

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CR - E
CASE NO. 2010 CF 238

STATE OF FLORIDA

vs.

JAY MORGAN SOWERS
_____ /

**DEFENDANT SOWERS' MOTION TO CORRECT
SENTENCING ERROR PURSUANT TO FLORIDA RULE OF
CRIMINAL PROCEDURE, RULE 3.800(b)(2)**

COMES NOW, the Defendant, JAY MORGAN SOWERS ("Sowers"), by and through his undersigned appellate counsel, pursuant to Rule 3.800(b)(2), Florida Rules of Criminal Procedure, and hereby moves this Honorable Court to vacate the judgment and sentence in this case on the ground set forth below and set this matter for a *de novo* resentencing.

SENTENCING ERRORS

- 1. THE COURT ERRED IN DETERMINING THAT SOWERS WAS NOT ELIGIBLE FOR YOUTHFUL OFFENDER SANCTIONS.**

At Sowers' sentencing Sowers's defense counsel stated that "a youthful offender sentence . . . *That's unavailable to the court because it's a life felony.*"



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[ROA 166-167; emphasis supplied]¹ Again the defense counsel stated “The juvenile sanction is available to this court, *but the youthful offender is not.*”² [ROA 168; emphasis supplied] The state appeared to adopt this view. Assistant State Attorney Sonson advised the court: “[I]t’s my understanding, your Honor, that because of the ten year minimum mandatory, *his sentence can range from ten years in the Florida State Prison all the way up to life in prison.*” [ROA 175; emphasis supplied] The state recommended twenty years imprisonment on count one (home invasion robbery (“HIR”), in violation of Florida Statutes, § 812.135), with a ten year minimum mandatory under Florida Statutes, § 775.087(2)(a)1, and fifteen years concurrent as to count two (aggravated battery with a deadly weapon, a knife, in violation of Florida Statutes, § 784.045(1)(a)2). [ROA 175; ROA 21]

The Court imposed the sentence requested by the State, twenty years as to count one, with a ten year minimum mandatory under the 10-20-Life statute, but only ordered ten years, not fifteen, concurrent, as to count two. [ROA 178]

This was error. The Court was authorized to impose a Youthful Offender sentence. The Court’s misapprehension of its authority to sentence Sowers as a

¹ Record references are to the record on appeal (“ROA”), followed by the applicable page number unless otherwise expressly noted.

² A defendant cannot concede to an illegal sentence. *Williams v. State*, 35 So.3d 165 (Fla. 3rd DCA 2010).

Youthful Offender entitles Sowers to a *de novo* resentencing.

The Court was misadvised that it did not have the authority to sentence Sowers as a Youthful Offender. It is correct that the Youthful Offender sanction is not authorized for a *life felony*:

(1) The court may sentence as a youthful offender any person:

. . . .

(c) Who has not previously been classified as a youthful offender under the provisions of this act; *however, a person who has been found guilty of a capital or life felony may not be sentenced as a youthful offender under this act.*

Florida Statutes, § 958.04(1)(c) (emphasis supplied).

But HIR is *not* a *life felony*, it is only a *first degree felony punishable by life imprisonment*. There is a difference, and it is a difference which matters for Youthful Offender purposes. The HIR statute on its face defines HIR as a *first degree felony punishable by life*:

(2)(a) If in the course of committing the home-invasion robbery the person carries a firearm or other deadly weapon, the person commits a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment

Florida Statutes, § 812.135(2)(a).

A first degree felony *punishable by life* is not the same category offense as a *life felony*. See *Burdick v. State*, 594 So.2d 267 (Fla. 1992); *Knight v. State*, 808 So.2d 210 (Fla. 2002); *Torres v. State*, 879 So.2d 1254 (Fla. 3rd DCA 2004).

The law is equally clear that first degree felonies, punishable by life imprisonment, are subject to Youthful Offender sanctions. *Tittle v. State*, 405 So.2d 1007 (Fla. 1st DCA 1981); *Richardson v. State*, 398 So.2d 1010 (Fla. 1st DCA 1981); *Lee v. State*, 667 So.2d 253 (Fla. 1st DCA 1995); *State v. Upshaw*, 469 So.2d 922 (Fla. 3rd DCA 1985).

The remedy for the failure to apprehend that a defendant was eligible for Youthful Offender sentencing is a remand for resentencing. *Richardson, supra*.

2. THE COURT ERRED IN DETERMINING THAT SOWERS WAS SUBJECT TO THE 10-20-LIFE SENTENCING ENHANCEMENT AND IN IMPOSING A MINIMUM MANDATORY 10 YEAR SENTENCE ON COUNT ONE.

The 10-20-Life sentencing enhancement statute, found at Florida Statutes, § 775.087(2), requires *actual possession* of the firearm *by the defendant personally*; vicarious possession, or possession as a principal, is legally insufficient.

For example, in *Kenny v. State*, 693 So.2d 1136 (Fla. 1st DCA 1997), the court reversed the imposition of the three-year mandatory minimum for possessing a firearm during the commission of an armed robbery, recognizing that an unarmed

defendant could be charged and convicted of armed robbery under a principal theory, the court held that imposing the minimum mandatory provision of subsection 775.087(2) required a “factual basis demonstrating *actual possession* of the firearm during commission of the offense.” *Id.* at 1136-37. *See also Earnest v. State*, 351 So.2d 957 (Fla. 1977) (Section 775.087(2) does not encompass vicarious possession). This is mandated by the plain meaning of the language of the statute itself, which expressly requires *actual possession* of the firearm *by the defendant*: “and during the commission of the offense, such person actually possessed a “firearm.”” Florida Statutes, § 775.087(2)(a)1.

Although Sowers pled guilty to an amended information which alleged actual possession [ROA 21], no factual basis for the allegation of actual possession was provided to the court or admitted by Sowers. In the trial of the co-defendants, Joshua Martin and Bernard Johnson, the victim, Kelley Rita, testified that it was Martin and Johnson who actually possessed the firearms, and that Sowers only possessed a knife, Sowers himself so testified at that trial, as a state witness on direct examination, and the State argued in closing argument that Sowers’ testimony was truthful and that it was Martin and Johnson who actually possessed the firearms, and that Sowers only armed himself with a knife. [See Exhibits A, B, and C, hereunto annexed and by this reference made a part hereof; Exhibit A being Rita’s testimony in pertinent part,

Exhibit B being Sowers' pertinent testimony, and Exhibit C being the State's rebuttal closing argument.]³

The State had originally thought Sowers might have been the person who possessed the pistol (a shotgun was possessed by one robber, a pistol by the other), and at one point pistol whipped Mrs. Rita with this pistol. This was incorrect. But based on this mistaken impression, the State originally charged Sowers in Count Two with aggravated battery *with a firearm*. [ROA 14; Information filed January 1, 2010] The State corrected this error and filed an Amended Information February 2, 2010, which rewrote the charge to remove the firearm allegation and replace it with an allegation that Sowers battered Rita with a knife instead. [ROA 21]

However, at sentencing this Court stated that it was required to impose the ten year minimum mandatory "required by *the firearm possession on Count 2*." [ROA 178; emphasis supplied]⁴ Clearly the Court had forgotten that the original information had been abandoned, with its charge of a firearm possession, and that the State had corrected its filing by replacing the firearm allegation with an allegation of a knife only. Sowers did not actually possess a firearm and his vicarious possession or

³ From the trial of Martin and Johnson, Case Numbers 2010-CF-41 and 2010-CF-110, Division CRE.

⁴ When the State allocuted in favor of the ten year minimum mandatory sentence being required by the 10-20-Life statute, it did not explain why it applied.

possession as a principle does not support enhancement or application of the 10-20-Life minimum mandatory sentence.⁵

A defendant is entitled to be present and accompanied by counsel for resentencing where a minimum mandatory was improperly imposed at the original

⁵ Even if it did, the Youthful Offender Act would trump the 10-20-Life provision:

I agree with the majority's resolution of this case as to the issues raised. When reviewing the record, however, I noted that all parties at sentencing clearly believed that the court had no discretion to do anything but impose the twenty-year minimum mandatory sentence. This may not have been true. Windham was born on May 6, 1987, and was nineteen years old at the time he committed the offense, a third degree felony, on July 6, 2006. If Windham has not previously been classified as a youthful offender, it appears that he would have qualified for a youthful offender sentence. See § 958.04(1), Fla. Stat. (effective to Sept. 30, 2008) ("The court may sentence as a youthful offender any person: (a) Who is at least 18 years of age ...; (b) Who is found guilty of ... a crime which is, under the laws of this state, a felony if such crime was committed before the defendant's 21st birthday; and (c) Who has not previously been classified as a youthful offender...."). The minimum mandatory sentencing provisions of the 10-20-life statute do not supersede the youthful offender sentencing provisions. *Darrow v. State*, 789 So.2d 552 (Fla. 5th DCA 2001); *State v. Wooten*, 782 So.2d 408 (Fla. 2d DCA 2001). Therefore, it appears that the trial court could have imposed a lesser penalty by sentencing Windham as a youthful offender. *Id.* This point can be argued in connection with a motion to mitigate sentence under Florida Rule of Criminal Procedure 3.800(c), filed anytime within 60 days after issuance of our mandate.

Windham v. State, 14 So.3d 255, 256 (Fla. 5th DCA 2009) (Lawson, J., concurring) (footnote ommitted).

sentencing - the correction is not merely a ministerial matter:

A defendant has the right to be present and represented by an attorney at resentencing. See *McGough v. State*, 876 So.2d 26, 26 (Fla. 1st DCA 2004); *Bines v. State*, 837 So.2d 1146, 1147 (Fla. 1st DCA 2003). Although the State argues that the striking of the minimum mandatory term was merely ministerial and did not require the presence of the appellant or his counsel, we conclude otherwise and determine that further proceedings are warranted. See *McGough*, 876 So.2d at 26; see also *Mullins v. State*, 997 So.2d 443, 444 (Fla. 3d DCA 2008).

Cross v. State, 18 So.3d 1235, 1236 (Fla. 1st DCA 2009).

Therefore, Sowers is entitled to a *de novo* resentencing on this ground as well.

3. THE COURT ERRED IN FINDING THAT A FIREARM WAS POSSESSED BY SOWERS AS TO EITHER COUNT.

See discussion of evidence and amended information in issue two, *supra*.

4. THE PRESENTENCE INVESTIGATION REPORT AND PREDISPOSITION REPORT EACH CONTAINED MATERIAL ERRORS OF FACT, IN PARTICULAR EACH ERRED IN STATING THAT SOWERS POSSESSED A FIREARM AND ERRED IN STATING THAT SOWERS HAD STRUCK THE VICTIM, KELLEY RITA, WITH A FIREARM.

The Court began the sentencing proceeding by assuring the parties that the Court had carefully read and reviewed the presentence investigation and predisposition reports (the “PSR” and “PDR” respectively) prior to sentencing. [ROA 122; ROA 162] The Court expressed admiration for the “very thorough job” done by the author of the PSR and PDR. Clearly the Court considered the PSR and PDR in

determining the appropriate sentence - as it was statutorily required to do.

Unfortunately, the PSR and PDR contained grievous errors which went to the heart of the offense conduct. Somehow the reports included the same mistaken information that had led the State to originally charge Sowers in Count Two with aggravated battery with a *firearm*, and in addition, stated that it was Sowers who pistol whipped the victim. [PSR, p. 2; PDR, p. 2] Clearly the Court accepted this statement in aggravation, which cemented in the Court's mind the confusion over the possession of the firearm originally charged in Count Two, which the Court then expressly referenced in imposing the 10-20-Life minimum mandatory.

Sowers was entitled to be sentenced based on a factually accurate PSR and PDR as to all material facts. That both the PSR and PDR wrongly stated that Sowers pistol whipped a defenseless woman in her home was certainly material to the Court's determination of the appropriate sentence. Sowers is entitled to a resentencing with a corrected PSR and corrected PDR.

A criminal defendant has a constitutional right under the Due Process clause of the United State Constitution as applied to the states under the Fourteenth Amendment, to be sentenced based upon constitutionally reliable evidence. *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948). Where the defendant disputes the truth of hearsay statements contained in pre-sentence investigation reports (as Sowers

now does by this 3.800 motion), when the false statements would be material to the statutory findings which the trial court is required to make, the court must require the state to produce corroborating evidence. *Eutsey v. State*, 383 So.2d 219 (Fla.1980). Because the State cannot corroborate the false statements in the PSR and PDR (we know they will not and cannot because they presented contrary testimony and argument in Johnson and Martin's trials to obtain their convictions), resentencing is required. *Stacey v. State*, 483 So.2d 542, 543 (Fla. 1st DCA 1986).

5. THE COURT ERRED IN DETERMINING THAT COUNT TWO REFERRED TO A FIREARM, WHEN COUNT TWO HAD BEEN AMENDED PRIOR TO SOWERS'S PLEA AND SENTENCING TO DELETE THE REFERENCE TO A FIREARM AND SUBSTITUTE A KNIFE AS THE DEADLY WEAPON.

See discussion of evidence and amended information in issue two, *supra*.

6. THE COURT ERRED IN ADVISING SOWERS THAT HE FACED LIFE IN PRISON FOR HIS CONVICTION UNDER COUNT ONE, WHEN LIFE IMPRISONMENT WAS NOT AN AVAILABLE SENTENCING OPTION.

At the change of plea the State and Court incorrectly advised Sowers that the maximum penalty he faced on Count One was life imprisonment. [ROA 184] The State repeated this claim at Sowers' sentencing. [ROA 175] Clearly life was not an available sentencing option for this defendant, who was seventeen years old at the time of the offense. [PSR, p. 1] *Graham v. Florida*, __ U.S. __, 130 S.Ct. 2011, 176

L.Ed.2d 825 (2010).

It was prejudicial error for the Court to determine the point within the range of available sentencing options to impose sentence, when the Court had misapprehended the range itself.

7. THE COURT ERRED IN ITS RESTITUTION ORDER WHICH FAILED TO EXPRESSLY PROVIDE THAT RESTITUTION WAS JOINT AND SEVERAL WITH THE CO-DEFENDANTS.

In its oral pronouncement of sentence the Court correctly stated that the restitution judgment would be joint and several with Joshua Martin and Bernard Johnson. [ROA 178] Although the written judgment does provide that Sowers would be entitled to offset amounts paid by Johnson or Martin, it fails to provide that the judgement is joint and several.⁶ The judgment should be conformed to the oral pronouncement. *Willis v. State*, 656 So.2d 261 (Fla. 1st DCA 1995).

⁶ Joint and several liability is a broader concept than offset. *See e.g.* Florida Statutes, § 768.31, providing a right of contribution (not simply offset) among joint tortfeasors.

CONCLUSION

Wherefore, Jay Morgan Sowers respectfully requests this Honorable Court vacate his judgment and sentence and set the case for *de novo* resentencing.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on (1) Vincent Joseph Sonson and Cyrus P. Zomorodian, Assistant State Attorneys, Duval County Courthouse, Jacksonville, Florida, and (2) on trial counsel for Jay Morgan Sowers, that is, Malcolm Anthony, Esq., 572 Ponte Vedra Blvd. Suite 1, Ponte Vedra Beach, Florida, and (3) on the Office of the Attorney General, PL-1, The Capitol, Tallahassee, Florida, by United States Postal Service First Class Mail Postage Prepaid, on this 23rd day of September, 2011.

A handwritten signature in cursive script, reading "William M Kent", written in black ink.

William Mallory Kent

EX A.

Sawers

415

VICTIM
Key RITA
Testing

1 back to bed, did you go back to sleep?

2 A Yes.

3 Q All right. Miss Rita, I want you to tell the
4 jury what woke you up a second time that night.

5 A The sound of men screaming: Where's the
6 cash? Where's the wallets? Where's the money?

7 Q When you woke up, what did you see?

8 A I saw two men at the foot of our bed with
9 guns aimed at me and my husband.

10 Q Did your husband wake up, as well?

11 A Yes.

12 Q If you could, Miss Rita, please describe for
13 the jury what those individuals looked like, what they
14 were wearing, the two that were at the foot of your
15 bed.

16 A The one that was on the -- my side, the foot
17 of my bed, he was -- he was fairly tall. He had --
18 black male. He had a black ski mask on, and he had
19 red -- bright red nylon pants with pockets all down the
20 side. He had a dark sweatshirt on, and he had a
21 long -- looked like a shotgun to me, aimed at me.

22 Q At some point, did you get a look at that
23 individual's footwear?

24 A Yes. He had black leather heavy boots on.
25 They looked like work boots.

1 Q If you could, Miss Rita, describe that second
2 individual for the jury.

3 A He was shorter, smaller, slighter build. He
4 had dark jeans on and a dark sweatshirt. And he had --
5 it was like a -- it was off-white, looked like a torn
6 sheet strip wrapped around his head with just his eyes
7 showing. He had a smaller revolver aimed at my
8 husband.

9 Q At some other point, did you also get a look
10 at that individual's footwear?

11 A Yes.

12 Q Tell the jury what stood out in mind.

13 A He had -- distinctive. They were bright
14 white shoes and they had a kelly green, like, a bright
15 true green marking on the sole.

16 Q How would you describe that individual's skin
17 tone?

18 A Olive skin, kind of like mine.

19 Q Were both those individuals screaming at you
20 and your husband?

21 A Yes.

22 Q Describe for the jury what you did at that
23 point.

24 A I tried to explain to them that we didn't
25 have wallets. Mine had just been stolen on a business

1 get up if you want me to help you look for them.

2 Q While they're asking you about these items,
3 were they also asking your husband?

4 A Yes, sir.

5 Q What did you tell them?

6 A Told them he was terminally ill and he had
7 brain damage and he wasn't going to be able to
8 understand or help them or get up. I asked them to
9 just leave him alone, and I would get up and help them
10 if they would just leave him be.

11 Q During this time while you were in your
12 bedroom with your husband, both these individuals had
13 those firearms pointed at you and your husband?

14 A Yes, sir.

15 Q Which man had the gun on you?

16 A Black man, the tall man in the red pants.

17 Q Who had the gun on your husband?

18 A Olive-skinned man.

19 Q This may sound like a silly question,
20 Miss Rita, but were you afraid for your life at that
21 point, the lives of your family?

22 A Yes, sir, mostly afraid for my son and my
23 husband.

24 Q Miss Rita, did you --

25 A Yes.

1 A Instructed me to lay facedown on my couch.

2 Q Miss Rita, is this all at gunpoint?

3 A Yes.

4 Q When you were walking out of your bedroom,
5 Miss Rita, did you notice someone else in your house at
6 that time?

7 A Yes, I noticed a gentleman carrying a flat
8 screen TV out of my guest bedroom, across the kitchen.

9 Q Can you describe for me what he looked like
10 and what he was wearing?

11 A He was wearing jeans and he had a
12 black-and-white-striped ski mask. I believe he had a
13 white and red T-shirt.

14 Q At some point while he was in your house, the
15 white male, were you able to see his face?

16 A Yes, sir.

17 Q Can you describe for the jury how you were
18 able to see his face?

19 A He had this -- had lifted his ski mask up and
20 set it on top of -- the face of it on top of his head
21 for quite some time.

22 Q Did you say something to him about his mask?

23 A I told him that I couldn't quite believe he
24 was arrogant enough to have -- to be standing in my
25 home for that long with his mask off his face.

1 Q Did -- the olive-skinned male, did he say
2 something to the white male with the mask up?

3 A He told him to put the mask down over his
4 face.

5 Q Miss Rita, describe for the jury what happens
6 once you get to the couch in the living room.

7 A Had me lay facedown, the man with the red
8 pants. The tall one with the red pants stood behind me
9 at my legs with the long shotgun pointed at me.

10 Q Did any of the individuals in your house at
11 that time start to -- did they turn their attention to
12 something big in your living room?

13 A Yes, sir, the TV.

14 Q Where was the TV?

15 A Mounted on the wall over the fireplace.

16 Q Did -- the olive-skinned male, did he say
17 something about the TV? Did he make a comment about
18 how it was mounted on the wall?

19 A He commented several times that he couldn't
20 get it down, and he commented that it wasn't like the
21 others. It didn't just slide off. It was somehow
22 bolted, he said. He had never seen one like that.

23 Q Did he eventually or did -- at some point,
24 did he stop working on getting that down and focus his
25 attention on something else?

1 A He went up and down from it several times.
2 He would go up and try and get it off, and then he'd
3 get back down and go do something else and then come
4 back to it.

5 Q When you say something else, tell the jury
6 what he was doing. Was he asking you about other
7 things?

8 A He was asking me where things were. Where
9 did I have video cameras, laptops, any other
10 electronics. And he was in and out of our master
11 bedroom. I couldn't see once he got in there, but I
12 know he was in and out, and I heard him talking to my
13 husband at times.

14 Q At some point, did you offer to help them
15 locate some items that they were looking for?

16 A Initially, when he kept asking me, I told him
17 I wasn't going to help him rob me; he could look
18 himself. And then, yeah, at some point later when I
19 just wanted them out of my house, I offered to get up
20 and help him look for a computer charger, a specific
21 charger he was looking for.

22 Q The white male that was in your house with
23 the striped mask, where did he stand for the majority
24 of the robbery, inside your house?

25 A In the foyer.

1 Q Was he armed?

2 A Not initially.

3 Q What did he eventually arm himself with?

4 A It looked like a knife.

5 Q The person in the foyer, was that the same
6 person that you initially saw walk out of your guest
7 bedroom with the TV when you were initially coming out
8 of your bedroom?

9 A Yes, sir.

10 Q Miss Rita, did you eventually ask the male in
11 the foyer with the striped mask to do something for
12 you?

13 A I did. Pretty quickly into it, I asked him
14 to shut my son's bedroom door.

15 Q Why did you do that?

16 A I didn't want my son to wake up. I was
17 afraid what would happen if he did.

18 Q Did he follow your request?

19 A At first, no.

20 Q Was there some dialogue between the two of
21 you?

22 A Yeah. He said no. And I continued to ask
23 and I addressed all three of them and said that my
24 guess was that they were four-year-olds truly not that
25 long ago and that I would ask them to consider what

EX. B

SOWERS' TESTIMONY (MARTIN
TRIAL

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12-14-2010

- 1 A Yes, sir.
- 2 Q Tell the jury?
- 3 A His mother gave it to him, took it from his
- 4 brother.
- 5 Q Did Bernard carry a gun?
- 6 A Yes, sir.
- 7 Q What kind of gun did he carry?
- 8 A A revolver, .38.
- 9 Q What color was it?
- 10 A Black.
- 11 Q Did he always carry that gun with him?
- 12 A Yes, sir.
- 13 Q Would he bring that gun into your house?
- 14 A Yes, sir.
- 15 Q When he was in the house, did you have
- 16 knowledge or did you know where he kept it?
- 17 A Yes, sir.
- 18 Q Where did he keep it?
- 19 A By the nightstand or by the pillow.
- 20 Q In which room?
- 21 A My sister's room.
- 22 Q Did Bernard have any other guns?
- 23 A Yes, sir.
- 24 Q Tell the jury what else he had.
- 25 A A shotgun.

1 Q What kind of shotgun?

2 A Mossberg.

3 Q What color was it?

4 A Black and silver.

5 Q Where did he -- when he first, I guess, got
6 that shotgun and first brought it into your house,
7 where did he keep it?

8 A My closet.

9 Q In your room?

10 A Yes, sir.

11 Q Did he move that to a different location?

12 A Yes, sir.

13 Q Where did he move it to?

14 A Across the street in the woods.

15 Q What about you? Did you carry a weapon with
16 you?

17 A Yes, sir.

18 Q What did you carry?

19 A A knife.

20 Q What kind of knife?

21 A Switchblade.

22 Q Did you know an individual by the name of
23 Joshua Martin?

24 A Yes, sir.

25 Q How do you know Joshua Martin?

- 1 Q Why was that?
- 2 A To go rob somebody.
- 3 Q How did you leave the apartment?
- 4 A Bernard's black car.
- 5 Q Who all was in the car?
- 6 A Me, Bernard and Josh.
- 7 Q Who was driving?
- 8 A Bernard.
- 9 Q Where were you?
- 10 A In the passenger seat.
- 11 Q Where was Josh?
- 12 A In the back.
- 13 Q Were the items in the black -- were there
14 items in the black Ford Taurus that y'all were going to
15 use to commit this robbery?
- 16 A Yes, sir.
- 17 Q What was in the car?
- 18 A Guns, masks and gloves.
- 19 Q When you say guns, what guns do you mean?
- 20 A The shotgun and the revolver.
- 21 Q Mr. Sowers, tell the jury how y'all decided
22 on who was going to use what and where, what and all
23 that?
- 24 A Bernard just gave Josh --
- 25 Q Keep your voice up, please.

1 A Bernard just gave Josh the revolver. He took
2 the shotgun. I just had my knife.

3 Q What about as far as the coverings for your
4 head and face? How was that divvied up?

5 A Well, I had a beanie. I cut holes in it.
6 Bernard has -- already had a mask. And he just told
7 Josh to use a pillow case.

8 Q Beanie. You mean a wool cap?

9 A Yes, sir.

10 Q How did you make it into a mask?

11 A I cut two holes in it with my knife.

12 Q Do you remember turning into the Pablo Bay
13 residential area?

14 A No, sir.

15 Q You remember being be in a neighborhood?

16 A Yes, sir.

17 Q Do you remember turning down the street to
18 where the victims' house was?

19 A Yes, sir.

20 Q How or why did y'all choose to rob that
21 particular house? What came about?

22 A The garage was open.

23 Q Did someone point that out?

24 A Yes, sir.

25 Q Who pointed that out?

- 1 A Straight ahead to the left.
- 2 Q Now, going back to your entrance into the
3 house, when you got there, was Josh Martin and Bernard
4 Johnson still in the house?
- 5 A Yes, sir.
- 6 Q When you got there, did you see someone
7 coming out of the room that you later learned to be the
8 master bedroom?
- 9 A Yes, sir.
- 10 Q Who was coming out?
- 11 A Josh.
- 12 Q Did Josh Martin say anything when he came out
13 of the bedroom?
- 14 A Yes, sir.
- 15 Q What did he say?
- 16 A There's people in there.
- 17 Q What did Bernard Johnson do at that point?
- 18 A Go in the bedroom.
- 19 Q Did he have anything with him?
- 20 A Yes, sir.
- 21 Q What did he have with him?
- 22 A Shotgun.
- 23 Q What do you recall happening once Bernard
24 Johnson went into the bedroom with the shotgun?
- 25 A He grabbed the lady on the bed.

- 1 Q Where did he instruct her to go?
- 2 A Into the living room, on the couch.
- 3 Q Is that all done at gunpoint?
- 4 A Yes, sir.
- 5 Q Can you describe for the jury what the
- 6 victim, Kelley Rita, was wearing?
- 7 A A nightgown.
- 8 Q Pajamas?
- 9 A Yes, sir.
- 10 Q What color hair did she have?
- 11 A I think brown.
- 12 Q Whenever Bernard Johnson brought Kelley Rita
- 13 out of the bedroom, what did Josh Martin do at that
- 14 time?
- 15 A Go in the bedroom.
- 16 Q At some point, did you realize that there
- 17 were other people in that house?
- 18 A Yes, sir.
- 19 Q Who did you learn was in the house next?
- 20 A Her husband.
- 21 Q How did you learn that her husband was in the
- 22 room, also?
- 23 A Because she had said: Don't hurt my husband.
- 24 Q Did there come an opportunity for you to see
- 25 him in the bedroom?

- 1 A Yes, sir.
- 2 Q How did you see him in the bedroom?
- 3 A When I walked through the living room.
- 4 Q Who was going through most of the victims'
5 things in the house? Who was that?
- 6 A Josh.
- 7 Q Who stayed with the woman most of the time?
- 8 A Bernard.
- 9 Q What was he doing with her while she was on
10 the couch?
- 11 A Making sure she didn't go nowhere.
- 12 Q Okay. What was he doing with the gun?
- 13 A Holding it to her.
- 14 Q Did Mr. Johnson go through the victims'
15 things, as well?
- 16 A Yes, sir.
- 17 Q Describe for the jury what y'all were doing
18 with the things that were taken from the victims'
19 house. What did you do with them?
- 20 A Put them in garbage bags.
- 21 Q What did you do with the garbage bags?
- 22 A Take it to the car.
- 23 Q Where did you position yourself in the house
24 for most of the robbery?
- 25 A By the bedroom where the kids were at.

1 where someone else held the victim at gunpoint?

2 A Yes.

3 Q Who?

4 A Josh.

5 Q Do you remember or do you recall if Josh
6 Martin took her to a different area of the house?

7 A Yes.

8 Q What area of the house did he take her in?

9 A The back room, by the kitchen.

10 Q Initially, were you there in that room with
11 them?

12 A When?

13 Q When Josh Martin took her to that back room,
14 did you go with them?

15 A No, sir.

16 Q Where were you?

17 A In the back office room.

18 Q With who?

19 A Bernard.

20 Q What were you doing back there?

21 A Getting a TV.

22 Q While you and Bernard were taking the TV off
23 the wall, did someone yell for you?

24 A Yes, sir.

25 Q Who yelled for you?

- 1 A Josh.
- 2 Q Remember what he said?
- 3 A Help.
- 4 Q What did you do?
- 5 A Ran over there.
- 6 Q What did you see?
- 7 A The lady trying to take the gun from Josh.
- 8 Q What did Bernard Johnson do?
- 9 A He ran up next to me with the shotgun.
- 10 Q Did he do something with the shotgun?
- 11 A He nudged her.
- 12 Q What did you do at that point?
- 13 A I ran up with my knife.
- 14 Q What did you do with the knife?
- 15 A I put it by her leg.
- 16 Q What did Josh Martin do?
- 17 A He eventually got control of her and he
- 18 pistol-whipped her.
- 19 Q Where did he hit her?
- 20 A In the face.
- 21 Q What did Miss Rita do?
- 22 A Fall.
- 23 Q Where did she fall?
- 24 A To the ground.
- 25 Q Did you and Bernard leave that area?

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EXHIBIT C

STATE'S REBUTTAL CLOSING ARGUMENT

EX C.

Sawyer

STATE

CLOSING ARGUMENT

845

1 changes it again. Miss Rita's description of
2 two white males.

3 Reasonable doubt, if you hold the State
4 accountable, what you see, what you heard,
5 that evidence, the lack of evidence, the
6 conflicts in the evidence, the State has not
7 proven Mr. Martin guilty beyond and to the
8 exclusion of every reasonable doubt. An
9 unlawful codefendant, a victim who can't make
10 an ID, lack of DNA, all of that equals
11 reasonable doubt and why you should find Mr.
12 Martin not guilty. Thank you.

13 THE COURT: Thank you, Miss Herrington.
14 Mr. Zomorodian.

15 MR. ZOMORODIAN: Yes, Your Honor, may it
16 please the Court. Defense counsel, ladies
17 and gentlemen of the jury.

18 Make no mistake, this was singularly
19 terrifying experience for the victim. This
20 man seated right here chose a random house
21 that had made the unfortunate decision of
22 leaving their garage door open to rob those
23 people in their home. The victims, the Ritas
24 were asleep in their bed with their child in
25 the house. They awoke to this man pointing a

1 pistol, Kelley Rita woke up to him putting a
2 pistol in her face. Mr. Rita woke having a
3 shotgun in his face.

4 The defendant made a choice that night.
5 It's not only that he was there, arguably he
6 was the ring leader of this crime, you heard
7 testimony at the party that he was trying to
8 get other people to conduct the lick. And
9 they conducted the lick all right.

10 Ladies and gentlemen, you've been very
11 patient over the last few days but there's
12 some things we have to go over.

13 I expect the Judge will give you an
14 instruction regarding weighing the evidence.
15 This is not my writing, this will come from
16 the law: Did the witness seem to have an
17 opportunity to see and know the things about
18 which the witness testified. Each one of the
19 defendants, associates, friends testified,
20 Mr. Busbin, Mr. Souza, Mr. Nimley, all of
21 them got up there and testified. Now, ladies
22 and gentlemen, should these witnesses be
23 discounted for what they said based upon the
24 fact they were drinking and smoking
25 marijuana? Are they the State's dream

1 Even if they were under the influence,
2 it doesn't matter and I'm going to tell you
3 more about that in a minute.

4 Did the witness seem to have an accurate
5 memory? Mr. Souza, Mr. Gallardo, Mr. Busbin,
6 Mr. Nimley, they all did the best job they
7 could. And they were very clear and concise.
8 They weren't up on the witness stand
9 sweating, they weren't darting their eyes
10 around, they were clear and they were concise
11 in what they saw. Their witness, their
12 testimony can be relied upon.

13 Was the witness honest and
14 straightforward in answering the attorneys'
15 questions? Yes, they were. Now what
16 about -- what about Storm, what about him?
17 Ladies and gentlemen, is he a criminal master
18 mind? No, he's not. Is he the bright -- and
19 I say this respectfully, is he the brightest
20 person? Is he the sharpest tool in the shed?
21 No, probably not. However, ladies and
22 gentlemen, he's the person that the defendant
23 chose to have with him. He is believable for
24 what he told you. Is it reasonable? Can you
25 expect in a home invasion robbery trial to

1 THE COURT: And your objection is?

2 MS. HERRINGTON: This -- Mr. -- this is
3 the State's rebuttal argument, outside of my
4 closing.

5 THE COURT: Outside the scope?

6 MS. HERRINGTON: Yes.

7 THE COURT: I'll deny that. Go right
8 ahead.

9 MR. ZOMORODIAN: Ladies and gentlemen,
10 Miss Herrington had spoke about no DNA, no
11 prints, et cetera. Ladies and gentlemen,
12 there's three pairs of gloves, three pairs of
13 gloves that were found in that car, in the
14 defendant's room. There's Mr. Johnson's ID
15 card, what's the address on there? The same
16 address which Miss Depres from the tax
17 collector's office testified was the owner of
18 the car. There's the gun, there's the weapon
19 of choice of the defendant that he in her own
20 house hit the victim, Miss Rita, in the head
21 with. And we all know what happened after
22 that, what he said to her and that he kicked
23 her all over her body in their house after
24 the illegal entrance.

25 The husband's watch which he earned,

1 held accountable for their actions. We're
2 asking you to hold him accountable for the
3 actions he chose to make.

4 You have to look at this case in the
5 context of where it is. The witnesses, yes,
6 they are friends of a robber, not Miss Rita,
7 not the police officers. Mr. Gallardo, Mr.
8 Busbin, those individuals, Mr. Busbin did not
9 have anything to drink, he did not consume
10 anything whatsoever that would affect his
11 ability to discern what happened in this
12 case. This man made the decision to go into
13 that victim's house and point a gun in her
14 face, hit her in the head and steal her blind
15 and rob her house and toss it. He should be
16 found guilty for the crime he chose to make
17 as an adult, that is home invasion robbery
18 with a firearm.

19 We ask that you follow the law, you've
20 listened to the facts, Judge Gooding is going
21 to tell you what the law is. We ask you to
22 listen to that and follow it. Find him
23 guilty as charged. Thank you for your time
24 and your attention.

25 THE COURT: Ladies and gentlemen, it