

VOLUME II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

J. Ernest Kinard, Jr., Circuit Court Judge

RECEIVED

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S.C. Supreme Court

JIMMY D PORTEE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213469

APPENDIX

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Kevin Isenhoward - Direct by Ms. Shipley

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1 Q Around 9:50 to 10 a.m.?

2 A Yes.

3 Q And again, what time was he already in police
4 custody?

5 A At 9:28.

6 Q Now, based on the evidence, can you explain to the
7 jury what charges you charged Mr. Portee with?

8 A Based upon the information I received, he was charged
9 with the armed robbery, failure to stop for blue
10 lights and siren, and two counts of assault and
11 battery of a high and aggravated nature for the two
12 ladies at the store.

13 Q Did you have an occasion to receive a court order to
14 obtain evidence from Mr. Portee?

15 A I did.

16 Q And can you describe -- I'm going to show you a
17 document and ask you if you recognize that?

18 A Yeah. This is the order to obtain a DNA sample from
19 Mr. Portee.

20 Q And on the last page can you see signatures?

21 A Yes, I can.

22 Q And did Mr. Portee consent to give his DNA?

23 A He did.

24 Q All right. Where did you -- did you -- as a result
25 of this order, what did you do?

1 A I took a DNA swab, a buccal swab. I provide a new
2 swab to him and allow him to swab the inner portion
3 of his mouth and then return that to the box which is
4 signed by me, sealed and entered into evidence.

5 Q I'm going to show you what's been put in evidence,
6 No. 67, and ask you if you recognize that item?

7 A Yeah. This is the buccal swab that I took from Jimmy
8 Portee on July the 25th of 2007.

9 Q And once you -- again, after you collected the
10 sample, saliva sample. Is that correct?

11 A That's correct.

12 Q What did you do with that box?

13 A I sealed the box in an evidence container and then
14 dropped or actually took this swab directly to the
15 evidence room where it was turned over to Curtis
16 Burnett.

17 Q And did you tamper with that item of evidence in any
18 way?

19 A No.

20 Q After you took Mr. Portee's statement back at the
21 Sheriff's Department on November 9th, what, if
22 anything, did you do with Mr. Portee and his clothes?

23 A We photographed him dressed as he was when he
24 apprehended him.

25 Q And I'm going to show you State's No. 49.

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1 MR. COOPER: Objection, Your Honor.

2 Q And 50.

3 THE COURT: I've already ruled those
4 inadmissible.

5 MS. SHIPLEY: Even though he's the one that --

6 THE COURT: Mm-hmm (affirmative).

7 MS. SHIPLEY: Okay.

8 Q What did you do with his clothing?

9 A We provided him with a change of clothing, allowed
10 him to change in a cell and took those clothing and
11 placed them into evidence.

12 Q Okay. And did you personally collect his clothes and
13 seal them in a bag of evidence?

14 A I did.

15 Q I'm going to show you the following articles.
16 State's No. 51, did you collect this and put it in
17 evidence?

18 A Yes.

19 Q And who did you get this off of?

20 A Jimmy Portee.

21 MS. SHIPLEY: Your Honor, at this time we'd seek
22 to introduce 51 in evidence.

23 MR. COOPER: No objection.

7-Wod. (S.yuSmfJltA" , qX ?&)?)z 08881 ?_q_N_J2&_d_& Jq ?/q)?
24 THE COURT: Without objection.

25

1 (WHEREUPON, State's Exhibit No. 51 is admitted
2 into evidence.)

3 Q I'm going to show you what's been pre-marked State's
4 No. 66. Do you recognize this?

5 A Yes. That's the shirt he was wearing.

6 MS. SHIPLEY: Your Honor, at this time the State.
7 seeks to introduce 66 into evidence.

8 MR. COOPER: No objection, Your Honor.

9 THE COURT: Without objection.

10 (WHEREUPON, State's Exhibit No. 66 is admitted
11 into evidence.)

12 Q And, lastly, did you collect State's 52?

13 A I did. Those are the shoes that he was wearing.

14 MS. SHIPLEY: Your Honor, at this time the State
15 seeks to introduce 52 in evidence.

16 MR. COOPER: No objection, Your Honor.

17 THE COURT: Without objection.

18 (WHEREUPON, State's Exhibit No. 52 is admitted
19 into evidence.)

20 Q And did you then put all of this together in one bag?

21 A Yes.

22 Q Do you see your initials on this bag?

23 A Yes. KSI.

24 Q I'm going to show you a map and ask you if you could
25 refer to the arrest report. What address did Mr.

1 Portee provide to you as his home address?

2 A 625 Child Street.

3 Q Do you see Child Street on this map?

4 A Yes. It's right here.

5 Q Do you see where Bluff Road is in relation to Child
6 Street?

7 A Bluff Road runs right here.

8 Q And do you see Atlas Road in relation to Bluff Road?

9 A Atlas Road is here.

10 Q Okay. And so if one were coming from the Garners
11 Ferry Road area, describe for the jury which
12 direction on Bluff Road one would have to turn off of
13 Atlas to head to Child Street?

14 A If you were coming from Garners Ferry Road, you would
15 have to take a right onto Bluff Road if you were
16 going towards Child Street.

17 Q Can you look also at the record and describe for the
18 jury the height and build of Mr. Portee?

19 A Mr. Portee is listed as six-foot-four, 160 pounds.

20 Q Beg the Court's indulgence. Thank you, Investigator
21 Isenhoward. Please answer any questions from the
22 defense.

23 A Absolutely.

24 THE COURT: Cross examination.

25 MR. COOPER: May it please the Court Your Honor.

CROSS EXAMINATION

BY MR. COOPER

Q Good morning, Investigator.

A Hello.

Q Investigator, this case was turned over to you by Sergeant Robinson, correct?

A That's correct.

Q So you weren't the first investigator on this case, correct?

A Yes. I was the first investigator. He handled the initial investigation as a responding officer. The case had been assigned to me from the beginning.

Q So Robinson didn't really investigate the case?

A He did. He was a responding officer. He did an initial investigation, an investigation just as the deputies did.

Q Oh. And he eventually -- you just testified he eventually turned his case fully over to you, correct?

A That's correct.

Q And you told Ms. Shipley a few minutes ago that you've had extensive training in interrogations, right?

A That's correct.

Q And you've also had extensive training in

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1 interviewing witnesses, correct?

2 A That's correct.

3 Q In fact, you've had extensive training on every
4 aspect of criminal investigations, right?

5 A Right.

6 Q And I assume that you've been in charge of numerous
7 investigations, right?

8 A That's correct.

9 Q And when you're in charge of an investigation, that
10 means you are sort of the boss of everyone else
11 involved in the investigation, right?

12 A They're my co-workers. I supervise what they do.
13 But, yes.

14 Q When you tell them to do something, you expect them
15 to do it?

16 A Yes.

17 Q All right. Part of a thorough criminal investigation
18 is interviewing relevant witnesses, right?

19 A Yes.

20 Q Part of a thorough investigation may include an
21 inspection of the crime scene, right?

22 A Right.

23 Q All right. Part of a thorough criminal investigation
24 may include searching for evidence, correct?

25 A Sometimes.

1 Q Okay. You only search for evidence sometimes?

2 A No. I only do it sometimes. We have to have a
3 location to search.

4 Q Okay. Investigator, after November 9th, 2006, when
5 did you go back to the Family Dollar Store on Garners
6 Ferry Road?

7 A I've been there several times since.

8 Q As part of this investigation?

9 A No.

10 Q So you never went back to Family Dollar as part of
11 this investigation, right?

12 A No.

13 Q You didn't send Sergeant Robinson back to Family
14 Dollar, did you?

15 A Yes, I did.

16 Q You did. And when was that?

17 A I sent him to Family Dollar that day to obtain a
18 videotape.

19 Q And he wasn't able to obtain the tape, right?

20 A He did obtain the tape.

21 Q All right. The tape was blank, right?

22 A Yeah. It was damaged.

23 Q All right. And at that point Sergeant Robinson was
24 not the -- you were the lead investigator at that
25 point, right?

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1 A Yes.

2 Q Okay. Now, you were familiar with what Sergeant
3 Robinson referred to as Region One, correct?

4 A Yes, I am.

5 Q And that's the Lower Richland area?

6 A That's correct.

7 Q And would you describe the area around the Family
8 Dollar as being somewhat residential?

9 A Yes.

10 Q Okay. Meaning live there, right?

11 A Yes.

12 Q And so you did not interview anybody in the
13 surrounding neighborhood, did you?

14 A No.

15 Q Okay. Didn't go knocking on doors, right?

16 A No.

17 Q Okay. Now, let's talk about, you talked to Ms.
18 Shipley about some phone calls you made to Ms.
19 Portee. When did you visit her home?

20 A You're asking about Ms. Janie Portee?

21 Q Yes, sir.

22 A I have not gone to her home.

23 Q All right. And in your experience in investigations,
24 you realize, Officer, that witness identifications
25 can be an important part of a criminal investigation,

1 correct?

2 A Absolutely.

3 Q So when you conduct an investigation you want to get
4 as accurate an identification as possible, right?

5 A Yes, sir.

6 Q Okay. After you talked to Mr. Portee, you didn't go
7 out to the library?

8 A No. Sergeant Robinson went there.

9 Q All right. After you talked to Mr. Portee, did you
10 get in your car and follow the route that he
11 described?

12 A The route that he described?

13 Q Yes, sir. As part of this investigation.

14 A No.

15 Q At any time after you talked to Mr. Portee, did you
16 go out as part of this investigation and search the
17 area for a handgun?

18 A No.

19 Q All right. Beg the Court's indulgence, Your Honor.
20 A couple more things, Investigator. Back to the
21 library. You didn't go out and talk to any patrons
22 at the library, did you?

23 A No.

24 Q And you don't know if Sergeant Robinson talked to any
25 patrons of the library, do you?

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1 A He went to the library and spoke with the staff.

2 Q Okay. Do you have as part of this investigation any
3 statements from any patrons of the library?

4 A No.

5 Q All right. Thank you, sir. I have nothing further.

6 THE COURT: Redirect.

7 MS. SHIPLEY: May it please the Court, Your
8 Honor.

9 REDIRECT EXAMINATION

10 BY MS. SHIPLEY

11 Q Mr. Cooper asked you on cross examination concerning
12 your work in this case?

13 A Yes.

14 Q Did you personally go to the Family Dollar to collect
15 evidence?

16 A No.

17 Q Whose job is that to do?

18 A The crime scene unit.

19 Q And which crime scene investigator went to the Family
20 Dollar Store to process it for evidence?

21 A Investigator Bouknight..

22 Q Did you personally go to the scene of the accident
23 after the high speed chase to collect evidence?

24 A No.

25 Q Who did that?

1 A Investigator Bouknight.

2 Q Is that his job?

3 A Yes.

4 Q Is that your job?

5 A No.

6 Q Did you ever -- you were also asked about going back
7 to the Family Dollar Store?

8 A Yes.

9 Q Would there be a need for you to go back to the
10 Family Dollar Store since Investigator Bouknight
11 returned there?

12 A No.

13 Q You were also asked about questioning neighbors in
14 the area. Did any neighbors come forward to tell you
15 what they saw, if they saw anything?

16 A No. Not that I'm aware of.

17 Q What witnesses actually provided statements in this
18 case?

19 A We have statements from several people.

20 Q And please list their names for the jury?

21 A We have statements from Joan Hooks, Michael Murphy,
22 Lisa Ellis and Erica Wilson and Leonard Smith.

23 Q What about a Michael Murphy?

24 A Yes.

25 Q Where did Mr. Murphy work?

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1 A He's at the Word of God --

2 MR. COOPER: Objection. This is going into
3 hearsay, Your Honor.

4 THE COURT: I don't know how he knows or doesn't
5 know where Mr. Murphy lived.

6 MS. SHIPLEY: I'm asking where he worked. I'm
7 not asking what Mr. Murphy said.

8 THE COURT: Oh, worked. I understand that.
9 Sometimes that's the only way you find out. But I
10 don't know how he found out. So --

11 Q Do you know where Mr. Murphy works?

12 A The Word of God Church.

13 MR. COOPER: Objection. It's not relevant to
14 anything.

15 Q How do you know that?

16 THE COURT: Go ahead.

17 MS. SHIPLEY: Can I ask the witness how he knows
18 that?

19 THE COURT: Go ahead.

20 Q How do you know that?

21 A He was one of the witnesses who came to the aid of
22 the employees at the store.

23 Q Do you know where the Word of God Church is in
24 relation to the Family Dollar?

25 A I believe it's by --

1 MR. COOPER: Objection. Irrelevant.

2 THE COURT: It's at the scene of the incident.

3 I think it's relevant. Go ahead.

4 A It's right nextdoor.

5 Q A nextdoor neighborhood?

6 A Yes.

7 Q You were asked on cross examination when you went to
8 Janie Portee's residence, to her house to talk to
9 her. Do you recall that line of questioning?

10 A Yes.

11 Q How many times do you think you spoke to Mrs. Portee
12 on the phone?

13 A Probably 20 times.

14 Q Did you ask her whether or not her son was with her
15 around 9:15 a.m.?

16 MR. COOPER: Objection. It's calling for
17 hearsay.

18 THE COURT: That's hearsay.

19 MS. SHIPLEY: I'm asking him if he asked her,
20 not what she said.

21 THE COURT: All right. Go ahead.

22 Q What did you ask her?

23 A I asked her, "Was he with you?"

24 Q And I don't want to know the -- don't go into
25 hearsay. Have you ever heard of -- did you ever hear

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1 from Janice Andrews?

2 A No.

3 Q Did you ever hear from Edward Andrews?

4 A No.

5 Q Did you ever hear from a person named Anita Knox?

6 A No.

7 Q Do you even know who that is?

8 A No.

9 Q You were also asked on cross examination concerning
10 the route the defendant took?

11 A Yes.

12 Q What relevance would have that have in your
13 investigation to drive down a route?

14 A None.

15 Q And also you were asked if you searched the area for
16 a handgun?

17 A Yes.

18 Q Do you remember that line of questioning?

19 A Yes.

20 Q Who specifically requested that this item be
21 collected from the vehicle?

22 A I did.

23 Q And lastly you were asked whether you went to the
24 library to talk to people that were at the Richland
25 County Public Library that morning?

1 **A** Yes.

2 **Q** Sir, what time did Mr. Portee tell you he was at the
3 Richland County Library?

4 **A** He told me that he was at the library from 9:50 to 10
5 a.m.

6 **Q** And remind this jury what time he was in police
7 custody?

8 **A** 9:28 a.m.

9 **MS. SHIPLEY:** No further questions, Your Honor.

10 **THE COURT:** Recross?

11 **MR. COOPER:** I have nothing further, Your Honor.

12 **THE COURT:** All right. You may come down, sir.
13 Thank you very much. Next witness?

14 **MS. SHIPLEY:** Your Honor, at this time the State
15 of South Carolina rests its case.

16 **THE COURT:** All right. All right, ladies and
17 gentlemen. The State of South Carolina has concluded
18 its case. There will be no more evidence presented
19 by the State. As I told you in my opening remarks,
20 the defense has the opportunity but is not required
21 to present a defense at this time. But at this time
22 there are some legal matters I need to discuss with
23 the attorneys. So I think it's a good time to take
24 our morning break. I'll just ask you to go to the
25 jury room. Don't discuss the case among yourselves

1 while you're in the jury room. We'll call you when
2 we're ready. Thank you.

3 (Jury out at 10:52 a.m.)

4 **THE COURT:** All right. Any motions?

5 **MR. COOPER:** Yes, Your Honor. At this time the
6 defense moves for a directed verdict on all counts.
7 And our basis for the motion for directed verdict on
8 the armed robbery is that, as Your Honor knows, an
9 element of armed robbery, there must be a showing
10 that the defendant was armed or alleged to be armed.

11 Under recent case law, a threat is not enough to
12 establish that the defendant was representing that he
13 was armed. And the evidence that the State has put
14 up has -- in a light most favorable to them, they
15 produced evidence that the robber made a threat.

16 Now, Ms. Shipley just referenced the saw handle.
17 That's entirely too circumstantial to be considered
18 as a representation -- number one, there is no
19 evidence, no evidence has been entered that anybody
20 saw the robber or Mr. Portee for that matter, with
21 that saw handle. The saw handle was found in the
22 car. It's a saw handle. Okay. It was found in the
23 car away from the scene. Nobody -- what the
24 witnesses said was that the robber made a threat.
25 And that is not enough to be considered a

1 representation of being armed.

2 What they believed is subjective. Our position
3 is the law requires such evidence of a
4 representation, and there isn't enough evidence of a
5 representation of being armed in this case to hold up
6 the indictment for armed robbery.

7 And that case is I believe it's State v. Dye.
8 I've got a reported copy here. But again, our
9 position is, Your Honor, that we're entitled to
10 directed verdict on the armed robbery indictment
11 because they haven't adduced enough evidence at all
12 to go to the jury on the issue of whether or not the
13 robber represented that he was armed. Again, our
14 position is that the subjective -- what -- you know,
15 the testimony of what the victims thought is
16 subjective. There has to be evidence of a
17 representation, and a threat is not enough.

18 As to the failure to stop for a blue light, we
19 stand on the evidence as Your Honor viewed it.

20 On the counts of ABHAN, again there was
21 testimony that someone assaulted the victims in some
22 manner, but we don't believe there's been enough
23 corroborating evidence entered that Mr. Portee was
24 responsible for any assault. And even if they had, I
25 don't believe -- we don't believe that they've

1 established that the evidence of those assaults were
2 enough to establish the elements of ABHAN. So, Your
3 Honor, we also would respectfully move for a directed
4 verdict on the counts of ABHAN.

5 And back to the armed robbery. The law requires
6 a representation of a deadly weapon or any object
7 which a person reasonably believed to be a deadly
8 weapon. They have not linked -- first of all, it's
9 our view that it's extremely tenuous that a common
10 hacksaw handle can be reasonably believed to be a
11 deadly weapon. But, moreover, they haven't linked
12 that saw handle to that scene or any person at all; I
13 mean, at the scene. So there's no testimony anybody
14 saw that handle.

15 So our position is, number one, that the saw
16 handle isn't sufficient; and, moreover, they didn't
17 link it to the scene. There's just not enough
18 evidence to go to the jury on the representation of a
19 deadly weapon.

20 And, Your Honor, one more thing, if you'll allow
21 me. The testimony from the State that they did offer
22 is, you know, there was testimony that the robber had
23 a hand down his pants. You know, nothing indicating
24 a representation of a deadly weapon there. So we
25 stand by our contention that there is just not enough

1 evidence on that to go to the jury.

2 **THE COURT:** The State's position.

3 **MS. SHIPLEY:** Your Honor, as to the charge of
4 armed robbery, the State has fulfilled and
5 established each element of the crime. Ms. Anderson
6 testified that she believed the defendant was armed
7 during the robbery. In addition to his threat, his
8 actions made her believe he was armed. He threatened
9 her: "If you don't do what I say, I will kill you."
10 While he grabbed her by the back of her hair and led
11 her down to the front of that business, he had his
12 hand in his pocket where she witnessed a bulge. And
13 the State contends that that bulge came from that
14 item that Investigator Isenhoward says looks like a
15 gun.

16 Your Honor, that is corroborated by the excited
17 utterance made by the reverend that is in evidence on
18 the record that he ran out to see where the defendant
19 was going and the man pointed a gun at him. So that
20 is corroborated, Your Honor.

21 We're not asking you to only look at the threat,
22 the verbal threat made by the defendant during the
23 robbery. We are asking you to also consider the
24 bulge that was also corroborated by Joan Hooks who
25 testified she also witnessed the defendant with his

1 hand in, I believe she thought it was his pants.
2 Regardless, the man is concealing his hand pretending
3 to be armed and they witnessed a bulge in his
4 clothing, Your Honor.

5 And it's just as any typical case where a
6 defendant walks into a convenience store with his
7 hand, his finger in his pocket pointing it at the
8 victim. The fact that there was actually no object;
9 regardless, it's what the victim reasonably perceives
10 and believes to be a weapon. And she testified
11 clearly that she believed he was armed with a weapon.
12 She did not know if it was a knife or a gun but she
13 did testify she saw a bulge. And for that purpose or
14 that reason, Your Honor, the evidence adduced in the
15 light most favorable to the State, we would ask that
16 you respectfully deny the defense's directed verdict
17 motion.

18 As to the assault and battery of a high and
19 aggravated nature, Your Honor, the aggravating
20 circumstance alleged in the indictment is difference
21 in the sexes. But I submit to you that there's more.
22 The intent to commit a felony which is the armed
23 robbery, that's another aggravating circumstances
24 that the jury can rely on.

25 The difference in the sizes. Ms. Anderson

1 testified that she is five-three and the perpetrator
2 was almost as tall as the door. And the evidence is
3 that he's six-foot-four.

4 Also, Your Honor, the defense indicated that
5 there is no corroboration that the defendant was the
6 one that assaulted Erica Wilson and Tracey Anderson
7 inside of the Family Dollar. However, Your Honor, I
8 ask that you remember the testimony of Ms. Anderson
9 when she does a show-up identification. Her
10 testimony was that he had his gray sweatpants in the
11 same location pulled up between the ankle and the
12 calf.

13 She also indicated that the mask worn by the
14 robber had homemade holes in it. Lo and behold, the
15 mask he is seen running out of his car by Deputy
16 Unger has homemade holes cut into the hat. Lo and
17 behold, the gray sweatpants that he's wearing are
18 between the knee and ankle, mid-calf.

19 Also she describes the robber wearing a bright
20 yellow jacket, rain jacket. Lo and behold, the
21 defendant is seen driving away in a white vehicle
22 with the bright yellow jacket. The officers report
23 that to 911, to dispatch, while they're chasing him,
24 that they see him lift the jacket. And at that
25 point, Your Honor, he is then caught with the jacket.

1 He is seen exiting his vehicle with the bright yellow
2 jacket. Again, another unique article of clothing.
3 Maybe you don't think it is independent, but I'd ask
4 that you consider it in conjunction with the other
5 articles of clothing and how unique the homemade
6 holes are on that mask and how unique he wore the
7 sweatpants and that they were gray.

8 In addition to that, he is caught in possession
9 of rolled quarters and nickles. And Ms. Anderson
10 testified that that morning when she prepared the
11 tills the coins were wrapped in plastic. Lo and
12 behold, they are wrapped in plastic in his vehicle.
13 Also he's found in possession of \$72 in cash
14 underneath his body when he is finally restrained
15 from the high speed chase and foot pursuit.

16 Your Honor, the DNA confirms that that mask was
17 put over his mouth. That's where the swab came from,
18 was the mouth area. And so I believe the evidence
19 viewed in the light most favorable to the State, Ms.
20 Anderson positively identified this person because of
21 his build, his height, his complexion, that it was
22 light, and the clothing articles.

23 And so I believe that we have presented enough
24 evidence for it to be a jury question, and we
25 respectfully request that you deny the defense

1 directed verdict motion.

2 And then finally as to the failure to stop for
3 the blue lights, I don't believe they challenged
4 that. I think they conceded that in opening.

5 **MR. COOPER:** If I may briefly respond?

6 **THE COURT:** Sure.

7 **MR. COOPER:** Well, the last thing she said, what
8 we say is not evidence. It's up to them to, you
9 know, produce evidence.

10 Back to the armed robbery, I mean, Ms. Shipley
11 has basically just recited her entire case. But we
12 believe that the inquiry on the armed robbery should
13 be narrowed to, you know, the issue of
14 representation. We believe case law indicates that
15 words are not enough. Our position is that a bulge
16 is not a representation. A bulge alone is not a
17 representation of a weapon.

18 Ms. Shipley referred to a situation about where
19 a defendant went and stuck his hand in his pocket and
20 pointed it. Well, you know, testimony that somebody
21 pointed something, that may go to a representation,
22 but what you have here is a situation with differing
23 testimony about there was a bulge, he had his hands
24 in his pants; but nothing that would indicate a
25 representation of the deadly weapon.

1 And under case law, under statute, that's what
2 we have to find to go forward on an armed robbery
3 indictment. And there is just not enough evidence of
4 that. They just haven't produced it.

5 Now, you know, it's our position that the
6 testimony about what the victims thought is rather
7 subjective in that regard. But even Ms. Anderson's
8 testimony, she indicated that she didn't feel
9 threatened, you know.

10 And as to the ABHAN, they didn't introduce any
11 evidence of bodily injury. Okay. Now, that is an
12 element of -- battery is an element of an ABHAN. So
13 I'd ask you to consider that.

14 And again, you know, as to failure to stop for a
15 blue light, what the attorneys say is not evidence.
16 It's still their duty to produce sufficient evidence.

17 **THE COURT:** Anything further?

18 **MS. SHIPLEY:** Yes, sir, Your Honor. The fact
19 that Ms. Anderson didn't feel threatened, he is
20 asking the Court to disregard it because a threat in
21 and of itself, a verbal threat is not enough. So,
22 then he's asking to you say, well, if the victim
23 didn't feel threatened, then she didn't think he was
24 armed.

25 She clearly testified that he told her he us

1 going to kill her if she did not do what he asked her
2 to do. And in the same time, in the same breath he
3 has his hand in his pocket with a bulge. I submit to
4 you that bulge was that item that was recovered from
5 his vehicle and that he had his hand on that was
6 sticking out of the pocket. That is what she
7 perceived. And she believed that he was armed with a
8 deadly weapon. She testified she didn't know if it
9 was a knife or a gun. And that goes to our clearly
10 deadly weapons.

11 Also, Your Honor, we're not alleging serious
12 bodily injury. But the State submits that the
13 unlawful touching, the battery in this case, would be
14 grabbing the women by their hair so hard that Erica
15 Wilson's hair got pulled out of her head. And I
16 believe that's enough to satisfy the elements of
17 ABHAN.

18 And as to the failure to stop for blue light,
19 Corporal Unger's testimony is uncontroverted, Your
20 Honor.

21 **THE COURT:** All right. Let me take a look at
22 it. Let's take about a ten-minute break and I'll let
23 you know.

24 **MR. COOPER:** Thank you, Your Honor.

25 (Whereupon, a break is taken)

1 **THE COURT:** All right. With regard to the --
2 well, to begin with, let me discuss this armed
3 robbery issue and the case of State v. Dodds
4 submitted by the defendant. In that case there was,
5 as Mr. Cooper has pointed out, only a threat, but
6 subsequently the defendant admitted to having a gun.
7 And of course the Court of Appeals affirmed the
8 conviction based on that fact, that they said that
9 was sufficient to support the conviction.

10 Now, that is not the case in this case. There
11 is no confession that the defendant had a gun or any
12 other weapon. But the case as I read it stands for
13 the fact that if there is independent evidence of a
14 crime which is the corpus delicti plus the threat,
15 'give me all your cash or I'll shoot you', which is
16 citing the Muldrow case, is sufficient evidence -- or
17 let's put it this way; is evidence from which the
18 jury could determine there was a use of a deadly
19 weapon. Or at least they could have reasonably
20 believed that according to the statute the
21 perpetrator, whoever that might have been, had a
22 deadly weapon.

23 I think it is arguable that there was no deadly
24 weapon, in which case I would be inclined if
25 requested to give a lesser-included charge, a

1 lesser-included charge as to common law robbery, and
2 let the jury decide.

3 But the point is, there is -- my burden is any
4 evidence; not persuasive evidence, not beyond a
5 reasonable doubt, not -- there's a very low threshold
6 of burden. Because I'm not the fact finder. I can
7 only rule as a matter of law based on the evidence as
8 presented.

9 So I think there is evidence. I will submit at
10 least at this point I think there is sufficient
11 evidence. There is evidence -- I'm not going to say
12 sufficient evidence to meet any burden or any
13 standard -- but there is evidence from which a jury
14 could determine that the perpetrator of this crime
15 was armed or that the person reasonably believed
16 based on the threat that the perpetrator was armed
17 with a deadly weapon or a representation of a deadly
18 weapon.

19 As to the assault and battery of a high and
20 aggravated nature, I think also there is certainly
21 evidence, whether it's based on the difference of
22 sexes or the fact that there were people were being
23 dragged around by their hair -- and again, that might
24 be subject to a lesser-included offense; I'm not sure
25 at this point -- but I think that there is evidence

1 to support the two assault and battery indictments.

2 And clearly there is evidence to support the
3 failure to stop for a blue light.

4 So as to all grounds for all motions, I feel
5 there is evidence that goes beyond that of mere
6 conjecture or suspicion, which is the burden, and
7 that there is some evidence, either direct or
8 circumstantial or some combination of both, which
9 reasonably tends to prove the guilt of the defendant
10 or from which that guilt might be logically and
11 reasonably deducted if that evidence is taken in the
12 light most favorable to the State. So I must
13 respectfully deny all four of your motions for
14 directed verdict.

15 Now, Mr. Cooper, has your client made a decision
16 about whether he wishes to present a case at this
17 point?

18 **MR. COOPER:** Your Honor, as to that, I would
19 respectfully request a little more time to discuss
20 that with him to make sure --

21 **THE COURT:** I'm going to tell him about it. I'm
22 going to advise him of his rights to testify. What
23 I'm asking you is, can you -- because it's time to
24 either decide you're either going to present a case
25 or not present a case. Because you listed witnesses.

1 And that's primarily what I'm thinking about. Let me
2 go ahead and charge your client with his rights. And
3 then I'll ask you for a decision. All right?

4 **MR. COOPER:** Yes, sir.

5 **THE COURT:** All right, Mr. Portee, if you'll
6 just stand. At this time I am going to explain to
7 you certain of your rights. If you do not understand
8 anything I say, please let me know. If you want me
9 to explain anything in more detail, please let know.
10 Do you understand?

11 **MR. PORTEE:** Yes, sir.

12 **THE COURT:** We have now reached the stage of the
13 trial where you may present your defense. You have
14 the right to proclaim the protections given to you by
15 Fifth Amendment of the Constitution of the United
16 States. This amendment states in part: No person
17 shall be compelled in any criminal case to be a
18 witness against himself or herself.

19 This means that you cannot be required to
20 testify in this case. You have the right to testify
21 on your own behalf. However, no one can make you
22 testify. This is a personal right. No one can waive
23 this right except you.

24 If you decide to testify, you will be subject to
25 the same rules that govern any other witness, and you

1 may be examined and cross examined on any relevant
2 issue in this case. In addition, if you have any
3 convictions involving dishonesty or false statement
4 or for crimes that are punishable by imprisonment for
5 more than one year and this Court determines that the
6 probative value of admitting this evidence outweighs
7 its prejudicial effect to you, the solicitor will be
8 able to introduce that record to attack your
9 credibility.

10 If you decide to testify, this decision on your
11 part must be freely, voluntarily and intelligently
12 made with knowledge of the protections given to you
13 by the Fifth Amendment to the Constitution and the
14 consequences of your decision to testify.

15 If you decide not to testify, I will instruct
16 the jury that they cannot consider the fact that you
17 did not testify any consideration whatsoever and that
18 there is to be absolutely no prejudice to you because
19 you did not testify. It is left entirely up to you
20 whether you wish to testify or not. You may talk
21 with your attorney, your family and friends or anyone
22 else, but the final decision will be left entirely up
23 to you.

24 Do you understand what I have explained to you?

25 MR. PORTEE: Yes, sir.

1 THE COURT: Do you have any questions about what
2 I have explained to you?

3 MR. PORTEE: No, sir.

4 THE COURT: Have you discussed with your lawyer
5 whether or not you should testify?

6 MR. PORTEE: I'm getting to that point now, sir.

7 THE COURT: Have you talked with them at all?

8 MR. PORTEE: No, sir; not as of yet. Briefly,
9 for a moment. I was considering it.

10 THE COURT: Okay. Well, I need to know because
11 we've got a jury here and the trial is ready to
12 continue. So I'm going to give you a few minutes to
13 talk with your lawyer. And you need to discuss the
14 issue of --

15 MR. COOPER: Five minutes.

16 THE COURT: -- whether or not you than to call
17 witnesses, too, because that may affect the procedure
18 in the trial from here on out. So I'll grant you --
19 what do you want to do?

20 MR. COOPER: Five minutes, Your Honor.

21 THE COURT: Do you want it out of the courtroom?

22 MR. COOPER: Right in that room will be fine.
23 Yes, sir.

24 THE COURT: The holding cell?

25 MR. SECOR: Yes, sir.

1 MR. COOPER: That's fine.

2 THE COURT: That's fine. All right. Just let
3 him speak privately with his lawyer, lawyers. Any
4 other family members here that you wish to consult
5 with?

6 MR. PORTEE: No, sir.

7 THE COURT: All right. Fine. We'll stand at
8 ease for five minutes, ten minutes. Five minutes.

9 MR. COOPER: Thank you, Your Honor.

10 (Whereupon, a break is taken)

11 THE COURT: Let's go back on the record. All
12 right, Mr. Cooper.

13 MR. COOPER: Your Honor, I have had an
14 opportunity to discuss with Mr. Portee his right to
15 testify, and I believe he has reached a decision.

16 THE COURT: All right, sir. Mr. Portee, do you
17 wish to testify?

18 MR. PORTEE: No, sir. I do not wish to testify.

19 THE COURT: All right. Do you wish to present
20 any other evidence?

21 MR. COOPER: No, sir. The defense would rest.
22 I do want to make sure out of an abundance of
23 caution, too, since their case is over to go ahead
24 and renew my objections or motions during their case.

25 THE COURT: Absolutely. Go ahead. I'm going to

1 allow you to do that. Let's just talk a minute about
2 if you wish to offer no defense. --

3 MR. COOPER: Yes, sir.

4 THE COURT: -- what I'm probably going to do is
5 dismiss this jury and let them go to lunch, ask them
6 to come back at 1:00 which will give us sufficient
7 time to argue and charge this afternoon and at least
8 get it to them by maybe 1:30, get it to them this
9 afternoon. But I'll give you the lunch, you know, a
10 break before we argue and charge.

11 MR. COOPER: Yes, sir.

12 THE COURT: Is that satisfactory?

13 MR. COOPER: Yes, sir.

14 THE COURT: All right. Now, the question, the
15 only other question I have is -- and go ahead and
16 make whatever motions you want to make at this time.
17 Then I'll talk to you about scheduling.

18 MR. COOPER: Beg the Court's indulgence. Your
19 Honor, are you saying you want to address the charges
20 right now or --

21 THE COURT: No. I'm asking if there are any
22 other motions you want to make right now. And then
23 after I dismiss the jury we'll talk about charges.
24 And then when the jury comes back at 1:30 we'll be
25 ready to go.

1 **MR. COOPER:** Okay. Well, Your Honor, all I
2 wanted to do is just renew my motions and objections.
3 I believe that's it.

4 **THE COURT:** All right. I find that all -- I see
5 no reason to overrule or to change any of my prior
6 rulings, whether they be the evidence or procedure, I
7 respectfully -- and with regard to the directed
8 verdicts motions, I see no reason to change those
9 rulings at this time, and I must respectfully deny
10 your motions.

11 Now, the other question I wanted to ask you is,
12 do you want to announce it to the jury, or do you
13 want me to announce to the jury that you rest?

14 **MR. COOPER:** Your Honor can do that. That's
15 fine with me.

16 **THE COURT:** Okay. All right. Let's bring the
17 jury. And once I dismiss the jury we'll discuss
18 charges and then be ready to go at 1:30.

19 (Jury in at 11:45 a.m.)

20 **THE BAILIFF:** The jury is all present, Your
21 Honor.

22 **THE COURT:** All right, ladies and gentlemen.
23 Thank you very much. During the break or during our
24 short recess the defendant advised the Court that
25 they plan to present no defense. So that will be the

1 end of the -- to offer a defense, I should say. That
2 will be the conclusion of that portion of the trial.
3 That is, you now have heard and seen all the evidence
4 there is in this case, and the remaining portion of
5 the trial will consist of the final arguments or
6 summations of the attorneys and then my instructions
7 to you on the law of the state of South Carolina as
8 it applies to this case.

9 Now, that procedure will take, oh, an hour and a
10 half or more, something like that. So I think the
11 best use of our time and an opportunity to give the
12 attorneys a few minutes to prepare their closing
13 arguments, I'm going to dismiss you now for the lunch
14 hour or lunch period, whatever you want to call it,
15 and ask you to be back in the jury room let's say at
16 1:15. Let's say 1:30. That will give everybody a
17 chance to get ready, have a pleasant lunch. And
18 we'll conclude the trial at that time.

19 So have a pleasant lunch. We'll see you.
20 Again, don't discuss the case among yourselves when
21 you return to the jury room or with anyone else over
22 the lunch hour. We'll see you at 1:30 at which time
23 we'll conclude the trial. Thank you very much.

24 (Jury out at 11:47 a.m.)

25 **THE COURT:** All right. Any requests to charge

1 on behalf of the State?

2 MS. SHIPLEY: Your Honor, the State does, just
3 to bring to the Court's attention, that we do plan to
4 argue in our closing argument evidence of flight.
5 But I know that you cannot charge it.

6 THE COURT: Correct. All right. From the
7 defense?

8 MR. COOPER: Yes, Your Honor. We would
9 request -- other than the usual charges, we'd request
10 a charge on a lesser-included of common strong armed
11 robbery. We'd also --

12 THE COURT: I think that's appropriate.

13 MR. COOPER: Yes, sir. Thank you. We'd also
14 request on the assault and battery of a high and
15 aggravated nature the lesser-included, simple
16 assault.

17 THE COURT: All right. Let me see what the
18 State has. Is that it? All right. You're
19 abandoning your alibi? I said you're abandoning --

20 MR. COOPER: Yes, sir.

21 THE COURT: -- the alibi defense?

22 MR. COOPER: Yes, sir.

23 THE COURT: All right.

24 MR. COOPER: Thank you, Your Honor.

25 THE COURT: Any --

1 *MS. SHIPLEY:* Since they're abandoning their
2 alibi defense, then I think it would be appropriate.
3 I'm not going to waste the Court's time and argue
4 differently.

5 *THE COURT:* All right. I'll give armed robbery,
6 common law robbery and strong armed robbery and
7 assault and battery of a high and aggravated nature
8 and assault and battery and blue light. All right.
9 I'll have you a set of charges about 1:15. We'll
10 stand at ease until 1:15.

11 *MR. COOPER:* Thank you, Your Honor.

12 (Whereupon, a lunch break is taken)

13 *THE COURT:* All right. The State ready to
14 proceed?

15 *MS. SHIPLEY:* Yes, sir, Your Honor.

16 *THE COURT:* Defense ready to proceed?

17 *MR. COOPER:* Yes, Your Honor.

18 *THE COURT:* All right. The State will open,
19 defense close?

20 *MS. SHIPLEY:* Yes, sir.

21 *THE COURT:* All right. Just so you'll know, I'm
22 going to explain the concept of lesser-included
23 offenses because I know you're going to talk about
24 it. So I think jurors can get confused sometimes
25 when I tell them one thing, you tell them something

1 else. So I'll explain that concept to them before
2 you begin your remarks. All right. Bring the jury,
3 please. Any problems with the charge as supplied?

4 MS. GOOD: No, sir. Not from the State.

5 MR. SECOR: Nothing from the defense, Your
6 Honor.

7 THE COURT: All right.

8 (Jury in at 1:34 p.m.)

9 THE BAILIFF: The jury is all present, Your
10 Honor.

11 THE COURT: All right. Thank you very much.
12 All right, ladies and gentlemen. We're now ready to
13 conclude the trial with the final arguments of
14 counsel and my charge to you on the law as it applies
15 to this case. But before that begins, I want to just
16 take a moment and explain concept to you under our
17 law that you will hear the attorneys talk about and I
18 will talk about in my final charge to you as to what
19 the law is. And that's something called a
20 lesser-included offense.

21 I told you at the beginning of the trial that
22 there is an armed robbery charge, an assault and
23 battery of a high and aggravated charge. Of course
24 there are two of those. And then there's one failure
25 to stop for a blue light.

1 Well, within our law, armed robbery is defined
2 as the taking and carrying away of property in an
3 armed situation. But a defendant could also be found
4 guilty of plain robbery, P-L-A-I-N, robbery if you
5 find that he was not armed, as I'll explain to you,
6 or that the witness didn't think he was armed with a
7 deadly weapon.

8 In other words, so you really can consider not
9 only armed robbery but simple robbery. It's not
10 simple, but it's robbery. We call it common law
11 robbery so that you will be able to -- you will have
12 to differentiate between whether or not the evidence
13 in your mind rises to the level of armed robbery or
14 if it's simply what I refer to as a plain robbery or
15 what we know as common law robbery.

16 So, in effect, when you consider the armed
17 robbery charge, you will also be asked to consider --
18 I'll tell you this in my -- I'll define it more
19 clearly I hope in my instructions to you. But the
20 attorneys are going to talk about it, too, that the
21 defendant could be -- if you find beyond a reasonable
22 doubt that it was just a robbery and there was no
23 armed robbery or no -- I'd have to actually read the
24 statute to you which I will do -- that no impression
25 by the witness, that if they didn't think it was -- I

1 mean, if or they thought it was an armed robbery,
2 even though there may not have actually been a gun or
3 a rifle or a knife or something, you could convict on
4 the grounds of simple robbery.

5 Now, the same is true for assault and battery of
6 a high and aggravated nature. You'll be allowed to
7 consider whether the defendant -- and again it's by
8 the same burden; that is, proof beyond a reasonable
9 doubt -- that the defendant committed an armed
10 robbery -- I mean an assault and battery -- but not
11 of a high and aggravated nature, and that again will
12 be defined for you more clearly in my instructions.

13 So when the attorneys start talking to you about
14 the charges, the individual charges; that is, the
15 armed robbery and the assault and battery of a high
16 and aggravated nature, they're going to talk to you
17 about what I tried to define to you as the
18 lesser-included offenses, that being common law
19 robbery and assault and battery that is not of a high
20 and aggravated nature.

21 Now, I just didn't want you to -- I think the
22 attorneys will be telling you something and I had
23 told you something else. These are concepts, the
24 legal concepts that are established in our law
25 that -- now, for example, with regard to the charge

1 of failure to stop for a blue light, there is no
2 lesser charge included in that definition. It's just
3 failure to stop for a blue light or not stop for a
4 blue light. So just keep that in mind, make those
5 mental notes as you hear the attorneys talk about the
6 definitions of each of these separate crimes and
7 their respective arguments or summations with regard
8 to each of them.

9 All right, counsel. You may begin with the
10 closing remarks.

11 **MS. SHIPLEY:** May it please the Court, Your
12 Honor?

13 **THE COURT:** Yes, ma'am.

14 **MS. SHIPLEY:** Mr. Secor, Mr. Cooper, Ms. Good;
15 good afternoon, ladies and gentlemen, Madam Forelady.
16 Jimmy Portee is a coward. He's a coward because he
17 put his hands on two innocent women who were simply
18 at work trying to make a living. He's a coward
19 because while disguised with a mask over his face he
20 grabs them by their hair forcing them down to the
21 ground, to the floor, all because of greed. Greed is
22 what drove Jimmy Portee November 9th, 2006. Greed is
23 what made him put his hands on those innocent women.
24 Greed is what made him cause Erica Wilson to be so
25 scared she yelled out for Jesus. Greed is what made

1 him go to the cash register and take money and run
2 out of the store to get into his car. Greed is what
3 made him flee from the police when they tried to stop
4 him. Greed is what made him endangerer lives of
5 others as he sped through neighborhoods at 100 miles
6 per hour.

7 Ladies and gentlemen, my name is Vanessa
8 Shipley, and I work with the Richland County
9 Solicitor's Office along with Ms. Good. It is our
10 job to prosecute cases, crimes that happen in
11 Richland County. I wanted to begin by thanking each
12 and every one of you for the attentiveness you've
13 shown throughout this case. I've watched you while
14 I've been seated at the State's table and I've seen
15 how carefully you've been listening to the witnesses,
16 and I just wanted to thank you from the beginning.

17 Procedurally, because the State of South
18 Carolina has the burden of proof, we get to close
19 first. We get to give our closing argument first.
20 Also because we have the burden of proof we are
21 permitted to go over the law with you to explain what
22 the law is and how it would apply to the facts of the
23 case.

24 I'm going to begin by discussing the law of
25 armed robbery. Because, ladies and gentlemen, as a

1 result of Jimmy Portee's criminal actions on November
2 9th, 2006 he incurred several charges, one being
3 armed robbery, two counts of assault and battery of a
4 high and aggravated nature dealing with Tracey
5 Anderson and then Erica Wilson, and then lastly
6 failure to stop for police blue lights.

7 I'm going to begin with armed robbery. In South
8 Carolina, Section 16-11-330 of the Code of Laws
9 describes armed robbery as the taking and carrying
10 away of personal property; i.e., cash, money, from
11 the presence or immediate presence of another -- for
12 instance, a cashier at a register in a store -- the
13 property of another; which, ladies and gentlemen,
14 that would be the property of Family Dollar, with the
15 intent to deprive them of possession by the use of
16 force, threats or intimidation: "If you don't do
17 what I ask, I'm going to kill you", while armed with
18 a deadly weapon or pretending to be armed with a
19 deadly weapon.

20 A deadly weapon is any article, instrument or
21 substance likely to produce death or great bodily
22 injury.

23 So, ladies and gentlemen, if a person goes into
24 a store and let's say does nothing, just goes up to
25 the cash register and says, 'lady at the cash

1 register, 'give me your cash' and does nothing more,
2 doesn't threaten to kill them, doesn't insinuate that
3 they're armed in any way, that's common law robbery
4 which Judge Cooper just described to you. That's a
5 totally different kind of robbery. That robbery is
6 simply the feloniously taking from the person or
7 presence of the victim by means of force or
8 intimidation goods or monies of said victim with the
9 intent to deprive the owner permanently of such
10 property.

11 In other words, it's a robbery where the person
12 committing the robbery doesn't insinuate that they're
13 armed in any way. But they either intimidate or use
14 force, like shoving the cash register lady away from
15 the cash register to take the money but never
16 producing a weapon, never claiming to be armed with a
17 weapon and never threatening to be armed with a
18 weapon.

19 What makes it armed robbery in this case, ladies
20 and gentlemen, is you heard the testimony of Tracey
21 Anderson. You heard her say how she was being led by
22 the back of her hair to the front of the store and
23 that as he held her with one hand he had his other
24 hand in his jacket. And she saw what appeared to be
25 a bulge. And she didn't know if it was a gun or if

1 it was a knife. But she thought he was armed. And
2 that's what she testified to, ladies and gentlemen.

3 And the question is: Was it reasonable for Ms.
4 Anderson to think that this man was armed? Was it
5 reasonable for her to believe so when in conjunction
6 with this right here he's telling her, "if you don't
7 do what I say, I'm going to kill you." So,
8 therefore, ladies and gentlemen, that's what makes
9 this case an armed robbery and not strong armed
10 robbery, not common law robbery.

11 Ladies and gentlemen, the defendant is also
12 charged with assault and battery of a high and
13 aggravated nature. An unlawful act of violent
14 physical injury to the person of another accompanied
15 by circumstances of aggravation. At least one of the
16 following things must exist.

17 And before we get to these aggravated
18 circumstances I want to explain basically what
19 assault and battery is. If I am standing here and I
20 try to assault the forelady but I'm too far -- I'm
21 within arm's length but I swing and I miss her, that
22 is an assault because I actually never was able to
23 put my fist on her. However, ladies and gentlemen,
24 if I were able to complete the fist and hit her,
25 that's a battery. So that's a simple assault and

1 battery. That is the lesser-included offense of
2 assault and battery of a high and aggravated nature.

3 So you've got the assault and battery of a high
4 and aggravated nature and then the lesser charge
5 which Judge Cooper just described of simple assault
6 and battery. And that's simply the unlawful touching
7 of another person without just cause or excuse.

8 What makes this assault in our case, ladies and
9 gentlemen, aggravated, there are several factors that
10 you as jurors can determine and use to determine
11 whether this is an aggravated assault. Whether or
12 not there was serious bodily injury; well, we've
13 never alleged that. These women didn't have to do to
14 the hospital for medical attention.

15 Whether or not there's a difference in the
16 sexes. Yes, ladies and gentlemen, right there we can
17 stop this analysis. A difference in the sexes by the
18 law is enough to justify convicting someone for
19 assault and battery of a high and aggravated nature.

20 But if that's not enough for you, ladies and
21 gentlemen, there is more. Use of a deadly weapon.
22 You heard from Ms. Anderson she truly thought he was
23 armed either with a gun or a knife when he threatened
24 to kill her.

25 A great disparity either between the ages or

1 physical conditions of the parties. Remember when
2 Tracey testified? She was five-three? Then you
3 heard from Investigator Isenhoward that the booking
4 report of Mr. Portee is six-foot-four. That is a
5 great disparity in height. That's over a foot
6 greater in height and size than the victim. That's
7 another thing you can hang your coat on.

8 The intent to commit felony. When you start
9 grabbing people by the hair and yanking them around
10 to commit an armed robbery, ladies and gentlemen,
11 that's assault and battery of a high and aggravated
12 nature. That's an aggravating circumstance.

13 Then the purposeful infliction of shame and
14 disgrace and indecent liberties. Those don't really
15 apply to the facts of this case. But right here,
16 ladies and gentlemen, one, two, three, four; four
17 factors that you can consider. They don't all have
18 to be present. You can just decide on one of them.

19 And again, ladies and gentlemen, he is charged
20 with this offense for each woman he put his hands on,
21 for each woman who he grabbed by their hair and
22 forced down to the floor of that Family Dollar, for
23 each woman such as Erica Wilson whose hairweave came
24 out of her head because he used so much force. That
25 is assault and battery of a high and aggravated

1 nature.

2 As Judge Cooper indicated, there is no lesser
3 offense for failure to stop for blue light. You
4 either did it or you didn't. Failure to stop for
5 blue lights, it is unlawful to fail to stop driving a
6 motor vehicle on the roads, street or highway here in
7 Richland County when signaled to do so by a law
8 enforcement agency by means of blue lights and siren.

9 Corporal Unger told you that when he pulled up
10 behind the white car at the corner of Bluff and Atlas
11 Roads the car turned right on Bluff Road and that he
12 was confirming with dispatch, do I have the right
13 car, do I have the right car; and at that point the
14 car picked up speed, turned around in the parking lot
15 at Rick's Party Shop on Bluff Road and then started
16 going the opposite direction, away from I-77 away
17 from downtown.

18 At that point, ladies and gentlemen, that's when
19 officer Unger decides it's time to put on my blue
20 lights and my siren. And he testified that he did
21 both. What happened as a result of his actions? Did
22 the car stop? No. It kept going. In fact, it went
23 up to 100 miles per hour through the neighborhoods of
24 Bluff Estates. That, ladies and gentlemen, is
25 failure to stop for blue lights. But I believe in

1 the defense opening statement they concede that to
2 you.

3 Now, because the State of South Carolina has
4 brought these charges forward against Mr. Jimmy
5 Portee, we have the burden of proof. The proof is
6 proof beyond a reasonable doubt, not beyond a shadow
7 of a doubt or any doubt; a reasonable doubt. An
8 example of an unreasonable doubt is doubt that the
9 sun is going to rise tomorrow. That's unreasonable.

10 We have -- it's a legal term of art, if you
11 will. But ultimately it's up to you to decide what's
12 reasonable, what a reasonable doubt is. There is
13 some case law to assist you, however. South
14 Carolina, State v. Darby found that proof beyond a
15 reasonable doubt is proof that leaves you firmly
16 convinced of the defendant's guilt.

17 There are very few things in this world that we
18 know with absolute certainty, and in criminal cases
19 the law does not require proof that overcomes every
20 possible doubt. If based on your consideration of
21 the evidence you are firmly convinced that the
22 defendant is guilty of the crime charged, you must
23 find him guilty. If on the other hand you think
24 there is a real possibility that he is not guilty,
25 then you must give him the benefit of that doubt and

1 find him not guilty.

2 How is it, ladies and gentlemen, that in a
3 criminal case the State produces evidence to satisfy
4 each element of the crime beyond a reasonable doubt?
5 Well, we do so with evidence. We do so with two
6 types of evidence: Direct evidence and
7 circumstantial evidence.

8 Direct evidence is what a witness perceives
9 through all of their senses. What do they see? What
10 do they hear? What that do they smell? What do they
11 taste, and what do they feel? That is direct
12 evidence. So when Tracey Anderson told you on the
13 witness stand that that man is the man that robbed
14 her, that is direct evidence. She saw him. She
15 identified him. She recognized him.

16 Circumstantial evidence, I always thought it was
17 weak. Back when I was in school I thought, oh, they
18 just have a circumstantial case. Well, apparently
19 no. DNA is circumstantial evidence, and that's
20 strong evidence. Circumstantial evidence is a chain
21 of circumstances that when linked together leads to
22 only one possible conclusion.

23 So, for instance, we don't have anybody
24 witnessing Mr. Portee put his saliva on the inside of
25 his mask where the mouth would rest. We don't have

1 anyone to testify that they saw him put his saliva
2 there. But what do we have? We have DNA. We have
3 DNA that shows that that's his saliva.

4 Both are equal under the law. They both carry
5 just as much weight. Tracey's positive
6 identification of Jimmy Portee and the DNA evidence
7 carries the same weight under the law in South
8 Carolina.

9 There is a further explanation of circumstantial
10 evidence in case I didn't explain it well. Two types
11 of evidence: Evidence, direct and circumstantial.
12 Direct is the testimony of a person who asserts or
13 claims to have actual knowledge of a fact, such as an
14 eye witness. Tracey Anderson.

15 Circumstantial evidence is proof of a chain of
16 facts and circumstances indicating the existence of a
17 fact. The law makes absolutely no distinction
18 between the weight or value to be given to either
19 direct or circumstantial evidence, nor is a greater
20 degree of certainty required of circumstantial
21 evidence than of direct.

22 You should weigh all the evidence in the case.
23 After weighing all the evidence if you are not
24 convinced of the guilt of the defendant beyond a
25 reasonable doubt, you must find him not guilty. If

1 on the other hand you are convinced of the
2 defendant's guilt beyond a reasonable doubt, then you
3 must find him guilty.

4 Ladies and gentlemen, another example. You're
5 getting ready to go to bed. You hear on the news on
6 the weather channel that it's getting ready to snow.
7 Well, you look outside and you don't see any snow on
8 the street; you go to bed. Well, lo and behold, you
9 wake up the next morning, you look out the window and
10 there's snow. Well, you didn't see it snow but you
11 heard the news and you also witnessed for yourself
12 that there was no snow before you went to bed;
13 however, there's snow on the ground when you woke up.
14 The reasonable conclusion is that it snowed while you
15 were asleep. And that's just a basic example of
16 circumstantial evidence.

17 Any time a person in the state of South Carolina
18 or in this country is charged with a crime, they are
19 also -- the State has the burden of proving their
20 criminal intent. Did they intend to do these things?
21 Ladies and gentlemen, criminal intent. Criminal
22 intent is a mental state, a conscious wrongdoing. It
23 is up to you to determine what the defendant intended
24 to do based on the circumstances shown to have
25 existed.

1 Example: You have a hat. You cut holes out of
2 your hat. You put the hat over your head and you go
3 into a store with an object bulging out of a pocket
4 and you rob it. Did you intend to commit the
5 robbery? That's basically what it means.

6 Criminal intent can arise from action or a
7 failure to act. It may arise from negligence,
8 circumstances, an indifference to duty or the
9 consequences that is considered by the law to be
10 equivalent of criminal intent.

11 We presented to you several witnesses, ladies
12 and gentlemen. You heard from Tracey, Joan and Lisa
13 who were at the Family Dollar that day. And when
14 you're trying to determine whether or not to believe
15 witnesses the law gives some factors that you can use
16 to determine whether or not to believe them.

17 Basically use your common sense. In each and
18 every one of your lives, you judge people's
19 credibility on a daily basis. You know if your child
20 is being truthful when there is a cookie missing from
21 the cookie jar and you find the cookie in their
22 bedroom. Or when a coworker is being truthful with
23 you about a deadline being met and then a customer,
24 you know, complains about not getting the work done.
25 Ladies and gentlemen, just use your common sense when

1 you're evaluating in that jury room and deliberating
2 whether to believe these victims and witnesses.

3 Credibility of witnesses. You can ask yourself
4 about the demeanor of the witness on the witness
5 stand. Was the witness forthright or hesitant? Ask
6 yourself when Tracey Anderson was being cross
7 examined by a skilled defense lawyer, did she waiver
8 in any way about what happened to her on November 9th
9 of 2006? Did she appear to hesitate in any way when
10 she pointed her finger at Jimmy Portee and told you
11 that's the man she knows robbed her? Ladies and
12 gentlemen, that is what this factor is talking about.

13 Was the testimony of the witness consistent?
14 And what that means is, remember on November 9th,
15 2006, Ms. Anderson gave a three-page statement to
16 Sergeant Don Robinson and then she came in and
17 testified about what happened to her. Well, ladies
18 and gentlemen, again she was subject to cross
19 examination by skilled defense lawyers and they were
20 not able to capture any inconsistency from what was
21 reported on November 9th to what she testified to you
22 today or yesterday. That's what we talk about
23 consistent.

24 And lastly, does the witness have a reason -- or
25 excuse me. The testimony of the witness, is it

1 corroborated? Remember Tracey tells the police that
2 the guy that robbed her is wearing a black ski mask
3 with homemade holes, a bright yellow rain jacket,
4 sweatpants up to the middle of his leg, between his
5 knee and ankle, and white scuffed up tennis shoes.

6 Well, is her description corroborated? Yes.
7 It's corroborated by the physical evidence. We've
8 got a knit hat with cutout holes, homemade. Her
9 words. We've got the sweatpants. And you heard her
10 testify that he was wearing the pants the same
11 fashion as during the robbery. And also look at it.
12 He's six-foot-four. These are going to be short on
13 him. She described the shoes as being scuffed up and
14 dirty, white tennis shoes. All of this corroborates.
15 It shows that she's telling you the truth.

16 Does the witness have any reason to be biased or
17 prejudiced? Remember when I asked Ms. Anderson if
18 she even knew Jimmy Portee? Her answer was no. She
19 doesn't know him. She has no axe to grind with Mr.
20 Portee. She is here to tell you that on November
21 9th, 2006 while she was at her job which she likes
22 earning a living, an honest living, working, that
23 that man came in and robbed her. She has no axe to
24 grind with Mr. Portee. She is simply telling you the
25 truth.

1 Because Ms. Anderson was challenged about her
2 identification of Mr. Portee, I wanted to go over
3 what factors you can use to determine whether to find
4 that her identification of Mr. Portee is reliable,
5 that you can count on it, that you can bank on it.

6 The opportunity of her to view the suspect.
7 Ladies and gentlemen, not only did she view him
8 during the crime; she got to see him at 8 a.m. She
9 even noticed his car at 7:45 a.m. by the hotel. She
10 told you that her office sits up high off the ground
11 over here by the Coke machine and that she heard the
12 car. She goes to look. She sees a man get out of
13 the car. She has no obstruction. It's about five
14 feet away from her to the door; at the time a little
15 concerned because she's alone in the business by
16 herself but didn't think much of it, thought he was
17 checking store hours.

18 Ladies and gentlemen, unbeknownst to her he was
19 casing the store out. He was planning, planning.
20 He'd already cut the holes out of his hat. He had to
21 find out when he could go hit the store when they
22 first opened when there'd be hardly any customers
23 around.

24 Ladies and gentlemen, the opportunity to view.
25 She said I have no problem with viewing his face and

1 the face of that man is the same face of the man that
2 was standing underneath that basketball goal. That
3 is the same person.

4 The witness's degree of attention. As I already
5 stated, she paid attention because she was alone in
6 the store. He never noticed her. So it's not like
7 she had to hide from him. She was watching him the
8 entire time. During the robbery, remember her degree
9 of attention while this man is up on top of her and
10 she is as much shorter than him?

11 Her testimony is so truthful, ladies and
12 gentlemen, because think about it. If you're that
13 short and someone that tall is next to you, you're
14 not going to be able to tell what kind of pants or
15 shoes they're wearing because they're right on top of
16 you. She is only at that point able to describe the
17 jacket and the ski mask and the light skin because
18 she saw his hands.

19 But remember when he stands away from her so
20 that she can start putting the money from the cash
21 register in the bag, he stands away. And that's when
22 he glances over and notices his pants and that they
23 were in the middle of his legs and that he's wearing
24 dirt white tennis shoes. That shows -- you can't
25 give her an Oscar if she's making that up.

1 The accuracy of the witness's prior description
2 of the defendant. You cannot be more detailed in
3 your description than homemade holes, the length of
4 his gray sweatpants. I mean, I concede these are
5 normal gray sweatpants. But when they're hanging
6 between exactly where she said she saw them during
7 the probable, that's what makes the sweatpants
8 unique. The homemade holes is what makes this mask
9 unique.

10 The jacket, she knew it came to his waist and
11 that it was a rain jacket, not a fleece yellow
12 jacket, and that it was bright. That's unique in
13 conjunction with these articles of clothing.

14 The level of certainty. She was honest with you
15 when she told you, I recognized that face from 8 a.m.
16 and it was the same build and the same height and the
17 same skin complexion as the person I saw at 8 a.m.
18 and again as the robber, but I didn't see the
19 robber's face because he had this on. But she told
20 you, ladies and gentlemen, that she knew it was him
21 because he was the same person with the same build,
22 same clothing.

23 Ladies and gentlemen, we presented some forensic
24 evidence to you in this case. We presented the
25 clothing obviously. That's physical evidence.

1 Remember the defense said that that was ignored by
2 the police. Well, apparently not, because every
3 single thing that the witnesses described they found
4 and it corroborates them, evidently that they did do
5 their job.

6 You heard about the swab. I guess it's number
7 8; and then again number 20, the buccal swab, the
8 saliva swab from Mr. Portee. And you heard from the
9 custodians from the evidence room. The reason why,
10 the State of South Carolina has the burden of proof,
11 and we've got to make sure that you can bank on the
12 integrity of the evidence. And that is why we are
13 required to show you the chain of custody of the
14 evidence. And I apologize it was boring. But we had
15 to do it so that when you go back into that jury room
16 you don't have to scene whether or not, hmm, did this
17 mask touch other items of evidence? No. It was
18 packaged in its own envelope. It was swabbed and
19 sealed properly. No contamination. So that you can
20 bank on the results of the DNA analysis.

21 After the defendant hears the blue lights and
22 the sirens and speeds off into the neighborhood at
23 excessive rates of speed and crashes his car into the
24 fence on Hialeah drive, he then flees from the car.
25 And you hear the deputies say, Deputy Davis and

1 Deputy Unger, that he grabbed with him the yellow
2 jacket, the ski mask and that black sock and that he
3 took off running.

4 And I think Davis says it the best. He was
5 trying to get away with his loot but as he was
6 running he kept dropping the evidence. And doesn't
7 the physical evidence corroborate that?, Where the
8 ski mask is found caught on that chain link fence
9 because a Rottweiler stopped him in his tracks and he
10 had to backtrack.

11 And that's how Davis caught up with him and how
12 he runs nextdoor to the neighbor's. And how they
13 struggle. Yes, sir; struggle. Davis uses the term
14 struggle. Unger didn't write struggle in his
15 incident report but he describes a struggle. Does
16 that not make it a struggle?

17 Here is the cash. As they lift the defendant up
18 from the ground, there is the cash in consistent
19 increments and denominations as Tracey told you. But
20 remember she said we didn't put \$10 bills in the
21 till. We had a customer though and gave that
22 customer change. Then again, I asked her about when
23 you prepared the till that morning describe how the
24 money was rolled. I don't want to get my fingers
25 dirty. She said it was clear plastic. Now, ladies

1 and gentlemen, alone that may not be very
2 significant; but in conjunction with the clothing
3 fitting the description, the shoes, the jacket, when
4 you put it all together like a puzzle, each piece
5 fitting together, then you see the big picture and
6 then you see the truth.

7 The law in South Carolina is, because you might
8 ask yourself, why would he flee? He's just been a
9 victim of a horrible carjacking where \$743 were
10 taken; yet he still has \$72 on him when he's caught
11 by the police. Flight from prosecution is admissible
12 as guilt. Evidence of flight is admissible to show
13 guilty knowledge and intent and that the defendant
14 sought to avoid apprehension.

15 Deputy Davis told you himself he was trying to
16 get away. He balled up his fists to fight me. If
17 you are a victim of a carjacking and you see the
18 police behind you, wouldn't you say, 'Thank God.
19 There you are. I've just been robbed or carjacked'?
20 Not speed away in excess of 100 miles per hour and
21 then fight the very police officers that are there to
22 serve and protect you.

23 You heard first from Sergeant Robinson that when
24 he went up to Mr. Portee who by that point was
25 already handcuffed in the back of his patrol car that

1 he Mirandized him, gave him his Miranda warnings and
2 said, 'Before I go any further let me introduce
3 myself. I am Sergeant Donald Robinson with the
4 Richland County Sheriff's Department. Before I can
5 talk to you, I have to advise you of your
6 Constitutional rights.' And you heard his testimony
7 as how he went through them.

8 You then heard from Investigator Kevin
9 Isenhoward that once Mr. -- when he got there to Mr.
10 Portee -- well, first of all, Mr. Portee after being
11 Mirandized by Sergeant Robinson and asked what's
12 going on; I don't know nothing about nothing. Not
13 I've just been carjacked. I don't know nothing.

14 Then Sergeant Isenhoward tries to talk to him
15 and says, 'All right. Well, let's go to headquarters
16 so I can properly Mirandize you in writing and have a
17 more formal interview process going on.' Well, you
18 heard all of the rights checked off one-by-one. As
19 he read them he checked them off.

20 "If you decide to answer questions without a
21 lawyer, you still have the right to stop answering at
22 any time. You also have the right to stop answering
23 at any time until you talk to a lawyer." Signed
24 Jimmy Portee; witnessed, Kevin Isenhoward.

25 Waiver of rights. "I have read this statement

1 of my rights and understand what my rights are. I am
2 willing to talk and answer questions. I understand
3 and know what I am doing. No promises have been made
4 to me and no pressure or coercion" -- and he
5 understood coercion or else it would have been
6 underlined -- "of any kind has been used against me."
7 Signed Jimmy Portee.

8 So let's go over what Jimmy had to say because
9 you have to determine whether his statement was
10 voluntary. Let's start with page number 1. Again,
11 after being Mirandized once, twice, again three
12 times, understanding the right to remain silent,
13 yada, yada, yada; question: "Where were you today at
14 9:15?" Now, ladies and gentlemen, this is at noon on
15 the very day. We're not asking you where you were a
16 year ago at 9:15. We're asking you a simple
17 question. Where were you this morning?

18 Here is his answer. "I was at my sister's
19 house. My sister's name is Janice Andrews and she
20 lives on Britton Drive in Columbia."

21 We will already have this map here for you to
22 look at when you go back to the jury room. But
23 Britton is over here. I found it on this map. It's
24 over here. And, lo and behold, Family Dollar is over
25 there. Okay? Putting himself near the scene.

1 "How long were you there?"

2 "I got there at 8:30 a.m."

3 Well, interesting. Because at 8 a.m. we know
4 that he was at the Family Dollar. Tracey saw him
5 looking at the store hours. So, not unrealistic for
6 him to leave at 8:00 and go to Britton Road, Britton
7 Lane where his sister lives until 9:15 when the
8 robbery occurs. He goes back because he's checked
9 the store hours.

10 But how long were you there?

11 "I got there around 8:30 but I left at 9:45."

12 Wait a minute. Because according to the police,
13 at 9:25 you're on the corner of Bluff and Atlas Road.
14 And look. You're detained three minutes later after
15 a high speed chase going over 100 miles per hour.
16 He's got his timeline messed up because he's not
17 being truthful.

18 "Was she there with you?"

19 "Yes. It was her and my mother, Janie Portee."

20 "Where did you go when you left your sister's
21 house?"

22 "I went to the Richland County Public Library
23 off of Garners Ferry Road."

24 Well, ladies and gentlemen, look at where the
25 Richland County Public Library is. Here is Family

1 Dollar. Here is Richland County Public Library. He
2 knows he's got to put himself somewhere in the
3 vicinity in case there's other witnesses. So I'll
4 concede I'm in that general vicinity.

5 "Did you go inside the library?"

6 "Yes, sir."

7 "What time did you get there?"

8 "I guess I got there around 9:50, 10 a.m.,
9 somewhere around there. I parked on the far end near
10 the store."

11 "The Family Dollar Store?"

12 Investigator Isenhoward. Why didn't you go to
13 the Richland County Public Library to interview
14 witnesses about whether or not they saw Mr. Portee
15 there? Because he's already in police custody when
16 he claims he was there. There are no witnesses,
17 Ladies and Gentlemen. Smoke and mirrors.

18 "How long were you inside the library?"

19 "I was in there for 15 to 20 minutes."

20 "What were you doing?"

21 "I was looking at ALECK which is a job search
22 program on the computer."

23 "What happened when you left the library?"

24 "I got in my car. I was pulling out of the
25 library getting to turn on the road when I stopped at

1 the stop sign and there was this white man pointing a
2 gun at me through the window."

3 So I'm in the driver's seat. I'm Portee. I'm
4 in the driver's seat driving my car and a man comes
5 up with a gun. Listen to this, ladies and gentlemen.

6 "He pointed a gun at me through my window."

7 So he's talking about the driver's window.

8 Right?

9 "Then he told me to get over."

10 So obviously, if you're in the driver's seat you
11 would get over to the passenger's seat. But wait a
12 minute. Why did you get in the passenger's seat?
13 Because look. He walked around the car and got into
14 the passenger's side front. It's not making sense,
15 ladies and gentlemen, because it's not the truth.

16 "When he got in, he looked in my wallet and took
17 \$743 from it."

18 Well, if you have \$743 in your wallet, why are
19 you looking for a job? You're rich.

20 "He told me to drive and directed me to go down
21 Atlas Road almost to Bluff."

22 Well, clearly he has to put himself where the
23 police start their chase.

24 "He jumped out of the car and ran off."

25 How convenient. He did so before Unger saw him.

1 "I was on my way home when a police officer
2 pulled up behind me. He put on his blue lights and I
3 panicked."

4 Well, he forget to mention how he pulled a
5 u-turn in Rick's Party Shop parking lot.

6 "And I panicked."

7 Why did you panic? You didn't do anything
8 wrong. You were a victim, sir.

9 "I kept driving into Bluff Estates. They chased
10 me a little bit and I jumped out of the car and
11 started running."

12 Didn't mention crashing it.

13 "I took the yellow jacket, money and ran."

14 Okay. So he admits he took this and the money and he
15 is running. He admits it. He admits he puts this in
16 his possession, ladies and gentlemen.

17 "Oh, I threw the money and jacket when the
18 deputies caught me."

19 No. Actually you dropped it. You were dropping
20 it because you couldn't hold onto it while they were
21 chasing you.

22 "Describe the white man."

23 "He was about six-two, six-three."

24 Well, Mr. Portee is six-four. So you've got to
25 describe the robber to be looking like you, right?

1 So make him tall. Short, red hair. Well, it doesn't
2 matter what color hair you describe because you know
3 you're wearing a ski mask to cover your hair. Green
4 eyes and he had a semi red beard close to his face.
5 Guess what? He was wearing a white t-shirt, a white
6 t-shirt, sneakers and khakis or sweats. I can't be
7 too detailed about what I'm wearing. Sweats.

8 "I am not certain. The gun was black,
9 semi-automatic."

10 Black semi-automatic? It sure looks like one.

11 "What did the man have with him when he got into
12 the car?"

13 Here is his opportunity, ladies and gentlemen.
14 But he messes up.

15 "He had a silver or gray bag."

16 All right. Gray bag, where did we hear that
17 description before? From Tracey. She put the money
18 in a gray bag. What do we have dispatch recording
19 from caller 991? And this is all going back with you
20 in the jury room. Second page. Caller 991. Bluff
21 and Harlem is where the suspect possibly threw
22 something out of the window. Because that gray bag
23 was never recovered. But isn't it interesting that
24 he chose to say gray bag? That's how Tracey
25 describes the bag that she put the money in. And

1 guess what? You can almost see the gray bag right
2 there in that picture, right there on that by the
3 register.

4 But what I was talking about earlier, a missed
5 opportunity for Mr. Portee, he forgot to put that
6 yellow jacket on the giant leprechaun. Right there.
7 And he was wearing a bright yellow jacket. Does he
8 say it? No. Why not? Because he already had it
9 with him. It's his jacket.

10 "Were you at the Family Dollar Store on Garners
11 Ferry Road at any time?"

12 "No. I have never been there."

13 Okay. Well, Ms. Anderson has him there 8 a.m.
14 She saw him with her own eyes.

15 "Did you rob the Family Dollar Store on Garners
16 Ferry Road today?"

17 "No, sir."

18 "Do you have anything else to add to your
19 statement?"

20 "No."

21 No yellow jacket. I forgot to tell you that man
22 that carjacked me was wearing that yellow jacket.

23 Because the State of South Carolina closes
24 first, gives the closing argument first, I have to
25 anticipate what the defense attorneys are going to

1 tell you in their closing argument. And I'm not a
2 mind reader. I don't have a crystal ball. So I went
3 over a little list in my head last night thinking
4 about what they were going to tell you. And there's
5 probably things that I didn't think of. And if they
6 say things that are not on my little list, think
7 about what the State would do to respond to it. What
8 would I say in response? What does the evidence say
9 in response? More importantly; not me.

10 All right. In their opening argument, and I
11 took notes, they had a perfectly good reason to
12 arrest the defendant for the failure to stop for blue
13 lights. So it's typical tactic by the defense.
14 Concede the lesser charge, failure to stop for blue
15 lights. Okay. We'll take responsibility for that
16 and sweep it under the rug. That's a defense tactic.
17 Why? Because if you think they're being honest with
18 you about the failure to stop for blue lights, then
19 they're being honest about the armed robbery and
20 ABHAN or assault and battery of a high and aggravated
21 nature.

22 But in their opening statement they minimize Mr.
23 Portee's actions. Well, he came to a stop and ran
24 versus what really happened. He crashed, resisted
25 arrest; and, yes, ladies and gentlemen, he struggled.

1 Ask why did Portee flee if he didn't do anything
2 wrong? Ask yourselves that question.

3 The police assumed they had the right guy. They
4 don't want you to remember Tracey Anderson is the one
5 that told them they had right guy. Tracey's
6 identification is tainted because an officer told her
7 they had a person in custody that fits the
8 description she provided. Repeat: She provided that
9 description to the police. The police didn't provide
10 the description to her.

11 And you heard how Sergeant Don Robinson went
12 through a lot of trouble, enough trouble to at least
13 keep the community safe. But he put the man's
14 handcuffs from behind where you look like you're
15 guilty of something to the front. And he covered it
16 with a white t-shirt which he documented in his
17 report. He covered the handcuffs so that Ms.
18 Anderson could not see that this man had handcuffs
19 on.

20 Now, I asked him, where were the business in
21 relation to Mr. Portee while you had him standing
22 under the basketball goal? About ten feet away.
23 Well, why didn't you just have them go take a coffee
24 break or something? Well, because this man just went
25 through this neighborhood at 100 miles per hour and

1 he's possibly guilty of an armed robbery. I can't
2 have the community's safety jeopardized. You are
3 going to have to keep law enforcement somewhere
4 present, ladies and gentlemen.

5 And I asked Sergeant Robinson, are show-up
6 identifications commonly used as a tool in criminal
7 investigations? Yes. And why? So we make sure
8 we've got the right person, so we don't grab some
9 innocent person off the street and take him into
10 jail. It's for the protection of people, ladies and
11 gentlemen.

12 But, no. They're trying to make him look like
13 he did something wrong. They want you to ignore that
14 the defendant is caught red handed. He's got the
15 same height, same build, same complexion, wearing the
16 same clothes with a hat with homemade holes with his
17 own DNA in the mouth area inside the hat, the bright
18 yellow jacket, the coins rolled in the same clear
19 plastic, hacksaw handle resembling a gun and the
20 cold, hard cash.

21 But the police ignored physical evidence. They
22 ignored it, you see. They didn't bother
23 fingerprinting these coins, did they? Well, that's
24 not what Bouknight told you. I just got my fingers
25 dirty.

1 Footwear impressions. You heard Investigator
2 Bouknight say, I didn't know if they were relevant or
3 not. I thought they might be important, so I
4 photographed them. And I photographed his shoes and
5 I did the comparison and they weren't even the same
6 shoe. But does that mean they're ignoring it? No.
7 They analyzed it. That's not ignoring it. They took
8 it into a scientific lab, photographed it, developed
9 the film, made an impression of it, compared it.
10 What else do they want, Ladies and Gentlemen?

11 The ski mask that was found that he dropped on
12 the chain link fence was analyzed. It was swabbed in
13 the mouth inside and then taken to a scientific lab
14 where Dr. Gray Amick compared the sample from inside
15 the mask to the known sample of Jimmy Portee and
16 analyzed it. And it matches.

17 The clothes were collected. The scene was
18 photographed. But they also, the police ignored
19 facts that don't support their assumptions. Well,
20 you know what? They went to the public library to
21 find a video to confirm Mr. Portee's story. They
22 tried. They also called Janie Portee. Investigator
23 Isenhoward told you that he talked with over her 20
24 times. He also tried to call Janice Edwards, the
25 sister that lives on Britton Drive, Britton Drive or

1 Lane. That's not ignoring the facts. He was
2 reaching out to the defendant's family.

3 Then what gets me is they're asking officers and
4 investigators if they did things that are outside
5 their scope of duty, trying to make them look
6 incompetent. And you remember my redirect of
7 Sergeant Isenhoward. Well, why didn't you go to the
8 crime scene and process the scene? It's not my job.
9 I sent Investigator Bouknight who is trained to do
10 that to do that job. That's his job. But that's
11 what they're doing, trying to make the police look
12 incompetent.

13 Then they're insinuating that the witnesses such
14 as Lisa Ellis and Joan Hooks, because they didn't
15 write down in their paragraph sentence the
16 description of the robber that they're fabricating it
17 in some fashion when they're coming into this
18 courtroom. Ladies and gentlemen, I asked both women,
19 do you need a look at the written statement to
20 remember what happened to you November 9th, 2006 and
21 what the person was wearing that did this? No.

22 And all of their descriptions, ladies and
23 gentlemen, all these witnesses, I'm sorry for the
24 delays between the witnesses, but Judge Cooper has
25 sequestered all the witnesses so that they can't hear

1 one another testify. And each woman came in here,
2 Anderson, Ellis and Hooks, and told you and described
3 the same exact clothing worn by the robber.

4 But just in case you believe he did do it, this
5 is another strategy. Well, if he did do it, he
6 didn't do it while armed with a deadly weapon. So
7 he's only guilty of the lesser-included offense of
8 strong armed robbery. If you think he did do it,
9 well, okay, he didn't hurt the women badly enough.
10 So he's only guilty of the lesser-included offense of
11 simple assault and battery. Just ignore the four
12 aggravating circumstances that exist.

13 Because the facts are the facts, ladies and
14 gentlemen. All of the evidence points to the
15 defendant's guilt. Tracey Anderson positively
16 identifies him; no waiver, no question. Gray
17 sweatpants? Not just any normal gray sweatpants.
18 They're found on him the same, worn in the same
19 fashion as the robber. Scuffed up white tennis
20 shoes? Not bright white tennis shoes or just white.
21 She describes how they're scuffed up. Scuffed up.

22 Bright yellow jacket, she describes where it
23 came to him, his waist, and it was a rain jacket, not
24 a fleece or cotton jacket. Homemade black ski mask
25 and the defendant's DNA on the mouth.

1 Ladies and gentlemen, when you're running and
2 you're sweating, the police are chasing you, you're
3 going to sweat. And you may leave your sweat on the
4 item, on an article of clothing. But, ladies and
5 gentlemen, don't forget what Harold Bouknight said.
6 He went inside to the mouth area and got the DNA
7 sample. Don't be fooled. Don't think it wasn't his
8 saliva from his mouth that left that DNA sample.
9 Don't let them make you think it was sweat from his
10 hands as he's grabbing it and running. 1 in
11 38 trillion. The chances of it being the giant
12 leprechaun is 1 in 38 trillion in the Caucasian
13 population. In the African-American population, the
14 chances of it being anybody else is 1 in
15 1.1 trillion. And you saw Ms. Good ask Dr. Amick,
16 how many zeroes is that? You saw all those zeroes.
17 There is only 6 billion people on earth, ladies and
18 gentlemen.

19 It must have been the most unluckiest day in
20 Jimmy Portee's life on November 9th, 2006. Because
21 he just so happened to have these statistics from his
22 saliva on this mask wearing these very clothes, the
23 ski jacket. The rolled coins happened to be in clear
24 plastic. He happened to be driving the same car as
25 the person who fled the scene. Because remember,

1 officer 180, that would be Shawn Kilcoyne; is talking
2 to a witness at the church. It's a white Chevy
3 Cavalier. Deputy Unger says that's very similar to a
4 Cutlass Sierra, late older eighties model.

5 The bottom line, ladies and gentlemen, is that
6 scientific and physical evidence does not lie. And
7 this case is so overwhelming. And when Ms. Good told
8 you in opening that we welcome the burden; she's
9 right. We welcome the burden. We have given you the
10 evidence that you need to make a responsible decision
11 in that jury room.

12 We want you to hold that man responsible for his
13 actions on November 9th, 2006. He is guilty of armed
14 robbery. Nothing less. He is guilty of assault and
15 battery of a high and aggravated nature for Erica
16 Wilson and for Tracey Anderson. Nothing less. And
17 he is guilty for failing to stop for police blue
18 lights. Thank you.

19 MR. COOPER: May it please the Court, Your
20 Honor?

21 THE COURT: Yes, sir.

22 MR. COOPER: Good afternoon, ladies and
23 gentlemen. You know, I've got a pretty cheap suit on
24 this afternoon. I really do. And I apologize for
25 that. I started thinking when I was preparing for

1 this argument, you know, I wish I could afford one of
2 those real nice tailored suits that some people get.
3 You know, some people go to a tailor when they buy a
4 suit. They don't just pull it off the rack like I
5 have to.

6 And I was thinking about that and thinking about
7 this case. And I started thinking that, you know,
8 there are some similarities there. Because the way a
9 tailor operates is he starts with the man or the
10 woman. The man or the woman is the very beginning.
11 And then meticulously when he's designing the suit he
12 designs the suit to fit around the man. That's the
13 whole idea. The man is the first step.

14 And, you see, that's exactly how they conducted
15 their investigation. They started with Mr. Jimmy
16 Portee. He was their first step and they tailored
17 their investigation to fit him. They conducted their
18 investigation so that everything that they found out
19 and everything that they have to put in reports, and
20 everything that would be in statements would fit in
21 perfectly. Well, that ain't the way you're supposed
22 to do an investigation. And we heard testimony about
23 the proper way you're supposed to conduct one. And
24 that ain't what they did.

25 And, you know, my co-counsel, Mr. Secor, he

1 addressed you all a couple of days ago, and he talked
2 about the fact that there is really no doubt that Mr.
3 Portee was arrested that day. And I know you all
4 just heard from Ms. Shipley. She talked about, well,
5 we'd give you some tricky strategy that we have. I
6 guarantee you this, that Mr. Secor doesn't do his job
7 to trick anybody; and I know I don't. We do our jobs
8 to help you all find the truth. And it's a good
9 thing, because they don't let you all find the truth.
10 They want you all to find exactly what fits their
11 story. Okay?

12 So, yeah, let's talk about that. They basically
13 spent the last two days meticulously going over
14 exactly what we told you all from the beginning.
15 Jimmy Portee was arrested and this stuff was in his
16 car from day one. I mean, we said that. But the
17 reason why they spent two days putting people on the
18 stand and going over every detail of that is because
19 they want to take you all's attention away from what
20 they don't know. And what they don't know is exactly
21 what happened in that store, and that's what's really
22 important.

23 You heard like two different cops testify about,
24 you know, taking Jimmy down. Why? Why did they call
25 two cops to testify to that? Because they want to

1 focus on: We arrested him. Well, we told you all
2 that. But while the second police officer was
3 testifying to the gory details of how he arrested Mr.
4 Portee, the evidence that they weren't giving you was
5 what they should have found out in a proper
6 investigation which is exactly who was in that store
7 and what happened. And they didn't have it, so they
8 had to focus on that.

9 Now, let's talk about, the State is required to
10 present you all with proof. And you all have already
11 heard that and you all are going to hear it again.
12 So I'm not going to go over every detail of the law
13 on that. But the State has to prove this case
14 against Mr. Portee. You all have already heard that.

15 But certainly the way that the State goes about
16 gathering proof in a case is through an
17 investigation. So let's talk about the investigation
18 in this case. You all, we've got the International
19 Investigator of the Year in this courtroom. He
20 testified he won an award, International Investigator
21 of the Year. I never heard of that, but it sounds
22 really important.

23 And the International Investigator of the Year
24 told you all he didn't return to the crime scene.
25 The International Investigator of the Year told you

1 all, well, you know, I've got subordinates and that's
2 their job. The International Investigator of the
3 Year, you're in charge of this investigation and you
4 don't go back to the crime scene?

5 He said, you know, he treated them like his
6 employees, they did what he told them. What do
7 bosses do? Bosses take charge of a job. Bosses
8 don't just say, well, that's somebody else's job.
9 Bosses take charge of an important job. And you all
10 know how important this is. So delegating duties
11 isn't an excuse for not investigating.

12 But, you know, another reason that there really
13 wasn't a big investigation? Is because they started
14 with the man. And it just would have been
15 inconvenient to find out too much other stuff. It
16 would have been inconvenient to go knocking on doors
17 looking for witnesses. It would have been
18 inconvenient to interview patrons of the library
19 because that wouldn't fit with the suit that they
20 were carefully tailoring around Jimmy Portee. And
21 they didn't want to know too much.

22 Well, let's talk about some examples of that.
23 Okay. You all heard a lot about something called a
24 show-up ID during the testimony. And, you know, I
25 apologize if I made that confusing in any way. But

1 basically it's when the police take an alleged eye
2 witness around to view somebody to see if that person
3 can identify the person that they have. And I talked
4 with Sergeant Robinson. He did some investigation in
5 this case he says. I talked with Sergeant Robinson
6 about that. And, you know, he testified he has done
7 a lot of those, 16 years on the force and every type
8 of job. He knows how to do one. He knows the
9 precautions to take.

10 And I asked him if he'd be concerned if that
11 person in the car were suggested, an appearance or
12 suggested the identity of the person they were going
13 to see. And I asked him would it bother you if
14 somebody, one of your officers, told the witness,
15 yeah, you're going to see somebody who matches our
16 description. Then he said, well, no, that wouldn't
17 bother me. What? Isn't that the point? Why do the
18 ID?

19 So when we talk about identifications in this
20 case, we're not saying that Tracey Anderson is a
21 liar. She's not lying. Ms. Shipley is right. She
22 doesn't have a reason to lie. The problem is that by
23 the time they talked to her and got her, the
24 investigators and the police had already decided.
25 They'd already made up their mind. So they needed

1 her to give them a positive ID. And that's why they
2 drove her around. That's why the officer talked to
3 her about a guy who matches our description. That's
4 why drove her up to an area where there were
5 uniformed police officers around him. And that's
6 why, you know, they put a t-shirt over his handcuffs.
7 Because they needed her to ID him. Because they
8 already had their man. Because Tracey Anderson, as
9 truthful as she wants to be, it's just a piece of
10 patchwork in that suit that they were carefully
11 building around Mr. Portee.

12 Now, let's talk about another aspect of the
13 investigation that you all heard about, is the 911
14 tape. Well, two words for you all about that 911
15 tape. White male. Now, you all have heard Mr.
16 Portee described in several different ways in this
17 trial. But the bottom line is you all are the
18 finders of fact. You all can see Mr. Portee over
19 there. You all decide whether he is a white man or a
20 black man. Okay? But what's clear from the evidence
21 is, that 911 call, they said white mail. And we live
22 in Columbia, a diverse society; and they said white
23 male.

24 Now, let's talk about another thing that they
25 glossed over but I submit to you is very important.

1 Who is Michael Murphy? Did you all notice that? Who
2 is Michael Murphy? I mean, yeah. Tracey Anderson up
3 here talking about this Michael Murphy fellow that
4 saw something, saw a robber, apparently got a pretty
5 good look at him, apparently ran through the store
6 talking to them, saw him get in the car. Who is this
7 guy? Where is he? You talk about providing
8 evidence. That sounds pretty important. Where is
9 this guy who saw this fellow in the store?

10 I can tell you one place where he wasn't. He
11 wasn't on that witness stand. He wasn't in this
12 courtroom talking to you all. And why didn't he
13 testify? Well, maybe he didn't tell you all what
14 happened because it doesn't fit with their story.
15 Maybe he didn't tell you all what happened because
16 he's got a completely different version of that day
17 than the story that they want you to believe. So
18 think about that.

19 Now, you know, we've talked about their
20 investigation and we've talked about the two days
21 they've spent basically proving that there was an
22 arrest. And I want you all to think about something
23 else that they definitely have not proven. They
24 haven't proven that whoever did this committed an
25 armed robbery. They have not shown that, because

1 they haven't shown there was a weapon in the Family
2 Dollar at all. Nobody says that. Nobody.

3 And this thing Ms. Shipley addressed about the
4 robber pretended. The robber didn't pretend. Not
5 from the evidence that we heard. The robber didn't
6 pretend that he had a weapon. Think about the
7 testimony and put it together. Okay?

8 They want you to believe that a robber went in
9 there pretending to have a weapon, holding onto one
10 of the clerk's hair and collecting money. Well, the
11 robber has only got two arms. And if you were
12 pretending that you had a weapon, or if the robber
13 was, why grab them? The person in the Family Dollar
14 didn't commit an armed robbery. He didn't pretend to
15 have a weapon.

16 Now, they'll talk to you about a bulge where he
17 had his hand in his pants. But there was no evidence
18 that the robber in that store pointed anything at
19 anybody. The witnesses talked about a bulge and a
20 hand down the pants. That ain't pretending to have a
21 weapon. It doesn't make any sense.

22 What they proved was that somebody went in there
23 and grabbed these women and took money. That's
24 called common law robbery. That's what that is.

25 Now, let's talk about grabbing the women. The

1 person who grabbed those women, no excuse for it.
2 But under our law, grabbing those women did not
3 constitute an assault and battery of a high and
4 aggravated nature, because it wasn't an act of
5 serious violence. And listen to the judge on this.
6 The judge is going to instruct you on the law.
7 Listen to what he says. But I'm telling you the
8 evidence showed that whoever grabbed those women did
9 not commit assault and batteries of a high and
10 aggravated nature. That's just not what it was.

11 Ladies and gentlemen, I really appreciate your
12 attention during this trial. I know Mr. Secor does.
13 I know Mr. Portee does. And I don't know what
14 happened on November 9th. I wasn't there. But the
15 important thing is they don't either. And it's their
16 job to prove it to you.

17 They can't prove, they haven't proved, that
18 Jimmy Portee committed an armed robbery. And they
19 haven't proven that Jimmy Portee committed assault
20 and batteries of a high and aggravated nature. And
21 the reason they haven't proven that to you is because
22 Jimmy Portee did not commit an armed robbery. And
23 the reason they haven't proven the assaults is
24 because Jimmy Portee did not commit assault and
25 batteries. Thank you.

1 **THE COURT:** All right, ladies and gentlemen.
2 Everybody okay? All right. You've now heard all the
3 testimony in this case. You will take to the jury
4 room as I said earlier all the evidence in this case
5 that's been introduced. You've heard the arguments
6 of both the State and the defendant. Now I will
7 explain the law as it applies to this case.

8 Under our Constitution and Code of Laws, only
9 the jury can make findings of fact. I am not
10 permitted to indicate to you how I might feel about
11 the facts. If anything I have said or done during
12 the course of this trial indicates to you that I have
13 an opinion concerning the facts of this case, then
14 you should disregard that. The jury must
15 independently weigh the evidence in this trial and
16 render a verdict based on that evidence.

17 Now, the same Constitution and laws which
18 designate and make you the finders of fact also make
19 me the instructor of the law. If you have some idea
20 as to what the law is or what the law ought to be and
21 it does not agree with what I now tell you the law
22 is, you are obligated under the oath which you have
23 taken to abandon that preconception on your part and
24 to accept and apply the law exactly as I now state it
25 to you.

1 I remind you again, the fact that the defendant
2 was arrested, charged and indicted in this case is
3 not evidence in this case and cannot be considered by
4 you as evidence in this case, nor does it create any
5 presumption or inference of guilt. This document or
6 these documents are simply the formal legal
7 instruments which contain the charges against the
8 defendant. They are the formal documents by which
9 the case is brought into court.

10 The defendant has pled not guilty to these
11 indictments, and that plea puts the burden on the
12 State to prove the defendant guilty of each
13 indictment. A person charged with committing a
14 criminal offense in South Carolina is never required
15 to prove himself or herself innocent.

16 I charge you that this is an important rule of
17 law, that the defendant in a criminal case no matter
18 what the seriousness of the charge may be will always
19 be presumed to be innocent of the crime for which the
20 indictment was issued unless guilt has been proven by
21 evidence satisfying you of that guilt beyond a
22 reasonable doubt.

23 This presumption of innocence does not end when
24 you begin your deliberations, but it accompanies the
25 defendant throughout the trial and until you reach a

1 verdict of guilt based on evidence satisfying you of
2 that guilt beyond a reasonable doubt.

3 The presumption of innocence in other words is
4 not a mere legal theory. It's not just a legal
5 phrase. It is a substantial right to which every
6 defendant is entitled unless you, the jury, are
7 satisfied from the evidence of the defendant's guilt
8 beyond a reasonable doubt.

9 Well, what is a reasonable doubt at law? A
10 reasonable doubt is the kind of doubt that would
11 cause a reasonable person to hesitate to act. Let me
12 repeat that. A reasonable doubt is the kind of doubt
13 that would cause a reasonable person to hesitate to
14 act. The State has the burden of proving the
15 defendant guilty beyond a reasonable doubt.

16 Now, some of you may have served as jurors in
17 civil cases where you were told it's only necessary
18 to prove that a fact is more likely true than not
19 true or by the greater weight or the preponderance of
20 the evidence. In criminal cases, however, the
21 State's proof must be more powerful than that. It
22 must be beyond a reasonable doubt.

23 Proof beyond a reasonable doubt is proof that
24 leaves you firmly convinced of the defendant's guilt.
25 There are very few things in this world we know with

1 absolute certainty, and in criminal cases the law
2 does not require proof that overcomes every possible
3 doubt. If based on your consideration of the
4 evidence are you firmly convinced that the defendant
5 is guilty of the crime charged, you must find the
6 defendant guilty. If on the other hand you think is
7 there a real possibility that the defendant is not
8 guilty, you must give him the benefit of the doubt
9 and find him not guilty.

10 Now, there are two types of evidence which are
11 generally presented during a trial: Direct evidence
12 and circumstantial evidence. Direct evidence is the
13 testimony of the person who claims to have actual
14 knowledge of a fact, such as an eye witness, evidence
15 which immediately establishes the main fact to be
16 proved.

17 Circumstantial evidence on the other hand is
18 proof of a chain of facts and circumstances
19 indicating the existence of some fact. It is
20 evidence which immediately establishes collateral
21 facts from which the main fact may be inferred.
22 Circumstantial evidence is based on inference in
23 other words, not on personal knowledge or
24 observation. But the law makes absolutely no
25 distinction between the weight or value to be given

1 to either direct evidence or circumstantial evidence,
2 nor is a greater degree of certainty required of
3 circumstantial evidence than of direct evidence.

4 You should weigh all the evidence in this case,
5 and after weighing all the evidence if you're not
6 convinced of the guilt of the defendant beyond a
7 reasonable doubt, you must find the defendant not
8 guilty. (

9 Now, necessarily you must determine the
10 credibility of these witnesses who have testified.
11 Credibility simply means believability. It becomes
12 your duty as jurors to analyze and evaluate the
13 evidence and determine which evidence convinces you
14 of its truth.

15 In determining the believability of witnesses
16 who have testified in this case, you may believe one
17 witness over several witnesses or several witnesses
18 over one other witness. You may believe a part of
19 the testimony of a witness, reject the remaining part
20 of the testimony of the same witnesses.

21 You may believe the testimony of any witness in
22 its entirety or reject the testimony of a witness in
23 its entirety. You may consider whether any witness
24 has exhibited to you any interest or bias or
25 prejudice or other motive in this case.

1 Now, when considering the credibility of
2 witnesses, a person who has a past criminal record;
3 and there was some evidence of that in this case, is
4 competent to testify in a trial. A past record does
5 not affect the ability of that witness to testify. A
6 past record may only be considered by you if at all
7 in determining the witnesses' believability.
8 Remember that you are the sole judges of the facts in
9 this case, and you're also the judge of the
10 believability of all the witnesses.

11 Now, rules of evidence, and those are the rules
12 that we govern our courtroom procedure by, ordinarily
13 do not allow witnesses to testify as to opinions or
14 conclusions. An exception to this rule exists for
15 witnesses we call expert witnesses. A witness who by
16 education and experience has become expert in some
17 art or science or profession or calling may state his
18 or her opinion as to relevant and material matter in
19 which the witness claims to be an expert.

20 That witness may also state the reasons for that
21 opinion. But you should consider any expert opinion
22 received in evidence in this case like any other
23 evidence and give that testimony or that evidence the
24 weight that you think it deserves.

25 Now, one of the issues in this case is the

1 identification of the defendant as the person who
2 committed the crime charged. The State has the
3 burden of proving identity beyond a reasonable doubt.
4 You must be satisfied beyond a reasonable doubt of
5 the accuracy of the identification of the defendant
6 before you may convict the defendant.

7 Identification testimony is an expression of
8 belief or impression by a witness. You must
9 determine the accuracy of the identification of the
10 defendant. You must consider the believability of
11 each identification witness in the same way as any
12 other witness. You may consider whether the witness
13 had an adequate opportunity to observe the offender
14 at the time of the offense.

15 These be will be affected by things like whether
16 the witness knew the defendant before the crime took
17 place or whether the witness had a good opportunity
18 to see the person or whether the witness seemed as
19 though she or he was paying careful attention to what
20 was going on or whether any description given by the
21 witness was close to the way the defendant actually
22 looked or how much time passed between the crime and
23 the first identification by that witness and whether
24 at any earlier time the witness had failed to
25 identify the defendant and whether at some earlier

1 time the witness had changed his mind regarding the
2 identification or whether the witness and the
3 defendant are of the same or different race; and, if
4 so, whether the witness was sensitive to differences
5 among persons of another race, and how certain or
6 confident was the witness as to that identification.

7 Once again I instruct you that the burden of
8 proof extends to every element of this crime, or
9 these crimes charged, and this specifically includes
10 the burden of proving beyond a reasonable doubt the
11 identity of the defendant as the person who committed
12 the crime.

13 If after examining all of the testimony you have
14 a reasonable doubt as to the accuracy of that
15 identification, you must find the defendant not
16 guilty.

17 Now, a statement is alleged to have been made in
18 this case by the defendant. It was admitted into
19 evidence. While the Court has determined that the
20 statement was admissible, I instruct you that you
21 make the ultimate decision of whether or not the
22 defendant made the statement. And if the defendant
23 did make the statement, you must determine whether
24 the statement was made by the defendant voluntarily
25 and of his own free will.

1 This means that the statement was not caused by
2 pressure, fear, force, threats, coercion or
3 intimidation or by hope or promise of leniency or
4 reward of any kind.

5 Now, in order to establish criminal liability,
6 criminal intent is required. For example, the mental
7 state required to be proven by the State for some
8 crime, particular crime, might be a specific purpose
9 or obviously some intention, not knowledge of certain
10 facts or recklessness. Criminal intent must be
11 proven by the State beyond a reasonable doubt.
12 Criminal intent is always a matter to be determined
13 by the jury from the circumstances surrounding the
14 situation.

15 There is no way to prove intent to a
16 mathematical certainty. There's no way medical
17 science can dissect a person's brain and determine
18 what the person had in mind. So the law says that
19 criminal intent may be inferred from the
20 circumstances shown to have existed at the time and
21 place. This is how you make a determination of
22 whether or not the element requiring intent was
23 present.

24 It is not necessary to establish intent by
25 direct and positive evidence, but intent may be

1 established by inference in the same way as any other
2 fact, by taking into consideration the acts of the
3 parties and all of the facts and circumstances of the
4 case. Criminal intent is a mental state, a conscious
5 wrongdoing. It's up to you to determine what the
6 defendant intended to do based on the circumstances
7 shown to have existed. Criminal intent can arise
8 from some action or some failure to act.

9 Now, the charges in this case, as I indicated to
10 you earlier, are first armed robbery. The defendant
11 is charged with armed robbery. In order to prove
12 this offense the State must prove beyond a reasonable
13 doubt that the defendant took personal property from
14 the person or the presence of another person.
15 Property in the presence of a person is if it is
16 within that person's reach or inspection or
17 observation or control so that the person if not
18 overcome with violence or prevented by fear could
19 keep possession of his or her own property.

20 The State must also prove beyond a reasonable
21 doubt that the defendant carried the property away
22 intending to permanently deprive the owner of the
23 property and keep the property for the defendant's
24 own use. The slightest removal of property or the
25 complete possession of property even for an instant

1 by the defendant is sufficient to show a taking and
2 carrying away of the property.

3 The taking and carrying away of the property
4 must have been done with violence or by putting the
5 owner of the property in fear of violence. And
6 finally the State must prove beyond a reasonable
7 doubt that the defendant was armed with a deadly
8 weapon or that the defendant alleged either by his
9 actions or his words that he was armed by using a
10 representation of a deadly weapon or of any object
11 which the person present during the commission of the
12 robbery reasonably believed to be a deadly weapon.

13 A deadly weapon is any article, instrument or
14 substance which is likely to cause death or great
15 bodily harm. And whether an instrument has been used
16 as a deadly weapon depends on the facts and
17 circumstances of each case. Certainly some examples
18 of a deadly weapon would be a pistol or a shotgun or
19 a rifle or a knife.

20 If you find that the State has failed to prove
21 to you that the defendant was armed with a deadly
22 weapon, you may then consider whether the State has
23 proved beyond a reasonable doubt that the defendant
24 committed robbery.

25 In order to prove robbery the State must prove

1 beyond a reasonable doubt all of the elements that I
2 have just explained to you, except that the defendant
3 was armed with the deadly weapon or that the witness
4 believed that the defendant was armed with a deadly
5 weapon.

6 In other words, in order to prove robbery the
7 State must prove beyond a reasonable doubt that the
8 defendant took personal property from person or
9 presence of another person without that person's
10 consent and carried it away.

11 If the defendant is found possessing recently
12 stolen goods, this may be used as evidence that the
13 defendant stole the goods. This would simply be an
14 evidentiary fact to be taken into consideration by
15 you along with the other evidence in the case, and
16 you may give it such weight as you decide it should
17 have.

18 Now, assault and battery of a high and
19 aggravated nature is an unlawful act of a violent
20 injury to the person of another accompanied by
21 circumstances of aggravation. An assault occurs when
22 a person unlawfully attempts or offers to commit a
23 violent injury upon another person and has the
24 present ability to complete the attempted injury.

25 Assault is the intentional creation of a

1 reasonable fear of immediate bodily harm. It's not
2 necessary that the attempted injury or harm actually
3 take place. For example, if I walk up to you when we
4 are within arm's range, I draw back to hit you,
5 that's considered an assault. A battery in the
6 touching or the unlawful touching of another person
7 by a person who has committed the assault. An
8 unlawful touching can be caused by part of the
9 accused's body or by any object the accused puts in
10 motion. A battery is the completion of the assault
11 by using or applying force to another person, however
12 slight, in a rude, angry or resentful manner without
13 legal justification for doing so.

14 Using my earlier example, if I carry through the
15 assault by hitting you, then that's the battery. The
16 State must prove also a circumstance of aggravation.
17 Circumstances of aggravation include use of a deadly
18 weapon, the intent to commit a felony, the infliction
19 of serious bodily injury, a great disparity between
20 the ages or physical condition of the parties, a
21 difference in the gender of the parties, a taking of
22 indecent liberties or familiarities with a female
23 through the use of force or the purposeful infliction
24 of shame and disgrace, and the resistance of lawful
25 authorities. These are only examples of

1 circumstances of aggravation.

2 But if you find the State has failed to prove
3 that the defendant is guilty of assault and battery
4 of a high and aggravated nature, you must then decide
5 whether the State has proven that the defendant is
6 guilty of simple assault and battery. Simple assault
7 and battery contains all of the elements of an
8 assault and battery of a high and aggravated nature
9 that I just explained, except the circumstances of
10 aggravation.

11 If you find the State has failed to prove beyond
12 a reasonable doubt that the defendant is guilty of a
13 simple assault and battery, has failed to prove that,
14 you must return a verdict of not guilty.

15 The defendant is also charged with failing to
16 stop for a blue light. In order to prove this crime
17 the State must prove beyond a reasonable doubt that
18 the defendant was driving a motor vehicle, that the
19 defendant was driving a motor vehicle on a road,
20 street or highway of this state, that the defendant
21 was signaled to stop by a law enforcement officer by
22 means of a siren or a flashing light and that the
23 defendant did not stop.

24 In determining whether or not there are
25 mitigating circumstances which would justify the

1 defendant's failure to stop for a blue light, you may
2 consider actual road conditions or roadside
3 conditions and any other conditions such as lighting
4 and weather, the officer, driver or passenger safety,
5 or any other circumstances you believe that would
6 reasonably mitigate the alleged violation.

7 An official signal requiring a motorist to stop
8 may be a siren or flashing lights, but both are not
9 required. An attempt to increase the speed of a
10 vehicle or in some other manner to avoid the pursuing
11 law enforcement vehicle when signaled by a siren or
12 flashing light may be considered as evidence of
13 failure to stop for that blue light. However, it is
14 merely an evidentiary fact to be taken into
15 consideration by you along with all the other
16 evidence in the case and may be given the weight that
17 you decide it should receive.

18 Now, I instruct you and emphasize this final
19 point. I instruct and emphasize to you the fact that
20 the defendant did not testify in this case is not a
21 factor to be considered by you in any way in your
22 deliberation and in your consideration of the guilt
23 or innocence of the defendant. It must not be
24 considered by you in any manner whatsoever.

25 A defendant has the Constitutional right, as I

1 have explained earlier, to remain silent; and the
2 assertion of this right must not be considered by you
3 in your deliberations. I repeat, under your oath you
4 are to draw no conclusion whatsoever from the fact
5 that the defendant in this case did not testify. The
6 fact that this defendant did not testify should not
7 even be discussed in the jury room. The burden of
8 proof, as I have stated to you, is on the State. The
9 defendant is not required to prove his innocence.
10 The burden of proof remains on the State to prove
11 guilt beyond a reasonable doubt.

12 Now, ladies and gentlemen, I am required to
13 declare the law as I've done through these
14 instructions to help and guide you to a just and
15 lawful verdict. Whether some of these instructions
16 will apply will depend on what you find to be the
17 facts. The fact that I have instructed on various
18 subjects in this case must not be taken by you as
19 indicating any opinion of this Court as to what you
20 should find to be the facts or as to which party
21 should be entitled to your verdict.

22 Your verdict must represent the considered
23 judgment of each juror. In order to return a
24 verdict, in other words, it's necessary that each
25 juror agree. Your verdict must be unanimous. All 12

1 of you must agree on the verdict. Your verdict
2 cannot be based on sympathy, passion, prejudice,
3 emotion or any other consideration that's not in
4 evidence in this case.

5 Remember at all times that are not partisans
6 favoring one party over the other. You are judges,
7 judges of the facts. Your sole interest is to speak
8 the truth from the evidence in this case.

9 Now, ladies and gentlemen, you should retire to
10 the jury room but do not begin your deliberations
11 until I have instructed to you do so. As I said at
12 the beginning, all of this evidence is going to be
13 brought to you in the jury room. The indictments are
14 also going to be brought to you. I am going to --
15 when you receive the indictments and when you receive
16 the evidence you can begin your deliberations. I'm
17 going to ask that the two alternate jurors wait in
18 the hall for a few minutes after I have dismissed the
19 jury.

20 All right, ladies and gentlemen. Again, don't
21 begin your deliberations until you receive the
22 indictments in this case and all of the evidence.
23 Just relax for a few minutes while we accumulate
24 these matters. And you can begin your deliberations
25 when you receive those. Thank you very much.

1 (Jury out at 3:06 p.m.)

2 THE COURT: Any exceptions to the charge from
3 the State?

4 MS. SHIPLEY: No, sir, Your Honor.

5 THE COURT: From the defense?

6 MR. SECOR: Just briefly, Your Honor, if I may.
7 With regards to the Court's instruction on robbery, I
8 believe that the Court added a sentence following the
9 portion of the charge that states: "All the elements
10 that I have just explained, except the defendant was
11 armed with a deadly weapon", I believe that the Court
12 added after that "or that the victim reasonably
13 believed the person was armed at the time."

14 It would be our position that the factor of
15 reasonable belief of someone's possession of a deadly
16 weapon only comes into play if the armed robber
17 attempts to represent that they actually have a
18 weapon. Based on the statute I believe that that's
19 the only time that the reasonable believability of
20 the victim should come into play. So we would just
21 object to that portion of the Court's instruction
22 respectfully.

23 THE COURT: Do you want me to bring them back
24 in?

25 MR. SECOR: I guess that would be appropriate if

1 Your Honor thinks it would be.

2 **THE COURT:** What's the State's position?

3 **MS. SHIPLEY:** Your Honor, the facts support that
4 charge, that this defendant had his hand in his
5 pocket and that there was a bulge in the pocket and
6 that while he's pulling her by the hair he's got his
7 hand in his pocket saying, "If you don't do what I
8 say, I'm going to kill you." So he's clearly by
9 actions and words alleging.

10 **THE COURT:** That's not his objection.

11 **MS. SHIPLEY:** I'm not clear on his objection
12 then, Your Honor. I'm sorry.

13 **THE COURT:** He says I said when defining common
14 law robbery?

15 **MR. SECOR:** Yes, Your Honor. I believe -- and
16 correct me if I'm wrong. I believe that as Your
17 Honor read it, beginning with the second paragraph:
18 "In order to prove robbery the State must prove
19 beyond a reasonable doubt all the elements that I
20 have just explained, except the defendant was armed
21 with a deadly weapon." Then I believe my
22 recollection is that Your Honor added: "Or that a
23 victim reasonably believed the person was armed."
24 And I don't think in reading the statute, Section
25 16-1-330(a) that it's either/or. I believe that

1 under the language of the statute the believability
2 factor has to come in when there's actually a
3 representation made of a deadly weapon, as if
4 somebody, you know --

5 *THE COURT:* I understand. I understand.

6 *MR. SECOR:* Okay.

7 *THE COURT:* I want to make sure Ms. Shipley
8 understands.

9 *MS. SHIPLEY:* Yes. I get it now. Thank you,
10 Your Honor.

11 *THE COURT:* All right. I'll bring them back.

12 *MR. SECOR:* Thank you, Your Honor.

13 *THE COURT:* I said that. Bring the jury.

14 (Jury in at 3:10 p.m.)

15 *THE BAILIFF:* The jury is all present, Your
16 Honor.

17 *THE COURT:* All right. Thank you very much.
18 Ladies and gentlemen, counsel pointed out one thing
19 to me. I'm not sure about exactly if I might have
20 left the wrong impression with you. I want to
21 instruct you again on the common law robbery charge
22 as opposed to the armed robbery charge. I'm just
23 going to read it to you again.

24 If you find the State has failed to prove that
25 the defendant was armed with a deadly weapon, you may

1 then consider whether the State has proved beyond a
2 reasonable doubt the defendant committed robbery. In
3 order to prove robbery the State must prove beyond a
4 reasonable doubt all the elements that I explained to
5 you, except that the defendant was armed with a
6 deadly weapon.

7 In other words, in order to prove robbery the
8 State must prove beyond a reasonable doubt that the
9 defendant took the personal property from the person
10 or presence of another person without that person's
11 consent and carried it away.

12 All right. Thank you very much. If I confused
13 you on that issue prior to my first instruction, I
14 apologize.

15 **THE BAILIFF:** What about those notebooks?

16 **THE COURT:** Oh, yeah. They take their pads. Is
17 that his question? Oh, absolutely take them. Let me
18 say this about your notes. Again, your notes are for
19 your own personal recollection. They're not to try
20 to prove something that you down to somebody else.
21 They're for your own recollection. And I hope you
22 all -- I'm sure you will just abide by that position.
23 All right. Thank you very much.

24 (Jury out at 3:13 p.m.)

25 **THE COURT:** Any objection?

1 **MS. SHIPLEY:** No, sir, Your Honor.

2 **THE COURT:** Any exception?

3 **MR. SECOR:** No. I appreciate Your Honor doing
4 that. Thank you very much.

5 **THE COURT:** All right. Let's check the
6 evidence, folks. Court is still in session. So
7 allow the court reporter to hear what's going on.
8 Just keep your comments to a minimum.

9 (Off the record)

10 (Jury begins deliberating at 3:20 p.m.)

11 **THE COURT:** All right, Ladies and Gentlemen. We
12 have a question from the jury. Approach the bench.

13 (Whereupon, a bench conference is had)

14 **MS. SHIPLEY:** Your Honor, the State has no
15 objection to sending the note back.

16 **MR. COOPER:** I don't have any objection to
17 sending it back.

18 **THE COURT:** All right.

19 (WHEREUPON, Court's Exhibit No. 1 is marked for
20 identification.)

21 **THE COURT:** We'll stand at ease.

22 (Whereupon, a break is taken)

23 **THE COURT:** All right, counsel. The bailiff has
24 informed this Court that the jury has reached a
25 verdict. Are you ready to receive the verdict?

1 **MS. SHIPLEY:** Yes, sir, Your Honor.

2 **THE COURT:** Defense ready?

3 **MR. COOPER:** Yes, Your Honor.

4 **THE COURT:** Bring the jury please, Mr. Hollis.

5 (Jury in at 4:05 p.m.)

6 **THE BAILIFF:** The jury is all present, Your
7 Honor and.

8 **THE COURT:** All right. Thank you very much.
9 I'm sorry. Madam Forelady, has the jury reached a
10 verdict?

11 **MADAM FORELADY:** Yes.

12 **THE COURT:** All right. Would you hand it to the
13 bailiff, please.

14 (Forelady complies)

15 **THE COURT:** All right, Madam Clerk. Publish the
16 verdict, please.

17 **THE CLERK:** Yes, sir. Indictment number
18 2007-GS-40-11829, the State of South Carolina vs.
19 Jimmy Portee; we, the jury, by unanimous consent on
20 the charge of failing to stop for a blue light find
21 the defendant, Jimmy Portee, guilty.

22 Indictment number 2007-GS-40-10686, the State of
23 South Carolina vs. Jimmy Portee; we, the jury, by
24 unanimous consent on the charge of assault and
25 battery of a high and aggravated nature as to Erica

1 Wilson find the defendant, Jimmy Portee, guilty.

2 Indictment number 2007-GS-40-10685, the State of
3 South Carolina vs. Jimmy Portee; we, the jury, by
4 unanimous consent on the charge of assault and
5 battery of a high and aggravated nature as to Tracey
6 Anderson, find the defendant, Jimmy Portee, guilty.

7 Indictment number 2007-GS-40-10684, the State of
8 South Carolina vs. Jimmy Portee; we, the jury, by
9 unanimous consent on the charge of armed robbery of
10 Tracey Anderson and/or Family Dollar, find the
11 defendant, Jimmy Portee, guilty.

12 Signed number 183, foreperson, September 3rd
13 (sic), 2008. Madam Forelady, was this your verdict
14 and the verdict of the entire jury?

15 **MADAM FORELADY:** Yes.

16 **THE CLERK:** Thank you.

17 **THE COURT:** Desire to poll the jury?

18 **MR. COOPER:** Yes, Your Honor.

19 **THE COURT:** All right. Madam Clerk, will you
20 poll the jury?

21 **THE CLERK:** Yes, sir. Ladies and gentlemen, I'm
22 going to ask you two questions relating to your
23 verdict. As I call your number please answer yes or
24 no to both questions. Number 183, was this your
25 verdicts?

1 JUROR: Yes.

2 THE CLERK: Is it still your verdicts?

3 JUROR: Yes.

4 THE CLERK: Number 224, was this your verdicts?

5 JUROR: Yes.

6 THE CLERK: Is it still your verdicts?

7 JUROR: Yes.

8 THE COURT: Number 145, was this your verdicts?

9 JUROR: Yes.

10 THE CLERK: Is it still your verdicts?

11 JUROR: Yes.

12 THE CLERK: Number 209, was this your verdicts?

13 JUROR: Yes.

14 THE CLERK: Is it still your verdicts?

15 JUROR: Yes.

16 THE CLERK: Number 48, was this your verdicts?

17 JUROR: Yes.

18 THE CLERK: Is it still your verdicts?

19 JUROR: Yes.

20 THE CLERK: Number 176, was this your verdicts?

21 JUROR: Yes.

22 THE CLERK: Is it still your verdicts?

23 JUROR: Yes.

24 THE CLERK: Number 63, was this your verdicts?

25 JUROR: Yes.

1 THE CLERK: Is it still your verdicts?

2 JUROR: Yes.

3 THE COURT: Number 149, was this your verdicts?

4 JUROR: Yes.

5 THE CLERK: Is it still your verdicts?

6 JUROR: Yes.

7 THE CLERK: Number 67, was this your verdicts?

8 JUROR: Yes.

9 THE CLERK: Is it still your verdicts?

10 JUROR: Yes.

11 THE CLERK: Number 12, was this your verdicts?

12 JUROR: Yes.

13 THE CLERK: Is it still your verdicts?

14 JUROR: Yes.

15 THE CLERK: Number 119, was this your verdicts?

16 JUROR: Yes.

17 THE CLERK: Is it still your verdicts?

18 JUROR: Yes.

19 THE CLERK: Number 174, was this your verdicts?

20 JUROR: Yes.

21 THE CLERK: Is it still your verdicts?

22 JUROR: Yes.

23 THE CLERK: The jury has been polled, Your

24 Honor.

25 THE COURT: All right. All right, ladies and

1 gentlemen. Thank you very much. This will conclude
2 your jury service this week. As I told you earlier,
3 or may have told you or somebody told you in the
4 original jury qualification, this will satisfy your
5 jury service responsibility for both this year and
6 the next two years if you wish to exercise that
7 option.

8 But before you leave let me just explain one
9 more thing. The remaining portion of the trial will
10 consist of -- or this matter will consist of the
11 sentencing of the defendant. Now, this is not quite
12 like Law & Order where they can -- or the federal
13 court system where sentencing takes place much later
14 than the actual jury verdict.

15 Just because of the sheer volume of cases we
16 have here in Richland County, we're forced to go
17 ahead and go through a sentencing procedure
18 immediately following a guilty verdict by a jury. So
19 that process will start in about between five and ten
20 minutes because there's some paperwork that has to be
21 prepared prior to doing that.

22 What I am going to suggest to you is that you
23 may wish to stay for that process just to see it.
24 Some jurors wish to see sort of the closure of the
25 case. But others -- it really doesn't matter.

1 You're certainly going to be free to leave once I
2 dismiss you.

3 But if you do choose to stay and watch the
4 sentencing procedure, the bailiffs are going to show
5 you your way around to the back of the courtroom.
6 And you can sit back there and watch the sentencing
7 procedure. As I say, it will take about ten minutes
8 for us to get ready for that. After that of course
9 you are dismissed. Of course you're going to be
10 dismissed right now. But you're certainly welcome to
11 stay.

12 I do want to -- for those of you who are
13 leaving, I do want to thank you for your service.
14 These matters sometimes are difficult. They need to
15 be decided. And we are eternally grateful to members
16 of the community who are willing to come and sit and
17 listen to these matters.

18 I tell jurors all the time, this system can do
19 without me, it can do without these lawyers, but it
20 can't do without you. You're such an essential part
21 of the judicial system of this county and this state
22 and this nation that, as I tell jurors often, the
23 founding fathers thought so much of the jury system
24 in this state, I mean in this country, that they
25 wrote it into our Constitution, and that that's such

1 a vital part of the system of justice that we have
2 here in not only this county but this state and this
3 nation. So we are eternally grateful to you.

4 At this point in time I'm going to dismiss you.
5 Ms. Falcone is going to just meet with you briefly
6 before you leave, probably thank you on behalf of
7 Ms. Scott. But at this point in time you're free to
8 go. You are dismissed. And thank you very much
9 again for your service. If you wish to come in and
10 watch the sentencing procedure, you're certainly
11 welcome to do that also. Thank you very much.

12 (Jury excused at 4:12 p.m.)

13 **THE COURT:** All right. Any motions?

14 **MR. COOPER:** Yes, Your Honor. At this time we
15 wish to renew all those motions and objections during
16 the trial that were overruled.

17 At this time defense also moves for a new trial
18 in this case based on several factors. Number one,
19 defense counsel's failure to object to several pieces
20 of evidence that came in, most notably pictures that
21 contain alcoholic beverages, beer bottles, that sort
22 of thing, things that, you know, could have
23 prejudiced the jury that I did not object to.

24 And also another basis for my motion is the
25 cumulative effect of all of the objections that

1 defense counsel failed to make during trial.

2 Another ground would be the shortness of the
3 deliberation by the jury, especially in consideration
4 of the numerous pieces of evidence that they had back
5 with them to evaluate. The defense believes that the
6 shortness of deliberation was, you know, especially
7 apparent. On those grounds the defense moves for a
8 new trial.

9 *THE COURT:* All right. Well, what's the State's
10 position?

11 *MS. SHIPLEY:* Your Honor, he's clearly trying to
12 set this up for a PCR down the road. The photograph
13 of the beer bottle, that beer bottle was never even
14 discussed by any of the witnesses. It's simply
15 depicted. The hacksaw handle inside of that
16 photograph, I don't recall a single witness talking
17 about a beer bottle. That was never an issue. There
18 was no allegation that the defendant was intoxicated
19 during this incident. So I believe that the record
20 is clear on that.

21 *THE COURT:* All right. There certainly wasn't
22 any evidence, no testimony about any beer bottle or
23 alcoholic beverage. And as you know, I don't
24 generally look at the photographs if there are no
25 objections to the photographs. But even if I did --

1 I probably shouldn't say this -- if there was no
2 testimony about a beer bottle, I don't know that --
3 because the evidence was so overwhelming, I don't
4 believe that that would have changed the minds or
5 unduly influenced the jury into reaching the decision
6 they reached. What was your other ground?

7 *MR. COOPER:* Your Honor, the other basis was --

8 *THE COURT:* Oh, the quickness of the jury.

9 *MR. COOPER:* Yes, Your Honor.

10 *THE COURT:* Well, as I said, I listened to the
11 evidence, as did everybody else in this courtroom.
12 The evidence seemed overwhelming against the
13 defendant. And I don't think that the jury failed to
14 consider all the evidence when they made their
15 decision. It was -- I'll grant you, it was a quick
16 decision. But in light of what I believe to be
17 overwhelming evidence, and the fact that there was no
18 contrary evidence, there wasn't a whole lot for them
19 to weigh, I think the jury was well within their
20 parameters in deciding as they did. So I must
21 respectfully deny your motions.

22 *MS. SHIPLEY:* And, Your Honor, if I may, I'd
23 like the record to reflect that the first question
24 within minutes of the jury receiving the case was:
25 Where is Michael Murphy? A point that Mr. Cooper

1 brought up in his closing argument. They clearly
2 considered the defense's version of the facts.

3 *THE COURT:* Okay. All right. Well, let's stand
4 at ease for five or ten minutes until we actually get
5 the paperwork done, at which time we'll commence with
6 the sentencing procedure.

7 (Whereupon, a break is taken)

8 *THE COURT:* All right, Solicitor. Mr. Cooper,
9 do you want to bring your client?

10 *MR. COOPER:* Yes, sir.

11 *MS. SHIPLEY:* May it please the Court, Your
12 Honor?

13 *THE COURT:* Yes, ma'am.

14 *MS. SHIPLEY:* Your Honor, the defendant's prior
15 record consists of a simple assault, three counts in
16 1986, resisting arrest, destruction of city property
17 and malicious jury to personal property.

18 *THE COURT:* All that in 1986?

19 *MS. SHIPLEY:* Yes, sir. Then in August, later
20 on, in August of '86, he was convicted of escape;
21 1987, petit larceny; and then August 28th, 1987, he
22 was arrested for five counts of armed robbery. He
23 was convicted of five counts of armed robbery
24 November 10th, 1987.

25 Your Honor, I have the certified convictions of

1 each armed robbery that I would make at this time a
2 part of the record as well as a notice of trial and
3 service of life without parole notice that I would
4 also like at this time to make part of the court
5 record.

6 (WHEREUPON, Court's Exhibit No. 2 is marked for
7 identification.)

8 **THE COURT:** All right.

9 **MS. SHIPLEY:** Your Honor, I've spoken with Ms.
10 Anderson.

11 **THE COURT:** Let me ask you this. Is that the
12 extent of his record?

13 **MS. SHIPLEY:** Yes, sir. He was released from
14 the Department of Corrections on February 2nd, 2004,
15 and this incident happened on November 9th, 2006. So
16 we have no record of an arrest for that.

17 **THE COURT:** Between 2004 and 2006?

18 **MS. SHIPLEY:** Yes, sir.

19 **THE COURT:** All right.

20 **MS. SHIPLEY:** Essentially had just been
21 released. Your Honor, I spoke with Ms. Anderson.
22 And under the Victim's Rights Act I explained her
23 right to address the Court. She indicated she did
24 not wish to address the Court. And that is all for
25 the State.

1 THE COURT: All right. Mr. Cooper or Mr. Secor.

2 MR. COOPER: Thank you, Your Honor. May it
3 please the Court. Your Honor, I think I speak for
4 both Mr. Secor and of course for myself when I say
5 that we've been very proud to represent Mr. Portee.
6 And we'd like to put on the record that we thank the
7 support of his family during this process, and we
8 leave sentencing to the Court.

9 THE COURT: Well, the five counts of -- and they
10 were armed robbery?

11 MS. SHIPLEY: Yes, sir.

12 THE COURT: What's your client's age?

13 MR. COOPER: He is 48, 48 today.

14 MR. PORTEE: 44.

15 MR. COOPER: 44 today, Your Honor.

16 THE COURT: 44. Those robberies took place in
17 1987?

18 MS. SHIPLEY: Yes, sir.

19 THE COURT: 20 years ago, when he was in his
20 twenties?

21 MS. SHIPLEY: Yes, sir.

22 THE COURT: Nevertheless, they still under our
23 state statutes make him -- make it mandatory that I
24 sentence him to a life without parole sentence. He
25 understood that, did he not?

1 **MR. COOPER:** Yes, Your Honor.

2 **THE COURT:** Okay. That's a mandatory -- I just
3 have -- I have no choice or option in a case like
4 this. Even if there was substantial mitigation, I
5 think -- I know that the state law requires that I
6 sentence him to a life sentence because of those most
7 serious offenses in his past. I think I can only
8 sentence him on the armed robbery. I can't do that
9 on the others, but at this point it makes little
10 difference.

11 Mr. Portee, do you have anything you wish to
12 say?

13 **MR. PORTEE:** No, sir.

14 (Pause)

15 **THE CLERK:** All right, Mr. Portee. On your
16 failure to stop for blue lights, the sentence of the
17 Court is you be committed to the State Department of
18 Corrections for a period of three years. On your two
19 assault and battery of a high and aggravated nature
20 cases, the sentence of the Court is you be committed
21 to the State Department of Corrections for a period
22 of ten years. And on your -- all of those sentences
23 to run concurrent. On your armed robbery charge, the
24 sentence of the Court is you be committed to the
25 State Department of Corrections for the remainder of

1 your natural life without the possibility of parole.

2 Good luck to you, sir.

3 MS. SHIPLEY: Thank you, Your Honor.

4 THE COURT: Court's adjourned.

5 (Whereupon, the proceedings are concluded)

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CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

I, Jenny H. Williams, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Richland County, South Carolina, on the 2nd, 3rd and 4th days of September, 2008.

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

November 20, 2008

Jenny H. Williams

Jenny H. Williams, Court Reporter

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JIMMY DOUGLAS PORTEE,

APPELLANT

FINAL BRIEF OF APPELLANT

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR APPELLANT.

TABLE OF AUTHORITIES

Cases

<u>State v. Dodd</u> , 354 S.C. 13, 579 S.E.2d 331 (2003).....	6
<u>State v. Muldrow</u> , 348 S.C. 264, 559 S.E.2d 849 (2002).....	6
<u>State v. Weston</u> , 375 S.C. 575, 654 S.E.2d 280 (2007).....	7

Statutes

S.C. Code Ann. § 16-11-330(A) (2003)	6
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Constitutional Provisions

S.C. Const. art. 1 § 14	8
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STATEMENT OF THE CASE

Appellant Jimmy D. Portee was convicted of failing to stop for a blue light, armed robbery, and two counts of assault and battery of a high and aggravated nature during the September 2008 term of the Richland County General Sessions Court before the Honorable G. Thomas Cooper, Judge. Appellant was sentenced to imprisonment for a period of three years on the failure to stop conviction, and concurrent sentences of ten years on each of the assault convictions, and life without parole on the armed robbery conviction.

Appellant appealed. This brief follows.

ARGUMENT

The lower court erred in denying appellant's motion for a directed verdict of acquittal on the armed robbery charge because there was insufficient proof on the element of whether there was a deadly weapon present, or a representation of a deadly weapon present, in the case.

At trial, Tracy Anderson testified that she was employed at a Lower Richland Family Dollar Store on the morning of November 9, 2006, and had just opened the store at 9:00 a.m. when she noticed that a male had appeared at the back stockroom area of the store where she and co-worker Lisa Ellis were standing. The perpetrator pulled her by her hair and moved her to the front of the store. He told Anderson to give him the money. Anderson stated that he had a bulge in his right pocket coming out from the yellow jacket where he worked. Anderson stated that he threatened to kill if she did not follow his instructions. Anderson stated that she believed he was armed. After she gave him the money as he ordered her to do, he fled the scene. Later, Anderson identified a male presented to her during a subsequent show-up identification as the perpetrator. The male shown to Anderson was appellant. R. p. 3, line 14 – p. 53, line 23. Lisa Ellis stated that she saw the perpetrator pull Anderson by the hair and guide her to the register, but that he told her to turn her head and not look. Ellis stated that she followed instructions and did not look at him. R. p. 88, lines 1 – p. 97, line 25. Patron Joan Hooks, who witnessed a portion of the events as a customer at that time, stated she did not remember anything about the perpetrator's jacket during the robbery. R. p. 72, line 16 – p. 82, line 17.

At the close of the state's case in chief, appellant moved for a directed verdict of acquittal on the ground that there was no evidence presented establishing that appellant was

armed, or alleged to be armed, and that a threat to kill standing alone did not elevate the robbery to an armed robbery. R. p. 323, line 5 – p. 324, line 1. Additionally, the defense argued that a bulge is not a representation of a deadly weapon. R. p. 330, line 7 – p. 331, line 4. The court agreed that arguably “there was no deadly weapon” in existence in the case, but chose to charge strong armed robbery in addition to armed robbery instead of directing a verdict of acquittal on the armed robbery charge. R. p. 333, line 1 – p. 334, line 18.

As a rule, the state may prove the corpus delicti of armed robbery by establishing that a robbery was committed and either the robber was armed with a deadly weapon or the robber alleged that he was armed with a deadly weapon either by action or words, while using a representation of a deadly weapon. State v. Dodd, 354 S.C. 13, 579 S.E.2d 331 (2003); S.C. Code Ann. § 16-11-330(A) (2003). Here, just like the defendant in Dodd, appellant threatened to kill, but never alleged that he was armed nor used an item to represent a deadly weapon. In Dodd, the defendant told the cashier at the store that he would kill her, but the cashier testified that “she did not know what Dodd was going to kill her with and that the only thing she saw in his hand was a rolled up t-shirt.” The court in Dodd went on to hold that a threat unaccompanied by some representation of a deadly weapon would not independently be sufficient to establish the element of a deadly weapon. The only reason the armed robbery conviction in Dodd was affirmed was because the defendant gave a statement explaining that he “did not mean to hurt her and he never pointed the gun at her.” Thus, the Dodd defendant’s confession to having a gun was what corroborated the threat to kill evidence and proved armed robbery. Compare State v. Muldrow, 348 S.C. 264, 559 S.E.2d 849 (2002) where the court held that the state did not

sufficiently prove the defendant was armed when the only evidence against him was that he handed a clerk a note that read that he would shoot if the cash was not handed over to him.

Here, the appearance of this bulge during the robbery did not represent a deadly weapon, which meant appellant's threat to kill existed independently sans any corroborative evidence establishing that a weapon was present or that there was a representation of a weapon at the time the threat to kill was made. Co-worker Ellis turned her head and saw nothing, i.e., no gun nor any representation on a gun or weapon about the perpetrator. Patron Hooks saw nothing, i.e. no gun. Anderson saw a bulge only under the perpetrator's jacket. In addition, there was no mention of a gun or weapon in appellant's statement. Appellant's statement was to the effect that he was driving along when a man obviously hijacked his car and then jumped out of his car, but the police stopped him instead of the hijacker.¹ In summary, there was no corroborative evidence accompanying the threat to kill that would show that there was a gun in existence during the robbery or the representation of a gun in existence during the robbery, which would in turn establish that an armed robbery was committed in this case.

If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused the case can be submitted to the jury, but a directed verdict should be granted when the evidence presents merely a suspicion of guilt. State v. Weston, 375 S.C. 575, 654 S.E.2d 280 (2007). In the instant case, the evidence presented merely a suspicion of armed robbery. The lower court erred in denying appellant's motion for a directed verdict of acquittal on the armed robbery charge because there was insufficient proof on the deadly weapon element, which clearly violated the requirement that the state

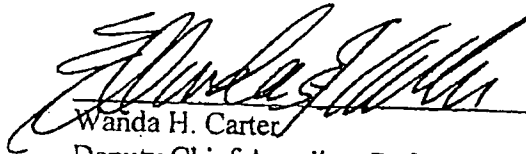
¹ R p. 299, line 7 – p. 301, line 22.

prove beyond a reasonable doubt every element of the offense charged per the Fourteenth Amendment of the United States Constitution and article 1 § 14 of the South Carolina State Constitution.

CONCLUSION

Based on the foregoing argument, appellant's convictions and sentences should be reversed and his case remanded to the lower court for a new trial.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT.

September 21, 2009

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Richland County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

JIMMY DOUGLAS PORTEE,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly denied Portee's directed verdict motion because there was sufficient evidence from which the jury could conclude Portee was either actually armed, or the victims reasonably believed he was armed, with a deadly weapon during the robbery.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On November 9, 2006, a man with his face covered by a knit hat with cut out eye holes robbed a Family Dollar store in Columbia, South Carolina. The man entered the back door of the store and told the employees he would kill them if they did not do what he said. He ordered the manager to give him money out of the cash register, and then left in a white vehicle.

The police were notified, and an alert was issued for the car and driver. When the police saw the car, the driver, subsequently identified as Appellant Jimmy D. Portee ("Portee"), tried to get away, but lost control and wrecked the car after a high speed chase. He then attempted to flee on foot, but was quickly captured by police.

On February 16, 2007, the Richland County Grand Jury indicted Portee on one count of armed robbery, two counts of assault and battery of a high and aggravated nature ("ABHAN"), and one count of failure to stop for a blue light. The matter was called for a jury trial on September 2, 2008, before the Honorable G. Thomas Cooper, Jr., Circuit Court Judge.

Tracey Anderson ("Anderson") testified she was working as the store manager at the Family Dollar store on Garners Ferry Road in Columbia on November 9, 2006. She arrived at the store early, and while she was putting the cash in the registers, she heard a loud noise and saw Portee standing at the front door. She noticed a white car pulled up in front of the store, and thought Portee was checking the store hours posted on the door. (Trial Transcript [TT], pp. 197-199, 210-220; Record on Appeal [R.], pp. 3-5, 16-26).

The store opened at 9:00 a.m., and shortly thereafter, Anderson went to the back of the store to take out trash. While the back door was open, a man came in with his face

covered by a knit hat with eye holes cut out. He grabbed Anderson's hair and forced her and another employee out of the stockroom into the store. He then forced them down to the floor, and said: "[i]f you don't do what I tell you to do, then I will kill you." (TT, pp. 221-227; R., pp. 27-33).

The man was wearing a yellow rain jacket and had his hand in his pocket. Anderson saw a bulge in his pocket, and believed he was armed. (TT, pp. 227-228, 264, 313-314; R., pp. 33-34, 70, 119-120). He took Anderson to the front of the store and ordered her to get money out of the cash register. She gave him all the money in the register, including rolls of change wrapped in clear plastic, the man ran out the back of the store. (TT, pp. 211-213, 230-232; R., pp. 17-19, 36-38). He was seen leaving the parking area behind the store in a white vehicle. (TT, p. 275; R., pp. 81).

Joan Hooks ("Hooks") was shopping in the store at the time of the robbery. She testified the robber had his hand inside his pants, "like he had something in his pants." (TT, p. 271; R., p. 77).

After the man left the store, Anderson and others called 911. Law enforcement issued an alert on the suspect and car. Richland County Sheriff's Department deputies located the car, and after a high speed chase, the driver, subsequently identified as Portee, lost control of the car and wrecked. Portee then attempted to flee on foot. Deputies saw him get out of the car with two black items and a yellow item, but he dropped them as he was running. The items were recovered and identified as a black knit mask, a black sock and a yellow rain jacket. (TT, pp. 233, 316-323, 367-372; R., pp. 39, 122-129, 173-178).

Portee was apprehended after a brief foot chase and struggle, during which Portee was forced to the ground face down. When the deputies rolled him over, they found loose

money of different denominations, totaling \$72, under him. They subsequently found rolls of change in his car. (R., pp. 323-335, 415-421; R., pp. 129-141, 221-227). They also found a utility knife in the right pocket of the rain jacket, and a hacksaw handle in the car. (TT, pp. 440-441, 482-485, State's Exhibits 23 and 26 [photographs]; R., pp. 246-247, 288-291).¹

Portee moved for a directed verdict on the armed robbery charge on the ground the State's evidence only showed the robber made a verbal threat to kill the victims, which was insufficient to establish armed robbery absent evidence of a weapon or a representation of a weapon. The State argued two witnesses testified they saw a bulge in the robber's pocket and they believed he had a weapon. The State also argued the hacksaw handle found in the car Portee was driving would have looked like a gun in his pocket.

The circuit court denied the motion, finding there was sufficient evidence from which the jury could determine the robber was armed, or the victims reasonably believed he was armed with a deadly weapon or the representation of a deadly weapon. The court noted the presence of a weapon or representation of a weapon was arguable, and indicated a charge on the lesser-included offense of common law robbery might be appropriate. (TT, pp. 517-529; R., pp. 323-335).²

The jury convicted Portee as indicted, and the circuit court sentenced him to three years incarceration on the failure to stop conviction, ten years incarceration on each ABHAN conviction, and life without parole on the armed robbery conviction. (TT, pp. 610-611, 622-623; R., pp. 371-372, 383-384). This appeal followed.

¹State's Exhibits 23 and 26 (photographs) will be transported to the Court for consideration.

²The court did submit the lesser-included offense to the jury. (TT, pp. 598-599; R., pp. 359-360).

ARGUMENT

The circuit court properly denied Portee's directed verdict motion because there was sufficient evidence from which the jury could conclude Portee was either actually armed, or the victims reasonably believed he was armed, with a deadly weapon during the robbery.

Portee contends the circuit court erred in denying his directed verdict motion as to the armed robbery charge because "there was no corroborative evidence accompanying the threat to kill that would show that there was a gun in existence during the robbery or the representation of a gun in existence during the robbery, which would in turn establish that an armed robbery was committed in this case."³ This contention is premised on an extreme parsing of the evidence, and completely ignores the victims' testimony, and the circumstantial evidence regarding the hacksaw handle's potential use as the representation of a weapon. It also ignores the direct evidence indicating Portee actually possessed a deadly weapon during the robbery.

When ruling on a directed verdict motion, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Gaines, 380 S.C. 23, 667 S.E.2d 728, 732-33 (2008). In reviewing the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. *Id.* at 733; State v. Pittman, 373 S.C. 527, 647 S.E.2d 144, 155 (2008); State v. Padgett, 354 S.C. 268, 580 S.E.2d 159, 161 (Ct.App.2003).

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged, but the appellate court must find the case was properly submitted to the jury if there is any direct evidence or substantial circumstantial evidence reasonably

³Portee does not challenge the failure to stop and ABHAN convictions.

tending to prove the guilt of the accused. Gaines, 667 S.E.2d at 733. When there is any evidence tending to establish the *corpus delicti* of a crime, the trial judge must pass the question to the jury. State v. Dodd, 354 S.C. 13, 579 S.E.2d 331, 334 (Ct. App. 2003).

South Carolina Code §16-1-330(A) (2005) provides:

A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony.

(emphasis added). The presence of a weapon may be inferred from circumstantial evidence, but words unaccompanied by any corroborating action are not sufficient. State v. Muldrow, 348 S.C. 264, 559 S.C.2d 847, 849 (2002); *see also* Dodd, 579 S.E.2d at 334 (a threat to kill unaccompanied by any representation of a deadly weapon is not independently sufficient to establish the element of a deadly weapon). The display of a deadly weapon is not an essential element of an armed robbery offense. State v. Jones, 342 S.C. 248, 536 S.E.2d 396, 398 (Ct. App. 2000) (*citing* State v. Nix, 288 S.C. 492, 343 S.E.2d 627 [Ct. App. 1986]).

In this case, Portee told the victims he would kill them if they did not do what he wanted. Two victims testified he had his hand in his pocket where they saw a "bulge," and police found a hacksaw handle in Portee's car when he was arrested shortly after the robbery. (State's Exhibit 23 [Photo]). One of the investigating officers testified his experience working burglaries indicated robbers who do not have access to a firearm make items look like a firearm, and he believed Portee used the saw handle for that purpose. (TT, pp. 484-485; R., pp. 290-291).

Given the saw handle's shape and size, a person present during the robbery could have reasonably believed Portee had a firearm in his pocket. At a minimum, there was

substantial circumstantial evidence indicating Portee represented he was armed by having an object in his pocket and keeping his hand in the pocket during the robbery, and based on his words and actions, the victims reasonably believed he was armed with a deadly weapon. See Nix, 343 S.E.2d at 630 (victims' testimony defendant pointed something under his shirt during robbery supported submitting case to the jury).

In addition, there was direct evidence Portee actually possessed a deadly weapon during the robbery. As he attempted to run from the police, Portee threw down the yellow raincoat described by the victims, and the police found a utility knife in the right pocket of that raincoat. (State's Exhibit 26 [Photo]). Clearly, the knife constituted a deadly weapon, and the evidence indicates Portee had it in his possession during the robbery.

The victims' testimony regarding the bulge in Portee's pocket and their belief he was armed, the hacksaw handle found in his car, and the knife found in his pocket constituted sufficient evidence from which the jury could find Portee was armed with a deadly weapon, or his words and actions indicated he was armed while using a representation of a deadly weapon.⁴ Therefore, the circuit court properly submitted the case to the jury, and Portee's armed robbery conviction and sentence should be affirmed.⁵

⁴The jury had the option to convict Portee on the lesser included offense of robbery if it concluded he was not armed. By convicting him of armed robbery, the jury clearly rejected that option, and found beyond a reasonable doubt he was either armed, or alleged he was armed while using a representation of a deadly weapon.

⁵Portee does not challenge the validity of the life without parole sentence imposed on the armed robbery conviction.

CONCLUSION

Based on the foregoing, Respondent respectfully submits Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

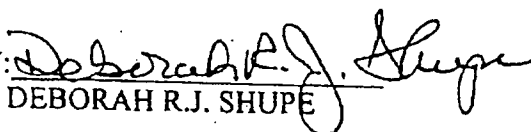
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September 21, 2009

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Richland County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

JIMMY DOUGLAS PORTEE,

Appellant.

CERTIFICATE OF COUNSEL

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

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September 21, 2009

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Jimmy Douglas Portee,

Appellant.

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Unpublished Opinion No. 2010-UP-435
Submitted October 1, 2010 – Filed October 12, 2010

AFFIRMED

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Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Salley W. Elliott,
Assistant Attorney General Deborah R.J. Shupe, and

Solicitor Warren B. Giese, all of Columbia, for Respondent.

PER CURIAM: Appellant, Jimmy Douglas Portee, was convicted of armed robbery, failure to stop for a blue light, and two counts of assault and battery of a high and aggravated nature and was sentenced to concurrent terms of ten years on the assault charges, three years for the failure to stop, and life without parole for the armed robbery. Portee appeals, asserting the trial judge erred in denying his motion for directed verdict on the armed robbery charge based upon the insufficiency of evidence of the presence of a deadly weapon or a representation of a deadly weapon. We affirm.¹

FACTUAL/PROCEDURAL BACKGROUND

On November 9, 2006, Family Dollar Store manager Tracey Anderson arrived at work between 7:30 and 7:45 a.m. to prepare the business for opening. Around 8:00, she heard a loud noise that drew her attention to a man who appeared to be looking at the door for the store's hours of operation. The man returned to his vehicle and left. Tracey testified the man was a skinny, light-skinned African-American and she noticed the front end of an older, white, four-door car. By the time of the store opening at 9:00, employees Erica Wilson and Lisa Ellis had arrived. Shortly thereafter, while Tracey and Erica were in the stockroom, a man entered the area from the store's back door. Tracey testified the man was very tall and he wore a knit hat over his face with the eyes cut out of it, and he had on a yellow coat. The man pulled Tracey and Erica by the hair and moved them out of the stockroom and then forced them to the floor. The man told Tracey she needed to give him the money. Erica became hysterical and started screaming, at which time the man threatened to kill the women if they did not do as he said. While the man used one hand to hold Tracey by her hair, she noticed a bulge in the right pocket of his yellow jacket, and she saw he had his other hand positioned "into his clothes." At that point, having been threatened, Tracey believed the man was armed. Erica was left on the floor, while the man nudged Tracey toward the front of the store, pulling her hair.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

As they approached the front, Tracey saw Lisa and one of their regular customers, Joan Hooks. The man instructed Joan to come with him and Tracey and led them to the cash registers. Tracey bagged all the money from one of the registers and gave it to the man, who then ran out the back door. During this time, she was able to observe the man wore gray sweatpants and white, scuffed shoes. Shortly thereafter, Michael Murphy, a minister with the church beside the store, came in and asked if they had been robbed. When Tracey told him they had, Michael ran to the back after the man, at which time he identified the car and stated the robber had pulled a pistol on him. Tracey stated the man who robbed them had the same build as the person she had observed at 8:00 that morning.

Sometime after the police arrived at the store, Tracey was taken to another location where she observed Portee, and identified him immediately as the person she had seen at the store at 8:00 that morning and the person who committed the robbery of the store around 9:00 or 9:15. She recognized his face from the 8:00 a.m. encounter, and the pants and shoes he was wearing from the robbery. She also testified a white car located near the suspect when she identified him was the same car she had seen earlier that morning in the parking lot. Additionally, she identified a yellow jacket Portee dropped while running from the police as the jacket worn by the robber that day. She also made an in-court identification of Portee.

Customer Joan Hooks testified she was in the store on November 9, 2006 when she heard a loud ruckus in the back. She then saw Tracey being held by the person robbing the store, who walked Tracey up to the front of the store by her hair. The man yelled something to her and she walked up to the front with them. Joan stated she was "not sure what type of weapon he had, but he was walking . . . [Tracey] up towards . . . the cash register." The man used one hand to grab Tracey's hair and had the other hand inside his jogging pants, "like he had something in his pants." The man asked Tracey to give him money out of the register and she complied. After he obtained the money, the man ran out the back of the store. The minister came in from the church next door and ran through the store following the robber. The minister then described seeing the white car in the back of the store.

The authorities were called and Deputy Kilcoyne responded to the scene. After obtaining a description of the man, his clothing and the vehicle from the witnesses, Deputy Kilcoyne radioed in the information. Kilcoyne testified Tracey advised him the man "had his hand in his pocket pointing it at her to indicate that he would have a weapon," and "she assumed he had a weapon."

Investigator Unger testified he was on patrol in the area with a trainee at the time of the dispatch for an armed robbery. He observed a car fitting the description being driven by a man and initiated a traffic stop, which turned into a high speed chase. During the car pursuit, Unger observed the occupant throw something out of the car, and then noticed him fumbling around and picking up a yellow piece of clothing, later identified as a yellow jacket. The driver eventually lost control of the vehicle and ran from the car. As he jumped from the automobile, the man had two black items and a yellow item that were subsequently identified as a black mask, a black sock, and a yellow rain jacket. After a foot chase, the officers apprehended the man.

The man dropped the yellow jacket while he was running. Inside the vehicle, officers found rolled money and the black handle of a hacksaw. In the right front pocket of the yellow rain jacket, officers found a blue cobalt utility knife. Also collected was a black mask with eye holes. Testing revealed DNA obtained from the mask matched that of Portee. A sergeant in the armed robbery division of the Richland County Sheriff's Department testified he deemed the broken-off hacksaw handle to be an item fashioned to look like a firearm, and that such items are often used by persons who do not have access to a real firearm. He stated any person in fear would think the hacksaw handle was a firearm and that the item inside a pocket of clothing would create a bulge.

At the close of the State's case, Portee moved for a directed verdict arguing, as to the armed robbery, the State failed to produce sufficient evidence the robber was armed or alleged to be armed. The trial judge determined there was sufficient evidence from which the jury could determine the perpetrator was armed or a person could reasonably believe based on the threat that the perpetrator was armed with a deadly weapon or a representation of a deadly weapon. He therefore denied the directed verdict

motion as to armed robbery, but found it was an issue for the jury based upon the evidence presented. He thereafter charged the lesser-included offense of robbery.

ISSUE

Whether the trial court erred in denying appellant's motion for directed verdict of the armed robbery charge because there was insufficient proof on the element of whether there was a deadly weapon present, or a representation of a deadly weapon present, in this case.

STANDARD OF REVIEW

"A defendant is entitled to a directed verdict when the State fails to present evidence of the offense charged." State v. Heath, 370 S.C. 326, 329, 635 S.E.2d 18, 19 (2006). When ruling on a motion for directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing the denial of a directed verdict, the appellate court views the evidence and all reasonable inferences in the light most favorable to the state. Id. An appellate court may only reverse the trial court's denial of a directed verdict motion if there is no evidence to support the trial court's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this court must find the case was properly submitted to the jury. Weston, 367 S.C. at 292-93, 625 S.E.2d at 648.

LAW/ANALYSIS

On appeal, Portee contends the appearance of a bulge did not represent a deadly weapon, and there was no corroborative evidence accompanying the threat to kill that would show there was a gun in existence, or a representation of a gun in existence, during the robbery. He therefore contends there was insufficient evidence on the deadly weapon element such that he was entitled to a directed verdict on the armed robbery charge. We disagree.

Section 16-11-330(A) of the South Carolina Code provides in pertinent part as follows:

A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony. . . .

S.C. Code Ann. § 16-11-330(A) (2003). Under this section:

[T]he State may prove armed robbery by establishing the commission of a robbery and either one of two additional elements: (1) that the robber was armed with a deadly weapon or (2) that the robber alleged he was armed with a deadly weapon, either by action or words, while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon.

State v. Muldrow, 348 S.C. 264, 267-68, 559 S.E.2d 847, 849 (2002). Under the first prong, the presence of a weapon may be inferred from circumstantial evidence. Id. at 268, 559 S.E.2d at 849. The display of a deadly weapon is not an essential element of the offense. State v. Jones, 342 S.C. 248, 252, 536 S.E.2d 396, 398 (Ct. App. 2000) (citing State v. Nix, 288 S.C. 492, 497 n.2, 343 S.E.2d 627, 630 n.2 (Ct. App. 1986)). However, words alone are not sufficient under either the first prong or the second prong of the statute, and a threat to kill one, in and of itself, is insufficient to establish the element of a deadly weapon. Muldrow, 348 S.C. at 268-69, 559 S.E.2d at 849-50; State v. Dodd, 354 S.C. 13, 17-18, 579 S.E.2d 331, 333-34 (Ct. App. 2003).

It is the use or alleged use of a deadly weapon that distinguishes armed robbery from robbery. State v. Moore, 374 S.C. 468, 477, 649 S.E.2d 84, 88

(Ct. App. 2007). A defendant may be convicted of armed robbery under the statute if the jury concludes that the robber alleged that he was armed under the requisite circumstances without having to conclude that he was, in fact, so armed. Jones, 342 S.C. at 253, 536 S.E.2d at 398.

We find there is sufficient evidence under both prongs of § 16-11-330(A) such that the trial judge properly denied Portee's motion for directed verdict. While Portee is correct in asserting that words alone are insufficient to establish the element of a deadly weapon, there is evidence that Portee actually possessed a deadly weapon during the robbery, as well as evidence that Portee alleged, by action or words, he was armed "while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon." See §16-11-330(A).

Under the first prong, the display of a deadly weapon is not an essential element of the offense. Jones, 342 S.C. at 252, 536 S.E.2d at 398. Further, under this prong the presence of a weapon may be inferred from circumstantial evidence. Muldrow, 348 S.C. at 268, 559 S.E.2d at 849. Here, the evidence shows that Portee threatened to kill the victims during the robbery and that the yellow raincoat identified by the victims as being worn by Portee, which he threw to the ground while running from the police, contained a utility knife, which constitutes a deadly weapon, in the right pocket. Additionally, there is evidence Portee used a gun during the robbery, as the minister who ran after Portee following the incident inside the store stated the man pulled a pistol on him. Because there is evidence Portee used a deadly weapon during his attempt to escape, there is evidence he committed armed robbery. See State v. Mitchell, 382 S.C. 1, 5, 675 S.E.2d 435, 437-38 (2009) (holding, "when a defendant commits robbery without a deadly weapon, but becomes armed with a deadly weapon before asportation of the victim's property, a conviction for armed robbery will stand," for "the crime of robbery is not completed the moment the stolen property is in the possession of the robbers, but may be deemed to continue during their attempt to escape"); Moore, 374 S.C. at 482-83, 649 S.E.2d at 91 (holding, when one commits a larceny and then displays a weapon so as to overcome the resistance of the witness, the crime is then elevated to armed robbery).

Accordingly, there is substantial circumstantial evidence Portee was actually armed at the time of the robbery.

Additionally, there is evidence Portee alleged he was armed with a deadly weapon, by his action or words, while using a representation of a deadly weapon or an object which the victims could have reasonably believed to be a deadly weapon. Portee threatened to kill the victims. Tracey testified, during this time, she noticed a bulge in the right pocket of the man's yellow jacket while he used one hand to hold her by her hair and he positioned the other hand into his clothes. At that point, having been threatened, Tracey believed the man was armed. This testimony was further corroborated by Joan, who testified she was not sure what type of weapon he had, but he walked Tracey up toward the register, using one hand to grab Tracey's hair and keeping the other hand inside his pants, "like he had something in his pants." Further, the State presented evidence from an investigating officer that he believed the hacksaw handle recovered from Portee's car was used by Portee to resemble a firearm, that any person in fear would think the hacksaw handle was a firearm, and that the item inside a pocket of clothing would create a bulge. Therefore, the State presented substantial circumstantial evidence Portee alleged he was armed with a deadly weapon while using a representation of a deadly weapon or an object which the victims could have reasonably believed to be a deadly weapon.

For the foregoing reasons, we find the trial judge properly denied Portee's motion for directed verdict on the armed robbery charge. His convictions are therefore

AFFIRMED.

FEW, C.J., and HUFF and GEATHERS, JJ., concur.

5thBP

STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of Richland)

2010C P408 8149

Jimmy Douglas Porter)

Full name and prison number, if any, of applicant.)

v.)

State of South Carolina)

Name of Respondent)

The State)

APPLICATION FOR

POST-CONVICTION RELIEF

JEANETTE W. MCBRIDE
C.C.P. & C.S.

2010 NOV 19 PM 12:33

RICHLAND COUNTY
FILEDINSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly, handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention Lee Correctional Institution 990 W. Macky Hwy.
Bishopville, S.C. 29010
2. Name and location of Court which imposed sentence
Richland County 5th Judicial
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - * (a) 2007-29-40-10684
 - (b) 10685, 10686, 11829
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - * (a) Sept - 4 - 2008, 10 yrs - 10 yrs, and Life
 - (b) With-out Parole, 3 yrs
 - (c) _____

20106 6409 814 8

SEARCHED INDEXED
 SERIALIZED FILED
 MAR 11 1964
 FBI - NEW YORK
 11a3110

(case # 20091508)

Prior CH

(case # 2009981)

Prior PC/PP/CA

Box # 11-2
 SRC # 50971

(case # 1999 05 295)
 Box # 6-T
 SRC # 63515

Prior PC/PC

20106 6409

5. Check whether a finding of guilty was made
- (a) after a plea of guilty _____
- (b) after a plea of not guilty Yes _____
- (c) after a plea of nolo contendere _____
6. Did you appeal from the judgment of conviction or the imposition of sentence? Yes _____
7. If you answered "yes" to (6), list
- (a) the name of each Court to which you appealed:
- i. S.C. Court of Appeals _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. AFFIRMED _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. October 12, 2010 _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Unpublished Opinion No. 2010-UP-435 _____
- ii. _____
- iii. _____
8. If you answered "no" to (6), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Effective Assistance of Counsel _____
- (b) U.S. Constitutional Violation 6th Amendment _____
- (c) Due process violations / inadmissible evidence used for conviction. _____

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

- (a) Counsel allowed many procedural errors / violation of S.C. rule 17-25-43 (See A)
 (b) failure to inform and/or give notice
 (c) Counsel failed to protect my Constitutional Rights and allowed these procedural irregularities which denied me of my right to a fair trial
 (d) Counsel failed to object to testimony of a witness, that never made statements, never was confronted as a witness by law enforcement, and which was hearsay

11. 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 petitions in State or Federal Courts for habeas corpus or post-conviction relief?

N/A

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) N/A

(d) any other petitions, motions or applications in this or any other Court?

S.C. Court of Appeals

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. S.C. Court of Appeals

ii. _____

iii. _____

iv. _____

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

i. The State of South Carolina Court of Appeals

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. Affirmed

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

- i. Filed October 12, 2010
- ii. _____
- iii. _____
- iv. _____

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

- i. Unpublished Opinion No. 2010-11P-435
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? N/A

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

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

- i. _____
- ii. _____
- iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) Said issues were not objected to by counsel and thus was not preserved for appeal.
- (b) _____
- (c) _____

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

- (a) your arraignment and plea? _____
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence?
Yes
- (e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? Yes

17. If you answered "yes" to one or more parts of (16), list:

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

- i. James Cooper and Michael Secor CASEY SECOR, S
- ii. Wanda H. Carter
- iii. _____

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

- i. trial and sentencing
- ii. Appeal
- iii. _____

18. State clearly the relief you seek in filing this application.

Any and all relief the court feels is fair and just, to include vacation and sentence set aside.

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

No

STATE OF SOUTH CAROLINA)
)
 COUNTY OF Richland)

VERIFICATION

I, Jimmy Douglas Portee, 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.

Jimmy Portee

Sworn to and subscribed before me

This 28 day of Oct, 2010

Shirley Ann L.S.

Notary Public for South Carolina

My Commission Expires 5-16-12

FILED
 RICHLAND COUNTY
 2010 NOV 19 PM 12:33
 JEANNETTE W. MCBRIDE
 C.P. & G.S.

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

I, Jimmy Douglas Portee, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty or perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty, I am unable to pay the costs of proceeding or give security therefor.

Jimmy Portee
 Applicant

Sworn to and subscribed before me

This 28 day of Oct, 2010

Shirley Ann L.S.

Notary Public for South Carolina

My Commission Expires: 5-16-12

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

PORTEE Jimmy D -
00145122,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2010CP4008149

RETURN

The Respondent, making its Return to the application for post conviction relief (PCR) filed November 19, 2010, would respectfully show this Court:¹

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. The Applicant was represented by James Cooper and Casey Secor, Esquire. On September 4, 2008, the Applicant was convicted following a jury trial and was sentenced by The Honorable G. Thomas Cooper, Jr.. The Applicant was indicted and/or

1

<http://www4.rcgov.us/publicindex/PICaseDetails.aspx?County=40+&Casenum=2010CP4008149&CourtType=G&CaseType=Civil&CourtAgency=40002>

State's Return - (2010CP4008149) - Applicant: PORTEE Jimmy D

convicted of the following: Armed Robbery, ABHAN (2 counts) and Traffic/Fail to Stop for Blue Light - (07-GS-40-10684;85;86;11829).

<u>Offender Type</u>	Adult-straight Sentence
<u>Offense</u>	Armed Robbery
<u>Sentence Start Date</u>	11/09/2006
<u>Sentence Length</u>	LIFE SENTENCE
<u>Admission Date</u>	09/09/2008
<u>Committing County</u>	Richland
<u>Location</u>	Mccormick
<u>Projected Release Date</u>	Not Eligible
<u>Projected Parole Date</u>	Not Eligible
<u>Supervised Furlough Eligibility</u>	Not Eligible
<u>Sex Offender Registry</u>	No

2

A timely Notice of Appeal was filed on Applicant's behalf, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence:

PER CURIAM: Appellant, Jimmy Douglas Portee, was convicted of armed robbery, failure to stop for a blue light, and two counts of assault and battery of a high and aggravated nature and was sentenced to concurrent terms of ten years on the assault charges, three years for the failure to stop, and life without parole for the armed robbery. Portee appeals, asserting the trial judge erred in denying his motion for directed verdict on the armed robbery charge based upon the insufficiency of evidence of the presence of a deadly weapon or a representation of a deadly weapon. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

On November 9, 2006, Family Dollar Store manager Tracey Anderson arrived at work between 7:30 and 7:45 a.m. to prepare the business for opening. Around 8:00, she heard a loud noise that drew her attention to a man who appeared to be looking at the door for the store's hours of operation. The man returned to his vehicle and left. Tracey testified the man was a skinny, light-skinned African-American and she noticed the front end of an older, white, four-door car. By the time of the store

² <https://sword.doc.state.sc.us/incarceratedInmateSearch/incarceratedInmateFaceSheet.do?id=00145122&youth=N&type=F>

opening at 9:00, employees Erica Wilson and Lisa Ellis had arrived. Shortly thereafter, while Tracey and Erica were in the stockroom, a man entered the area from the store's back door. Tracey testified the man was very tall and he wore a knit hat over his face with the eyes cut out of it, and he had on a yellow coat. The man pulled Tracey and Erica by the hair and moved them out of the stockroom and then forced them to the floor. The man told Tracey she needed to give him the money. Erica became hysterical and started screaming, at which time the man threatened to kill the women if they did not do as he said. While the man used one hand to hold Tracey by her hair, she noticed a bulge in the right pocket of his yellow jacket, and she saw he had his other hand positioned "into his clothes." At that point, having been threatened, Tracey believed the man was armed. Erica was left on the floor, while the man nudged Tracey toward the front of the store, pulling her hair. As they approached the front, Tracey saw Lisa and one of their regular customers, Joan Hooks. The man instructed Joan to come with him and Tracey and led them to the cash registers. Tracey bagged all the money from one of the registers and gave it to the man, who then ran out the back door. During this time, she was able to observe the man wore gray sweatpants and white, scuffed shoes. Shortly thereafter, Michael Murphy, a minister with the church beside the store, came in and asked if they had been robbed. When Tracey told him they had, Michael ran to the back after the man, at which time he identified the car and stated the robber had pulled a pistol on him. Tracey stated the man who robbed them had the same build as the person she had observed at 8:00 that morning.

Sometime after the police arrived at the store, Tracey was taken to another location where she observed Portee, and identified him immediately as the person she had seen at the store at 8:00 that morning and the person who committed the robbery of the store around 9:00 or 9:15. She recognized his face from the 8:00 a.m. encounter, and the pants and shoes he was wearing from the robbery. She also testified a white car located near the suspect when she identified him was the same car she had seen earlier that morning in the parking lot. Additionally, she identified a yellow jacket Portee dropped while running from the police as the jacket worn by the robber that day. She also made an in-court identification of Portee.

Customer Joan Hooks testified she was in the store on November 9, 2006 when she heard a loud ruckus in the back. She then saw Tracey being held by the person robbing the store, who walked Tracey up to the front of the store by her hair. The man yelled something to her and she walked up to the front with them. Joan stated she was "not sure what type of weapon he had, but he was walking . . . [Tracey] up towards . . . the cash register." The man used one hand to grab Tracey's hair and had the other hand inside his jogging pants, "like he had something in his pants." The man asked Tracey to give him money out of the register and she complied. After he obtained the money, the man ran out the back of the store. The minister came in from the church next door and ran through the store following the robber. The minister then described seeing the white car in the back of the store.

The authorities were called and Deputy Kilcoyne responded to the scene. After obtaining a description of the man, his clothing and the vehicle from the witnesses, Deputy Kilcoyne radioed in the information. Kilcoyne testified Tracey advised him the man "had his hand in his pocket pointing it at her to indicate that he would have a weapon," and "she assumed he had a weapon."

Investigator Unger testified he was on patrol in the area with a trainee at the time of the dispatch for an armed robbery. He observed a car fitting the description being driven by a man and initiated a traffic stop, which turned into a high speed chase. During the car pursuit, Unger observed the occupant throw something out of the car, and then noticed him fumbling around and picking up a yellow piece of clothing, later identified as a yellow jacket. The driver eventually lost control of the vehicle and ran from the car. As he jumped from the automobile, the man had two black items and a yellow item that were subsequently identified as a black mask, a black sock, and a yellow rain jacket. After a foot chase, the officers apprehended the man.

The man dropped the yellow jacket while he was running. Inside the vehicle, officers found rolled money and the black handle of a hacksaw. In the right front pocket of the yellow rain jacket, officers found a blue cobalt utility knife. Also collected was a black mask with eye holes. Testing revealed DNA obtained from the mask matched that of Portee. A sergeant in the armed robbery division of the Richland County Sheriff's Department testified he deemed the broken-off hacksaw handle to be an item fashioned to look like a firearm, and that such items are often used by persons who do not have access to a real firearm. He stated any person in fear would think the hacksaw handle was a firearm and that the item inside a pocket of clothing would create a bulge.

At the close of the State's case, Portee moved for a directed verdict arguing, as to the armed robbery, the State failed to produce sufficient evidence the robber was armed or alleged to be armed. The trial judge determined there was sufficient evidence from which the jury could determine the perpetrator was armed or a person could reasonably believe based on the threat that the perpetrator was armed with a deadly weapon or a representation of a deadly weapon. He therefore denied the directed verdict motion as to armed robbery, but found it was an issue for the jury based upon the evidence presented. He thereafter charged the lesser-included offense of robbery.

State v. Jimmy Portee, Op. No. 10-UP435 (S.C. Ct. App. filed October 12, 2010)

(Remittitur date October 28, 2010).

II.

Attached herewith and incorporated herein are the records of the Richland County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the trial transcript, and the Applicant's applicable direct appeal files (if any).³ The Respondent reserves the right to amend this Return upon receipt of any relevant materials or submit an amended Return to reflect any amended allegations and/or to provide a more detailed procedural history.

III.

For the purposes of this Return, the Respondent interprets each of the Applicant's allegations to be claims that he received ineffective assistance of counsel. The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v.

³ The Respondent will utilize the Record on Appeal if the direct appeal was an Anders appeal.

Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied. The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held. The Respondent will coordinate with the Applicant's attorney who is, according to the Respondent's file, Ralph W. Barber, III, Esquire regarding when the hearing should be set.⁴

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737
bpetrano@scag.gov

February 8, 2011

⁴ The current PCR Roster for the 5th Circuit is available at <http://www.scattorneygeneral.com/inside/pdf/5th.pdf>
State's Return - (2010CP4008149) – Applicant: PORTEE Jimmy D
Page 8 of 8

1 STATE OF SOUTH CAROLINA)

2 COUNTY OF RICHLAND)

COURT OF COMMON PLEAS
10-CP-40-8149

3
4 Jimmy D. Portee,)

5 Plaintiff,)

6 vs.)

7 State of South Carolina,)

8 Defendant.)

TRANSCRIPT OF RECORD

9 September 10, 2012
10 Columbia, South Carolina

11
12
13 B E F O R E :

14 THE HONORABLE J. ERNEST KINARD, JR., JUDGE.
15
16

17 A P P E A R A N C E S :

18 DAVID E. BELDING, ESQ.
Attorney for the Plaintiff

19 ROBERT D. CORNEY, ASSISTANT ATTORNEY GENERAL
20 Attorney for the Defendant
21
22
23
24

25 DEBORAH M. McCURDY, RPR
Official Court Reporter

INDEX OF WITNESSES

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ANITA KNOX

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JAMES DANIEL COOPER, III

Direct By Mr. Belding 48

Cross By Mr. Corney 65

CASEY SECOR

Direct By Mr. Belding 74

1 SEPTEMBER 10, 2012

2 MR. CORNEY: May it please the Court, Your
3 Honor? This is the PCR application of Jimmy Portee
4 the State calls at this time. Docket
5 Number 2010-CP-40-8149.

6 Mr. Portee was true-bill indicted at the
7 January 2007 term of the Richland County Grand Jury
8 for armed robbery, two counts of assault and
9 battery of a high and aggravated nature, and at the
10 February 2007 term for failure to stop for a blue
11 light.

12 He was -- he proceeded to jury trial
13 September 2nd, 2008, before Judge Cooper, and after
14 a 3-day trial he was convicted on all four counts
15 as indicted.

16 Mr. Portee was sentenced to life without
17 parole for the armed robbery, ten years'
18 imprisonment for each of the assault and battery of
19 high and aggravated natures, and three years for
20 the failure to stop for a blue light, all to run
21 concurrently.

22 Notice of appeal was filed and an appeal was
23 perfected. He was represented by Chief Appellant
24 Defender Wanda Carter on the appeal. And after
25 briefing, the Court of Appeals affirmed the

1 conviction and sentences by unpublished opinion.
2 And that was filed October 12, 2010. Remittitur
3 was issued October 28, 2010, and a timely PCR
4 application filed November 19, 2010.

5 Mr. Portee is represented by David Belding
6 today, Your Honor. And we have his former trial
7 counsel, James Cooper and Casey Secor are both in
8 the courtroom today prepared to testify as well.

9 Thank you very much.

10 THE COURT: Okay.

11 MR. BELDING: Thank you, Your Honor. May it
12 please the Court? I would like to call to the
13 stand Mr. Jimmy Douglas Portee.

14 THE COURT: All right, Mr. Portee, come
15 around.

16 (Witness complies.)

17 THE COURT: All right, Mr. Portee, do you
18 swear or affirm you are going to truthfully
19 testify?

20 THE WITNESS: Yes, sir.

21 THE COURT: Please take the stand.

22 (Witness complies.)

23 MR. BELDING: Thank you, Your Honor. May it
24 please the Court?

25 JIMMY DOUGLAS PORTEE,

1 after being duly sworn, testified as follows:

2 DIRECT EXAMINATION

3 BY MR. BELDING:

4 Q Please state your full name for the record.

5 A Jimmy Portee. Just name?

6 Q Yes.

7 A Jimmy Douglas Portee.

8 Q Okay. Mr. Portee, are you incarcerated at this
9 time?

10 A Yes, sir.

11 Q Where are you incarcerated?

12 A Currently at McCormick.

13 Q Okay. McCormick Correctional?

14 A Yes, sir.

15 Q And what sentences are you serving?

16 A I'm serving a life without possibility of parole
17 for the armed robbery, I'm serving ten years ran
18 concurrent for two counts of ABHAN, and three years
19 for a failure to stop for a blue light.

20 Q Okay. Did you plead guilty or were you sentenced
21 after convicted by a jury?

22 A No, sir, I was sentenced after conviction by a
23 jury.

24 Q Okay. Who represented you at your jury trial?

25 A Mr. James Cooper and Mr. Casey Secor.

1 Q Okay. And are those gentlemen in the courtroom
2 today?

3 A Yes, sir.

4 Q Okay. When were you arrested?

5 A November 6th -- no, the 9th, excuse me.

6 Q Of what year?

7 A 206[verbatim].

8 Q 2006?

9 A Yes, sir.

10 Q Okay. And did you make bond or did you stay in
11 jail until time of trial?

12 A I was incarcerated for 22 months at the Richland
13 County Detention Center up until, sir.

14 Q Okay. Now, during the time that you were a
15 pretrial detainee, did you get a chance to meet
16 with your attorneys about preparing a defense to
17 your charges?

18 A Yes, sir, I did.

19 Q Okay. How many times did you meet with either
20 Mr. Cooper or Mr. Secor?

21 A It would take maybe once or twice, no more than
22 three at the most.

23 Q In almost two years?

24 A Yes.

25 Q Okay. How long were those meetings?

1 A Give or take some -- I would give it to like maybe
2 20 to 30 minutes, sometimes maybe less than that.

3 Q Okay. What did you discuss with your attorneys
4 about your defense to these charges?

5 A Actually, at the time we didn't discuss anything
6 pertaining to my sentencing because he never
7 informed me that I was, at the time, that it was an
8 LWOP sentence, and I never received any LWOP
9 sentence, and I never was noticed up under
10 17-25-45, Section 8, that it was coming with the
11 criteria, so I wasn't aware of these things up
12 until my court trial.

13 Q Okay. Let me make sure I understand that.

14 A Yes, sir.

15 Q During the two years that you were in jail --

16 A Yes, sir.

17 Q -- and you met with your attorneys some number of
18 times --

19 A Yes, sir.

20 Q -- you did not know you were potentially facing
21 life without parole?

22 A No, sir, we never discussed that at all. He never
23 discussed that with me at all.

24 Q When was the first time you learned that the
25 Solicitor was seeking a life without parole

1 sentence?

2 A Only during the course -- after my trial that she
3 mentioned this to my -- during the course -- after
4 the trial had proceeded.

5 Q All right. Have you seen the transcript of this
6 trial?

7 A Yes, sir.

8 Q You know it pretty well?

9 A Yes, sir.

10 Q Okay. On Page 620 of the transcript there is a
11 discussion between the Solicitor and the Court
12 about them having served a notice to seek life
13 without parole on your attorneys. Was that the
14 first time -- is that when you first heard about
15 that?

16 A That was the very first time of me ever having any
17 knowledge of the 17-25-45, Section 8, yes.

18 Q Okay. Did you know what it meant when you heard
19 those words in court?

20 A I had no earthly idea. Like I said, this was my
21 first time it had ever been mentioned and I had no
22 earthly idea.

23 Q Would that have made any difference if you had
24 known that that is what you were facing?

25 A If -- in some sort of way, yes, sir, because I

1 really didn't understood at the time when I was
2 really facing life without the possibility of
3 parole because, like I said, he never discussed
4 that. And that being the case, it probably would
5 have deferred my thinking, yes, sir, and it may
6 have subjected me to a lesser -- may -- at least
7 try to work an understanding or maybe something a
8 little lesser, yes, sir, than me facing life
9 without parole, yes, sir.

10 Q All right. And, Jimmy, you said a couple of times
11 *he*. Who did you actually meet with at the jail?
12 Was it just one attorney or was it both Mr. Cooper
13 and Mr. Secor?

14 A Actually I met with both.

15 Q Okay. All right. But then it is your testimony
16 that neither of them brought this sentencing matter
17 up?

18 A Neither one of them, sir.

19 Q Okay. Now, you were charged with this armed
20 robbery at a Family Dollar store, correct?

21 A Yes, sir.

22 Q Okay. And part of the testimony that came out in
23 your trial was that someone had sort of cased the
24 joint, so to speak, had been at that Family Dollar
25 before it opened early that morning, correct?

1 A Yes, sir.

2 Q Okay. Approximately what time? Do you recall?

3 A If I'm not mistaken, I think they said between 8:00
4 and 8:15 at the current time, sir.

5 Q Okay. And the person that they saw at the door,
6 how did they describe that person?

7 A They described that individual as a white male.

8 Q Okay. The person who came earlier?

9 A Yes, sir, a white, light-skinned, I'm thinking a
10 white male, yes, sir.

11 Q Light-skinned?

12 A Light-skinned or a white male, yes, sir.

13 Q Okay. Were you at the Family Dollar at
14 8:00 o'clock or so that morning of November 9,
15 2006?

16 A No, sir.

17 Q Okay. Where were you at 8:00 o'clock that morning?

18 A At my home with my fiancée, Ms. Anita Knox, and my
19 stepson, Breeland Knox, at the current time.

20 Q Did you tell your attorneys, either Mr. Cooper or
21 Mr. Secor, that you were at home?

22 A Yes, sir, I did.

23 Q Okay. Did you tell them that you had witnesses
24 that corroborated you were at home?

25 A Yes, sir, I did.

1 Q What witnesses did you list for your attorneys?

2 A Actually, my fiancée, Ms. Anita Knox; her son; my
3 mother; and my sister, Ms. Janice Andrews; and my
4 brother-in-law, Mr. Edward Andrews.

5 Q Okay. Now, this trial --

6 A Yes, sir.

7 Q -- didn't have a lot of direct evidence, did it?

8 A No, sir.

9 Q Okay. What was used by the State to connect you
10 with this robbery at the Family Dollar?

11 A If I'm not mistaken, like they said, they said that
12 the person who came in the Family Dollar store at
13 that time were a white male at the time. What
14 connected myself, like they said, an individual
15 said that -- the Reverend -- if I'm not mistaken,
16 the Reverend Michael Murphy, Minister Michael
17 Murphy said that an individual came in at that time
18 and he was the one that came in -- and I'm thinking
19 like he said he was the one that he saw the
20 individual at the time, and upon the individual
21 leaving the place of business, that the individual
22 pointed a gun at him during the course of that
23 accident. He ran out the back door and he was the
24 one that I think he said like he was the one that
25 seen that car, if I'm not mistaken.

1 Q Okay. Let me run through those real quick.

2 A Yes, sir.

3 Q First of all, in the trial --

4 A Yes, sir.

5 Q -- there was a 9-1-1 call that was testified to.

6 And they had both the 9-1-1 operator and Ms. Tracy

7 Anderson, who was one of the victims, is that

8 right?

9 A Yes, sir.

10 Q Okay. How was the robber described in the 9-1-1

11 call?

12 A A white male.

13 Q White male?

14 A Yes, sir.

15 Q In the trial, was there testimony from Ms. Anderson

16 about her meeting with the investigating police

17 officers?

18 A Yes, sir.

19 Q How was the robber described?

20 A A white male.

21 Q In the course of Ms. Anderson's testimony, do you

22 recall there being a discussion about the car

23 driven by the person who came earlier in the day?

24 A Yes, sir.

25 Q Okay. How did she describe the car?

1 A She said she only seen the front end of the vehicle
2 and that she wasn't sure of the vehicle at the
3 current time. She said she don't want to give a
4 description of the vehicle that morning, which she
5 only seen the front end of the car at the time.

6 Q Okay. Now, the two victims --

7 A Yes, sir.

8 Q -- Ms. Tracy Anderson and this Erica lady, did
9 either of them testify that they saw a weapon of
10 any kind?

11 A Ms. Anderson stated that she never once seen a
12 weapon nor did she ever felt threatened. Ms. Hooks
13 says she doesn't recall anything about the
14 incident, none whatsoever.

15 Q Now, Ms. Hooks, was she the employee or the
16 customer?

17 A Ms. Hooks was the customer.

18 Q Customer?

19 A Yes, sir.

20 Q Okay. Now, in the course of both the testimony of
21 Ms. Anderson and Ms. Hooks -- and you alluded to
22 this a minute ago -- was there testimony about a
23 man running in?

24 A Yes, sir.

25 Q Okay. How was he described to the court?

1 A Excited.

2 Q Okay. And who was he supposed to have been?

3 A If I'm not mistaken, the minister or the Reverend
4 Michael Murphy or some church -- some Word of God
5 next-door.

6 Q Next-door?

7 A Yes, sir.

8 Q Okay. Did -- was it clear from the transcript and
9 does your recollection from the trial that the
10 description of the car that Ms. Anderson gave, she
11 actually got from this Mr. -- Reverend Murphy?

12 A Yes.

13 Q Okay. Did Reverend Michael Murphy appear at your
14 trial?

15 A No, sir.

16 Q Was there testimony about what he said that was
17 brought out in the trial?

18 A Yes, sir.

19 Q What was -- what testimony was elicited from either
20 Ms. Anderson or Ms. Hooks?

21 A Ms. Anderson stated that the reverend came in the
22 place of business after the incident had occurred
23 and asked her what had happened. And she stated
24 that they were just robbed.

25 So the reverend -- minister ran out back --

1 said he ran out the back to see what was going on.
2 That is when the individual pointed a weapon at
3 him.

4 Q Okay. So the testimony at trial was that someone
5 robbed the store without ever showing a gun, but
6 pulled it on someone out back?

7 A Yes.

8 Q Is that right?

9 A Yes.

10 Q All right. Now, this Reverend Michael Murphy, did
11 he testify at your trial?

12 A No, sir. I have no earthly idea who this minister
13 or who the Reverend Michael Murphy may be. I have
14 never seen him, never spoke to him, never -- I have
15 no statement, no affidavit, or nor was he up in the
16 courtroom.

17 Q Okay. Did you talk with your attorneys prior to
18 trial about the potential testimony about --
19 from -- about Reverend Murphy?

20 A He never discussed that at all with me, sir.

21 Q Okay. Did you feel like that testimony was
22 prejudicial to your case?

23 A I feel that statement was very prejudicial against
24 me because, like I said, we never -- he never
25 objected to it and he never said anything as far as

1 pertaining to that matter.

2 Q Okay. Now -- and it was a long trial, but let me
3 go to the end for a minute.

4 Near the end of the trial, Judge Cooper asked
5 you if you were going to take the stand to testify
6 in your own defense.

7 A Yes.

8 Q Do you recall that?

9 A Yes, sir.

10 Q Did you have a chance to discuss that with your
11 attorneys?

12 A Briefly, about five minutes. My attorney advised
13 me at the current time that it wasn't good for me
14 to take the stand because there was no way that I
15 could be convicted of it, and if I did, if I was to
16 take the stand, that the closing argument would
17 fall in the hands of the Solicitor and he wanted
18 the closing arguments, he wanted to have the
19 remainder of the closing argument, which would
20 then -- on my behalf, because he said in that case
21 he wanted to finish the argument and he wanted to
22 have the last say-so in the argument, sir.

23 Q Okay. And is that colloquy -- does that whole
24 discussion take place in the transcript and
25 Page 532, does that sound right?

1 A Yes, sir.

2 Q Okay. You know the page numbers, don't you?

3 A Yes, sir.

4 Q Okay. So it is my understanding that -- who
5 actually advised you that there was no way you
6 could be convicted?

7 A My attorney, Mr. Cooper.

8 Q Okay. Who was actually the lead attorney in your
9 trial?

10 A Mr. Cooper.

11 Q Okay. Did Mr. Secor sit second chair?

12 A Mr. Secor sat second chair.

13 Q All right. So did they -- after they explained
14 this to you, did you agree to not take the stand?

15 A I agreed not to take the stand on my behalf
16 because, like I said, I was under the impression
17 that this was what was going to be in my best
18 interest, but I had no earthly idea that he was
19 going to put any of my witnesses on the stand on my
20 behalf because I was basically confused. We only
21 spoke for about five minutes and I wasn't exactly
22 sure. And I was just confused. Like I said, he
23 said on my behalf I accepted it because I did have
24 a prior record in 1987. He said that would be in
25 my best interest was to take the -- he wanted the

1 closing argument. And he stated also that if I was
2 to take the stand that this could be brought up.
3 So he said if I felt comfortable with myself, but,
4 like I said, I had no idea that he wasn't going to
5 put anyone on the stand on my behalf, which clearly
6 was -- I just -- I mean, I did not understand.

7 Q Okay. So you agreed not to testify?

8 A Yes, sir.

9 Q Okay. But am I understanding this right, you did
10 not understand that that meant no one would get up
11 on your defense?

12 A Correct.

13 Q Okay. Did you have people there to testify?

14 A Yes, sir, I did.

15 Q Okay. Are any of those people in the courtroom
16 today?

17 A Yes, sir, they are.

18 Q Okay. What would -- just briefly, what would they
19 have been called to testify to?

20 A Well, they could have give time and credibility of
21 my whereabouts that morning and would have made a
22 big difference, I honestly and truly believe. And,
23 like I said, it would have been very, very vital on
24 my behalf if I had had someone to -- in my -- how
25 would I say it -- on my behalf that -- on my behalf

1 as far as the State, like I said, because I had no
2 one to verify my whereabouts or my being, so
3 therefore it was obvious for the jurors to conceive
4 what was said, and therefore I understand why that
5 they felt like that, because I had no one to
6 give -- account for me or my whereabouts.

7 Q Okay. To the best of your knowledge, had your
8 attorneys notified the State, prosecutors, that you
9 were planning to put up an alibi defense?

10 A Yes, sir.

11 Q Okay. And that was discussed between you and Judge
12 Cooper or Judge Cooper and your lawyers, wasn't it,
13 that you were abandoning the alibi defense?

14 A Yes.

15 Q Is that -- do you recall that discussion taking
16 place near the end of the trial?

17 A Yes, sir.

18 Q Did you know what was going on at that point?

19 A I wasn't really a hundred percent sure at the time.
20 I just went along with it because I was just
21 confused at the time. I was uncertain. And, like
22 I said, I really didn't -- it was kind of new to
23 me. I just went along with it because that is what
24 my attorney advised me of.

25 Q Okay. I want to make sure I cover this point.

1 Going back to this reverend or minister, Michael
2 Murphy, did your attorneys do anything to keep that
3 testimony out?

4 A No, sir.

5 Q Okay. Did you feel that that testimony was
6 prejudicial to your case?

7 A Yes.

8 Q What prejudiced your defense by that testimony?

9 A Because, like I said, the Minister Michael Murphy,
10 I have no earthly idea who he is, nor was there any
11 affidavit nor statement, nor was this person ever
12 in the courtroom, so therefore I didn't have a
13 chance to challenge his credibility or see --
14 because the State -- my Sixth Amendment gives me
15 the right to face my accuser, which I couldn't face
16 my accuser if he is not there or I don't know who
17 he is.

18 Q Did the State ever offer any explanation for why he
19 wasn't called as a witness?

20 A No, sir.

21 Q Okay. My understanding from witness Joan Hooks, he
22 was the minister of the church next-door.

23 A Yes.

24 Q No one ever said why they couldn't find him?

25 A No one ever said a word, sir.

1 Q Do you recall taking -- seeing Court's Exhibit
2 Number 2, which is apparently the notice of intent
3 to seek life without parole sentence?

4 A I have never seen it. I have no earthly idea of
5 what it even consists of.

6 Q Okay. Did you take part in the robbing of the
7 Family Dollar store?

8 A No, sir.

9 Q Okay. Were you even there that night?

10 A No, sir.

11 Q Thank you. When did you get arrested?

12 A I got arrested, I'm thinking about 9:30 that
13 morning.

14 Q Where were you at the time?

15 A On Bluff Road.

16 Q How far is that from the Family Dollar store?

17 A Give or take, I'd say about five or six miles, sir.

18 Q Okay. Were you in a car or were you walking?

19 A I was in a car.

20 Q What kind of car was it?

21 A I was in a white 1993 Oldsmobile -- Oldsmobile.

22 Q Okay. Did that match the description of the car at
23 the scene of the crime?

24 A I really can't say what -- the description that I
25 was told, that the car was a 1993, maybe a 1995

1 Cavalier, sir.

2 Q Okay. Was that your car?

3 A No, sir.

4 Q Whose car was it?

5 A It was my mother's car. I -- honestly I didn't
6 receive that car, I didn't even get that car maybe
7 till around 8:15 that morning. My witness can
8 verify the same. So I didn't have that car at the
9 current time that morning.

10 Q Okay. And how far is your -- where you were
11 staying or your house from the Family Dollar store?

12 A Give or take about seven or eight miles, sir.

13 Q Okay. All right. Was there any evidence that came
14 up at the trial that was obtained from your white
15 car, or your mother's white car?

16 A If I'm not mistaken, I think they said they found a
17 hacksaw blade, which was in the back seat of the
18 car, or something like that. And, otherwise than
19 that, I don't know of any other evidence that was
20 in the car that could be pertaining to this matter
21 right here.

22 Q Now, was it a hacksaw blade or a hacksaw handle?

23 A Hacksaw handle.

24 Q Okay. What was the significance of the hacksaw
25 handle?

1 A I really have no earthly idea, because he just
2 stated that it could have possibly resembled of a
3 weapon, but it was, like I said, nowhere in the
4 vicinity of where I was at the current time, sir.

5 Q Did the State use that as perhaps being the bulge
6 in your pocket that was testified about?

7 A Yes, sir.

8 Q Okay. Was there a ski mask found in the car?

9 A A ski mask was not found in the car, sir.

10 Q Where did they find the ski mask?

11 A They found it on the ground by the yellow jacket
12 that was worn -- that was supposed to have been in
13 the car at the time.

14 Q Okay. And where was all that located?

15 A On the ground outside of the neighborhood where I
16 was.

17 Q Okay. Were those articles of clothing yours?

18 A No, sir.

19 Q Okay. Now, we have covered a lot. And have you
20 read the brief that has been submitted on your
21 behalf?

22 A Yes, sir.

23 Q Okay. Is there anything in the brief that is
24 incorrect?

25 A No, sir.

1 Q Okay. Did you feel that your attorneys represented
2 you well in the trial of this case?

3 A I feel that my attorney did miss some valid points
4 and there are some things he could have done a
5 whole lot better and some stuff that he actually
6 missed in my transcript as far as the minister,
7 Michael Murphy, and the 17-25 and the LWOP notice.
8 So I feel that I was, how would I say, not
9 precisely, but in some perspective he did good and
10 some perspective he failed to do his job. And, I
11 mean, I can't say I'm satisfied with the outcome
12 because I feel he could have did a much greater
13 job.

14 Q Well, in a 3-day trial, nobody does everything
15 wrong or nobody does everything right.

16 A Yes, sir.

17 Q Would you agree with that?

18 A Yes, sir.

19 Q Were there things that your attorneys did on your
20 behalf that they did well?

21 A No, sir.

22 Q Okay. Overall do you feel that their
23 representation of you at the trial was ineffective?

24 A Yes, sir.

25 Q Do you feel that that ineffectiveness resulted in

1 your conviction?

2 A Yes, sir.

3 Q Okay. Is there anything else you would like to
4 tell Judge Kinard today? This is your evidentiary
5 hearing.

6 A Yes. At the current time of the trial, like I
7 said, my attorney advised me as far as myself that
8 if I didn't take the stand it would be beneficial
9 on my behalf, but at the time I didn't have no
10 earthly idea that he wasn't going to place any of
11 my witness or nobody on my behalf at the current
12 time.

13 Also, my attorney allowed several statements
14 made by Ms. Hooks and Ms. Anderson about the
15 hearsay. And I was, like I said, it was --
16 constitute a violation of my Sixth Amendment, which
17 gives me the right to face my accuser, and I
18 couldn't -- no way possible to face my accuser if I
19 don't know who he is or he is not in the courtroom.

20 And, also, I was charged with armed robbery,
21 which then there was no weapon, none whatsoever on
22 my behalf or, in other words, no weapon found on me
23 whatsoever. And, therefore, like I said, I should
24 have -- if anything, it should have been -- I
25 should have received a lesser included charge by

1 all -- which even the Courts agreed that there was
2 no deadly weapon nor was there -- they gave me --
3 they granted me a lesser included charge across the
4 board, but instead of -- they granted me -- they
5 charged it to the jurors, so, therefore, because
6 the jurors are hearing what these people are saying
7 about the minister, Michael Murphy, I feel that I
8 was prejudiced by that a great deal, sir.

9 Q Thank you. Thank you, Jimmy. Appreciate it.
10 Please answer any questions Mr. Corney has.

11 A Yes, sir.

12 CROSS-EXAMINATION

13 BY MR. CORNEY:

14 Q Mr. Portee, just starting with this life without
15 parole sentence.

16 A Yes, sir.

17 Q At the sentencing phase, the Solicitor introduced
18 the notice of intention to seek life without
19 parole, correct?

20 A Yes, sir.

21 Q And that would be Exhibit 2 that Mr. Belding just
22 referenced a minute ago?

23 A Yes, sir.

24 Q And the Solicitor said that that notice of LWOP had
25 been previously served on you, correct?

1 A Yes, sir.

2 Q And from there Judge Cooper asked your attorneys
3 whether or not you understood that the conviction
4 would be a mandatory life without parole sentence?

5 A No, sir, I don't think Mr. Cooper asked --

6 Q You don't recall that?

7 A No, sir.

8 Q Okay. But if the record reflects that --

9 MR. CORNEY: And specifically just to direct
10 the Court to Page 621, starting on Line 24 when
11 that question was asked.

12 A Yes, sir.

13 Q You don't remember that question being asked of
14 your attorney, whether or not they had explained
15 that to you or whether you understood that?

16 A I'm not a hundred percent sure, sir, but I'm
17 thinking like Ms. Shipley did say something about
18 the notice. I'm not certain -- exactly sure what
19 it was.

20 Q Okay. But if your attorney said that you
21 understood that the charge carried life without
22 parole, that was a misstatement, that was not
23 correct?

24 A Sir?

25 Q If your attorney said in the record that they

1 explained to you or you understood the charge
2 carried life without parole, they told the judge
3 that, you are saying that was incorrect, they never
4 discussed that with you?

5 A They never discussed that with me at all, sir.

6 Q That is something you probably would want to stand
7 up and say something at that point in time? If
8 they had said that, you would have wanted to say,
9 Judge, I didn't have any idea?

10 A Yes, sir, by all means.

11 Q But if you didn't do that in the transcript when
12 that was said, then any explanation for not saying
13 anything?

14 A No, sir.

15 Q Reverend Murphy, I know you referenced -- you said
16 that, but you said he didn't testify at trial,
17 correct?

18 A I have no earthly idea who he is.

19 Q But the statements that came out from Mr. Murphy
20 were essentially that he had seen a suspect running
21 from the back of the store and he pulled a gun, is
22 that what your testimony was?

23 A Yes.

24 Q And, specifically, Mr. Murphy's statement was that
25 the suspect pointed a gun at him or he saw a gun in

1 his hand, something along those lines?

2 A Yes.

3 Q And there was no gun ever recovered from you or
4 your car in this case?

5 A No, sir.

6 Q There was a notice of alibi that your attorneys had
7 served opposing counsel prior to trial, were you
8 aware of that?

9 A No.

10 Q You weren't? You don't remember that being
11 discussed throughout the course of the trial?

12 A No.

13 Q You don't remember a notice of alibi being
14 withdrawn by your counsel during the trial?

15 A No.

16 Q But there was a motion at the time of the close of
17 the case, Mr. Cooper made a motion for a new trial
18 on your behalf, that he failed to object to some
19 evidence, do you remember that?

20 A Yes.

21 Q Okay. And do you remember that Judge Cooper denied
22 that motion?

23 A Yes.

24 Q Do you remember him saying he denied it based on
25 the fact that he believed there was overwhelming

1 evidence of guilt in this case?

2 A He believed there was overwhelming evidence because
3 I didn't have any alibi or I didn't have any
4 witness on my behalf.

5 Q Okay. But I think that is what he says. It is on
6 Page 585.

7 A Yes.

8 Q Or not 585, I apologize. I forgot the page number.
9 But you do remember Judge Cooper saying at least
10 once and I believe more than once that he believed
11 there was overwhelming evidence of guilt so he
12 wasn't going to grant you a new trial?

13 A Yes.

14 Q And just to touch base briefly on some of that
15 evidence that was found, the police recovered a
16 mask that was similar at least to the one used by
17 the suspect in this case?

18 A Yes.

19 Q And there was DNA on that mask that was linked to
20 you?

21 A Yes.

22 Q Okay. The clothing you were wearing at the time
23 you were arrested was at least similar to what all
24 the victims had in the case had described as the
25 suspect wearing?

1 A Actually, in the clothes -- in the clothing that I
2 was wearing, they didn't give any clothing details
3 at the current time until the drive-by show-up,
4 sir.

5 Q Okay. And I know that you said before that the
6 victim had described the suspect as a white male,
7 is that correct?

8 A Yes, sir.

9 Q Okay. But it was their testimony at trial that
10 they deduced it was a white male only from being
11 able to see a portion of his wrists and the circle
12 around his eyes, the rest of his body would be
13 covered up?

14 A Yes, sir.

15 Q He was wearing long pants, a long-sleeved shirt,
16 and a mask. There wasn't a big portion of the skin
17 they had seen at that point, correct?

18 A I'm assuming, yes, sir.

19 Q Okay. And I believe that Ms. Anderson actually
20 gave testimony that she had seen you outside the
21 store earlier and recognized you when you came in
22 wearing the mask as a person that had been standing
23 out in front of the store before the robbery,
24 correct?

25 A That was said, yes, sir.

1 Q Okay. This issue with whether or not the suspect
2 was carrying a gun at the time, that was something
3 that was raised on direct appeal by your appellate
4 attorney?

5 A Yes, sir.

6 Q Okay. And I believe Ms. Anderson testified at
7 trial that she believed that the suspect was armed
8 at the time?

9 A Ms. Anderson's statement that she only seen a
10 bulge.

11 Q And her testimony was that she believed that bulge
12 was a firearm?

13 A Yes, sir.

14 Q She reasonably believed that that suspect was
15 armed, that is why his hand was in his pocket, that
16 is what it was was a gun in there, that is what her
17 testimony was?

18 A Yes, sir.

19 Q Okay. And I believe that Shawn Kilcoyne, if I am
20 saying that correctly, also testified he assumed
21 the suspect had a firearm based on the way the
22 suspect was acting, correct?

23 A I'm not certain about that part right there, sir.

24 Q Okay.

25 MR. CORNEY: Beg the Court's indulgence for

1 just one minute, Your Honor.

2 THE COURT: Okay.

3 (Pause.)

4 BY MR. CORNEY:

5 Q Now, in closing argument, your attorney was able to
6 bring out the fact that Mr. Murphy never testified
7 at trial, or Reverend Murphy didn't testify,
8 correct?

9 A Yes.

10 Q And kind of pointed to that -- and it is on Page
11 585 of the transcript, where he essentially says,
12 where is he, why didn't the State bring him in
13 here, if he has got something to say, why isn't he
14 here testifying?

15 A Yes, sir.

16 Q That was something he was able to use in closing
17 argument to kind of call into question the
18 statements that were allegedly made by Reverend
19 Murphy?

20 A Yes.

21 MR. CORNEY: Beg the Court's indulgence for
22 just one moment. I apologize, Your Honor.

23 (Pause.)

24 BY MR. CORNEY:

25 Q And your testimony regarding alibi is that you had

1 family members who would have come in to testify
2 that you were with them that morning?

3 A Yes, sir.

4 Q And they are here today and they are able to --

5 A Yes.

6 MR. CORNEY: I believe that is all the
7 questions I have, Your Honor.

8 MR. BELDING: No redirect, Your Honor. Thank
9 you.

10 THE COURT: All right.

11 (Witness steps down.)

12 MR. BELDING: Your Honor, at this time I would
13 like to call Ms. Anita Knox to the stand.

14 THE COURT: All right, Ms. Knox.

15 (Witness approaches.)

16 THE COURT: Ms. Knox, do you swear or affirm
17 you are going to truthfully testify?

18 THE WITNESS: Yes.

19 THE COURT: Take the stand.

20 (Witness complies.)

21 ANITA KNOX,
22 after being duly sworn, testified as follows:

23 DIRECT EXAMINATION

24 BY MR. BELDING:

25 Q Thank you. Please state your full name.

1 THE COURT: Hold it.

2 MR. BELDING: I'm sorry.

3 THE COURT: I only have half of the
4 transcript. I only have 300 something pages.

5 MR. CORNEY: Your Honor, it is on the back of
6 it. If I may approach, Your Honor.

7 (Pause.)

8 BY MR. BELDING:

9 Q Please state your full name for the record.

10 A Anita Renee Knox.

11 Q All right. Ms. Knox, where do you live?

12 A I currently live at 111 Childs Lane in Columbia,
13 South Carolina.

14 Q Okay. And how long have you been a resident of
15 Columbia?

16 A Pretty much all my life.

17 Q Okay. Do you know Mr. Jimmy Douglas Portee?

18 A Yes.

19 Q How do you know him?

20 A He's my fiance.

21 Q How long has he been your fiance?

22 A Since 2004.

23 Q Okay. In the year 2006, you were his fiancée at
24 that time?

25 A Yes.

1 Q Okay. Where was he living in November of 2006?

2 A We were living at 111 -- I mean, 625 Childs Street.

3 Q And you were living with Mr. Portee, is that
4 correct?

5 A Correct.

6 Q Okay. Now, do you have occasion to recall the
7 morning of November 9th, 2006?

8 A Yes.

9 Q All right. You know that -- why do you remember
10 that day?

11 A Because it is the day my life changed.

12 Q Okay. Were you available at the trial of
13 Mr. Jimmy's case?

14 A Yes.

15 Q To testify?

16 A Yes.

17 Q Okay. What were you going to testify to?

18 A I was going to testify that that morning he was
19 still at home. He didn't leave the house until
20 between 8:15 and 8:30, which is currently the time
21 after my son leaves to go to school at 8:00 o'clock
22 that morning.

23 Q And is that how you were able to establish the
24 time?

25 A Yes, sir.

1 Q And I want to make sure I understand. He didn't
2 leave until after what time?

3 A 8:15.

4 Q After 8:15. Okay. And when he left, was he
5 driving a car?

6 A Yes.

7 Q What kind of car was it?

8 A A white, I guess it is a white Oldsmobile.

9 Q Okay. Now, were there others at the house at say
10 8:00 o'clock in the morning?

11 A Yes.

12 Q Who else was there?

13 A At the time, my sister, Alyse Robinson, was living
14 with me; my daughter, Kia Fisher; and my son, of
15 course, Breeland Griffin had just left. And the
16 car was brought to him by Mr. Edward Andrews.

17 Q Who owned the car?

18 A The car belonged to Jimmy's mother, Ms. Janie
19 Portee, but we were at the time sharing the car
20 between three households.

21 Q Okay. Was Ms. -- was his mother, Ms. Janie Portee,
22 was she at the house that morning?

23 A No, she was not.

24 Q Okay. How many of these people you just named were
25 actually at the courthouse available to testify

1 when the trial was held in this matter?

2 A The day of the trial, Ms. Janice Andrews, Edward
3 Andrews, Alyse Robinson and myself were all present
4 at the hearing.

5 Q Okay. Did you hear the testimony -- did you sit
6 through the trial?

7 A No. I was not allowed to come into the courtroom.

8 Q Were the witnesses sequestered?

9 A Basically we were told to sit out in the waiting
10 area. We couldn't come in.

11 Q Okay. Has it come to your attention since the
12 trial that a Ms. Anderson testified that a skinny,
13 light-skinned African-American male came to the
14 store around 8:00 o'clock in the morning?

15 A I have been told that lately, yes.

16 Q All right. So your testimony was to say that at
17 8:00 o'clock in the morning, the Defendant, Jimmy
18 Douglas Portee, wasn't there because he was with
19 you?

20 A Correct.

21 Q Okay. All right. Now, let me ask you, because I
22 stated and you said yes --

23 A Uh-huh.

24 Q -- (a), is that the truth?

25 A Yes.

1 Q And would you tell us in your own words exactly
2 where Jimmy Douglas Portee was on the morning of
3 November 9th, 2006?

4 A Yes. We approximately woke up around about 7:30.
5 He contacted Edward Andrews, which is his
6 brother-in-law, requesting that he needed to borrow
7 the car to run some errands.

8 He was advised by Mr. Andrews that he needed
9 to take their son -- his son Israel to school and
10 would bring the car after that.

11 He was also going to be waiting for his ride,
12 which was his boss. I can't recall the guy's name.
13 But his boss was going to come to our house to pick
14 him up and take him on to work.

15 After he arrived to the house, roughly about
16 7:45, 7:50, him and Jimmy stood outside and talked
17 until his ride came to get him, which was probably
18 roughly around about 8:05 or so.

19 Then Jimmy came into the house and got in the
20 shower, took a shower, got dressed and left the
21 house about 8:15, 8:20.

22 Q Okay. Now, you understand you are under oath
23 today?

24 A Yes.

25 Q And you are testifying to these things as being

1 true?

2 A Yes.

3 Q Did you talk to either of the attorneys that
4 represented Jimmy prior to the trial?

5 A Yes.

6 Q Do you recognize either Mr. Secor or Mr. Cooper
7 here today?

8 A Yes.

9 Q Did you talk to either or both of them about this?

10 A Yes.

11 Q Which one, or both?

12 A I talked to Mr. Cooper initially when the court --
13 just before court started, and he advised me that
14 he would be calling me as a witness and that we
15 couldn't come in.

16 And Mr. Secor spoke basically that he felt
17 that Jimmy had a really good case and that I
18 shouldn't be worried.

19 Q Okay. Was there -- who else was there for the
20 trial, did you say, that could have testified to
21 the same thing essentially?

22 A Basically my sister, Alyse Robinson, was there,
23 Edward Andrews was there, and Janie -- Janice
24 Portee was there.

25 Q Okay. And that is Jim's mother?

1 A No, that is his sister. Janice Andrews, I'm sorry.

2 Q Okay. What is Jimmy's mother's names?

3 A Janie Portee.

4 Q Janie, okay. Are any of those people also here
5 today?

6 A Yes. Janice Andrews is here, Janie Portee is here,
7 and Alyse Robinson is here.

8 Q Okay. To your knowledge, would they all testify
9 essentially the same way you have this morning?

10 A Yes.

11 Q Are you married to Mr. Portee at this time?

12 A No.

13 Q Okay. Are you still his fiancée?

14 A Yes.

15 Q Do you have an interest in him getting out of
16 prison?

17 A I would love to have him home, yes.

18 Q Okay. Would you be willing to lie in front of
19 Judge Kinard in order to help get him out of
20 prison?

21 A No.

22 Q Why not?

23 A Because I believe if a person has done wrong then
24 they deserve to do the punishment -- have the
25 punishment. I feel that if you haven't done wrong

1 and you get punished, you know, anyway, it is
2 almost like teaching that no matter if you do right
3 or young you are going to get punished in the
4 process. So I don't feel that he deserves to be
5 punished for something he didn't do. If he did it,
6 I believe he should get punished. If he didn't, I
7 don't think he should. And I feel as though he
8 didn't do it.

9 Q Has he ever told you whether he did it or not?

10 A He told me he has never -- he never -- when I asked
11 him, he said no. But I didn't really have to ask
12 because I knew where he was, so --

13 Q Did you know where he was after he left the house
14 in the car?

15 A No.

16 Q Okay. So primarily your testimony would have been
17 to show that he was not the person that cased the
18 store earlier in the morning?

19 A Correct.

20 Q I understand. Thank you, Ms. Knox.

21 MR. BELDING: No further questions, Your
22 Honor.

23 MR. CORNEY: Just very briefly, Your Honor.

24 CROSS-EXAMINATION

25 BY MR. CORNEY:

1 Q Ms. Knox, your testimony a minute ago was that
2 Mr. Portee possibly woke up at 7:15, 7:30? Was
3 that what you testified to a moment ago?

4 A Correct.

5 Q It was?

6 A Correct.

7 Q Okay. Possibly. So, I mean, you don't remember
8 when he woke up, this is just conjecture, I mean,
9 he usually woke up around 7:15 or 7:30, but you
10 don't remember specifically?

11 A Correct.

12 Q Okay. Do you remember what day of the week this
13 was, November 9th, 2006?

14 A No.

15 Q So you remember these details and him getting in
16 the shower a specific time and him doing -- but you
17 don't remember what day of the week it was when
18 this occurred?

19 A Correct.

20 Q Okay. And this is a day that changed your life and
21 you have got a rock solid memory of it, but you
22 don't remember what day of the week it was?

23 A Well, I know it was a school week -- a school day,
24 but I'm not specific on what --

25 Q Monday through Friday. That is the best you can.

1 give us is Monday through Friday?

2 A Right.

3 Q Do you remember if it was raining or sunny outside?

4 A It was cloudy.

5 Q Cloudy? Temperature? Do you remember the
6 temperature outside? Do you remember any other
7 conditions of the day? I mean, you say you
8 remember this day very, very well.

9 A Somewhat chilly.

10 Q As you said a minute ago, I mean, obviously you
11 love Mr. Portee, you don't want him to be locked
12 up, correct?

13 A Correct.

14 Q You would love for him to come home?

15 A Yes.

16 Q Okay.

17 MR. CORNEY: I believe that is all the
18 questions I have, Your Honor.

19 MR. BELDING: No redirect, Your Honor. Thank
20 you.

21 THE COURT: You can step down.

22 (Witness steps down.)

23 MR. BELDING: Your Honor, in the interest of
24 judicial economy, obviously I have apparently three
25 more witnesses who would all testify substantially

1 the same as Ms. Knox did.

2 Would it be all right if I just have them
3 stand up and identify themselves for the record and
4 maybe affirm that is what they would say so we
5 wouldn't have an hour's worth of duplicative
6 testimony?

7 THE COURT: They can all stand and be sworn
8 and then you ask them a question.

9 MR. BELDING: Everyone who would have
10 testified for Jimmy Douglas Portee about his
11 whereabouts that morning, please stand.

12 (Witnesses stand.)

13 THE COURT: Okay, you need to identify
14 yourself when I point at you, and then do you swear
15 or affirm you are going to truthfully testify?

16 MS. ANDREWS: Janice Andrews. Yes, I do.

17 MS. PORTEE: Janice Portee, his mother.

18 THE COURT: And you are going to truthfully
19 testify?

20 MS. PORTEE: Yes.

21 THE COURT: Okay.

22 MS. ROBINSON: Alyse Robinson.

23 THE COURT: And?

24 MS. ROBINSON: I can testify as to where he
25 was also.

1 MR. BELDING: Thank you, Your Honor.

2 THE COURT: Ask them --

3 MR. BELDING: To all three of you, now that
4 you have been sworn in, would you all testify the
5 same way that Ms. Anita Knox just did about Jimmy
6 Douglas Portee's whereabouts on the morning of
7 November the 9th, 2006?

8 MS. ANDREWS: Yes.

9 MS. ROBINSON: Yes.

10 MS. PORTEE: Yes, I would.

11 MR. BELDING: Do you all know of your own
12 personal knowledge that he was at the house at
13 8:00 o'clock that morning?

14 MS. ANDREWS: Yes.

15 MS. PORTEE: Yes.

16 MS. ROBINSON: Yes.

17 MR. BELDING: Thank you, Your Honor.

18 THE COURT: You can cross-examine.

19 MR. CORNEY: Sure, Your Honor.

20 THE COURT: Y'all need to stand back up.

21 (Witnesses stand.)

22 MR. CORNEY: Was it pretty normal for all of
23 y'all to be at that house that morning before, I
24 mean, 8:00 o'clock in the morning, 8:15 in the
25 morning? Were y'all living with him? Living with

1 Mr. Portee at the time?

2 MS. ROBINSON: I was.

3 MR. CORNEY: Just one of you?

4 THE COURT REPORTER: I'm sorry, I am getting
5 confused as to who was speaking.

6 THE COURT: Just answer one at the time.

7 MR. CORNEY: Yes, sir. And I apologize. I
8 apologize for having my back to the court reporter.

9 MR. CORNEY: Can any of the three of you tell
10 me what day of the week this occurred on?

11 MS. ANDREWS: It was through the week at my
12 sister -- well, will be my sister-in-law -- it was
13 through the week. It was cloudy that day. And how
14 I know it was through the week because, as she
15 said, it was -- the children would go to school and
16 normally get on the bus, so that is how I would
17 know.

18 MR. CORNEY: All right. So the three of
19 y'all, your testimony is you remember the day very
20 specifically, but don't remember which day it was.
21 It could have been any day Monday through Friday?

22 MS. ANDREWS: Well, as far as -- I am Janice
23 Andrews. I can't speak for others, but as far as
24 I'm speaking for Janice Andrews.

25 THE COURT: And you don't have any other

1 testimony outside of that as to a specific day of
2 the week?

3 MS. ANDREWS: No.

4 MR. CORNEY: That's all the questions I have,
5 Your Honor.

6 MR. BELDING: Thank you, Your Honor.

7 Your Honor, I would like to call Mr. James
8 Cooper to the stand.

9 THE COURT: All right, Mr. Cooper.

10 (Witness approaches.)

11 All right, Mr. Cooper, do you swear or affirm
12 that you are going to tell us the truth?

13 THE WITNESS: Yes, sir, Your Honor.

14 JAMES DANIEL COOPER, III,
15 after being duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. BELDING:

18 Q Thank you. Please state your full name for the
19 record.

20 A My name is James Daniel Cooper, III.

21 Q Thank you. Mr. Cooper, where are you employed?

22 A Richland County Public Defender's Office.

23 Q How long have you been with the Public Defender's
24 Office?

25 A About five and a half years now.

1 Q How long have you been an attorney practicing law
2 in South Carolina?

3 A About five and a half years now.

4 Q Okay. Is this the only job you have had since you
5 were sworn in to the bar?

6 A Yes, sir.

7 Q Okay. Did you represent Mr. Jimmy Douglas Portee
8 in this matter?

9 A I did, yes.

10 Q Okay. When did you get appointed to represent him?
11 How long after his arrest? Do you know?

12 A Well, originally what happened is Ms. Kristy
13 Grafton was appointed to him after his arrest. I
14 didn't even work at the office yet. And then I
15 started to assist her on the case. And then I
16 became his lead attorney when she left the office
17 in early 2008, I believe. So I didn't become his
18 lead attorney until 2008. Originally it was Ms.
19 Kristy Grafton.

20 Q Okay. And when you say early in 2008?

21 A Well, my notes indicate that -- probably -- I think
22 February 6th, 2008 -- around February 2008 is when
23 I became the -- when I met with him and then --
24 with Ms. Grafton -- and then later I took over his
25 trial when she left.

1 Q Okay. Did you have approximately six months to
2 prepare for this trial?

3 A Yes, sir, that would be correct.

4 Q Okay. During that time, was -- as I understand it,
5 Mr. Portee was in jail awaiting trial?

6 A He was, yes.

7 Q Okay. Do you recall how many times you might have
8 met with him to discuss his defense in this case?

9 A Well, let me look at my notes again.

10 On February 6th he was served with LWOP, and
11 Kristy and I spoke with him about that.

12 Q Let me ask you --

13 A And then --

14 Q There has been some confusion about that. Are you
15 saying you actually handed him a copy of the
16 written notice that the State was seeking life
17 without parole?

18 A Well, my notes say February 6th, 2008. Kristy and
19 I spoke with him about LWOP. And it says LWOP
20 notice served. So I believe that would be the --
21 that would be the day.

22 Q Okay. Do you have an independent recollection of
23 you actually handing it to him?

24 A No, I don't have a specific memory of me handing
25 him the paper, no, sir.

1 Q Okay. Now, you were here earlier. Did you hear
2 Mr. Portee's sworn testimony?

3 A I did, yes, sir.

4 Q Mr. Portee, as I understand it, did not understand
5 at the time of this trial that he was facing a
6 potential life without parole sentence. Does that
7 square with your recollection?

8 A No, sir.

9 Q Okay. How is it different?

10 A Well, I think from my recollection, I believe he
11 knew it was a life without parole because it was a
12 big deal. I mean, we talked about it a lot.
13 Mr. Secor and I discussed it with him, Ms. Grafton
14 discussed it with him. You know, this was this was
15 my first LWOP case, so I talked about it a lot with
16 him. I can't imagine that he didn't -- I
17 understand what he says, but my recollection is
18 that he had to understand that.

19 Q Okay. This was an interesting trial. There wasn't
20 a lot of direct evidence linking Mr. Portee to the
21 crime, if I read the transcript. Is that a fair
22 assessment?

23 A I suppose so.

24 Q Okay. In that -- let me just give you a couple of
25 for instances. The original report was that a

1 white male had robbed the store?

2 A Yes, that's correct.

3 Q Okay. As we sit here today, do you know what race
4 Mr. Portee is?

5 A He is a light-skinned African-American male.

6 Q He is not a white male, correct?

7 A No, sir.

8 Q Okay. And had you -- was there ever a weapon found
9 that was linked between Mr. Portee and a crime?

10 A No.

11 Q Okay. Was there any other physical evidence that
12 linked Mr. Portee to the crime?

13 A Well, I mean, the big problem to me was the car.
14 You know, when he jumped out of the car and ran, in
15 the car they, as I recall, they found cash, they
16 found the ski mask, they found the handle of the
17 cobalt knife that they alleged he represented as a
18 weapon. So those were problematic.

19 Q Did you get a chance to talk to Mr. Portee about
20 why he would have jumped out of his car and run?

21 A Well, I mean, we discussed it as part of the
22 evidence that would be used against him, yes. So,
23 yes, I mean, we certainly went over that as part of
24 the case. I mean, he knew to expect those to be --
25 to come in against him at trial.

1 Q Okay. Did he ever give you a reason for why he
2 jumped out of the car and ran?

3 A I don't -- I mean, I have to think about this.
4 From our discussions, the whole problem was his
5 story and his statement didn't make a lot of sense
6 because he gave a story that he was basically
7 carjacked, so we did discuss that, yes.

8 Q In what manner was he carjacked? What do you mean?

9 A Well, I mean, his story was that he was basically
10 carjacked by a short white male with red hair and
11 that, you know, that explained the presence of the
12 money and everything in the car.

13 Q All right. Did you ever receive a plea offer of
14 any kind from the Solicitor's Office prior to
15 trial?

16 A Well, I did not, but I can tell you that, according
17 to the notes that I have, I believe they offered
18 Ms. Grafton 25 years before they served LWOP
19 notice. And according to the notes that I have, he
20 turned that down.

21 I will say that in hindsight leading up to
22 this case, you know, I wish I had fought them
23 harder to get him some kind of offer he would have
24 taken. That just comes with experience, learning
25 how to fight them and they can give you an offer.

1 But I don't think they ever -- after they served
2 him with LWOP notice, that was it.

3 Q That was it?

4 A (Nods affirmatively.)

5 Q Okay. And as you said, this was your first LWOP
6 trial?

7 A Yes, sir.

8 Q All right. Did you feel that you did an effective
9 job questioning the witnesses about the
10 discrepancies in the testimony?

11 A I think there were things that I left out. There
12 were things that I could have focused on more.

13 Q Can you give some examples?

14 A Well, I think from my review of the transcript
15 there was -- one thing I remember bringing up
16 post-trial was that there were some pictures that
17 came in that were I think irrelevant I failed to
18 object to.

19 I think that another thing I should have done
20 was, I let them get in a lot of prior consistent
21 statements. I don't think I'd do that now. I
22 think I would want to be more diligent about
23 objecting to that.

24 Q And let me ask this. I don't mean to -- don't lose
25 your train of thought. But on Page, I believe 616

1 of the transcript is when you moved for a new trial
2 beginning at Line 14.

3 A 616.

4 Q 616.

5 A Okay.

6 Q Is this what you were referring to about your
7 failure to object to several pieces of evidence,
8 for example, the pictures he was talking about?

9 A Yes, sir, that's right.

10 Q Okay.

11 A And --

12 Q And -- I'm sorry, go ahead, finish your answer.

13 A Well, the only other thing I wanted to mention was,
14 after my review of the transcript, I noticed that
15 Ms. Shipley called him a coward in her closing.
16 And today I would definitely object to that. But
17 it doesn't look like I did back then. But, anyway,
18 while I was on that subject I thought I would say
19 that.

20 Q And just for our record, Mr. Cooper, what did she
21 refer to Mr. Douglas as a coward for?

22 A I guess I could turn back -- for the crime. I'd
23 have to read her exact -- I just remember seeing
24 the word coward. I can't remember everything she
25 said. Do you know what page that is on?

1 Q I didn't write the number down either. I have seen
2 it. It was part of her closing argument? Does
3 that sound right?

4 A Yes, sir.

5 Q Okay.

6 A This transcript is missing a few pages, so maybe --

7 THE COURT: On Page 542.

8 MR. BELDING: Thank you, Your Honor.

9 BY MR. BELDING:

10 Q Well, that was early on in her closing arguments?

11 A Right. Yes, right off the bat.

12 Q Madam Forelady, Jimmy Portee is a coward. Line 16.

13 Okay?

14 A Yes, that's right.

15 Q And you did not object to that?

16 A No, there is no objection to that.

17 Q Okay. Why would you object to that in the closing
18 argument today?

19 A Probably my main reason would be, it is just
20 impermissible character evidence. It is just
21 undue -- it is appealing to the passions and
22 prejudices of the jury, which is 403. And I just
23 think that right now if the Solicitor were to get
24 up and say that, I don't think there is any doubt I
25 would jump up, but I didn't back then.

1 Q Do you feel that that prejudiced Mr. Portee in
2 front of the jury?

3 A I think it could have, yes.

4 Q Okay.

5 A I can't say for sure, but --

6 Q Going back -- and let's finish on Page 616 when you
7 were making the post-trial motions. Do you feel
8 that these things that you admitted failing to do
9 prejudiced the case in front of the jury?

10 A I can't get inside their head, but there is a
11 possibility that they could have.

12 Q Okay. Well, for example, the pictures, you know.

13 A I don't know what the jury talked about, but I just
14 know that -- just trying to be honest, I know that
15 that is one thing I looked at and that I probably
16 would do differently.

17 Q Okay. Do you recall on Page 617 of the transcript
18 that Ms. Shipley stated, beginning at Line 11, that
19 you were just clearly trying to set this up for a
20 PCR down the road. Was that your intent at the
21 time?

22 A No. They always -- they always say stuff like that
23 when you do your post-trial motions. I mean, I
24 wasn't -- I was just trying to do my job the right
25 way and make post-trial motions and be honest

1 about -- and just like you said, in any trial you
2 forget stuff and make mistakes. So when you
3 realize that, you have to bring it up at the end.
4 So that is all I was doing.

5 Q And as we know, as people that had to go through
6 law school, the constitution doesn't guarantee you
7 a perfect trial, isn't that correct?

8 A Right.

9 Q It guarantees you a fair trial, is that correct?

10 A Right.

11 Q Okay. So the issue in PCR is, were you effective
12 as an attorney that resulted in Mr. Portee getting
13 a fair trial. You understand that?

14 A Yes.

15 Q Okay. Let me come back to that after I ask you
16 about this. Tell me about Reverend Michael Murphy.

17 A Okay. Reverend Michael Murphy was a strange
18 witness in the discovery. He actually never
19 appeared. I mean, it was our information he was on
20 the run because he was wanted for a felony or
21 something, but I don't know whether that is true.
22 He was the guy that Jimmy talked about that
23 supposedly saw him come around the corner of the
24 building with a gun.

25 Q Okay.

1 A And, you know, Mr. Secor and I were very well aware
2 of him as a witness, but we decided to go ahead and
3 let them talk about him just to punch a hole in
4 their case and to make it obvious that they have
5 got this main witness that they can't even get into
6 court and why didn't they bring him in. So that
7 was the story behind Mr. Murphy.

8 Q Okay. I want to make sure I understand. So this
9 was basically a trial strategy decision?

10 A It was. Me and Mr. Secor, we did talk about that,
11 yes.

12 Q Do you recall talking about that with Mr. Portee?

13 A You know what? I don't have a specific
14 recollection of it, so I can't -- I can't say.

15 Q Okay. So as we sit here today, you don't know
16 whether or not Mr. Portee participated in that
17 trial strategy decision?

18 A I can't say with absolute certainty. I imagine --
19 speculate that it was something that we talked
20 about at the trial table, but I just -- I don't
21 have a specific recollection of that.

22 Q Okay. Was Mr. -- was Reverend Michael Murphy on
23 the State's witness list?

24 A I think he was. I think he was, yes.

25 Q Okay. When did it become apparent to you that he

1 was not going to testify?

2 A Well, I think we kind of knew. My recollection is
3 that we sort of knew they didn't have him just from
4 having conversations with the Solicitor prior to
5 trial, and we thought that looked bad for them. So
6 our decision was to sort of let them make a big
7 deal about him and then let them, you know, not
8 produce what they -- you know, that was what we
9 decided to do.

10 Q So it was your decision -- I mean, so you didn't
11 make a motion in limine or anything to try to
12 prevent any testimony about Reverend Michael
13 Murphy?

14 A I don't think I did, no, sir.

15 Q Okay. And from Mr. Portee's point of view, this
16 isn't just anybody that comes running in, but he
17 was described as a reverend or minister?

18 A That's right, yes.

19 Q Okay. What did that title convey to a juror?

20 A I don't know, you would have to ask them.

21 Q Okay. Just in general, would that convey to you
22 that he is someone who would be truthful because he
23 is a minister or reverend?

24 A Sure. I can see that.

25 Q Okay. So when Ms. Tracy Anderson and the customer

1 witness, Ms. Joan Hooks, testified that the
2 reverend came busting in all excited and said, a
3 guy in back is waving a gun at me --

4 A Uh-huh.

5 Q -- a gun that they never saw during the robbery,
6 you didn't object to that?

7 A No. And the idea was that if they have got this
8 reverend that saw so much out there, then why not
9 bring him to court. The idea was exactly as you
10 said, that if you had this extremely credible guy,
11 a minister or reverend, and he is supposedly such
12 an important witness you can't even call him to the
13 stand. That was our -- as I recall, our
14 discussions, that was the decision.

15 Q Okay. And so the trial strategy decision was that
16 you would just bring that up in closing?

17 A That was part of it, yes, sir.

18 Q Okay. How did that work out?

19 A Well, I mean, Mr. Portee was convicted.

20 Q Do you think that, in looking back on it in
21 hindsight, that that prejudiced his case in front
22 of the jury?

23 MR. CORNEY: Your Honor, I am going to object
24 to the questions. All these questions that are in
25 hindsight, that is not something we consider.

1 THE COURT: Just ask him what he did.

2 A I think from talking to Mr. Secor this morning and
3 reviewing the transcript, talking about the whole
4 case, I think I might have done it the same way
5 again.

6 There are a lot of things I would have done
7 differently in this trial. We have discussed some
8 of those. But the Michael Murphy thing, I mean, I
9 would have to think about it, but I might do it the
10 same way.

11 Q Okay. And just so I will understand, why would you
12 do it the same way?

13 A Because I think it looks bad. I think it looks bad
14 for their case to make a big deal about this
15 reverend witness and then not even have him come
16 testify. I mean, it is a -- I can see it both
17 ways, but I think I might go about it the same way.

18 Q Have you ever had another case similar with a
19 State's witness that doesn't appear that seems
20 pretty important?

21 A I have certainly had trials where they wouldn't
22 call people, either because they had, you know,
23 records or they weren't saying what they wanted to
24 say.

25 Q Okay. Now, let me shift to something else real

1 quick. Mr. Cooper, you heard Mr. Portee testify
2 about the conversation with you and Mr. Secor
3 during the -- what was on the record as a five
4 minute break.

5 A Uh-huh.

6 Q -- to talk about whether or not he was going to
7 take the stand.

8 A Uh-huh.

9 Q Was it your -- are you satisfied as you sit here
10 today that Mr. Portee made the decision not to take
11 the stand?

12 A Yes, because we, Casey and I, definitely talked
13 with him about it. If I recall correctly, the
14 judge even made sure that we talked to him about
15 it, so we did.

16 Q Okay. What was your concern as the defense
17 attorney about his taking the stand?

18 A I thought that the -- I did not think his testimony
19 would go well. I thought that just from talking to
20 him, I didn't really think he sounded that
21 believable. I thought that they were going to --
22 that he would be impeached rather badly. And I
23 thought -- I advised him that that is what I
24 thought, I mean, just from my opinion, is that I
25 advised him I did not think he should take the

1 stand.

2 Q Okay. Now, in this approximately five minutes, did
3 you also convey to Mr. Portee that you were not
4 going to be putting up any defense witnesses of any
5 kind?

6 A I believe we did talk about that. We talked about
7 him testifying before. And we also talked about
8 that day, if I recall correctly, we did talk about
9 waving the alibi.

10 Q All right. Now, you heard Mr. Portee testify that
11 he didn't realize that he wasn't going to be able
12 to have any witnesses testify about his
13 whereabouts, correct?

14 A Uh-huh. I did.

15 Q Okay. Did that square with your recollection of
16 that point in the trial?

17 A It doesn't. I thought that he was clear with what
18 we were going to do.

19 Q Do you think -- had you talked to the witnesses
20 that appeared in court today prior to the trial?

21 A I mean, a long time ago, you know.

22 Q Was there testimony today essentially what they
23 would have been able to say at trial, to your
24 understanding?

25 A I think that they told me very similar things. It

1 was just a decision that I thought it was best not
2 to use that.

3 Q Okay. Did you make that decision or did Mr. Portee
4 make that decision?

5 A Well, I mean, I think that we talked about it. And
6 I -- if I remember correctly, me, Mr. Secor sat
7 down and we talked with Jimmy about what we were
8 doing.

9 Q Okay. And I just want to clarify because a minute
10 ago you said -- I thought you might have said it
11 was your decision. Is it your testimony in front
12 of Judge Kinard that it was Jimmy's decision to not
13 put up an alibi defense?

14 A Well, ultimately it was all three of us. It was
15 based on conversations that we had. I mean, I'm
16 sure that we said, look, Jimmy, as your lawyers,
17 this is what we think. I don't remember that
18 specifically, but that is generally what we do.

19 Q Okay. You are satisfied that Mr. Portee knew that
20 the alibi witnesses were not forthcoming?

21 A I -- I -- at the time I thought that he did, yes.

22 Q Thank you, Mr. Cooper.

23 MR. BELDING: No further questions, Your
24 Honor.

25 CROSS-EXAMINATION

1 BY MR. CORNEY:

2 Q All right, Mr. Cooper, at some point in time
3 Mr. Portee was mentally evaluated for competence,
4 and that sort of thing, is that your recollection?

5 A Yes. I think it was Dr. Schwartz-Watts that did
6 it.

7 Q And you said you were able to discuss this
8 two-three -- the two and three strike law under
9 17-25-45 with him and how that would affect his
10 potential sentences?

11 A Yes. Both Ms. Grafton and I discussed that with
12 him.

13 Q And you feel that he, entering trial that day,
14 understood that if he was convicted of these
15 serious charges he would be getting a mandatory
16 life without parole sentence?

17 A I feel that he did know that.

18 Q And were you able to review his, kind of his
19 version of the facts that led to these charges with
20 him during your discussion?

21 A Yes.

22 Q And to the extent necessary to rebut his
23 allegations in the PCR allegation, what did he tell
24 you regarding the charges? And I don't want you to
25 divulge anything you don't feel comfortable about

1 divulging, but just to rebut his allegations --
2 regarding his allegations?

3 A Right. Well, just as pertains to what we did in
4 the trial and why we did it, his -- again, he had a
5 story about being carjacked by an individual, that
6 we didn't like him, we didn't want to use at the
7 trial. And so that was a big reason why I advised
8 him, you know, that I didn't think he needed to
9 testify.

10 Q Okay. This carjacking, is it something that he
11 alleged occurred at the time that the robbery was
12 going on?

13 A I mean, basically, yes. He said that he had been
14 carjacked by a guy, a small white male with red
15 hair and beady eyes, and that -- I think to
16 explain, you know, the presence of some of the
17 things in the car. And, you know, just looking at
18 it, I think Mr. Secor and I decided that that
19 didn't sound that great and we didn't want to use
20 it in front of a jury.

21 Q Okay. So your testimony today is that was his
22 statement of facts to you, that the witnesses that
23 stood up and said he was at the house with them,
24 that would be inconsistent with what he told you?

25 A Okay. It -- okay, as far as consistency, it didn't

1 make sense together. I can say that. I mean, I
2 guess you could quibble about the exact timeline,
3 but I did not like the way the two stories went
4 together. I didn't think it made sense. And
5 honestly I thought that the jury would not, you
6 know, wouldn't, just wouldn't believe that
7 carjacking thing in combination with the other
8 witnesses.

9 Q Okay. And not to dwell on that too much more, but
10 just one more question regarding that. Based on
11 your investigation into the story of being at home
12 or being carjacked, was it an airtight alibi, from
13 your recollection? Is it something that left open
14 the possibility that he could have been in both
15 places doing both things?

16 A Well, that was part of it, it was not airtight.
17 And, again, I just had to judge, how does -- how is
18 all this going to sound together. And I did not --
19 my judgment was at the time that that wouldn't
20 sound good.

21 Q Okay, very briefly. Do you remember receiving any
22 discovery file in this matter?

23 A Well, I think Ms. Grafton was the first one to
24 receive it, but I remember, you know, having it and
25 looking at it.

1 Q Do you recall being able to review those discovery
2 materials with Mr. Portee?

3 A Yes, we did.

4 Q Okay. Do you remember any specific noteworthy
5 items, things that concerned you in the discovery
6 file?

7 A Well, the few things that I mentioned to counsel a
8 moment ago. The items found in the car, clothing,
9 those were things that, like I said, I felt were
10 problematic.

11 Q And essentially -- I mean, the testimony at trial,
12 the facts that came out were that he -- when he
13 jumped in this car and ran from them, there was
14 money falling out of his pockets, there was money
15 in the car, is that the testimony that you recall?

16 A That sounds right, yes, sir.

17 Q Okay. And the mask also was found right there and
18 DNA was matched to Mr. Portee from the mask?

19 A That's correct.

20 Q And the mask fit, at least very similarly, to what
21 the victims had described the suspect wearing?

22 A I'm not sure I specifically remember that, but I'm
23 not saying you are wrong, I'm just trying to be
24 accurate.

25 Q And I just -- if you don't recall, that is fine. I

1 don't want to push you to say something you don't
2 recall. There was a surveillance video tape and it
3 wasn't played at trial or brought out?

4 A That's right. There was a -- we had some
5 information that it was -- part of it was erased or
6 something, I think. That was in the notes.

7 Q Okay. Regarding Michael Murphy, the minister that
8 came over, essentially his statement was -- or the
9 testimony that came out at trial was that he had
10 seen the robber running out, ran next-door and said
11 something to the victim, is that your recollection?

12 A Yes.

13 Q And with your knowledge, obviously a defense
14 attorney for five and a half years and trying a lot
15 of cases, do you think that could have come in
16 under a hearsay exception?

17 A Maybe. If I wanted to fight it, I'd like to think
18 not, but I guess it just -- it could have.

19 Q And the fact that Mr. -- Reverend Murphy's alleged
20 testimony or hearsay testimony of Mr. Portee
21 allegedly was that the suspect had a gun but no gun
22 was ever found on Mr. Portee, do you think that was
23 something beneficial to the Defense?

24 A Can you ask that one more time?

25 Q And I'm sorry for making that a very complex

1 question. The fact that Mr. Murphy -- Reverend
2 Murphy had said he saw the suspect with a gun --

3 A Uh-huh.

4 Q -- and relating that to the fact that no gun was
5 ever found on Mr. Portee, how do you -- what affect
6 do you think that might have had on the outcome of
7 the case?

8 A Well, like I said, I mean, part of our idea was,
9 you know, you have testimony about a gun from a
10 supposedly credible minister that you won't even
11 call and you can't even produce a gun. So we were
12 trying to use those two things to poke holes in
13 their -- just the investigation and their case as a
14 whole.

15 Q The failure to stop for a blue light charge was
16 essentially something conceded at trial, correct?

17 A Yes, I guess you could -- yes.

18 Q There wasn't much getting over the fact that he had
19 been essentially caught running from the car when
20 the police were chasing him?

21 A There wasn't -- as I recall, there wasn't much
22 getting past that.

23 Q Based on your review of the discovery materials and
24 your discussions with Mr. Portee and your
25 investigation, were you able to formulate your

1 opinion about the State's ability to prove his
2 guilt beyond a reasonable doubt prior to going to
3 trial?

4 A I mean, I thought there was a very good chance that
5 he would get convicted. I didn't deceive myself, I
6 think, or him about that. I try not to do that. I
7 just try to tell everybody the way I think it
8 really is.

9 MR. CORNEY: Beg the Court's indulgence just
10 one minute, Your Honor.

11 THE COURT: All right.

12 (Pause.)

13 BY MR. CORNEY:

14 Q Regarding the victims' descriptions of the suspect,
15 would it be fair to say that their descriptions of
16 the suspect as a white male was based on the very
17 limited view of the suspect's skin?

18 A I think that was the testimony, that they had a
19 limited view of the skin, yes.

20 Q Okay. But these kind of differences in the
21 description of the suspect, is that something that
22 you tried to bring out in cross-examination?

23 A I think we did, yes.

24 Q And there had been several different descriptions
25 of the suspect?

1 A There were, yes.

2 Q But the clothing description, would you agree that
3 there was some difference in what Mr. Portee was
4 wearing at the time he was arrested?

5 A As I recall, they were pretty consistent.

6 MR. CORNEY: Beg the Court's indulgence for
7 one moment. I think I might be about finished.

8 (Pause.)

9 BY MR. CORNEY:

10 Q Now, when you made that motion that Mr. Belding
11 referred to a minute ago for a new trial, that was
12 overruled by Judge Cooper, is that correct?

13 A It was.

14 Q And the basis for his overruling that was that he
15 believed there was overwhelming evidence of
16 Mr. Portee's guilt?

17 A I believe he did say that.

18 MR. CORNEY: That's all the questions I have.
19 Thank you.

20 MR. BELDING: No redirect.

21 THE COURT: You can step down.

22 THE WITNESS: Thank you, Your Honor.

23 (Witness steps down.)

24 MR. BELDING: I have one more brief witness.

25 I would like to call Mr. Casey Secor to the stand.

1 THE COURT: All right, Mr. Secor.

2 (Mr. Secor approaches.)

3 THE COURT: All right, Mr. Secor, do you swear
4 or affirm you are going to tell the truth?

5 THE WITNESS: Yes, sir.

6 THE COURT: Take the stand.

7 MR. BELDING: May it please the Court, Your
8 Honor?

9 THE COURT: Sure.

10 CASEY SECOR,
11 after being duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. BELDING:

14 Q Please state your name for the record.

15 A Casey Secor.

16 Q And are you an attorney licensed in the State of
17 South Carolina, Mr. Secor?

18 A Yes, sir.

19 Q How long have you been licensed to practice law?

20 A Since 2007.

21 Q Okay. Where are you employed right now?

22 A South Carolina Commission on Indigent Defense.

23 Q All right. And do you do appellate defense or do
24 you do administrative duties over there?

25 A I'm a trial level lawyer.

1 Q Okay. Did you work on the Jimmy Douglas Portee
2 case with Mr. Cooper?

3 A I did.

4 Q Okay. How long were you involved working with
5 Mr. Cooper? Did you come in kind of late?

6 A Yes. I don't think I was sworn in to the bar until
7 the fall of 2007, so I was not -- I didn't have
8 much to do with the case during the time that Mr.
9 Portee was in jail waiting trial.

10 Q Okay. And, just briefly, you were sitting second
11 chair?

12 A Yes, sir.

13 Q And was it for the purpose of gaining some trial
14 experience?

15 A Well, frankly, I sort of take offense to people
16 saying that people are public defenders for trial
17 experience. I mean, this is a person's life that
18 was at stake. I was doing it because I believed in
19 the job that I was doing then, just like I believe
20 in the job I'm doing now. So, no, I would say it
21 was not for the purposes of gaining trial
22 experience.

23 Q Okay. Didn't mean to offend you. But you were not
24 the primary counsel?

25 A I was not.

1 Q Okay. Briefly describe what you did to assist
2 Mr. Cooper.

3 A He and I met together, I have no idea how many
4 times during the lead-up of the time leading up to
5 the trial. Tried to do our best to formulate
6 defense theories that we thought would be effective
7 and come up with ways to combat the State's
8 evidence. It was a terrifying experience, as I
9 recall, facing what we were facing at the time and
10 based on the small amount of experience that I had
11 and what Jay Cooper had. And we, you know, just
12 did whatever we could.

13 Q Okay. And you said, based on what we were facing.
14 Are you referring to the LWOP possibility?

15 A Yes, sir.

16 Q Okay. Do you recall whether or not you and
17 Mr. Cooper specifically told Jimmy Douglas Portee
18 that that would -- what the State was seeking in
19 these cases?

20 A I don't ever remember a specific conversation. I
21 mean, I remember it was a constant theme we were
22 talking about because we with scared about it. And
23 we -- one of the things that made it such a
24 terrifying experience, in my recollection, is that
25 we were always constantly thinking about the fact

1 that Mr. Portee was facing life without parole.

2 And it weighed heavily on both of us.

3 Q Okay. Did you discuss with Mr. Cooper how to
4 handle the Reverend Michael Murphy?

5 A We did. We talked a lot about that. And we
6 thought that Michael Murphy was a fraud. And the
7 information that we had about him indicated that he
8 was a fraud. I'm not -- I can't remember the
9 specific information, but I know that we had some
10 information that he had I think fleeced some people
11 out of money and that he probably was not in fact a
12 reverend. And we thought that the State didn't
13 believe him and the police didn't believe him, and
14 the reason we thought that was because if the State
15 and the police had believed Michael Murphy, then
16 Mr. Portee would have been charged with pointing
17 and presenting a firearm, which never happened.
18 And we thought that was indicative of the fact that
19 the State and the police didn't believe Michael
20 Murphy, and then when they chose not to call him to
21 the stand, we thought that that corroborated our
22 belief.

23 Q I understand. But you allowed to get in as
24 testimony that a Reverend Michael Murphy came in
25 and said, hey, a guy just pointed a gun at me

1 outside?

2 A Intentionally allowed that to come in, yes, sir.

3 Q Okay. And you agree with Mr. Cooper's testimony
4 about why you all came to that trial strategy
5 decision?

6 A Yes, sir.

7 Q Okay. Do you recall the conversation with
8 Mr. Portee about whether or not he should take the
9 stand in his own defense?

10 A I know that we talked about it. And the rationale
11 behind our telling Mr. Portee that he should not
12 take the stand was based on the fact that the State
13 put into evidence Mr. Portee's statements.

14 Mr. Portee always told us that his statement
15 that he gave to the police was the truth. And we
16 thought if the State put his statement into
17 evidence that there would be no reason to put Jimmy
18 Portee on the stand to say the same thing and
19 expose him to cross-examination if the State's
20 evidence was going to be what he was going to say
21 on the stand himself.

22 Q I understand. Okay. You -- I believe Mr. Portee
23 testified that he understood from Mr. Cooper that
24 it was Mr. Cooper's opinion that there was no way
25 he would be convicted and that he didn't need to

1 take the stand. Do you recall those words being
2 said in that meeting?

3 A I don't ever remember anybody saying that to him,
4 and I can tell you that if anybody did say that to
5 him, it would have been in contradiction with what
6 we felt at the time.

7 Q How did you feel going into the time the jury went
8 out?

9 A What do you mean, how did I feel?

10 Q Did y'all feel that you had done everything you
11 could do to defend Mr. Portee in the case?

12 A I don't remember having an opinion about what --
13 how we had done.

14 Q Okay.

15 A I didn't know what I was doing at the time the
16 trial happened.

17 Q And did you have any reason to disagree with
18 Mr. Cooper's statement during the trial that there
19 was things that he should have done differently
20 when he moved for a new trial?

21 A There was several things that both of us should
22 have done differently.

23 Q Could you briefly just point those out?

24 A Yes. For one thing, I can tell you that the State
25 called some clown to the stand who referred to Mr.

1 Portee as a high yellow in front of the jury.

2 MR. CORNEY: Your Honor, I am just going to
3 object to hindsight, all hindsight testimony as to
4 what we should have done at the time.

5 THE COURT: If it is addressed in his PCR
6 application you can move on with it. If it is not,
7 you can't bring it up.

8 MR. BELDING: I understand.

9 MR. CORNEY: Yes, sir.

10 MR. BELDING: He is alleging ineffective
11 assistance of counsel. I just -- that's what I'm
12 getting at is to support that allegation.

13 MR. CORNEY: I think just to let the attorney
14 get up there and set out the allegations rather
15 than him set out the allegations open-ended --

16 THE COURT: He has got to testify as to his
17 specific allegations unless you --

18 MR. CORNEY: Thank you, Judge.

19 THE COURT: That is what he has to do.

20 MR. BELDING: I understand. Just so the Court
21 will know, the application states ineffective
22 assistance of counsel, which is rather broad, so
23 I'm just trying to pull out, would this be one of
24 those examples.

25 THE COURT: All right.

1 MR. BELDING: Thank you. I appreciate the
2 Court's latitude.

3 BY MR. BELDING:

4 Q Mr. Secor, do you need the question repeated?

5 A No, I do not.

6 Q Good. Thank you.

7 A It was ineffective for nobody to object when the
8 State's -- a State's witness used a racial slur to
9 refer to the Defendant in front of a jury.

10 Q Do you recall where that is exactly in the
11 transcript?

12 A I have no idea.

13 Q Did you see it this morning as you were reviewing
14 it?

15 A No, I saw it about two months ago when I was
16 initially preparing for this hearing.

17 Q Okay. Anything else specifically that you thought
18 should have been done differently?

19 A Allowing a Solicitor to refer to Mr. Portee as a
20 coward in a closing argument I think was really
21 poor on our part. It clearly was intended to make
22 the jury have an emotional reaction and base a
23 decision on their emotions or their hatred of
24 Mr. Portee. That should have been objected to.
25 Numerous witnesses testified to prior consistent

1 statements that they had made at different points
2 in time that weren't objected to.

3 Those are three of the main things that I can
4 think of in recollection that when I read the
5 transcript I'm not particularly proud of.

6 Q I understand. Thank you for your honesty,
7 Mr. Secor. I appreciate your coming.

8 MR. BELDING: No further questions, Your
9 Honor.

10 MR. CORNEY: I have no questions for this
11 witness, Your Honor. Thank you.

12 THE COURT: You may step down.

13 (Witness steps down.)

14 MR. BELDING: Your Honor, that is the
15 applicant's case. We would move for
16 post-conviction relief in this matter.

17 THE COURT: Does the State have anything in
18 reply?

19 MR. CORNEY: No, Your Honor. We will just
20 rest on the testimony and record before the Court,
21 Your Honor.

22 THE COURT: All right, y'all can prepare a
23 couple of orders.

24 Now, this is how it looks. I'm not ruling,
25 now. I'm not ruling, because I haven't read the

1 orders.

2 I don't put too much weight to Michael Murphy
3 testifying or not because the State didn't allude
4 to that in their closing argument that I saw.

5 The Appellate Court indicated there was
6 ample -- I mean, direct testimony that he was armed
7 at the time. And they tied it to an eyewitness
8 saying bulge in the pocket. He had a knife on him
9 also. That didn't come out in the trial, but on --
10 well, I mean, the State didn't make a big issue of
11 it, but the Appellate Court did.

12 He couldn't have testified, you know, if I'm
13 representing him, with five prior armed robberies.
14 There is no way to testify, chances are, especially
15 when he has given inconsistent statements or the
16 thing about the carjacking is not too good.

17 Now, there were numerous trial errors made,
18 so, you know, just prepare an order giving him a
19 new trial based on that and the State prepare an
20 order denying it, address the issues raised.

21 And y'all need to spend a lot of time, now, on
22 this LWOP situation. All I have in front of me is
23 his testimony, he was not served. The State did
24 not put up anything. And as I read the statute, it
25 says, to get LWOP you must serve it on the Defense

1 counsel and the attorney. That's why I asked if
2 the State had anything in reply, and they said no.
3 But y'all can brief that.

4 MR. CORNEY: Your Honor, I would just request
5 -- I mean, I guess at this point in time, I don't
6 know if you will allow me to do it, to leave the
7 record open to get that notice of LWOP.

8 THE COURT: I don't think that is the rule.

9 MR. CORNEY: Okay.

10 THE COURT: I mean, I just mention that for
11 future reference when you do things like that.

12 MR. CORNEY: And that's fine, Your Honor. I
13 don't know if that is something that is part of the
14 Clerk of Court's record, but we can introduce or
15 make part of the record his actual notice to show
16 that he was served.

17 THE COURT: Well, you should have done it
18 today.

19 MR. CORNEY: Sure.

20 THE COURT: When you recognize that is his
21 position, right?

22 MR. BELDING: Absolutely, Your Honor.

23 THE COURT: Y'all prepare two orders and then
24 we'll do it.

25 Now, it is no question that he was advised by

1 his attorneys at some point.

2 MR. BELDING: You said there is a question?

3 THE COURT: There is no question he was
4 advised of the LWOP situation by his attorneys at
5 some point. Y'all can just address that. That was
6 different testimony.

7 All right. Good luck.

8 MR. BELDING: Thank you, Your Honor.

9 MR. CORNEY: Thank you very much, Judge.

10 (WHEREUPON, the proceedings were concluded.)
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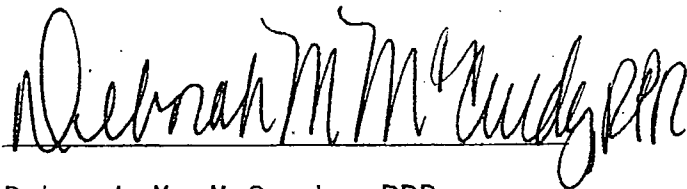
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

I, Deborah M. McCurdy, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 10th day of September, 2012.

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

February 11, 2013



Deborah M. McCurdy, RPR
Fifth Circuit Court Reporter

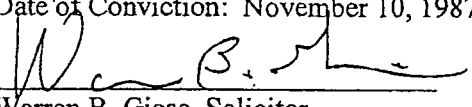
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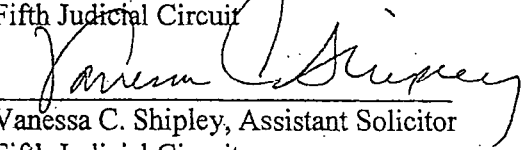
STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
 2008 FEB -6 AM 9:25
 COUNTY OF RICHLAND) NOTICE OF INTENTION TO SEEK A
) SENTENCE OF LIFE WITHOUT PAROLE
 The State of South Carolina) C.C.C. & G.S.
) INDICTMENT #: 2007-GS-40-10684, et al.
 -v-)
) WARRANT #: I979745
 JIMMY DOUGLAS PORTEE,)
 DEFENDANT) CHARGE: ARMED ROBBERY

TO: JIMMY PORTEE, DEFENDANT
 KRISTY GRAFTON, ATTORNEY FOR THE DEFENDANT

YOU WILL PLEASE TAKE NOTICE that upon conviction (trial or guilty plea) of the above-entitled action to be scheduled on a date at least ten (10) days hence, of which you will be timely notified, the State of South Carolina will be seeking a sentence of life imprisonment without the possibility of parole, pursuant to South Carolina Code of Laws, Section 17-25-45 (1995), as amended. The State intends to rely upon the following prior convictions of the defendant to statutorily enhance his punishment:

Case No.: 1987-GS-40-4064, 4065, 4066, 4067, 4068
 Charge: ARMED ROBBERY - 5 COUNTS
 Date of Conviction: November 10, 1987


 Warren B. Giese, Solicitor
 Fifth Judicial Circuit


 Vanessa C. Shipley, Assistant Solicitor
 Fifth Judicial Circuit
 Columbia, South Carolina

February 6th, 2008

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Jimmy Portee, #145122,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

2010-CP-40-08149

ORDER OF DISMISSAL

FILED
2012 NOV 19 AM 11:40
JENNIFER W. HERRIDGE
C.C.P. & G.S.
RICHLAND COUNTY

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 19, 2010. An evidentiary hearing into the matter was convened on Monday, September 10, 2012, at the Richland County Courthouse. The Applicant was present at the hearing and was represented by David E. Belding, Esquire. The Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Also testifying was Applicant's trial former counsel, Jay Cooper, Esquire (hereafter "counsel") and Casey Secor, Esquire (hereafter "Secor"). Applicant also presented the testimony of his fiancée, Anita Knox, and had several family member witnesses acknowledge their agreement with Knox's testimony. This Court also had before it a copy of the transcript of the proceedings against Applicant, the records of the Richland County Clerk of Court, Applicant's direct appeal documents, and Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was true bill indicted at the January 2007 term of the Richland County



SCANNED

Grand Jury for Armed Robbery and two (2) counts of Assault and Battery of a High and Aggravated Nature, as well as at the February 2007 term for Failure to Stop for a Blue Light (2007-CP-40-10684 through -10686; -11829). James "Jay" Cooper, Esquire, and Casey Secor, Esquire, of the Richland County Public Defender's Office represented Applicant on the charges. On September 2, 2008, Applicant proceeded to jury trial before The Honorable Thomas G. Cooper, Jr. After a three (3) day trial, Applicant was found guilty of the charges as indicted, and was sentenced to life imprisonment without parole for Armed Robbery, ten (10) years imprisonment for each ABHAN charge, and three (3) years imprisonment for the Failure to Stop charge. All sentences were to run concurrently.

A Notice of Appeal was filed and an appeal perfected. Applicant was represented by Chief Appellate Defender Wanda Carter, Esquire, of the South Carolina Office of Appellate Defense on the appeal. After briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence by unpublished opinion filed October 12, 2010. State v. Portee, Unpub. Op. No. 2010-UP-435 (S.C. Ct. App. filed October 12, 2010). The remittitur was issued October 28, 2010.

In the current application for PCR, the Applicant alleges he is being held in custody unlawfully for the following reasons:

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

- (a) Excessive Bail/Arrest of Counsel
- (b) US Constitutional Violation 6th Amendment
- (c) Due process violations / inadmissible evidence used for conviction



10. State concisely and in the same order the facts which support each of the grounds set out in (9)
- (a) Counsel allowed many procedural errors / violation of S.C. Code 17-23-45 (See)
- ~~(b) Failure to inform and/or give advice~~
- (b) Counsel failed to protect my constitutional rights and allowed these procedural irregularities which denied me of my right to a fair trial
- (c) Counsel failed to object to testimony of a witness, that would make statements that was confirmed as a witness by law enforcement, and which was hearsay

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985) and Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007) ("[C]ounsel preparing orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to the issuance of the order, and the PCR judge should carefully review the order prior to signing it").

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel



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rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Notice of Intention to Seek Life Without Parole

Applicant first alleges counsel was ineffective for failing to advise Applicant of the potential life without parole ("LWOP") sentence he could receive if convicted on the charges, and for failing to object to the imposition of such a sentence as Applicant alleged he was never personally served with the state's "Notice of Intention to Seek LWOP" as required by statute.

At the PCR hearing, Applicant testified he met with counsel "one or two times" to discuss the charges prior to his trial, but never discussed the potential sentencing range he was facing if convicted. Applicant conceded that the state's "Notice of Intention to Seek LWOP" was introduced at trial and he did not contest whether counsel was served with the notice, but said the

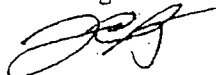


notice failed to satisfy the statutory requirements as it was never served upon him personally. On cross-examination, Applicant testified he didn't make any remarks or objections to the trial judge when the notice was introduced, but "would have" if counsel had ever mentioned discussing the potential sentence with Applicant.

Counsel testified he originally became involved in the case as co-counsel to Applicant's original public defender, Kristy Grafton Goldberg, Esquire. He stated when Goldberg left the public defender's office in February of 2008, he became lead counsel as he was already very involved in the case. Counsel said he had roughly six (6) months to prepare for the trial and he was able to meet with Applicant several times at the jail to discuss the case during that time. Specifically, counsel noted that, based on his recollections and notes from his defense file, he met with Applicant at the jail on February 6, 2008, at which time he discussed his receipt of the state's Notice of Intent to Seek LWOP with Applicant. He went on to say "Applicant knew this was a LWOP case" because they had "talked about it a lot"; counsel noted this was his first LWOP trial as a public defender, so he discussed that fact with Applicant very often. On cross-examination, counsel reiterated that he discussed the state's intention to seek life without parole with Applicant "many times" well in advanced of trial.

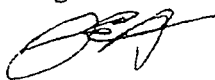
Secor testified that he "didn't have much to do with the case" as he had just recently been sworn in to the Bar before being assigned as second chair in the case, but noted that the "constant theme" of he and counsel's discussions with Applicant was that Applicant was facing life without parole. Secor explicitly stated that "Applicant knew" he was facing such a sentence if convicted.

Based on a thorough review of the record before this court and the testimony presented at the PCR hearing, this Court finds Applicant's allegation to be without merit. As a preliminary



note, this court finds Applicant's testimony to not be credible, while conversely finding counsel and Secor's testimony on this allegation to be very credible. According to the credible testimony, Applicant was thoroughly and sufficiently advised of the state's intention to seek life without parole on the charge at trial. The state served counsel with such notice on February 6, 2008, according to the clerk's filed copy of the notice introduced at the PCR hearing. Counsel credibly testified he then met with Applicant that same day to discuss it. Applicant fully understood that discussion and was well aware of the state's intentions roughly seven (7) months prior to Applicant's trial.

While Applicant contends the counsel was ineffective for failing to object to improper service of the notice because Applicant was not "personally" served with it, this Court finds the allegation to be without merit as well. "[S]o long as the defendant and his counsel, at least ten days prior to trial, possess *actual notice* of the state's intention to seek a sentence under South Carolina's recidivist statute, the statute has been satisfied." James v. State, 372 S.C. 287, 295, 641 S.E.2d 899, 903 (2007) (emphasis added). Applicant and counsel both had *actual notice* of the state's intention to seek LWOP roughly seven (7) months prior to trial; therefore, counsel was not deficient in failing to pose an objection as there was no valid objection to be made. Further, Applicant has failed to prove resulting deficiency as (1) counsel's objection, if posed, would have been unsuccessful based on Applicant's *actual knowledge*; and (2) Applicant cannot prove prejudice as there is nothing preventing the state from re-serving its notice of intention to seek life without parole and Applicant receiving such a sentence if the current action was granted, the conviction vacated and the matter remanded for new trial. Further, this Court find that based on the overwhelming evidence of Applicant's guilt, a conviction and life without

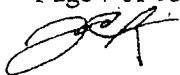


parole sentence would be the likely outcome if such a new trial were granted. Therefore, this Court denies the current allegation.

Failure to Object to Reverend Michael Murphy's Statements as Hearsay

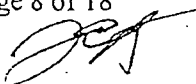
Applicant additionally alleges counsel was ineffective for failing to object to the testimony of Joan Hooks (hereafter "Hooks") at trial, who testified as to statements made by the Reverend Michael Murphy (hereafter "Murphy") directly following his encounter with the fleeing suspect. Hooks, who had been in the store at the time of the robbery, testified at trial that Murphy came into the store "very excited" directly after the robber fled, asking which way the robber had gone. (Trial Tr. p. 275, l. 12). Hooks went on to say Murphy ran outside after the robber, thereafter returning to the store "very excited" saying the robber had fled in a white car. (Trial Tr. p. 275, ll. 19 – 24). Tracey Anderson (hereafter "Anderson"), an employee of the Family Dollar working at the time of the robbery, also testified that Murphy followed the suspect out of the store, after which Murphy said the suspect "pulled out a pistol" and pointed it at him before fleeing in a car. (Trial Tr. p. 233, ll. 1 – 10). Anderson went on to say she gave police the description of suspect's car "basically based on what [Murphy]" said when he re-entered the store. (Trial Tr. p. 244, l. 23 – p. 245, l. 2). Applicant contends counsel failed to object to this as hearsay testimony and, therefore, was ineffective.

Applicant testified at the PCR hearing, and the record confirms, that Murphy did not testify at trial. Applicant also conceded that Murphy's absence at trial was a point raised by counsel in closing arguments. Specifically, according to the record counsel argued to the jury: "Who is Michael Murphy? Who is this guy? Where is he?... I can tell you one place where he wasn't. He wasn't on that witness stand." (Trial Tr. p. 585, ll. 1 – 11).



Counsel testified he decided to let the state introduce the statements of Murphy at trial through the other witnesses in an attempt to "punch holes" in the state's case against Applicant. Specifically, counsel said he and Secor developed a strategy in which they would allow the state to discuss Murphy, then make a point in closing arguments to question why Murphy hadn't appeared as a witness at trial. Counsel stated that, although Murphy was listed on the state's witness list, he already knew the state was unable to locate him as a witness at trial. In sum, counsel finished this point by saying he "thought it looked bad for the state" to get into Murphy's statements and presence at the scene of the robbery without then producing Murphy as a witness for the jury to see/hear. This strategy, counsel said, was confirmed when the jury sent a note out during deliberations asking where Murphy was.

Based on the testimony presented and the record, this Court finds counsel was not ineffective in this regard. First, counsel's decision to withhold objections to Murphy's statements at trial in an effort to discredit the state's case was a reasonable and valid trial strategy. "Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective." See Underwood v. State, 309 S.C. 560, 563, 425 S.E.2d 20, 22 (1992), citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). The strategy obviously inserted some doubt in the jury's minds concerning Murphy's absence at trial, as evidenced by their letter during deliberations asking where Murphy was. Therefore, this court finds counsel was not ineffective as the strategy used was well reasoned and thoroughly articulated by counsel at the PCR hearing. Further, in light of the overwhelming evidence of Applicant's guilt, this Court cannot find any "reasonable probability" that, but for counsel's failure to object to the testimony, the outcome of Applicant's trial would have been different. See Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994) (reasonable probability of a different result does not exist where there is



overwhelming evidence of guilt). Accordingly, this court finds no resulting prejudice from counsel's alleged failure.

Failure to Present Alibi Witnesses

Applicant contends counsel was ineffective for failing to present several family members' testimonies at trial that allegedly could have provided an alibi for Petitioner on the date and at the time of the crime. Applicant testified he was at his wife's home with his stepson at the time of the robbery, which could have been verified by several of his family members. Applicant said he advised counsel of this, but no witnesses were called at trial to testify to such.

Anita Knox ("Knox"), Applicant's fiancée since 2004, testified at the PCR hearing that, at the time of the robbery, she and Applicant were living together. Knox said the morning of the robbery, Applicant was at home with her until "about 8:15 or 8:20 am" at which time he left to go look for a job. She noted Applicant was driving a white Oldsmobile at the time, which was brought to him by "Mr. Andrews". Knox said her sister and son were living with her at the time. Knox went on to say she specifically remembers the day of the robbery because it was "the day her life changed", but on cross-examination was unable to even venture a guess as to what day of the week it had been. Thereafter, several witnesses in the audience at the PCR hearing identified themselves as being family members of Applicant who could also testify to the fact that Applicant was at Knox's house until 8:20 am on November 9, 2006. When asked what day of the week they were referring to as having "seen Applicant" at Knox's house, none of the alleged witnesses could testify as to the particular day.

Counsel testified he and Applicant discussed the alleged alibi strategy prior to trial and said that, ultimately, it was the unanimous decision of all three (counsel, Secor and Applicant) that it was not a good defense to present at trial. Counsel said there were several big problems

with presenting the purported alibi witnesses at trial and plainly noted that the alleged alibi Applicant wanted to present was entirely inconsistent with his other statements on how the morning progressed, as well as was not a true alibi in the sense that it left open the possibility that Applicant had committed the robbery. Counsel noted that Applicant had explained in their meetings that he was at the library at the time of the robbery and was carjacked by a "short, white male with red hair", and that was how the money recovered in his car after the high-speed chase had gotten there. Counsel said this story, which Applicant maintained throughout the course of his representation, was wholly inconsistent with any allegation that he was at Knox's home at the times testified to at the PCR hearing. In all, counsel said, Applicant's stories were inconsistent and did not support an alibi defense.

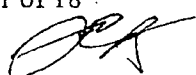
Based upon the record, the testimony at the PCR hearing, and a careful observation of the alleged witnesses, this court finds the current claim to be without merit. Of important note to this finding is this court's determination that neither Applicant, Knox, nor the several family members presented at the PCR hearing established any credibility with this court as to their alleged "recollections" of the day in question. This court gives no weight to those witnesses' testimonies as they are **wholly not credible**. However, this Court finds counsel's testimony to be **credible**, especially in saying he and Applicant collectively agreed not to present the alibi witnesses at trial because of the inconsistencies and issues such a defense could encounter under the factual circumstances. With this in mind, this Court finds counsel's performance to have been objectively reasonable and, therefore, not deficient.

Further, this Court finds any alleged deficiency in failing to present an alibi defense to have not resulted in prejudice. Because "alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it

possible for the accused to be the guilty person is no alibi at all." See State v. Robbins, 275 S.C. 373, 377, 271 S.E.2d 319, 321 (1980). Even assuming, *arguendo*, this Court believed the PCR witnesses, their testimony does not suffice as a *true* alibi as it leaves open the possibility that Applicant was both at Knox's house when he was alleged to have been *and* committed the robbery. Anderson testified at trial that her two employees, who were present at the time of the robbery, arrived at work between 8:45 and 9:00 am the morning of the robbery. (Trial Tr. p. 221, ll. 13 - 17). She went on to testify that the robbery itself occurred "between 9 and 9:10 or 9:15 am" that morning. (Trial Tr. p. 247, l. 12). Knox and the other PCR witnesses were only able to allegedly account for Applicant's whereabouts until roughly 8:20 am on the morning of the robbery. Applicant produced no further evidence to account for the remaining forty to fifty-five minutes between his departure from Knox's house and the robbery occurring, and counsel's credible testimony reflects Applicant's original story of the library carjacking entirely contradicts with the timeframe and facts set forth by Applicant's family at the PCR hearing.

While the record reflects the witnesses statements that they first saw a man approach the store at 7:45 or 8:00 am whom they thought may be the same person that subsequently robbed them, none of the witnesses were able to say with any certainty that such was the case or that the robber could **not** have been someone else. Testimony that makes it **less likely** that a defendant committed the crime is not an alibi and will not satisfy the prejudice prong of Strickland. See Walker v. State, 397 S.C. 226, 723 S.E.2d 610 (Ct. App. 2012).

Finally, counsel's presentation of the incomplete alibi set forth by Applicant would have done nothing to change the outcome at trial. Applicant was facing overwhelming evidence of guilt at trial that would have been sufficient to overcome the imperfect alibi. See Ford v. State, *supra*. Several items of note are as follows: Applicant was arrested following a high-speed chase

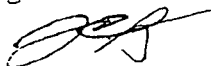


with police, during which a mask fell out of his pocket, as did numerous low currency dollar bills consistent with the bills stocked each morning at the Family Dollar; the mask recovered was identified by victims, as well as linked by DNA to Applicant; victims' identification of suspect's clothing matched Applicant's clothing exactly; and Applicant was identified by victim in a drive-by "show up". These pieces of evidence (particularly Applicant's matching DNA on the mask identified by victims) were sufficient to show Applicant was in fact at the robbery and would have overcome the alleged alibi put forth by Applicant at the PCR hearing. For all of the preceding reasons, this Court denies and dismisses this allegation.

Erroneous Advice Not to Testify At Trial

Applicant alleges counsel was ineffective for advising him not to take the witness stand in his defense at trial. Applicant alleged counsel told him it wasn't a good idea for Applicant to take the stand in his defense because the state had failed to carry its burden in proving Applicant's guilt, and counsel wanted to retain the opportunity to present the final closing argument to the jury by not introducing any evidence in his defense. Applicant went on to testify that counsel said there was "no way" Applicant was going to be convicted when the state rested its case in chief and, therefore, his testimony was unnecessary.

Counsel testified he advised Applicant not to testify because counsel "was concerned [Applicant's] testimony would not go well based on [their pretrial] discussions". Counsel said he felt very confident Applicant would be irreparably impeached by the state on cross-examination, and did not think Applicant's story about where he was at the time of the robbery was very convincing. Counsel noted he advised Applicant that, ultimately, it was solely Applicant's decision whether to testify and that Applicant made the voluntary and informed decision not to testify in the end. Secor testified he never heard counsel advise Applicant not to testify because



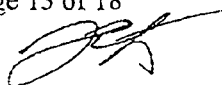
he "wasn't going to be convicted", and noted there was no need to have Applicant take the stand and be subjected to cross-examination as Applicant's statement to police was admitted at trial by the state, thereby putting his alleged story into evidence before the jury.

This court finds Applicant's statement of facts to be not credible, while conversely finding counsel and Secor's testimonies in this regard to be credible. Applicant was fully informed of his right to testify, including the fact that it was solely his decision whether to do so. He made the intelligent and voluntary decision not to take the witness stand in his defense after being fully and properly advised of the potential consequences of doing so by competent counsel. Therefore, this court finds no deficiency. Further, Applicant's alleged testimony would have been cumulative to his statement as introduced at trial. (Trial Tr. pp. 491, ll. 11 – p. 495, ll. 22). Finally, Applicant failed to present any testimony at the PCR hearing to convince this court that his testimony would have made any difference in the outcome at trial. Therefore, Applicant failed to meet his burden in proving prejudice as well. Accordingly, this allegation is without merit.

Insufficiency of the Evidence

Applicant set forth a vague allegation that there was insufficient evidence presented at trial to support his conviction as there was never a gun recovered from the robbery to satisfy the state's burden of proving he was armed with a deadly weapon at the time of the robbery. Applicant contends the police only introduced the handle of a hacksaw found in Applicant's car to show he allegedly represented he was armed with a deadly weapon at the time of the robbery.

Counsel agreed with Applicant's testimony in part, saying there in fact never was a gun recovered that linked Applicant to the robbery; however, he said, the state alleged Applicant used a hacksaw handle in his pocket, along with verbal threats to the victims, to sufficiently represent



that the was in fact armed with some type of weapon during the robbery, thereby satisfying the statute.

As an aside, this Court would agree with the state's argument at the PCR hearing that "insufficiency of the evidence" is not a cognizable claim for post-conviction relief. See S.C. Code § 17-27-20(a)(6) ("Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction."). Therefore, this allegation is without merit. Regardless, this Court denies the allegation on the merits as well based on the record and testimony presented. First, Applicant cannot prove resulting prejudice as the question of whether the representation of a weapon through use of a hacksaw blade and verbal threats was sufficient to support the conviction was the substance of the issue raised to the Court of Appeals on direct appeal. Specifically, in its opinion, the Court of Appeals stated:

On appeal, Portee contends the appearance of a bulge did not represent a deadly weapon, and there was no corroborative evidence accompanying the threat to kill that would show there was a gun in existence, or a representation of a gun in existence, during the robbery. He therefore contends there was insufficient evidence on the deadly weapon element such that he was entitled to a directed verdict on the armed robbery charge. We disagree.

This Court's review of the record comes to the same conclusion regarding the current PCR allegation. Under S.C. Code § 16-11-330(A), "a person who commits robbery while armed with a....deadly weapon or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object a person present during the commission of the robbery reasonably believed to be a deadly weapon....is guilty of a felony". Not only was a utility knife found in the pocket of the yellow jacket thrown down by Applicant while being chased by

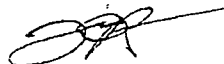
police (thereby providing direct evidence of a deadly weapon), but the record reflects the suspect threatened to kill the victims while keeping his hand on "a bulge" in his pocket which they reasonably believed to be a deadly weapon. Therefore, this improper PCR allegation, even if reviewed on its merit, fails to support the current claim. Accordingly, it is denied and dismissed.

Failure to Object to Solicitor's Comment in Closing Argument

While not specifically raised in the PCR application or otherwise testified to by Applicant at the PCR hearing, testimony was presented by counsel and Secor regarding comments made by the prosecuting solicitor in closing arguments that each witness said, in hindsight, they maybe should have objected to.

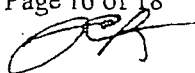
Specifically, counsel stated he now would likely object to the solicitor's statements that Applicant "is a coward" because he "put his hands on two innocent women...while disguised with a mask over his face". (Trial Tr. p. 542, ll. 16 – 21). Counsel stated that at the time, he didn't see that as a problem and chose not to pose an objection, but in trying a case now he probably would object to that type of commentary. Counsel agreed he has no way of knowing whether the jury considered or even remembered those comments in their deliberations, as well as the fact that a defendant is only guaranteed a "fair" trial, not a "perfect" trial, which the commentary likely did not affect. Secor testified he would also likely object to the use of the word "coward" in closing argument if trying a case now, but noted he was newly admitted to the Bar at the time of the trial and didn't really "know what [he] was doing".

This court finds counsel was not ineffective in this regard. Counsel plainly testified he didn't object to the statements at the time because he did not think they rose to a level of egregiousness to warrant an objection. While he openly stated he would probably object to that type of remark in closing now and that "in hindsight" he maybe should have, this court does not



evaluate an attorney's performance "in hindsight". "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, *supra* at 690, 104 S.Ct. at 2066. At the time, counsel did not believe the statements rose to an egregious enough level of impropriety to pose an objection which would draw the statements made back to the jury's attention. This court finds that evaluation to be objectively reasonable, especially in light of counsel's obvious desire to retain last closing argument. In keeping last closing argument, the defense often hopes a jury's memory of the state's version fades, a strategy which may be thwarted by an objection which points the jury's attention to a certain statement. Therefore, this Court finds no deficiency.

Further, this court finds no resulting prejudice. "Improper comments [in closing arguments] do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* Improper comments made in closing argument do not infect the trial with unfairness to the extent that the conviction is a denial of due process where there was ample evidence of guilt in the record to support the conviction. See State v. McFadden, 318 S.C. 404, 458 S.E.2d 61 (Ct. App. 1995). There is not only "ample" evidence in the record to support Applicant's conviction; rather, as stated by the trial judge in ruling on Applicant's post-trial motions, there was "overwhelming evidence of guilt" produced at trial to support the conviction. Therefore, the use of the word "coward" by the solicitor, even if improper, did not affect the outcome of Applicant's trial, nor would counsel's timely objection to



the comment have reasonably changed the outcome of the case. Accordingly, this allegation is denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise all additional allegations raised in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BML Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court notes Applicant must file and serve a notice of appeal within thirty (30) 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 PCR. Rule 71.1(g), SCRCF, provides that if the applicant wishes to seek appellate review, PCR



counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 29 day of Oct, 2012.



J. Ernest Kinard Jr.
Presiding Judge
Fifth Judicial Circuit

Camden, South Carolina.

DOCKET NO. 2007-GS-40-10684

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

JANUARY TERM 2007

91

THE STATE
vs.

JIMMY PORTEE

Indictment for

ARMED ROBBERY
SC Code: 16-11-330(A)
CDR Code: 0139
Class FEL-A(V)

WITNESSES

(S) INV. ISENHOWARD - RCSD

ARREST WARRANT NUMBER

1979745

ACTION OF GRAND JURY
TRUE BILL

James C. Lee
Foreperson of Grand Jury
Date: JAN 25 2007

VERDICT

Foreperson of Petit Jury
Date:

After being fully advised as to my legal rights, I hereby waive present and future rights to the Grand Jury.

Defendant

I hereby appear in my own presence and admit guilt to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

NOTED TRUE COPY
OFFICIAL FILE
C.C.C. P&G.S.
JAN 25 2007
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on January 24, 2007, the Grand Jurors of Richland County present upon their oath:

ARMED ROBBERY

That Jimmy Portee did in Richland County on or about November 9, 2006, commit robbery by feloniously taking from the person or presence of Tracey Anderson by means of force or intimidation goods or monies of Family Dollar such goods or monies being described as US Currency, with the intent to deprive the owner permanently of such property, while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by actions or words, that he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon. All in violation of SC Code of Laws § 16-11-330(A).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

RECEIVED
JAN 24 2007
CLERK OF COURT
RICHLAND COUNTY
SOUTH CAROLINA

Warren B. Giese
WARREN B. GIESE, SOLICITOR

WITNESSES

(S) INV. ISENHOWARD - RCSD

ARREST WARRANT NUMBER

1979748

ACTION OF GRAND JURY

TRUE BILL

James C. Lee

Foreperson of Grand Jury

Date:

JAN 25 2007

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2007-GS-40-10685

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

JANUARY TERM 2007

91

THE STATE
vs.

JIMMY PORTEE

Indictment for
ASSAULT AND BATTERY
OF A HIGH AND
AGGRAVATED NATURE
SC Code: 17-25-30 C/L
CDR Code: 0013
Class MIS/UNC

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

COPIES FILED TRUE COPY
ORIGINAL FILED
JAN 25 2007
C.C.C. PLS. AND G.S.
RICHLAND COUNTY
SOUTH CAROLINA

I hereby appear in my own proper person and plead guilty to the within indictment.

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

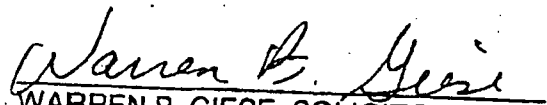
INDICTMENT

At a Court of General Sessions, convened on January 24, 2007, the Grand Jurors of Richland County present upon their oath:

ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE

That Jimmy Portee did in Richland County on or about November 9, 2006, commit an assault and battery upon the victim(s), Tracey Anderson, constituting an unlawful act of violent injury to the person of the said victim, accompanied by circumstances of aggravation, to wit: difference in the sexes. All in violation of the Common Law of South Carolina.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


WARREN B. GIESE, SOLICITOR

RECEIVED
JAN 24 2007
CLERK OF COURT
RICHLAND COUNTY
SOUTH CAROLINA

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

DEFENDANT
 RICHLAND COUNTY
 SOUTH CAROLINA
 C.C.C. PLS. AND G.S.
 OFFICIAL FILED
 TRUE COPY
 hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Defendant

Witness:

C.C.C. PLS. AND G.S.

DOCKET NO. 2007-GS-40-10686

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

JANUARY TERM 2007

91

THE STATE
 vs.

JIMMY PORTEE

Indictment for
 ASSAULT AND BATTERY
 OF A HIGH AND
 AGGRAVATED NATURE
 SC Code: 17-25-30 C/L
 CDR Code: 0013
 Class MIS/UNC

WITNESSES

(S) INV. ISENHOWARD - RCSD

ARREST WARRANT NUMBER

1979747

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
 Date: JAN 25 2007

VERDICT

Foreperson of Petit Jury
 Date:

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

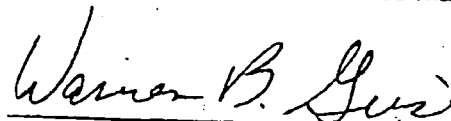
INDICTMENT

At a Court of General Sessions, convened on January 24, 2007, the Grand Jurors of Richland County present upon their oath:

ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE

That Jimmy Portee did in Richland County on or about November 9, 2006, commit an assault and battery upon the victim(s), Erica Wilson, constituting an unlawful act of violent injury to the person of the said victim, accompanied by circumstances of aggravation, to wit: difference in the sexes. All in violation of the Common Law of South Carolina.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


WARREN B. GIESE, SOLICITOR

ARREST WARRANT

1-979747

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

THE STATE

against: Jimmy Douglas Portee

RCSD 0611077809

Address:

29201-

Phone:

Sex: M

Race: SC

SSN: [REDACTED]

Height: 6' 2"

Weight: 176

DL #:

DL #:

Agency ORI #: 04000

Prosecuting Agency:

Prosecuting Officer:

Offense: Assault / Assault and battery of a high and aggravated nature (ABHAN)

Offense Code: 0013

Code/Ordinance Sec: C/L 17-25-0030

This warrant is **CERTIFIED FOR SERVICE** in the☐ County/ ☐ Municipality of

The accused is to be arrested and brought before me to be dealt with according to the law.

Date:

Signature of Judge

(L.S.)

RETURN

A copy of this arrest warrant was delivered to

defendant:

on

Jimmy Douglas Portee

O/L Miller

RETURN WARRANT TO:

Richland General Sessions

1701 Main Street

P O Box 192

Columbia, SC 29202

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

Personally appeared before me the affiant Kevin Isenhoward

being duly sworn deposes and says that defendant Jimmy Douglas Portee

did within this county and state on or about 11/09/2006

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of

in the following particulars:

DESCRIPTION OF OFFENSE: Assault / Assault and battery of a high and aggravated nature (ABHAN)

I further state that there is probable cause to believe that the defendant named above did the crime set forth and that probable cause is based on the following facts:

That on 11/09/2006 while at 7361 Gamer Ferry Rd in the Lykesland Magisterial District of Richland County, one Jimmy Portee did commit the crime of ABHAN in that he did with malice aforethought and with the intent to injure, grab the victim's hair and drag her to the cash register of the Family Dollar Store. The defendant threatened that he had a weapon and would kill the victim's. The defendant then robbed the store of US currency. Witness identified the defendant's vehicle and clothing. Deputies apprehended the defendant who was still in possession of the clothing, money, receipts and a mask. Affiant and others are witness to prove the same.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

Affiant's Address 5623 Two Notch Road

Columbia, SC 29223-

Affiant's Telephone (803)576-3000

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 11/09/2006

defendant Jimmy Douglas Portee

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Richland Bond Court

DESCRIPTION OF OFFENSE: Assault / Assault and battery of a high and aggravated nature (ABHAN)

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me

on 11/09/2006

Signature of Issuing Judge

Caroline W Streeter

Judge Code: 7027

Judge's Address 1400 Huger Street

Columbia, SC 29201-

Judge's Telephone (803)576-2341

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

Form Approved by
S.C. Attorney General
April 21, 2000
SC-2A-518

ORIGINAL

AFFIDAVIT

COPY

CERTIFIED

TRUE

TO THE

COURT

OF

SOUTH CAROLINA

COUNTY OF

RICHLAND

ON

11/09/2006

BY

Kevin Isenhoward

Affiant

Violating the criminal laws of the

State of South Carolina

in the following particulars:

DESCRIPTION OF OFFENSE: Assault / Assault and battery of a high and aggravated nature (ABHAN)

WITNESSES

(S) UNGER - RCSD

ARREST WARRANT NUMBER

36823DM

ACTION OF GRAND JURY

TRAILER

FEB 16 2007

Foreperson of Grand Jury
Date:

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2007-GS-4D-11829

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2007

91

THE STATE
vs.

JIMMY PORTEE

Indictment for

TRAFFIC/FAIL TO STOP FOR BLUE
LIGHT

SC Code: 56-5-750(b)(1)
CDR Code: 065
Class MIS-A

After being fully advised as to my legal rights, I hereby waive present and future rights to a trial by jury to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

FILED TRUE COPY
OF ORIGINAL FILED
JAN 17 2007
CLERK OF COURT
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

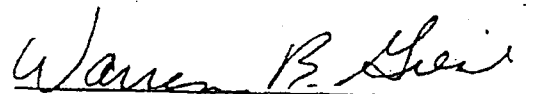
INDICTMENT

At a Court of General Sessions, convened on February 14, 2007, the
Grand Jurors of Richland County present upon their oath:

TRAFFIC/FAIL TO STOP FOR BLUE LIGHT

That Jimmy Portee did in Richland County on or about November 9, 2006,
unlawfully fail to stop while driving a motor vehicle on a road, street or highway of the
state for a law enforcement vehicle after being signaled so to by a duly constituted and
acting law enforcement officer, to wit: the Richland County Sheriff's Department, with a
blue light and/or siren all in violation of §56-5-750, Code of Laws of South Carolina,
(1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such
case made and provided.


WARREN B. GIESE, SOLICITOR

Form S-438
REV. 88

STATE OF SOUTH CAROLINA
UNIFORM TRAFFIC TICKET

CITY OR COUNTY OF Richland VERSUS
FIRST NAME Jamie MIDDLE NAME Danielle LAST NAME Porter
STREET AND NO. 1701 Main St CITY Columbia STATE SC

STATE LICENSED SC DRIVER'S LICENSE NO. 6655NP UTM. LIC. CLASS A
VEH. LIC. NO. 6655NP STATE SC MAKE OF VEH 1989 YEAR 89 COMM. VEH. HAZ. MT. AUTO TRUCK COMB. MOPED MTRCYCL OTHER

YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL OFFICER
NAME OF TRIAL OFFICER Barbara A. Smith STREET AND NO. 1701 Main St
CITY Columbia STATE SC ZIP CODE 29201

DATE OF TRIAL 11-9-06 TIME OF TRIAL 1:00 CITY Columbia STATE SC ZIP CODE 29201
VIOLATION Failure to stop for Blue Light Right of Way COURT APPEARANCE REQUIRED YES NO NO VIOLATION SECTION NO. 56-5-750

OWNER OF VEHICLE Porter, Jamie DATE OF ARREST 11-09-06
ADDRESS OF OWNER 1701 Main St DATE OF VIOLATION 09-06

NAME OF ARRESTING OFFICER Wheeler, D.T. RANK 1-02
DESCRIPTION OF ACCUSED 3m 14-3 64 154 120 160 125 COUNTY Richland NUMBER 90
DATE REC'D 11-09-06 BY Cooper BADGE # 1237 DISTRICT 1

CASE BEFORE MAGISTRATE ☒ JURY COURT ☐ CIRCUIT COURT ☐ FAMILY COURT ☐ FEDERAL COURT ☐
NAME OF TRIAL OFFICER Barbara A. Smith TYPE OF VIOLATION 0925 WEATHER Clear
DEFENDANT DID NOT APPEAR ☐ APPEARED ☒ DISTANCE IN FEET FROM INTERSECTION 0125

DISPOSITION Guilty AND Blot
FORFEITED BOND ☐ PLED NOLO CONTENDERE ☐
TRIAL BY: TRIAL OFFICER ☐ JURY ☐ Atty. R.

VERDICT OF TRIAL IF ANY Guilty DATE OF TRIAL IF ANY 11-09-06 MILES 48 CITY Columbia
FINE 3 years - concurrent AMT COLLECTED 0.00 AMT SUSPENDED 0.00 HWY. NO. US CITY Columbia
COMMITTED TO GSC Pending B.A. LEVEL 0.00

CERTIFIED CORRECT Barbara A. Smith DATE 11-09-06 36823 DM
TRIAL OFFICER'S COPY 28

3000 CS/SB
11-9-06 Streater

CERTIFIED TRUE COPY
OF ORIGINAL FILED
Jocetta L. P. Smith
C.C.C.P.G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA

COUNTY OF Richland
STATE VS.Jimmy Portee

AKA:

Race: B Sex: M Age: _____

DOB: _____ SS#: _____

Address: _____

City, State, Zip Columbia, SC 29201

DL# _____ SID# _____

IN THE COURT OF GENERAL SESSIONS

07 INDICTMENT/CASE#: GS-40-10684AW#: 1979745Date of Offense: 11-9-06S.C. Code §: 16-11-330(A)CDR Code #: 0111319☐ CASE RESTORED
☐ SENTENCE SHEET
☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Armed Robberyin violation of § 16-11-330(A) of the S.C. Code of Laws, bearing CDR Code # 0111319
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC §17-25-45 w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (Defendant initial)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

WITEST:

Anna Shipley X Jimmy Portee
Solicitor Defendant Attorney for DefendantWHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of LWOP (days/months/years) or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine:

\$14-1-206 (Assessments 107.5%) \$ _____

\$14-1-211(A)(1) (Conv. Surcharge) \$100 \$ _____

\$14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

\$56-5-2995 (DUI Assessment) \$12 \$ _____

\$35.13 (Public Def/Prob) \$500 \$ _____

\$73.3, 1B TP (Law Enforce. Funding) \$25 \$ _____

\$33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____

\$50-21-114(BUI Breath Test Fee) \$50 \$ _____

\$56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) \$ _____

TOTAL \$ _____

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Public Defender Fund

PRESIDING JUDGE _____

Judge Code: _____

Sentence Date: _____

RICHLAND COUNTY
SOUTH CAROLINA

Clerk of Court, Deputy Clerk

Court Reporter: J. Williams