with Victim at his Sunoco store on May 18, 2012, and also reached out to a different Mr. Patel who owned the Sunoco in Jacksonboro. He elaborated that he could not determine, based on this investigation into the other Sunoco store, whether the alibi was valid. He explained that this alibi was not strong, as people could not remember seeing Applicant and Applicant did not do the things he alleged to have done. He further explained that presenting this alleged alibi would have distracted from the defense.

He testified that there were several eyewitnesses to this crime; and, consequently, they had a *Biggers* hearing. He elaborated that two law enforcement officers testified during the hearing, who recognized Applicant from prior interactions with him and from the news. He further testified that two eyewitnesses testified at the hearing, Victim and Ms. Patel. He elaborated that Ms. Patel testified that Applicant was a regular in the store, and that she recognized him.

Counsel also testified that he attempted to submit a photograph from the Colleton County bank robbery. He elaborated that Applicant's brother was arrested in connection with that armed robbery, and the photographs of the suspects in both robberies were similar, though the picture from the bank robbery was fuzzy. He further elaborated that he attempted to introduce this photograph in order to discredit Ms. Patel's ability to identify the suspect of this robbery. He testified, however, that he was unable to introduce the photograph. He further testified that he proffered the photograph through Applicant's mother, but the trial court sustained the State's objection.

He testified that Detective Lawrence and Deputy Lucakdoo gave inconsistent testimony at trial. He elaborated that their testimony was inconsistent with regards to previous interviews with Applicant, specifically that the interview either lasted one hour or two-and-a-half hours. He explained that there was no way to verify the length of the previous interview, as there was no evidence to challenge the duration, except for Applicant's testimony. He further explained that he did not want to highlight these inconsistencies, as he wanted to avoid all references to prior armed robberies Applicant had committed.

Counsel also testified that he should have objected during closing, particularly in light of the fact that Victim was an immigrant and the solicitor was telling the jury the witnesses were



telling them the truth. He elaborated, however, at the time, that he did not believe these comments were objectionable and only now believes that they were.

He further testified that he and Applicant discussed the possibility of Applicant taking the stand. He testified in order to show that Victim and Ms. Patel were mistaken in their identification of Applicant. He hired an expert. Counsel further testified that he did not need to testify in order to say he was not present at the scene, as he felt they had presented a good defense. He explained that he feared if Applicant testified he would open the door for the prosecution to question him about his previous armed robbery conviction. He also testified that he advised Applicant of his right to testify, and, ultimately, it was Applicant's decision whether or not he would testify. He elaborated that the trial court would have questioned Applicant regarding this right, and that he and Applicant discussed it. He further elaborated that it was possible Applicant and Mr. Grimes discussed this possibility without Counsel being present.

#### **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 presented at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

##### ***Ineffective Assistance of Counsel***

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant 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 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action. Below are this Court’s findings in regards to each of Applicant’s allegations of ineffective assistance of counsel.

*Counsel’s alleged failure to object during the solicitor’s closing argument*

Applicant contends Counsel was ineffective for failing to object during the solicitor’s closing argument. Specifically, Applicant contends Counsel was ineffective for failing to object when the solicitor stated: “But maybe the thinking was who would believe this immigrant anyway. Who would believe this man who couldn’t even come into this courtroom and couldn’t

“speak English.” Tr. 725. Applicant alleges this comment bolstered the testimony of Victim and was an inflammatory statement meant to appeal to the jurors’ emotions. Applicant further contends Counsel was ineffective for failing to object when the solicitor made the following comment:

Before I show it to you though I don’t think all of you are going to be able to identify this man, obviously. I don’t think that can be done, and that is just what Dr. Beaudry was telling you about. Strangers have a lower level of being able to identify somebody. So just because all of you can’t, and some of you may, does not mean you have reasonable doubt. This case is based on the witnesses who knew him, not on your ability to look at this video and determine if it is him.

Tr. 729-30. Applicant alleges this comment is bolstering. Next, Applicant alleges Counsel was ineffective for failing to object when the solicitor stated: “There are four people in this case who told you they know. If you want to take off 20 percent take one and a half people. They are all telling you they know. They are not all mistaken. They are actually all correct.” Tr. 731. Applicant contends the solicitor was vouching for the credibility of the witnesses with this statement. Applicant further alleges Counsel was ineffective for failing to object to the following comment made by the solicitor in closing argument: “And just because they weren’t able to take an exact translation there that day at the scene about this is the man who comes in and buys Newport cigarettes, usually a lottery ticket, sometimes gas and he jokes with us about Obama does not mean it didn’t happen.” Tr. 734. Through this comment, Applicant argues the solicitor was bolstering his own personal opinion. Next, Applicant contends Counsel was ineffective for failing to object to the following statement, which he alleges is explicit vouching: “You judge their credibility and you determine if they are lying to you, and they are not. Why would they? Why would they go through a lie to frame somebody and say things they don’t know? This isn’t about their credibility. They are telling you the truth.” Tr. 734. Applicant

also alleges Counsel was ineffective for failing to object when the solicitor stated: "You heard from Ms. Patel, and you'll decide to believe her or not. There's every reason in the world to believe her. . . . Does she know or is she lying? She is not." Tr. 738. Applicant contends this comment vouched for the credibility of Ms. Patel. Further, Applicant alleges the following comment was a personal assurance by the solicitor of the witnesses' veracity: "You can believe all those witnesses and you can believe the truth in this case." Tr. 738-39. Finally, Applicant contends Counsel was ineffective for failing to object when the solicitor stated: "If you knew with certainty what happened in this case you wouldn't be sitting where you are. You would have taken the witness stand, told the jury what you knew. People who are certain have certain information. They know. And certain people take that stand." Tr. 739. Applicant contends through this comment, the solicitor placed the prestige of the government behind the witnesses.

This Court finds Applicant has wholly failed to establish Counsel was deficient. "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004) (citing *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). Furthermore, a closing argument should stay within the content of the record and the reasonable inferences to be drawn therefrom and must not be intended to arise the passions or prejudices of the jury. *Id.* at 609-10, 602 S.E.2d at 744 (citing *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); *Copeland*, 321 S.C. at 324, 468 S.E.2d at 624). A solicitor must also not vouch for a witness' credibility. *Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (citing *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001)). A solicitor vouches for the credibility of a witness by placing "the government's prestige behind a witness by making personal assurances, or indicating that information not presented to the jury supports the testimony." *Id.* However, "[a]

solicitor's argument concerning the credibility of the State's witnesses based on the record and its reasonable inferences is not error.” *State v. New*, 338 S.C. 313, 319-20, 526 S.E.2d 237, 240 (1999) (quoting *State v. Caldwell*, 300 S.C. 494, 505, 388 S.E.2d 816, 822 (1990) (finding the solicitor's remarks referencing credibility of State witnesses permissible and directly related to the evidence where biases of the witnesses were apparent from the record)). See also *State v. Raffaldt*, 318 S.C. 110, 456 S.E.2d 390 (1995) (the State may comment on the credibility of witnesses in argument).

Here, the solicitor's closing argument was within the confines of the record and the reasonable inferences therefrom. Furthermore, his comments on the credibility of the State's witnesses were based upon the record and its inferences. At trial, evidence was presented that Victim, Ms. Patel, Detective Lawrence, and Deputy Luckadoo all had personal knowledge of Applicant. Specifically, Victim and Ms. Patel were familiar with Applicant based upon prior dealings with him in their store. See Tr. 289-90, 532-36. Similarly, Detective Lawrence and Deputy Luckadoo both had prior encounters with Applicant. See Tr. 334-36, 352-54.

Similarly, this Court finds Applicant has failed to establish any resulting prejudice from the alleged deficiencies. Even if the comments made by the solicitor were improper, “[c]onduct that would otherwise be improper may be excused under the ‘invited reply’ doctrine if the prosecutor’s conduct was an appropriate response to statements or arguments made by the defense.” *Vaughn*, 362 S.C. at 169, 607 S.E.2d at 75. When the door has been opened to such comments, the comments must have “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Donnelly v. Christoforo*, 416 U.S. 637, 643 (1974). Furthermore, upon review of such comments, “a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury,

sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.” *Id.* at 647.

At trial, Applicant presented the testimony of Dr. Beaudry in order to cast doubt on the identifications made in this case. Dr. Beaudry’s testimony served to present a slew of factors, some present in this case, which could have affected the identification of Applicant. The solicitor’s comments made during closing were merely an invited response from the defense—that the jury should believe the witnesses because their identifications of Applicant were not wrong. Based on all the foregoing, this Court finds Applicant has failed to meet his burden. Accordingly, this allegation must be denied and dismissed with prejudice.

*Counsel’s alleged failure to object to testimony*

Applicant alleges Counsel was ineffective for failing to object to the so-called “perjured” testimony of Detective Lawrence and Deputy Luckadoo. Specifically, Applicant contends Counsel was ineffective for failing to object when Detective Lawrence testified to the duration of a prior interview with Applicant, which were inconsistent. Applicant further alleges Counsel was ineffective for failing to object when Deputy Luckadoo testified he knew Applicant from the news.

With respect to the inconsistencies in Detective Lawrence’s testimony regarding the length of a prior interview with Applicant, this Court finds Applicant has failed to establish Counsel was deficient or any resulting prejudice therefrom. Trial counsel must be given leeway to make reasonable strategic decisions. Indeed, “no particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” *Strickland*, 466 U.S. at 689. Furthermore, “representation is an art, and an act or omission that is

unprofessional in one case may be sound or even brilliant in another.” *Id.* at 693. Where counsel articulates a valid strategic reason for his action or inaction, counsel’s performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Counsel testified he did not want to highlight the fact Applicant had been interviewed by Detective Lawrence in the past, because he wanted to quell all references to Applicant’s prior armed robbery convictions. Furthermore, Counsel testified that there was no method in which to verify the length of the interview, whether it be one hour or two-and-a-half hours, without Applicant having to testify. Based on the foregoing, this Court finds Counsel employed a valid strategic decision in not highlighting this minor inconsistency; therefore, Applicant has wholly failed to establish that Counsel was deficient or any prejudice therefrom. This allegation must be denied and dismissed with prejudice.

With respect to Applicant’s allegation that Counsel was ineffective for failing to object to Deputy Luckadoo’s testimony, this Court finds Applicant has failed to meet his burden. Applicant contends he was not featured in the media, but rather his brother was, and therefore Deputy Luckadoo could not have recognized Applicant from the media. However, even assuming Applicant is correct in that he was not featured in the news, Applicant completely overlooks that Deputy Luckadoo recognized him from prior dealings with Applicant. Therefore, this allegation must be denied and dismissed with prejudice.

*Counsel’s alleged failure to advise Applicant of his right to testify*

Applicant alleges Counsel failed to advise him of his right to testify. In particular, Applicant contends Counsel was ineffective for advising him not to testify. A criminal defendant has a constitutional right to testify on his own behalf. *Rock v. Arkansas*, 483 U.S. 44

(1987). The decision on whether or not the defendant will testify ultimately rests with the defendant alone. *Jones v. Barnes*, 463 U.S. 745 (1983). When a defendant chooses not to testify, "an on-the-record waiver of a constitutional or statutory right is but one method of determining whether the defendant knowingly and intelligently waived that right." *Brown v. State*, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994) (citing *Myers v. State*, 248 S.C. 359, 151 S.E.2d 665 (1966)). Here, the trial court fully advised Applicant of his right to testify at trial. See Tr. 419-21. The trial court specifically stated to Applicant: "You may talk with your attorney, either together or individually, your friends, your family members, or anyone else but the final decision is left *entirely up to you*." Tr. 421 (emphasis added). Furthermore, the record clearly indicates Applicant made a choice, of his own, not to testify after having been fully advised of his rights and the ramifications of testifying or, in the alternative, not testifying. Tr. 684. Applicant chose not to testify. Tr. 439. Moreover, Counsel testified he discussed Applicant's right to testify with him and expressed his concerns if Applicant did decide to testify, namely opening the door for his prior armed robbery convictions to become admissible. He further testified that he made it clear to Applicant the decision whether or not he would testify ultimately rested with him. Accordingly, this Court finds Applicant has failed to show any deficiency or resulting prejudice with respect to Counsel's alleged failure to adequately advise of Applicant regarding his right to testify. Accordingly, this allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to investigate and present an alibi defense*

Applicant contends Counsel was ineffective for failing to fully investigate Applicant's purported alibi. "Although counsel should conduct a reasonable investigation into potential defenses, *Strickland* does not impose a constitutional requirement that counsel uncover every



scrap of evidence that could conceivably help their client.” *Tucker v. Ozmint*, 350 F.3d 433, 442 (4th Cir. 2003) (quoting *Green v. French*, 143 F.3d 865, 892 (4th Cir. 1998)). Moreover, “failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result.” *Porter v. State*, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (citing *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). “In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003). This Court finds Counsel’s testimony with respect to this allegation very credible, whereas Applicant’s testimony is not credible. Counsel testified that he hired an investigator and had that investigator search for and interview Applicant’s alleged alibi witnesses. He testified based on this investigation, he could not present a strong alibi defense, as the alleged witnesses could not be found, did not remember the events of that date, or indicated Applicant did not partake in the actions in which he alleged to have partaken. Because Counsel did, indeed, investigate Applicant’s alleged alibi, this Court finds Applicant has failed to establish any deficiency on the part of Counsel.

Similarly, this Court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. Prejudice from counsel’s failure to interview or call witnesses cannot be shown where the witnesses do not testify at the post-conviction relief hearing. *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Bassette v. Thompson*, 915 F.2d 932 (4th Cir. 1990), *cert. denied*, 499 U.S. 982 (1991). Applicant’s mere speculation as to what a witness’s testimony would have been cannot, by itself, satisfy his burden of showing prejudice. *Clark v.*



*State*, 315 S.C. 385, 434 S.E.2d 266 (1993); *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995). An applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the post-conviction relief hearing in order to establish prejudice from the witness's failure to testify at trial. *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998). Applicant wholly failed to present the testimony of these alleged alibi witnesses. Applicant's mere speculation as to what these witnesses would have said does not give rise to the level of proof required to establish his burden. Accordingly, this allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to have Applicant mentally evaluated*

Applicant further alleges Counsel was ineffective for failing to have him mentally evaluated. Counsel testified he has no problems communicating with Applicant and, therefore, had no reason to have Applicant evaluated. Therefore, this Court finds Applicant has failed to show Counsel was deficient. Furthermore, because Applicant neither produced any medical records concerning his mental health "nor offered the testimony [of some mental health expert] in some other manner consistent with the rules of evidence," what this additional testimony would have been, and similarly what his medical records would have shown, is "purely speculative." *Bannister*, 333 S.C. at 304, 509 S.E.2d at 810. This Court finds this allegation must be denied and dismissed with prejudice.

**CONCLUSION**

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. That this application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to and remain in the custody of the State

AND IT IS SO ORDERED this 23<sup>rd</sup> day of August, 2018.

ROGER M. YOUNG, SR.  
Presiding Judge  
Ninth Judicial Circuit

CHB, South Carolina

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

RECEIVED  
SEP 27 2018  
S.C. SUPREME COURT

Marvin Bowens Green, #346650

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Order of Dismissal has been served upon the applicant by mailing one copy in the United States mail, postage prepaid, addressed to:

Christopher L. Murphy, Esquire  
Murphy Law Offices, LLC  
234 Seven Farms Drive, Suite 128  
Charleston, SC 29492

This 5<sup>th</sup> day of September, 2018.

*Jennifer Jennison*  
Jennifer Jennison  
Legal Assistant for Respondent

SWORN to before me this 5<sup>th</sup> day of September, 2018.

Notary Public for South Carolina  
My Commission Expires:



RD20110100055

WITNESSES

LAWRENCE

Charleston County Sheriff

AGENCY CASE NUMBER

2010021305B

ARREST WARRANT NUMBER

K684608

DATE OF ARREST

December 30, 2010

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: -- APR 04 2011

VERDICT

Foreperson of Petit Jury

Date:

INDICT.DOT

DOCKET NO.

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

MARVIN BOWENS GREEN

DOB: [REDACTED]

B/M

Indictment for

Armed Robbery

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

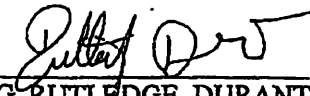
## INDICTMENT

At a Court of General Sessions, convened on April 4, 2011 the Grand Jurors of Charleston County present upon their oath:

Armed Robbery

That on or about December 24, 2010, in Charleston County, South Carolina, at [REDACTED], Charleston, South Carolina, by use of force, threats or intimidation and while armed with a deadly weapon, to wit: a <sup>(CH)</sup> 38 Colt revolver, serial #82846, the Defendant, MARVIN BOWENS GREEN, did take and carry away goods and/or monies from the person or immediate presence of Natubhai Patel with the intent to permanently deprive him of possession thereof, in violation of Section 16-11-330(A) of the South Carolina Code of Laws (1976) as amended.

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

  
G. RUTLEDGE DURANT  
ASSISTANT SOLICITOR

GRD20110100053

WITNESSES

LAWRENCE

Charleston County Sheriff

AGENCY CASE NUMBER

2010021305B

ARREST WARRANT NUMBER

K684609

DATE OF ARREST

December 30, 2010

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

APR 04 2011

VERDICT

Foreperson of Petit Jury

INDICT DOT

DOCKET NO. 2011GS1004557

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

MARVIN BOWENS GREEN

DOB: [REDACTED]

B/M

Indictment for

Possession Of A Firearm During The  
Commission Of A Violent Crime

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

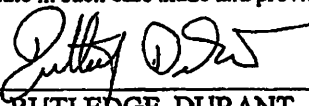
## INDICTMENT

At a Court of General Sessions, convened on April 4, 2011 the Grand Jurors of Charleston County present upon their oath:

**Possession Of A Firearm During The Commission Of A Violent Crime**

That in Charleston County, South Carolina, on or about December 24, 2010, the Defendant, MARVIN BOWENS GREEN, did possess a ~~38 Colt~~ revolver, serial #82846 or visibly display what appeared to be a firearm during the commission, or attempted commission, of Armed Robbery, a violent crime. This is in violation of 16-23-490 of the South Carolina Code of Laws, (1976) as amended.

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

  
G. RUTLEDGE DURANT  
ASSISTANT SOLICITOR