

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Newberry County
D. Garrison Hill, Circuit Court Judge

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JUL 18 2014

Opinion No. 5207 (S.C. Ct. App. filed 3/19/2014)
09-CP-36-00107

S.C. Supreme Court

TED E. ABNEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Ted E. Abney, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-164906

ON WRIT OF CERTIORARI

Appeal From Newberry County
D. Garrison Hill, Circuit Court Judge

Opinion No. 5207
Heard November 13, 2013 – Filed March 19, 2014

AFFIRMED

Appellate Defender Kathrine H. Hudgins, of Columbia,
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General John W. McIntosh, Assistant Deputy Attorney
General Salley W. Elliott, and Assistant Attorney
General J. Rutledge Johnson, all of Columbia, for
Respondent.

KONDUROS, J.: In this post-conviction relief (PCR) action, Ted E. Abney claims his trial counsel's assistance was rendered ineffective when counsel did not request a jury instruction on the lesser included offense of strong arm robbery. He further contends he was prejudiced by his attorney's decision because he was convicted of armed robbery. We affirm.

FACTS/PROCEDURAL HISTORY

The victim testified that on October 30, 2004, she parked outside the Citgo Station in Prosperity, South Carolina. She went into the store, purchased items, and returned to her car. She put her purchases on the passenger seat and walked around to the driver's side. As she opened the driver's side door, Abney came up behind her and leaned over her so that she could not get away. He pushed something into her ribs and told her "don't move, don't say nothing or I will kill you." She testified at trial she believed he had a gun. He then took her purse and drove away in a white van. Abney turned himself in to the Newberry police a few days after the incident. He admitted taking the purse but insisted he never had a weapon. No weapon was ever recovered.

Abney was charged with armed robbery and possession of a firearm or knife during the commission of a violent crime. During his trial, the court granted Abney's motion for directed verdict on the possession of a firearm or knife during the commission of a violent crime charge. The armed robbery charge went to the jury. Neither Abney nor the State asked for a jury charge on the lesser included offense of strong arm robbery. Abney was found guilty of armed robbery and sentenced to twenty-six years' imprisonment. He appealed his sentence to this court, which dismissed the appeal.¹ On March 12, 2009, he filed an application for PCR. On May 24, 2010, the PCR court issued an order denying relief and dismissing the application. Abney then filed a petition for writ of certiorari. This court granted the petition. This appeal followed.

STANDARD OF REVIEW

"In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision." *Holden v. State*, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011). A petitioner for PCR bears the burden of establishing he is entitled to relief. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). An appellate court "will uphold the findings of the PCR

¹ *State v. Abney*, No. 2008-UP-184 (S.C. Ct. App. filed Mar. 17, 2008).

court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law." *Id.* Appellate courts give great deference to PCR courts' findings of fact and conclusions of law. *Holden*, 393 S.C. at 573, 713 S.E.2d at 615.

LAW/ANALYSIS

Abney argues trial counsel was ineffective because he did not request a jury instruction on the lesser included offense of strong arm robbery. He believes this decision fell below an objectively reasonable standard. He asserts he was prejudiced by this decision because he would have been convicted of strong arm robbery instead of armed robbery if the jury received the instruction. We disagree.

The South Carolina Code defines armed robbery as the commission of a:

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.*

S.C. Code Ann. § 16-11-330 (2003) (emphasis added). Strong arm robbery is defined under common law "as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear." *State v. Rosemond*, 356 S.C. 426, 430, 589 S.E.2d 757, 758 (2003).

The trial court is required to charge a jury on a lesser included offense "if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed." *State v. Gourdine*, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). However, the trial court should refuse to charge on a lesser included offense when there is no evidence that the defendant committed the lesser rather than the greater offense. *State v. Smith*, 315 S.C. 547, 549, 446 S.E.2d 411, 413 (1994).

"In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case." *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356

(2006). Under the second prong, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). "[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690.

Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). When counsel articulates a strategy, it is measured under an objective standard of reasonableness. *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 691.

South Carolina has not considered the specific situation presented by this case. However, other states have determined whether failing to ask for a jury charge on a lesser included offense is a valid trial strategy. Alabama, Georgia, and Utah all found refusing to ask for a charge on a lesser included offense could be a reasonable trial strategy. See *Harbin v. State*, 14 So. 3d 898, 909 (Ala. Crim. App. 2008), *Ojemuyiwa v. State*; 647 S.E.2d 598, 605 (Ga. Ct. App. 2007); *Havard v. State*, 928 So. 2d 771, 791 (Miss. 2006). The Supreme Court of Mississippi stated that "[t]rial counsel's decision not to submit lesser offense instructions, while it turned out to be unsuccessful, was appropriate trial strategy, and thus beyond the realm of serious consideration on a claim of ineffective assistance of counsel." *Havard*, 928 So. 2d at 791.

We find evidence supported the PCR court's decision. Abney does not prove trial counsel failed to meet an objectively reasonable standard. Trial counsel was able to articulate a valid reason for employing his strategy. He testified that during a break in the trial, he and Abney felt they were winning the case and he would be found not guilty of armed robbery.² Therefore, the trial counsel did not feel it was in his client's best interests to ask for a jury instruction on strong arm robbery.

² The dissent believes trial counsel did not understand the elements of armed robbery; however, we find pursuant to *State v. Muldrow*, 348 S.C. 264, 268, 559

We, therefore, do not reach whether Abney was prejudiced by his trial counsel's actions.

CONCLUSION

Because the record contains evidence supporting the PCR court's finding and Abney failed to meet his burden of proof, the PCR court's decision is

AFFIRMED.

PIEPER, J., concurring.

I concur with the majority opinion that the evidence supports the PCR court's determination Abney did not prove trial counsel rendered ineffective assistance by failing to request a jury instruction on the lesser included offense of strong arm robbery. I write separately to further discuss the decision-making authority between a criminal defendant and his lawyer.

Certain decisions are considered fundamental and personal to a criminal defendant, and thus, are waivable only by the defendant. *United States v. Teague*, 953 F.2d 1525, 1531 (11th Cir. 1992). For example, a defendant has the ultimate authority to decide "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Conversely, decisions primarily involving trial strategy and tactics may be made by trial counsel. *Sexton v. French*, 163 F.3d 874, 885 (4th Cir. 1998). Examples of such decisions include "which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined." *People v. Hambrick*, 96 A.D.3d 972, 973 (N.Y. App. Div. 2012). What motions to file and "whether to put on evidence so as to preserve the final word in closing argument" are also strategic and tactical decisions to be made by trial counsel. *Wright v. State*, 745 S.E.2d 866, 868 (Ga. Ct. App. 2013).

The 1980 American Bar Association's (ABA) Standards for Criminal Practice commentary provided the decision to ask for a lesser included offense was a right reserved for the defendant, explaining:

S.E.2d 847, 849 (2002), and the record, trial counsel had an accurate understanding of the law.

[It is] important in a jury trial for the defense lawyer to consult fully with the accused about any lesser included offenses the trial court may be willing to submit to the jury. Indeed, because this decision is so important as well as so similar to the defendant's decision about the charges to which to plead, the defendant should be the one to decide whether to seek submission to the jury of lesser included offenses. For instance, in a murder prosecution, the defendant, rather than the defense attorney, should determine whether the court should be asked to submit to the jury the lesser included offense of manslaughter.

People v. Colville, 979 N.E.2d 1125, 1129 (N.Y. 2012) (emphasis omitted) (quoting ABA Standards for Criminal Justice, Defense Function, § 4-5.2 (2d ed. 1980)).

In *People v. Brocksmith*, 642 N.E.2d 1230, 1232 (Ill. 1994), the Illinois Supreme Court, relying in part on the 1980 ABA commentary, found:

We believe that the decision to tender a lesser included offense is analogous to the decision of what plea to enter, and that the two decisions should be treated the same. Because it is [the] defendant's decision whether to initially plead guilty to a lesser charge, it should also be [the] defendant's decision to submit an instruction on a lesser charge at the conclusion of the evidence. In both instances the decisions directly relate to the potential loss of liberty on an initially uncharged offense.

However, in 1993, the commentary to the third edition of the ABA standards was amended to omit the portion of the commentary providing the decision to request a lesser included offense is a right reserved for the defendant. ABA Standards for Criminal Justice, Prosecution Function and Defense Function, § 4-5.2 (3d ed. 1993). The 1993 ABA commentary now provides in its entirety: "It is also important in a jury trial for defense counsel to consult fully with the accused about any lesser included offenses the trial court may be willing to submit to the jury." ABA Standards for Criminal Justice, Prosecution Function and Defense Function, § 4-5.2 (3d ed. 1993).

After the 1993 ABA commentary revision, courts addressing the issue have determined the decision to request a lesser included offense rests with trial counsel, not the defendant. For example, in *Arko v. People*, 183 P.3d 555, 558 (Colo. 2008), the Colorado Supreme Court was asked to determine whether the decision to request a lesser included offense is a tactical decision to be made by trial counsel or the defendant. The court explained some trial decisions, such as whether to plea, waive a jury trial, or testify, "implicate inherently personal rights which would call into question the fundamental fairness of the trial if made by anyone other than the defendant." *Id.* The court noted "these rights are so important to the integrity of the legal process that the decision to waive them may require a trial court to determine that the defendant has made a voluntary, knowing, and intelligent decision." *Id.* However, the *Arko* decision recognized "[o]ther decisions are regarded as strategic or tactical in nature, and final authority to make such decisions is reserved to defense counsel." *Id.* The court determined "[t]he decision whether a lesser offense instruction should be requested is distinguishable from the decision to plead guilty," reasoning:

When a defendant pleads guilty, he waives all rights attendant to a jury trial. On the other hand, a defendant retains all of his trial rights when he requests that a jury consider a lesser offense instruction. He also retains the opportunity to advocate for outright acquittal. Thus, this decision is not analogous to the decision whether to plead guilty. Because the defendant retains these fundamental trial rights, we conclude that the decision to request a lesser offense instruction is strategic and tactical in nature, and is therefore reserved for defense counsel. This tactical decision requires sophisticated training and skill which attorneys possess and defendants do not

Id. at 558-59 (internal citation omitted). Like *Arko*, other jurisdictions addressing the issue have also decided the decision to request instructions on lesser included offenses is a matter of strategy and tactics for trial counsel. See *United States v. Estrada-Fernandez*, 150 F.3d 491, 496 (5th Cir. 1998) ("In deciding whether to request a lesser-included-offense instruction, defense counsel must make a strategic choice: giving the instruction may decrease the chance that the jury will convict for the greater offense, but it also may decrease the chance of an outright acquittal."); *Cannon v. Mullin*, 383 F.3d 1152, 1167 (10th Cir. 2004) (rejecting a claim of ineffective assistance based on the change in the ABA commentary because "[w]hether to argue a lesser-included offense is a matter to be decided by

counsel after consultation with the defendant"); *Simeon v. State*, 90 P.3d 181, 184 (Alaska Ct. App. 2004) (relying in part on the change in the ABA commentary to hold the decision to request a lesser offense instruction rests with trial counsel); *Mathre v. State*, 619 N.W.2d 627, 630 (N.D. 2000) (holding that as a matter of trial strategy, trial counsel has the authority to decline requesting an instruction "on lesser included offenses and thereby take an all or nothing risk that the jury will not convict of the greater offense"); *Colville*, 979 N.E.2d at 1129-30 (discussing the 1980 ABA commentary, the 1993 ABA commentary, and the law in various jurisdictions in determining the decision to request a lesser included offense rests with defense counsel); *State v. Grier*, 246 P.3d 1260, 1268 (Wash. 2011) (indicating that "the decision to exclude or include lesser included offense instructions is a decision that requires input from both the defendant and [defense] counsel but ultimately rests with defense counsel"); *State v. Eckert*, 553 N.W.2d 539, 544 (Wis. Ct. App. 1996) (noting that the proposition contained within the 1980 ABA commentary does not contain any citation to authority and observing that the decision whether to request lesser included instruction is "a complicated one involving legal expertise and trial strategy").

Although the ABA guidelines are not binding upon the appellate courts of our state, I agree with the foregoing authorities that the decision to request a lesser included offense instruction is a tactical decision to be made by defense counsel, not the defendant. The reasoning that the decision to request a lesser included offense is a matter of strategy requiring the legal expertise of trial counsel is compelling. See *Van Alstine v. State*, 426 S.E.2d 360, 363 (Ga. 1993) (rejecting the 1980 ABA commentary and noting the decision to request a lesser included offense "is often based on legal complexities only the most sophisticated client could comprehend, not unlike the tactical decisions involved regarding the assertion of technical defenses"). While trial counsel should consult with his client, the final decision on strategy belongs to counsel.

Furthermore, in determining whether the decision to request a lesser included offense rests with trial counsel, I have also considered whether the trial court has an absolute duty to sua sponte charge a lesser included offense when not requested by the parties. I believe this analysis is necessary because if the trial court does have this absolute duty absent any request by counsel, I would not hold the decision may be made by counsel. It is often recognized in our state that if there is any evidence from which the jury could infer the defendant committed the lesser rather than the greater offense, a trial court must charge a lesser included offense. *State v. White*, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004). A trial court has a general duty to charge the law that is applicable to the facts. This duty requires the

trial court to consider any lesser included charges the court determines are warranted by the facts. This general duty does not, however, amount to an absolute requirement that the trial court sua sponte charge a lesser included offense. In *State v. Parker*, our supreme court found the trial court did not err by failing to charge the jury on a lesser included offense because such charge was not requested; "there was no duty on the court to sua sponte provide the charge"; and the evidence did not warrant the charge. 315 S.C. 230, 236-37, 433 S.E.2d 831, 834 (1993). Other jurisdictions have likewise determined the trial court does not have an absolute duty to charge a lesser included offense. See *People v. Romero*, 694 P.2d 1256, 1269 (Colo. 1985) (explaining the trial court is "not obligated to instruct on a lesser offense unless either the prosecution or the defense requests such instruction" and "[i]n the absence of a request by the defendant, it may reasonably be assumed that he elected to take his chance on an outright acquittal or conviction of the principal charge rather than to provide the jury with an opportunity to convict on a lesser offense"); *State v. Kobel*, 927 S.W.2d 455, 460 (Mo. Ct. App. 1996) (holding a trial court does not err by failing to sua sponte charge the jury on a lesser included offense when it is not requested by defense counsel, reasoning defense counsel sometimes consciously decides "not to request an instruction on a lesser included offense for strategic purposes"). Based upon the policies and reasoning previously discussed, I would find the trial court is only absolutely required to charge a lesser included offense if the facts support the charge and counsel requests the charge. Here, even though the evidence warranted the lesser included offense, because neither the State nor defense counsel requested the charge, the trial court was not required to instruct the jury on strong arm robbery.

Having determined the decision to request a lesser included offense is a strategic decision to be made ultimately by trial counsel after consultation with the defendant, I agree with the denial of Abney's PCR application. Here, trial counsel's testimony at the PCR hearing supports the PCR court's finding that trial counsel consulted with Abney in deciding not to request the lesser included offense. Evidence in the record supports the PCR court's finding that trial counsel was not ineffective by failing to request the lesser included offense of strong arm robbery because it was a valid strategic decision under the facts of this case. Therefore, I concur in the decision to affirm the PCR court's decision.

FEW, C.J., dissenting.

I agree with the majority that the decision not to request a jury charge on a lesser-included offense *can* be a valid trial strategy. In this case, however, counsel's

decision not to request a charge on strong armed robbery was ineffective under the Sixth Amendment because the decision was based on a critical misunderstanding of the law. Further, counsel's deficient performance prejudiced Abney because it deprived him of the chance to avoid being convicted of armed robbery. For these reasons, I respectfully dissent.

The victim's testimony provided the only evidence of how the theft occurred.³ The victim testified Abney "pushed into my ribs and he said 'don't move, don't say nothing, I will kill you.'" She described him as "leaning over me and . . . talking into my left ear." She testified he threatened her again, and "this time he was much more angry and much more forceful and he pushed harder on me and he said . . . 'shut the f*** up or I will kill you.'" She also stated, "I was so afraid that he was going to shoot me that I was afraid to hit the panic button [on my car key] or do anything except just stand there." Abney grabbed her purse, threw it into his vehicle, and sped off. As he sped off, she reached for the purse, "holding on [to the car] for about seven or eight feet," but she "finally let go" and he got away. She testified she "did not see" the object Abney pushed into her ribs and "he [n]ever refer[red] to having a gun," but, "It was a gun." There was no other evidence presented as to how the theft occurred.

In his closing argument, counsel conceded Abney used violence and fear to accomplish the theft when he stated, "she was standing in the open door of her car about to get into the SUV. Mr. Abney steps out of his car and he immediately grabs her and pushes into her. And he makes . . . these terrible threats to her. He says 'stay here or I will kill you.'" Counsel testified at the PCR hearing that his "trial strategy" was to "admit he was guilty of the charge but . . . that it was an unarmed purse snatching," and "all through the trial . . . I'm telling the jury he's guilty of . . . [strong armed] robbery, my closing, my opening." Under these facts, the theft that counsel admitted Abney committed could only have been robbery. *See State v. Mitchell*, 382 S.C. 1, 4-5, 675 S.E.2d 435, 437 (2009) (stating "robbery . . . is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence *by violence or by putting such person in fear*" (emphasis added) (internal quotations omitted)).

As to whether the robbery was armed robbery, counsel correctly pointed out in his closing argument that the State failed to prove Abney possessed a gun during the robbery. In fact, the trial court directed a verdict in Abney's favor on the charge of

³ Abney did not testify at trial.

possession of a firearm because the court found the State produced no evidence Abney possessed a gun. Counsel argued, therefore, the robbery could not have been armed robbery based on the actual use of a gun.

However, the law allows the State to prove armed robbery without proving possession of a gun if the State proves the defendant committed robbery "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." S.C. Code Ann. § 16-11-330(A) (2003). Counsel understood the State could convict Abney of armed robbery without proving he possessed a gun, but misunderstood what the law required to accomplish that. Counsel stated in his closing argument, "The judge is going to charge you [that] unless [Abney] alleges he ha[d] a deadly weapon[,] threats do not make the crime armed robbery." The trial court recognized counsel's misunderstanding and interrupted at this point, stating, "Counsel, wait a minute now. I am going to have to step in on that. It says by action or words." Counsel then engaged the court in an argument in front of the jury, thereby clearly demonstrating his misunderstanding of the armed robbery statute. Counsel stated, "I take the position, your honor, that the words have to allege the representation of a weapon and I am going to cite the case I brought." To this, the court responded, "I am going to charge exactly what the law says and I am pointing out to you, it says 'either by action or words.'" Counsel then stated, still in the presence of the jury, "Yes, sir. And I am going to ask the judge to charge the jury also that the mere use of the words alone does not make it armed robbery. And at the end of my closing argument I would ask for an argument, just a closing charges motion."

Under subsection 16-11-330(A), the State may convict a defendant of armed robbery by proving he "alleg[ed], *either by action or words*, he was armed." *Id.* (emphasis added). Therefore, it is not necessary, as counsel incorrectly believed, for the defendant to represent that he possessed a gun with words. Rather, as the trial court pointed out to counsel when it interrupted his closing, "action" may suffice as a representation of a weapon. Thus, the premise of counsel's belief that Abney could not be guilty of armed robbery was wrong. Counsel's misunderstanding could have been corrected by reading the statute or cases interpreting the statute,⁴ or *listening* when the trial court corrected him. Counsel

⁴ The case was tried in May of 2005. In 2002, the supreme court interpreted subsection 16-11-330(A), stating,

gambled his client's opportunity to avoid an armed robbery conviction on the premise that he could be convicted of armed robbery only if he said he had a gun, when the law clearly allowed him to be convicted of armed robbery for merely acting like he had a gun. The error was critical considering the facts of this case because Abney did not say he had a gun, but his actions led the victim to believe he had one. No supposedly strategic decision passes Sixth Amendment scrutiny when it is based on such an obvious misunderstanding of the law. *See Watson v. State*, 370 S.C. 68, 74, 634 S.E.2d 642, 645 (2006) (Pleicones, J., dissenting) (stating a valid strategic decision cannot be "grounded in a fundamental misunderstanding of the law"); *Gallman v. State*, 307 S.C. 273, 277, 414 S.E.2d 780, 782 (1992) (finding a strategic decision invalid where "an error of law was involved").

The State relies on counsel's testimony that he consulted with Abney, who agreed to the strategy. The argument misses the point of the Sixth Amendment. A criminal defendant is entitled to rely on the advice and expertise of his lawyer—not vice versa. By failing to understand the law on which the State sought to convict his client, and by acting on that misunderstanding, counsel deprived his client of the chance to be convicted of a lesser-included offense for a crime the client admitted to committing. Thus, I would find counsel rendered deficient performance under the Sixth Amendment.

The more difficult question is whether counsel's error prejudiced Abney. To prove prejudice under *Strickland*, "the PCR applicant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *McHam v. State*, 404 S.C. 465, 474-75, 746 S.E.2d 41, 46 (2013) (internal quotations omitted). In this case, Abney must

[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) (emphasis added).

demonstrate a reasonable probability the jury would have found him guilty of strong armed robbery if the trial court had charged it.

In light of the evidence that Abney stole the victim's purse and counsel's admission to the jury that Abney was "guilty of strong armed robbery," it was impossible for Abney to be "not guilty" of robbery. The State presented convincing evidence that Abney "alleged" the use of a deadly weapon by the act of pushing into the victim's side and telling her to shut up or he would kill her. However, to convict Abney of armed robbery, the State was also required to prove the victim "reasonably believed" Abney had "a deadly weapon." § 16-11-330(A). In this regard, it is important to remember the victim's testimony:

Q: Did you ever see a weapon in Mr. Abney's hand?

A: I did not see it.

Q: Did you see any sort of knife?

A: No.

Q: Firearm?

A: No.

Q: Anything?

A: No.

Our experience in criminal trials teaches us that no result is certain. This is particularly true when it comes to factual findings regarding mental state, such as whether the victim's belief was "reasonable." The standard for prejudice is not whether Abney *would* have been convicted of the lesser offense, but whether there is a reasonable probability he would. *See McHam*, 404 S.C. at 474-75, 746 S.E.2d at 46. If one juror stood firm on his or her position that the State failed to prove beyond a reasonable doubt that the victim's belief that Abney had a gun was reasonable, that would have been enough to prevent a conviction for armed robbery, and could have been enough for the jury to find him guilty of the lesser charge.

Counsel's all or nothing strategy depended on the jury applying the State's burden of proof in a purely technical fashion and finding an admitted robber not guilty. Such optimism is refreshing, but it has no place at the defense table of a criminal trial when the defendant's right to the effective assistance of counsel is at stake. Counsel apparently reflected on his strategy later, and at the PCR hearing admitted it "was an objectively wrong decision to make when you're telling the jury he's guilty of [strong armed] robbery but then not give them the option." The same practical reflection before or during trial would have informed counsel what a juror

told him afterwards—"[the jury] didn't think that the defendant was actually armed, 'but we aren't letting a creep like that just go home either.'"

I would find counsel's performance was deficient and prejudiced Abney. I would reverse the conviction and remand to the court of general sessions for a new trial.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

TED E. ABNEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appeal from Newberry County

D. Garrison Hill, Circuit Court Judge

Opinion No. 5207

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Ted E. Abney petitions the Court for rehearing. Counsel respectfully submits that the majority opinions overlook the fact that under the specific facts of this case, where the sole issue to be decided by the jury was whether Petitioner was guilty of the greater or lesser offense and Petitioner admitted guilt of the lesser offense, trial counsel's all or nothing strategy can not be a valid trial strategy. Additionally as noted by the dissent, the record reflects that trial counsel misunderstood what the law required in order for the jury to find Petitioner guilty of armed robbery. Any purported trial strategy based on a

misunderstanding of the law can not meet the objectively reasonable standard required under the Sixth Amendment.

The jury found Petitioner guilty of a robbery that occurred on October 30, 2004, at the Citgo gas station in Prosperity. Traci Roosen testified that she went inside the store and purchased a twelve pack of beer. (App. p. 49, lines 12-25). When she came back to her car the Petitioner approached her and stole her purse. (App. pp. 49-51). According to the Ms. Roosen's testimony at trial, Petitioner told her not to say anything or he would kill her. (App. p. 50, lines 3-5). Ms. Roosen testified that Petitioner took his right hand and kept pushing it in her ribs. (App. p. 50, lines 8-10). She admitted that she never saw a gun but believed that he had a gun. (App. p. 54, lines 13-25). He never told her that he had a gun. (App. p. 55, lines 5-6). After Petitioner took the purse, he threw it into a van and quickly left the gas station. (App. p. 50, lines 21 – p. 51, lines 1-7). Ms. Roosen identified Petitioner from a photo lineup. A few days later petitioner contacted law enforcement and turned himself in. (App. pp 98-99). Petitioner gave a statement to law enforcement admitting that he took the purse but denying that he had a weapon. (App. p. 103, lines 2-9). The police never recovered a weapon. (App. p. 123, lines 1-5).

In opening statements trial counsel told the jury that petitioner admitted that he took the victim's pocketbook, but denied that he ever had a weapon. (App. 40 – 44). Again, during closing arguments, trial counsel argued that Petitioner robbed the victim, but did not possess a weapon while doing so. (App. 137 – 145). Trial counsel, however, never requested the lesser included offense of strong armed robbery. Counsel's failure to request the lesser included offense of strong armed robbery **after** informing the jury that petitioner was guilty of strong arm robbery constitutes ineffective assistance of counsel. Petitioner was prejudiced by the error because he was convicted of armed robbery, the only choice given to the jury, rather than strong armed robbery and sentenced

to 26 years rather than a maximum of 15 years for strong armed robbery. S.C. Code §§16-11-325, 330.

Petitioner was entitled to the lesser included offense of strong armed robbery. A trial judge “is required to charge jury on lesser included offense if there is evidence from which it could be inferred that defendant committed lesser offense rather than greater.” State v. Drafts, 288 S.C. 30, 31, 340 S.E.2d 784, 785 (1986). See also State v. Tyson, 283 S.C. 375, 323 S.E.2d 770 (1984). “Due process requires that a lesser included offense be charged when the evidence warrants it but only if the evidence would permit a jury rationally to find the defendant guilty of the lesser offense.” State v. Tyndall, 2336, S.C. 8, 21, 518 S.E.2d 278, 285 (Ct. App. 1999); United States Constitution, Amendment 14. See also Hopper v. Evans, 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982); Keeble v. United States, 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973).

S.C. Code §16-11-330 provides that a person who commits robbery “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 armed robbery. In State v. Mitchell, 382 S.C. 1, 4-5, 675 S.E.2d 435, 437 (2009) the South Carolina Supreme Court wrote, “Included in armed robbery is the lesser included offense of robbery, which is defined as ‘the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear.’ State v. Al-Amin, 353 S.C. 405, 424, 578 S.E.2d 32, 42 (Ct.App.2003)”. There is evidence from which it could be inferred that defendant committed robbery or strong armed robbery rather than armed robbery. Petitioner told the police that he did not have a weapon, a weapon was never recovered, he never said he had a weapon and the victim never saw a weapon. The question of whether petitioner alleged by words or actions that he was

armed while using a representation of a deadly weapon or any object which a person would reasonably believe to be a deadly weapon was a factual question to be resolved by the jury. If counsel had requested the lesser included charge and the judge had refused to charge strong armed robbery, the judge would have committed reversible error. Trial counsel was ineffective for failing to make the request. See Pelzer v. State, 381 S.C. 217, 672 S.E.2d 790 (Ct. App. 2009).

At the PCR hearing, trial counsel testified that he did not request the lesser included instruction because both he and petitioner believed they were winning the case:

In the beginning and even during trial, through trial we wanted to plead guilty to common-law robbery, even assuming he was going to take a maximum sentence. I tell you, at the end of the State's case we thought we were winning the case. I thought as the lawyer that we were winning the case. Mr. Abney thought we were winning the case. A lot of the courtroom personnel talked to us.

There was a concern, you know, even after he snatched the purse, the lady chased him and he got into a car, started the car and drove away while she testified he was holding the pocketbook in one hand and pushing her away with the other hand. She clearly had the opportunity to see weapon at that point and still didn't. And we thought we were winning the case.

Ted (Petitioner) and I had discussed the possibility, after the directed verdict motion, of not putting in a lesser included, Ted and I specifically talked about, "Do you want a lesser included charge on common law robbery?" We thought, we both felt we were winning the case and so we didn't ask for a lesser included charge for common law robbery.

(App. 213 – 214).

Trial counsel testified that after the jury reached its verdict and his client sentenced, he had lunch with the deputies and the sheriff at a local restaurant. One of the jurors indicated that although petitioner was not actually armed, they were not going to let "a creep like that just go home either." (App. 215, lines 10-16). During the PCR hearing trial counsel testified:

I will say in hindsight I believe that was legally wrong for me to do, not legally wrong, but it was clearly a tactical decision, we made a conscious choice not to ask the judge to charge common law robbery. The judge had already indicated he wasn't going to charge common law robbery anyway in chambers. It doesn't appear on the record because he made his decision in chambers, but all through the trial it was clear, when you read the transcript, I'm telling the jury he's guilty of purse snatching, which is common robbery, my closing, my opening. My problem in hindsight now is when we didn't charge common law robbery that was a trial decision we made, I think in hindsight that was an objectively wrong decision to make when you're telling the jury he's guilty of common law robbery but then not give them the option.

(App. p. 214, lines 8-25). Trial counsel later clarified that if he had requested the lesser included charge, the judge would have instructed the jury on strong armed robbery. (App. p. 216, lines 11-21). When asked if the charge on the strong armed robbery would have had a result on the outcome of the case, trial counsel testified, "I think it is to an even greater than probable because he would have been found guilty on common law robbery and would have been sentenced to fifteen years under common law. I don't have any doubt in my mind that would be the likely result." (App. p. 218, lines 4-16).

Trial counsel rendered ineffective assistance of counsel by not requesting the lesser included jury instruction of strong armed robbery because, had he done so, the judge would have given the charge. The evidence supported giving the charge, and petitioner would have been convicted of an offense that carries up to 15 years instead of armed robbery, which carries 10 to 30 years. See Beck v. Alabama, 447 U.S. 625 (1980).

Trial counsel admitted that his initial trial strategy was to admit guilt on the strong armed robbery and challenge the State's failure to produce evidence of a weapon.. (App. p. 209, lines 23 – p. 210, lines 1-16). Trial counsel stated, however, that the trial strategy changed and, "We went for broke, basically, and lost. I think the attorney at the end of the day has to make the decision to

include it [the lesser included offense].” (App. p. 214, lines 25 – p.215, lines 1-2). Trial counsel admitted that the decision not to ask for the lesser included offense of strong armed robbery “ . . . [w]as inconsistent with my original strategy in talking to the jury.” (App. p. 215, lines 8-9).

In Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) the South Carolina Supreme Court wrote:

To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. *Id.*

Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Where counsel articulates a strategy, it is measured under an objective standard of reasonableness. Roseboro, *supra*.

In Ingle the Court found that it was objectively unreasonable for counsel to question a witness without first determining if her testimony supported the theory of defense. In Roseboro the Court found that counsel's strategy in failing to request an alibi charge was invalid under an objective standard of reasonableness. In the present case counsel's failure to request a charge on the lesser included charge of strong armed robbery and employ a strategy of “all or nothing” was invalid under an objective standard of reasonableness where such strategy was inconsistent with counsel's initial strategy to admit guilt of strong armed robbery and counsel informed the jury that his client was guilty of strong armed robbery. In the order of dismissal the PCR judge wrote:

The Applicant, in consultation with his counsel, made a strategic choice not to request the jury be charged with the lesser included offense of strong armed robbery. The choice was made based on sound and experienced professional judgment, and was valid under the circumstances.

(App. 238). There is no probative evidence to support the PCR judge's finding that trial counsel's failure to request a charge on strong armed robbery was a valid strategic choice after admitting guilt of strong armed robbery. If counsel had employed a strategy that petitioner was not guilty of any type of robbery, armed or strong armed, then an "all or nothing" strategy may have been reasonable. Under the facts of this case, the decision was objectively unreasonable.

The fact that counsel consulted with petitioner about the decision not to request the charge on strong armed robbery does not excuse the deficiency. The decision whether to request a lesser included offense lies with the attorney, and not the client. A defendant has "the ultimate authority" to determine "whether to plead guilty, waive a jury, testified in her his or her own behalf, or take an appeal." Jones v. Barnes, 463 U.S. 745, 751 (1983); Wainwright v. Sykes, 433 U.S. 72, 93, n. 1 (1977) (Burger, C.J., concurring). It is objectively unreasonable for an attorney to raise a particular defense, and then not request a jury instruction that allows the jury to consider that defense. See Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995).

The majority opinion, in support of finding that the failure to request a jury charge on the lesser included offense was valid trial strategy, cites cases from Alabama, Georgia and Utah. All three of the decisions relied upon by the majority are distinguished from the present case. In Harbin v. State, 14 So.3d 898 (Ala. Crim. App. 2008) the issue before the Court was whether the trial judge erred in *sua sponte* instructing the jury on heat of passion manslaughter as a lesser included offense of murder. In Harbin the Court wrote, "Here, the parties do not dispute, and the record clearly reflects, that heat-of-passion manslaughter is a lesser-included offense of murder as charged in

the indictment in this case and that there was evidence presented at the trial supporting a charge on heat-of-passion manslaughter. Thus, the only question presented in this case is whether a trial court may instruct the jury on a lesser-included offense that is supported by the evidence in the face of the defendant's desire to pursue an all-or-nothing strategy with the jury. We hold that it may." Harbin, 14 So.3d at 902. The Harbin case simply stands for the proposition that the trial judge in the present case would not have erred in *sua sponte* instructing the jury on the lesser included offense of strong armed robbery.

In Ojemuyiwa v. State, 647 S.E.2d 598 (Ga.Ct.App. 2007) the Court found that trial counsel's decision not to request a jury charge on the lesser included offense of misdemeanor obstruction was a valid trial strategy. In Ojemuyiwa, however, the defendant denied that she was guilty of both felony and the lesser included misdemeanor obstruction. In the present case, Petitioner admitted guilt of the lesser included charge of strong armed robbery and trial counsel told the jury in both the opening statement, (App. pp. 40-44) and the closing argument, (App. pp. 142-143) that Petitioner was guilty of strong armed robbery. In Ojemuyiwa, in finding the decision not to request the lesser included a valid trial strategy, the Court wrote, ". . .[C]ounsel testified that based on conversations with Ojemuyiwa during plea negotiations during which she rejected the offer of probation, he did not think it was wise to offer the jury a lesser alternative upon which to convict Ojemuyiwa." 647 S.E.2d at 605. In contrast, in the present case trial counsel testified during the PCR hearing that Petitioner was willing to plead guilty to common law robbery. (App. p. 213, lines 2-13).

In Havard v. State, 928 So. 2d 771 (Miss. 2006), the Mississippi Supreme Court found that trial counsel's decision not to request the lesser included offense of murder or manslaughter when Havard was charged with capital murder based on the underlying felony of sexual battery

was an appropriate trial strategy. Havard denied the underlying felony of sexual battery but told police he accidentally dropped the child against the commode after bathing her, shook her in a panic, and then rubbed her down with lavender lotion before putting her to bed. The present case presents a starkly different factual situation in which Petitioner gave a statement to law enforcement admitting that he took the purse but denying that he had a weapon. (App. p. 103, lines 2-9). Petitioner did not deny committing the robbery. Petitioner only denied that he was armed during the robbery, leaving the factual determination of whether Petitioner's acts constituted armed robbery or strong arm robbery to the jury.

As reflected by the trial judge's denial of the directed verdict motion as to armed robbery but granting a verdict of acquittal for possession of a firearm or knife during the commission of a violent crime, there is some evidence, however scant, from which the jury could find Petitioner guilty of armed robbery although the State failed to prove that Petitioner was actually armed. According to the witness at trial, Petitioner told her not to say anything or he would kill her. (App. p. 50, lines 3-5). The witness testified that Petitioner took his right hand and kept pushing it in her ribs. (App. p. 50, lines 8-10). She admitted that she never saw a gun but believed that he had a gun. (App. p. 54, lines 13-25). Petitioner never told her that he had a gun. (App. p. 55, lines 5-6). This evidence combined with the fact that Petitioner and trial counsel admitted guilt of strong armed robbery renders counsel's failure to request a charge on strong armed robbery deficient. Under the facts of this case, aside from any misunderstanding of the law by trial counsel, the failure to request the lesser included offense of strong arm robbery can not be deemed a valid trial strategy.

Trial counsel failed to request the lesser included offense because, as testified by trial counsel at the PCR hearing, "Ted [Petitioner] and I had discussed the possibility, after the directed verdict motion, of not putting in a lesser included, Ted and I specifically talked about, "Do you want

a lesser included charge on common law robbery?" We thought, we both felt we were winning the case and so we didn't ask for a lesser included charge for common law robbery." (App. p. 214, lines 1-7). Petitioner testified at the PCR hearing that he did not understand that he could be convicted of armed robbery even if he did not have a weapon. (App. pp. 193-197). Trial counsel's belief that he was "winning" was based on the fact that trial counsel believed that the jury could not find Petitioner guilty unless they found that he said he had a deadly weapon. As noted by the dissent:

Counsel understood the State could convict Abney of armed robbery without proving he possessed a gun, but misunderstood what the law required to accomplish that. Counsel stated in his closing argument, "The judge is going to charge you [that] unless [Abney] alleges he ha[d] a deadly weapon[,] threats do not make the crime armed robbery." The trial court recognized counsel's misunderstanding and interrupted at this point, stating, "Counsel, wait a minute now. I am going to have to step in on that. It says by action or words." Counsel then engaged the court in an argument in front of the jury, thereby clearly demonstrating his misunderstanding of the armed robbery statute. Counsel stated, "I take the position, your honor, that the words have to allege the representation of a weapon and I am going to cite the case I brought." To this, the court responded, "I am going to charge exactly what the law says and I am pointing out to you, it says 'either by action or words.'" Counsel then stated, still in the presence of the jury, "Yes, sir. And I am going to ask the judge to charge the jury also that the mere use of the words alone does not make it armed robbery. And at the end of my closing argument I would ask for an argument, just a closing charges motion."

State v. Abney, Op. No. 5207 (S.C.Ct.App. filed March 19, 2014). (App. p. 139, line 12 – p. 140, lines 1-6).

Trial counsel's misunderstanding of the law is further demonstrated when he objected to the judge's charge to the jury. (App. pp. 156 – 158). Trial counsel argued:

Your Honor, as a Court's Exhibit introduce the case of State v. Muldrow which again my request for the judge to charge words alone are not sufficient to establish a representation of a deadly weapon for purposes of the armed robbery statute which allows a finding of armed robbery when the robber alleged, when the robbery alleged he is armed with a deadly weapon either by actions or word while using a representation of a deadly weapon to establish armed robbery offense. Under this provision the State had to show evidence corroborating an allegation of being armed either by words or the use of a physical representation of a deadly weapon.

(App. p. 157, lines 1-12). Counsel misinterprets State v. Muldrow. In State v. Muldrow, 348 S.C. 264, 267-268, 559 S.E.2d 847, 849 (2002) the South Carolina Supreme Court wrote:

Under § 16-11-330(A), the 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. See State v. Jones, 342 S.C. 248, 536 S.E.2d 396 (Ct.App.2000). The second prong of this statute was added by amendment in 1996.

Under the first prong of § 16-11-330(A), the presence of a weapon may be inferred from circumstantial evidence. See State v. Williams, 266 S.C. 325, 223 S.E.2d 38 (1976). We have never had occasion, however, to consider whether words alone are sufficient to establish the element of a deadly weapon. Other courts have held words unaccompanied by any corroborating action are not sufficient. We concur with this general rule and hold words alone are not sufficient under the first prong of the statute. (footnote and internal citations omitted).

Trial counsel failed to recognize that the present case is not a “words alone” case like Muldrow. Counsel failed to recognize that under the **second** prong (Muldrow addressed the first prong) a jury could find that Petitioner’s **actions** met the requirement for armed robbery. It is precisely this failure to recognize the danger that Petitioner could be convicted of armed robbery that renders trial counsel’s failure to request the lesser included offense deficient. As noted by the dissent, “No supposedly strategic decision passes Sixth Amendment scrutiny when it is based on such an obvious misunderstanding of the law. See Watson v. State, 370 S.C. 68, 74, 634 S.E.2d 642, 645 (2006) (Pleicones, J., dissenting) (stating a valid strategic decision cannot be “grounded in a fundamental misunderstanding of the law”); Gallman v. State, 307 S.C. 273, 277, 414 S.E.2d 780, 782 (1992) (finding a strategic decision invalid where ‘an error of law was involved’).” State v. Abney, Op. No. 5207 (S.C.Ct.App. filed March 19, 2014).

Trial counsel was ineffective in failing to request a charge on strong armed robbery. The all or nothing strategy was objectively unreasonable where counsel admitted guilt on strong armed robbery, there was evidence, although weak, of armed robbery and counsel misunderstood the law of armed robbery. Petitioner was prejudiced by the deficient performance: There is a reasonable probability that if the jury had been instructed on the law of strong armed robbery, the jury would have returned a verdict of guilty of strong armed robbery rather than armed robbery and petitioner would have faced a maximum sentence of 15 years rather than 30 years. Based on the above argument, counsel respectfully requests rehearing.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

This 3rd day of April, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County
D. Garrison Hill, Circuit Court Judge

TED E. ABNEY,

PETITIONER,

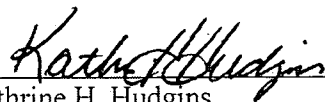
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

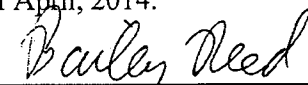
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon J. Rutledge Johnson, Esquire, this 3rd day of April, 2014.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 3rd day
of April, 2014.


_____(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.

The South Carolina Court of Appeals

Ted E. Abney, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-164906

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

John Cannon, Jr. C.J.
Daniel G. Pieper J.
U. Ke J.

Columbia, South Carolina

cc:

Kathrine Haggard Hudgins, Esquire
James Rutledge Johnson, Esquire
The Honorable D. Garrison Hill

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OFFICE OF
APPELLATE DEFENSE

FILED

April 24, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County

D. Garrison Hill, Circuit Court Judge

RECEIVED

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S.C. Supreme Court

TED E. ABNEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2010-164906

APPENDIX

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COURT OF GENERAL SESSION

COUNTY OF NEWBERRY

)

2005-GS-36-43

STATE OF SOUTH CAROLINA

)

VS.

)

TRANSCRIPT OF RECORD.

)

TED E. ABNEY

)

DEFENDANT

)

MAY 17, 2005
NEWBERRY, SOUTH CAROLINA

B E F O R E:

HONORABLE PAUL M. BURCH, JUDGE.

A P P E A R A N C E S:

JACK HAMMACK, ASSISTANT SOLICITOR
ATTORNEY FOR THE STATE

CHARLES VERNER, PUBLIC DEFENDER
ATTORNEY FOR THE DEFENDANT

JOY E. HOLSTON
OFFICIAL COURT REPORTER

I N D E X O F W I T N E S S E S

(IC) - DENOTES IN CAMERA
(DW) - DENOTES DEFENSE WITNESS
(SW) - DENOTES STATE'S WITNESS

(SW) WESLEY BOLAND (JACKSON V. DENNO)

DIRECT EXAMINATION BY MR. HAMMACK: 14

CROSS-EXAMINATION BY MR. VERNER: 20

(SW) ROBERT DENNIS (JACKSON V. DENNO)

DIRECT EXAMINATION BY MR. HAMMACK: 25

CROSS-EXAMINATION BY MR. VERNER: 30

(SW) ROY PASCAL

DIRECT EXAMINATION BY MR. HAMMACK: 44

CROSS-EXAMINATION BY MR. VERNER: 47

(SW) TRACI ROOSEN

DIRECT EXAMINATION BY MR. HAMMACK: 49

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(SW) JAMES HARMON

DIRECT EXAMINATION BY MR. HAMMACK: 67

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MAY 17, 2005

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JURY SELECTION

CASE NO.: 04GS3643

JUDGE: BURCH

PL./STATE: State

ATTORNEY: JACK HAMMACK

DEFENDANT: Ted Abney

ATTORNEY Charles Verner

REPORTER: JOE HEDSTON

	JUROR NAME	SEX	RACE	COURT	<u>State</u> PLAINT.	DEF.	ACCEPT	
63	<u>Diana Kinard</u>	F	W		✓	✓	✓	①
10	<u>Traci Booknight</u>	F	W		✓	X	-	-
87	<u>Robert Reynolds</u>	M	W		✓	✓	✓	②
66	<u>Earl Zeitzberg</u>	M	W		✓	✓	✓	③
112	<u>Ann Wicker</u>	F	W		✓	✓	✓	④
131	<u>Donald Layton</u>	M	W	foreperson	✓	✓	✓	⑤
74	<u>Stacie Martini</u>	F	W		✓	✓	✓	⑥
19	<u>Ellen Buttner</u>	F	W		✓	✓	✓	⑦
30	<u>William Cunningham</u>	M	W		✓	✓	✓	⑧
135	<u>Kathy Yarbrough</u>	F	W		✓	✓	✓	⑨
103	<u>Dorothy Tolbert</u>	F	W		✓	✓	✓	⑩
49	<u>Danny Graham</u>	M	W		✓	X	-	-
35	<u>Robert Eckstein</u>	M	W		X	-	-	-
90	<u>Justin Ruff</u>	M	W		X	-	-	-
86	<u>Andrea Real</u>	F	W		✓	✓	✓	⑪
118	<u>Earl Worthy, Jr.</u>	M	W		✓	✓	✓	⑫

JURY SELECTION

JUDGE: *Burch*

ATTORNEY: Jack Hammack

ATTORNEY Charles W. Wain

JUROR NAME	SEX	RACE	COURT	~~PLAINT.~~	DEF.	ACCEPT
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Altman

104 Telescopium FW

✓

✓

✓

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124 William Brier NW

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✓

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EXHIBITSSTATE'S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE #</u>
1	TED ABNEY SKETCH		X	47
2	RIGHTS FORM		X	104
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DEFENDANT'S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	
1	STORE SKETCH		X	74
2	PHOTO		X	86
3	PHOTO		X	86

COURT'S EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	
1	RIGHTS FORM	X		33
2	VOLUNTARY STATEMENT	X		33
3	WESTLAW CASE	X		158

1 THE COURT: MR. BAILIFF, ARE ALL THE JURORS BACK IN
2 THE COURTROOM?

3 BAILIFF: YES SIR, I CHECKED OUT THERE AND THEY ARE
4 ALL UP HERE.

5 THE COURT: THANK YOU, SIR. SOLICITOR, YOU MAY CALL
6 YOUR FIRST CASE FOR TRIAL.

7 MR. HAMMACK: YOUR HONOR, THE STATE WOULD CALL
8 INDICTMENT 04-GS-36-43, CHARGING TED EDWARD ABNEY WITH
9 ARMED ROBBERY AND POSSESSION OF A FIREARM OR KNIFE DURING
10 THE COMMISSION OF A VIOLENT CRIME.

11 THE COURT: LADIES AND GENTLEMEN OF THE PETIT JURY
12 PANEL. IF I COULD HAVE YOUR ATTENTION, WE ARE ABOUT TO
13 COMMENCE IN THE TRIAL OF THE CASE ENTITLED THE STATE OF
14 SOUTH CAROLINA VERSUS TED EDWARD ABNEY, CHARGED IN THE
15 BILL OF THE INDICTMENT BY THE GRAND JURY OF NEWBERRY
16 COUNTY WITH THE OFFENSE OF ARMED ROBBERY AND POSSESSION OF
17 A FIREARM OR KNIFE DURING THE COMMISSION OF A VIOLENT
18 CRIME. THE DEFENDANT IS PRESENT IN COURT REPRESENTED BY
19 MR. VERNER. MR. ABNEY, AT THIS TIME I NEED YOU TO STAND
20 AND FACE THE JURY PANEL FOR VOIR DIRE PURPOSES. THANK
21 YOU, SIR. YOU MAY BE SEATED. ARE ANY OF THE PETIT JURY
22 PANEL RELATED BY BLOOD OR CONNECTED BY MARRIAGE WITH THE
23 DEFENDANT, TED EDWARD ABNEY. IF SO WOULD YOU PLEASE STAND
24 AT THIS TIME.

25 (THERE WAS NO RESPONSE.)

1 MR. VERNER: MAY I APPROACH SIDEBAR, YOUR HONOR?

2 THE COURT: YES, SIR.

3 (WHEREUPON, A BENCH CONFERENCE WAS HELD IN THE
4 PRESENCE OF THE JURY BUT OUT OF THE HEARING OF THE
5 JURY.)

6 THE COURT: NOW, I AM GOING TO POSE ANOTHER QUESTION
7 ON WITNESSES. IF THE WITNESSES ARE IN COURT, IF YOU ARE
8 SEATED, IF YOU WILL STAND WHEN I CALL YOUR NAME OR IF YOU
9 ARE ALREADY STANDING IF YOU WOULD RAISE YOUR RIGHT HAND
10 AND BE RECOGNIZED. LADIES AND GENTLEMEN OF THE JURY, SOME
11 OF THE WITNESSES MAY NOT BE PRESENT. ALL RIGHT, ANY
12 MEMBER OF THE PETIT JURY PANEL RELATED BY BLOOD OR
13 CONNECTED BY MARRIAGE WITH ANY OF THE FOLLOWING
14 INDIVIDUALS. BEN CHAPMAN WITH THE NEWBERRY SHERIFFS
15 DEPARTMENT, WESLEY BOLAND WITH THE SHERIFFS DEPARTMENT,
16 ROBERT DENNIS WITH THE SHERIFFS DEPARTMENT, ROY PASCAL
17 WITH THE STATE LAW ENFORCEMENT DIVISION, TRACI ROOSEN,
18 JAMES HARMON, MELVIN GALLMAN, BILLY HILLER, JESSE L.
19 GALLMAN, STACIE GALLMAN, SHIRLEY JACKSON, ASHLEY WILSON.
20 IF SO, I NEED YOU TO STAND AT THIS TIME. YES, MA'AM.

21 JUROR: I AM RELATED TO WESLEY BOLAND.

22 THE COURT: WHAT IS YOUR NAME, PLEASE.

23 JUROR: TRACI BOUKNIGHT.

24 THE COURT: MS. BOUKNIGHT, WESLEY BOLAND?

25 JUROR: YES, SIR.

1 THE COURT: WHAT IS THAT RELATIONSHIP?

2 JUROR: HE IS MY COUSIN.

3 THE COURT: FIRST, SECOND?

4 JUROR: SECOND.

5 THE COURT: SECOND?

6 JUROR: YES, SIR.

7 THE COURT: YES, SIR.

8 JUROR: BEN CHAPMAN AND WAY ON DOWN THE LINE.

9 THE COURT: WHAT IS YOUR NAME?

10 JUROR: DAN GRAHAM.

11 THE COURT: SO, NOT FIRST COUSINS?

12 JUROR: NO, SIR.

13 THE COURT: I MAY COME BACK TO YA'LL IN JUST A FEW
14 MINUTES. YOU MAY BE SEATED AT THIS TIME. THANK YOU. ALL
15 RIGHT, LADIES AND GENTLEMEN, I AM GOING TO TAKE A LOOK AT
16 THE INDICTMENT, THE ALLEGATIONS. IT APPEARS THAT
17 ALLEGATIONS ALLEGED THAT THESE OFFENSES OCCURRED IN
18 NEWBERRY COUNTY ON OR ABOUT THE 30TH DAY OF OCTOBER OF
19 2004, THE VICTIM BEING TRACI ROOSEN. IS THERE ANY MEMBER
20 OF THE PETIT JURY PANEL FORMED OR EXPRESSED AN OPINION AS
21 TO THE GUILT OR INNOCENCE OF THE DEFENDANT. IF SO PLEASE
22 STAND AT THIS TIME BUT DON'T MAKE ANY COMMENT.

23 (THERE WAS NO RESPONSE.)

24 THE COURT: ARE ANY MEMBERS OF THE PETIT JURY PANEL
25 CONSCIOUS OF ANY INTEREST, ANY BIASED OR ANY PREJUDICE FOR

1 OR AGAINST THE DEFENDANT. IF SO PLEASE STAND.

2 (NO RESPONSE.)

3 THE COURT: ANY MEMBER OF THE PETIT JURY PANEL
4 PRESENTLY REPRESENTED OR HAVE BEEN REPRESENTED IN THE PAST
5 BY THE SOLICITORS OFFICE OR BY THE PUBLIC DEFENDERS
6 OFFICE. IF SO, WE NEED YOU TO STAND AT THIS TIME.

7 (NO RESPONSE.)

8 THE COURT: I ASKED YOU, EACH MEMBER OF THE PETIT
9 JURY PANEL, IF YOU CAN GIVE THE STATE AND THE DEFENDANT,
10 TED EDWARD ABNEY, A FAIR AND IMPARTIAL TRIAL. IF NOT AND
11 PLEASE STAND AT THIS TIME AND DON'T MAKE ANY COMMENT.

12 (NO RESPONSE.)

13 THE COURT: ALL RIGHT, TWO JURORS, MS. BOUKNIGHT AND
14 MR. GRAHAM, WOULD YA'LL STEP UP ONE AT A TIME, PLEASE.
15 AND COUNSEL, YA'LL MAY APPROACH.

16 (WHEREUPON, A BENCH CONFERENCE WAS HELD IN THE
17 PRESENCE OF THE JURY BUT OUT OF THE HEARING OF THE
18 JURY WITH TWO JURORS.)

19 THE COURT: ANY OTHER INQUIRES FROM THE STATE?

20 MR. HAMMACK: NONE, YOUR HONOR.

21 THE COURT: FROM THE DEFENSE.

22 MR. VERNER: NO, YOUR HONOR. IF ANYBODY HAS GOT ANY
23 BUSINESS DEALINGS OR SOCIAL CONTACTS WITH THE SHERIFFS
24 DEPARTMENT, YOUR HONOR.

25 THE COURT: I WILL POSE ANOTHER QUESTION. DOES

1 ANYONE ON THE PANEL HAVE ANY BUSINESS, SOCIAL, BUSINESS
2 RELATIONSHIP WITH ANY OF THE WITNESSES I CALLED AT THE
3 SHERIFFS DEPARTMENT, WITH THE SOLICITORS OFFICE, THE
4 PUBLIC DEFENDERS OFFICE OR THE DEFENDANT, TED EDWARD
5 ABNEY. IF SO WOULD YOU STAND AT THIS TIME. YOUR NAME,
6 PLEASE.

7 JUROR: DOUG DERRICK.

8 THE COURT: AND WHAT RELATIONSHIP?

9 JUROR: WESLEY BOLAND IS MY SON'S BASEBALL COACH.

10 THE COURT: BASEBALL COACH, THANK YOU, SIR. YES,
11 MA'AM.

12 JUROR: MILDRED GALLMAN AND TED WAS MY NEIGHBOR.

13 THE COURT: THANK YOU, MS. GALLMAN. YES, MA'AM.

14 JUROR: SHIRLEY JACKSON, SHE IS CURRENTLY MY
15 BEAUTICIAN.

16 THE COURT: YOUR BEAUTICIAN?

17 JUROR: YES.

18 THE COURT: AND YOUR NAME, PLEASE?

19 JUROR: TONYA LYLES.

20 THE COURT: THANK YOU. YOUR NAME, PLEASE.

21 JUROR: JOYCE BISHOP. AND CHARLES VERNER IS A GOOD
22 FRIEND OF MY SON'S.

23 THE COURT: THANK YOU. ANY FURTHER INQUIRES?

24 MR. VERNER: NONE FROM THE DEFENDANT.

25 MR. HAMMACK: NONE FROM THE STATE.

1 THE COURT: ALL RIGHT, IT APPEARS IN OUR CODE OF LAWS
2 FOR IN THIS PARTICULAR CASE THE STATE WILL HAVE FIVE
3 STRIKES AND THE DEFENDANT WILL HAVE 10 STRIKES.

4 MR. HAMMACK: YES, SIR.

5 THE COURT: LET'S SEAT TWO ALTERNATES. THE STATE
6 STRIKES ONE PER ALTERNATE AND THE DEFENDANT STRIKES GET
7 TWO PER ALTERNATE. ALL RIGHT, MADAME CLERK.

8 (WHEREUPON, THE JURY WAS IMPANELED AT APPROXIMATELY
9 11:45 A.M., LOCATED BEHIND INDEX.)

10 THE COURT: ALL RIGHT, ANY MOTIONS FROM THE JURY
11 SELECTION?

12 MR. HAMMACK: NONE FROM THE STATE.

13 MR. VERNER: NO, YOUR HONOR.

14 THE COURT: LADIES AND GENTLEMEN THAT ARE SEATED ON
15 THE PRESENT JURY, I AM GOING TO RELEASE YOU AT THIS TIME
16 FOR LUNCH. WE HAVE SOME MATTERS OF LAW THAT WE HAVE GOT
17 TO TAKE UP. I WILL TELL YOU SORT OF LATER ON BEFORE WE
18 BEGIN THE TRIAL, YOU WILL BE THE TRIER OF FACTS AND I AM
19 THE JUDGE OF THE LAW. I HAVE SOME OTHER SCHEDULED MATTERS
20 THAT HAVE GOT TO BE TAKEN CARE OF BEFORE WE CAN COMMENCE
21 THIS TRIAL. GO AHEAD TO LUNCH AND BE BACK IN THE JURY
22 ROOM AT 2:30. BEFORE I LET YOU GO, DO NOT DISCUSS THIS
23 CASE WITH ANYONE, DO NOT DISCUSS THIS CASE AMONGST
24 YOURSELVES. SHOULD SOMEONE TRY TO APPROACH YOU AND
25 DISCUSS THIS CASE DO NOT DISCUSS IT WITH THEM AND LET ME

1 KNOW OF THAT CONTACT IMMEDIATELY. EVERYBODY ELSE WILL
2 REMAIN SEATED WHILE THE JURY PANEL DEPARTS FOR LUNCH. THE
3 BAILIFF WILL SHOW YOU WHERE TO REPORT AT 2:30. THANK YOU.

4 (WHEREUPON, THE JURY WAS EXCUSED FOR A LUNCH BREAK.)

5 THE COURT: FOR THE JURORS THAT ARE REMAINED ON THE
6 PANEL, MAKE SURE YOU HAVE THE CARD BEFORE YOU LEAVE, WE
7 NEED YOU TO CALL IN BETWEEN 6:00 AND 7:00 O'CLOCK THIS
8 EVENING. YOU WILL GET AN UPDATE AT THIS TIME. MOST
9 LIKELY WE WILL HAVE YOU CALL IN AT A LATER TIME. WE DO
10 NEED FOR YOU TO REPORT IN OR CALL THAT NUMBER BETWEEN 6:00
11 AND 7:00 THIS EVENING. I WANT TO THANK YOU FOR BEING
12 WILLING TO SERVE ON THE JURY AND THANK YOU FOR YOU COMING.
13 WE WILL IN TOUCH WITH YOU BY PHONE. NOW, EVERYBODY ELSE
14 REMAIN SEATED IN THE COURTROOM WHILE THE PANEL IS EXCUSED.

15 (WHEREUPON, THE JURY PANEL WAS EXCUSED FROM OPEN
16 COURT.)

17 THE COURT: ALL RIGHT, SOLICITOR, MOTIONS?

18 MR. HAMMACK: YOUR HONOR, MR. ABNEY, WE WOULD SEEK TO
19 INTRODUCE INTO EVIDENCE AT TRIAL, A JACKSON VERSUS DENNO
20 HEARING IN REFERENCE.

21 MR. VERNER: I DO HAVE A MOTION IN LIMINE, YOUR
22 HONOR, AND A MORE OF AN ADVISORY MOTION IN LIMINE. THE
23 FIRST WOULD BE MY CLIENT, UNDER THE RULES, HAS NO, AS I
24 SEE IT, IMPEACHABLE RECORD. HE DOES HAVE A CRACK COCAINE
25 CONVICTION ABOUT 12 YEARS AGO, YOUR HONOR. AND CERTAINLY

1 I DON'T THINK IT COMES IN UNDER THE RULES, UNDER THE, BOTH
2 403, THE PREJUDICIAL EFFECT. I THINK THE RULE, ITSELF,
3 DOES NOT ANTICIPATE A CONVICTION MORE THAN 10 YEARS OF
4 BEING USED FOR IMPEACHMENT. AND FOR THAT REASON, YOUR
5 HONOR, JUST SO WE ARE CLEAR, I DON'T NEED A RULING ON THAT
6 BUT I WOULD SUGGEST THAT VIGOROUSLY. THERE ARE SOME
7 STATEMENTS THAT MY CLIENT WAS USING CRACK COCAINE AT THE
8 TIME OF THIS INCIDENT, YOUR HONOR. UNDER RULE 403,
9 PREJUDICIAL EFFECT AND TO THE EFFECT THAT HIS CHARACTER
10 AND POSSIBLY LEADING TO IMPROPER SPECULATION BY THE JURY,
11 YOUR HONOR, I WOULD MOVE TO STRIKE ANY REFERENCE IN HIS
12 STATEMENT TO THE USE OF CRACK COCAINE WHICH I THINK IT IS
13 PRIMARILY WHERE IT WOULD COME IN IN HIS OWN STATEMENT, THE
14 MOTION IN LIMINE, YOUR HONOR. AND THEN, OF COURSE, I HAVE
15 GOT THE JACKSON V. DENNO.

16 THE COURT: SOLICITOR.

17 MR. HAMMACK: YOUR HONOR, I BELIEVE IT WOULD BE
18 RELEVANT TO INCLUDE HIS OWN STATEMENT THAT HE WAS DRINKING
19 AND SMOKING CRACK COCAINE THE NIGHT OF THE ROBBERY. HE
20 OBVIOUSLY, IT WOULD BE THE STATE'S OPINION THAT HE WAS
21 TRYING TO EXPLAIN THE WAY HIS ROBBERY TO LAW ENFORCEMENT
22 BY EXPLAINING TO THEM HE WAS ON CRACK COCAINE, HE WAS
23 DRINKING. HE MADE SEVERAL STATEMENTS TO LAW ENFORCEMENT
24 USING CRACK COCAINE. IN HIS OWN WRITTEN STATEMENT HE
25 ADMITS TO USING CRACK COCAINE THE NIGHT OF THE ROBBERY

1 WHICH HE WAS INTERCONNECTED TO THE ROBBERY IN THIS CASE
2 DUE TO THE ADMISSION HE WAS USING IT THAT NIGHT JUST PRIOR
3 TO THE ROBBERY OR PRIOR TO THE ROBBERY AND HAD BEEN
4 DRINKING HEAVILY, IT SHOULD BE ADMITTED INTO EVIDENCE.

5 THE COURT: I WILL HEAR, IF I SEE A PROBLEM I WILL
6 DEAL WITH IT.

7 MR. HAMMACK: YES, SIR. IF YOUR HONOR IS PREPARED WE
8 ARE READY TO GO.

9 THE COURT: ALL RIGHT.

10 MR. HAMMACK: YOUR HONOR, THE FIRST WITNESS I WOULD
11 CALL FOR THE JACKSON V. DENNO HEARING WOULD BE LIEUTENANT
12 WESLEY BOLAND WITH THE SHERIFFS DEPARTMENT.

13 MR. VERNER: AND I WOULD, I DON'T THINK THAT IS GOING
14 TO BE A PROBLEM, I DON'T NEED TO SEQUESTER WITNESSES. I
15 JUST, FOR THE LAST HEARING BY MY COUNT TEN LAW ENFORCEMENT
16 OFFICERS IN THIS SECTION, I UNDERSTAND THAT. BUT JUST
17 DURING THE TRIAL I DON'T THINK THE STATE INTENDS TO HAVE
18 QUITE THAT MANY UNIFORMED OFFICERS.

19 LIEUTENANT WESLEY BOLAND, AFTER BEING DULY
20 SWORN, TESTIFIED AS FOLLOWS:

21 DIRECT EXAMINATION

22 BY MR. HAMMACK:

23 Q LIEUTENANT BOLAND, BY WHOM ARE YOU EMPLOYED?

24 A NEWBERRY COUNTY SHERIFFS OFFICE.

25 Q AND ABOUT HOW LONG HAVE YOU WORKED AT THE NEWBERRY

1 COUNTY SHERIFFS OFFICE?

2 A 13 YEARS.

3 Q LIEUTENANT BOLAND, AS A RESULT OF YOUR EMPLOYMENT
4 WITH THE SHERIFFS OFFICE DID YOU HAVE ANY CHANCE TO GET
5 INVOLVED WITH THE INVESTIGATION OF AN ARMED ROBBERY AT THE
6 CITGO STATION IN PROSPERITY BACK ON OCTOBER 30TH OF 2004?

7 A YES, SIR.

8 Q COULD YOU TELL ME WHAT YOUR INVOLVEMENT WAS?

9 A IT INITIALLY STARTED BY INVESTIGATOR CHAPMAN WHO WAS
10 THE RESPONDING INVESTIGATOR. WITHIN A COUPLE OF DAYS WE
11 OBTAINED A WARRANT ON HIM WHICH AT THE TIME WE GOT A CALL
12 FROM HIM IN COLUMBIA, SAID HE WANTED TO TURN HIMSELF IN.
13 HE WAS IN COLUMBIA, HE WAS PICKED UP. AT THAT TIME WE
14 NOTIFIED THE AUTHORITIES OF RICHLAND COUNTY AND THEY MET
15 ME AND WE WENT TO THE LOCATION WHERE HE SAID AND HE WAS
16 SITTING ON THE PORCH WAITING ON US.

17 Q WHAT HAPPENED WHEN YOU GOT TO COLUMBIA AND PICKED HIM
18 UP?

19 A I HANDCUFFED HIM IMMEDIATELY AND READ HIM HIS RIGHTS.
20 AND I TOLD HIM HE COULD TALK FURTHER IN DISCUSSIONS BUT I
21 DID IMMEDIATELY READ HIM HIS RIGHTS WHEN I CUFFED HIM. HE
22 SAID THAT HE HAD DROVE THE VAN IN THE YARD. AND I
23 PHOTOGRAPHED IT, THAT WAS PRETTY MUCH THE EXTENT OF THE
24 FULL CONVERSATION AT THAT TIME. THEN WE CAME BACK TO
25 NEWBERRY AT WHICH TIME I MET INVESTIGATOR DENNIS, SERGEANT

1 DENNIS, WE DID A WRITTEN ARRAIGNMENT FORM AND THEN
2 CONTINUED TO QUESTION HIM IN THE WRITTEN STATEMENT.

3 MR. HAMMACK: YOUR HONOR, IF I MAY APPROACH THE
4 WITNESS.

5 THE COURT: ALL RIGHT.

6 Q DOES THAT APPEAR TO BE THE ARRAIGNMENT WAIVER FORM
7 THAT WAS FILLED OUT AT THE SHERIFFS OFFICE?

8 A YES, IT WAS.

9 Q WERE YOU PRESENT WHEN THE FORM WAS FILLED OUT?

10 A YES, SIR.

11 Q WAS THE RIGHTS ON THAT FORM READ TO MR. ABNEY?

12 A YES, SIR.

13 Q CAN YOU TELL ME WHAT WAS STATED TO MR. ABNEY THAT
14 NIGHT, CAN YOU READ THE RIGHTS AS THEY WERE STATED OFF OF
15 THE FORM.

16 MR. VERNER: THE COURT, I ASSUME, HAS THE DOCUMENT OF
17 THE COURT'S EXHIBIT. IT IS A STANDARD MIRANDA FORM, WE
18 STIPULATE TO IT UNLESS THE COURT WANTS TO HEAR IT.

19 THE COURT: THERE IS NO OBJECTION TO THE MIRANDA
20 FORM.

21 MR. HAMMACK: ALL RIGHT.

22 Q WERE YOU PRESENT WHEN EACH OF THESE RIGHTS WERE READ
23 TO MR. ABNEY?

24 A YES.

25 Q AND DID YOU ACTUALLY SPEAK TO MR. ABNEY THAT NIGHT?

1 A IT WAS THAT AFTERNOON, YES SIR.

2 Q THAT AFTERNOON. DID HE PROVIDE A WRITTEN STATEMENT
3 SUBSEQUENT TO THOSE RIGHTS?

4 A YES. ON THE RIGHTS FORM, JUST FOR YOUR INFORMATION,
5 SIR, WE READ THE RIGHTS AND INITIALED BY THE LEFT-HAND
6 SIDE TO EACH LINE BEFORE THE SIGNATURE. SO EACH LINE IS
7 UNDERSTOOD BY HIS INITIALS, SIGNED BESIDE IT AND A
8 SIGNATURE AT THE BOTTOM OF THE RIGHTS AND THE WAIVER IS UP
9 UNDERNEATH WHAT HE WAS READ AND SIGNED.

10 Q DID YOU ILLICIT FACTS ON THE DAY OF THE STATEMENT OF
11 MR. ABNEY'S AGE?

12 A YES.

13 Q HIS EDUCATIONAL LEVEL?

14 A ALL OF THAT IS FILLED OUT AT THE TOP OF THE FORM.

15 Q AT THE TIME THAT THE WAIVER WAS SIGNED DID HE
16 INDICATE THAT HE UNDERSTOOD?

17 A YES, SIR.

18 Q DID HE AT ANY POINT HE INDICATE THAT HE DID NOT
19 UNDERSTAND THE WAIVER OF HIS RIGHTS?

20 A NO SIR, NOT AT ALL.

21 Q DID HE AT ANY POINT ASK FOR AN ATTORNEY?

22 A NO, SIR.

23 Q DID HE ASK AT ANY POINT THAT THE QUESTIONS BE
24 STOPPED?

25 A NO, SIR.

1 Q AND YOUR INTERVIEW AND QUESTIONING, DID MR. ABNEY
2 SIGN A WRITTEN STATEMENT?

3 A YES SIR, HE DID.

4 MR. HAMMACK: YOUR HONOR, IF I MAY APPROACH THE
5 WITNESS.

6 THE COURT: GO AHEAD.

7 Q DOES THIS APPEAR TO BE THE STATEMENT SIGNED BY MR.
8 ABNEY?

9 A YES SIR, IT IS.

10 Q WHO WROTE THAT STATEMENT?

11 A THAT IS MR. ABNEY'S WRITING AND SIGNATURE. I AM NOT
12 ONE-HUNDRED PERCENT POSITIVE BUT I THINK THAT IS WHO WROTE
13 IT.

14 Q DID MR. ABNEY SIGN THAT STATEMENT?

15 A YES SIR, HE DID.

16 Q WERE YOU PRESENT WHEN THE STATEMENT WAS SIGNED?

17 A YES, SIR.

18 Q DID YOU WITNESS MR. ABNEY SIGN THAT STATEMENT?

19 A YES, SIR.

20 Q AT THE TIME THAT MR. ABNEY WAS BEING QUESTIONED AND
21 THE STATEMENT WAS SIGNED, THAT TOOK PLACE IN YOUR OFFICE?

22 A YES SIR, IN MY OFFICE AT THE SHERIFFS OFFICE.

23 Q ABOUT WHAT TIME WAS IT?

24 A IT WAS, ENDED AT 4:19, IT WAS SOMEWHERE AROUND LUNCH
25 TIME WHEN THE CALL FROM RICHLAND AND WENT THERE SHORTLY

1 AFTER LUNCH. SO, BUT IT ENDED AT 4:18.

2 Q WAS MR. ABNEY HANDCUFFED WHILE THE STATEMENT WAS
3 BEING WRITTEN?

4 A NO, SIR.

5 Q HOW MANY OFFICERS WERE PRESENT?

6 A MYSELF AND SERGEANT ROBERT DENNIS.

7 Q WHAT SORT OF ATTIRE WERE YOU WEARING THAT DAY?

8 A TYPICAL GOLF SHIRT WITH SHERIFFS OFFICE LOGO AND A
9 UNIFORM TYPE PANTS.

10 Q WERE YOU WEARING A WEAPON THAT DAY?

11 A YES, SIR.

12 Q DID MR. ABNEY HAVE ACCESS TO A TELEPHONE?

13 A YES, SIR.

14 Q DID HE HAVE ACCESS TO RESTROOM, DRINKS, FOOD. DID HE
15 EVER REQUEST ANY ITEMS?

16 A YES, SIR. I AM PRETTY SURE HE ASKED FOR A DRINK THAT
17 DAY WHILE WE WERE SITTING IN THERE TALKING.

18 Q DID HE MAKE ANY REQUEST THAT WERE DENIED?

19 A NO, SIR.

20 Q DID YOU MAKE HIM ANY PROMISES?

21 A NO, SIR.

22 Q WERE ANY THREATS OR COERCIONS USED TO OBTAIN THE
23 STATEMENT?

24 A NO, SIR.

25 MR. HAMMACK: YOUR HONOR, I HAVE NOTHING FURTHER OF

1 THIS WITNESS.

2 THE COURT: MR. VERNER.

3 MR. VERNER: THANK YOU.

4 CROSS-EXAMINATION

5 BY MR. VERNER:

6 Q INVESTIGATOR BOLAND, LET ME BACK TRACK. YOU PICKED
7 HIM UP FROM COLUMBIA?

8 A YES, SIR.

9 Q AND THAT WAS AFTER HE CALLED IN OR SOMEBODY ON HIS
10 BEHALF CALLED LAW ENFORCEMENT AND SAID HE WANTED TO TURN
11 HIMSELF IN?

12 A YES, SIR.

13 Q OKAY. AND I THINK YOU PROBABLY WENT IN A SUV OR A
14 PICKUP TRUCK TO PICK HIM UP?

15 A YES, SIR.

16 Q AND HE WAS AT A FRIENDS HOUSE IN COLUMBIA?

17 A I DON'T KNOW THE RELATION, SOME FRIEND OR FAMILY. I
18 DON'T KNOW EXACTLY.

19 Q BUT HE TOLD YOU WHERE TO FIND HIM?

20 A YES, HE TOLD ME THE ADDRESS AND I MET WITH RICHLAND
21 COUNTY, JUST OFF OF 277.

22 Q AM I CORRECT, YOU PROBABLY CORRELATED IT WITH THE
23 RICHLAND COUNTY DEPUTIES OR CITY POLICE?

24 A RICHLAND COUNTY SHERIFFS.

25 Q DO YOU KNOW TED ABNEY PRIOR TO THIS?

1 A I DIDN'T KNOW HIM, I DON'T KNOW HIM PERSONALLY OR
2 ANYTHING. I KNOW THE NAME, I HAVE SEEN HIM AROUND.

3 Q YOU RECOGNIZED WHO IT WAS WHEN YOU GOT THERE?

4 A I AM FAMILIAR WITH HIM.

5 Q OKAY. WHEN DID YOU FIRST READ HIM HIS MIRANDA
6 RIGHTS?

7 A WHEN HE WAS HANDCUFFED.

8 Q I THOUGHT YOU SAID YOU HAD NOT AT THAT TIME READ HIM
9 HIS MIRANDA RIGHTS?

10 A I READ VERBATIM, READ HIS RIGHTS AT THAT POINT AND
11 LATER WHEN WE GOT TO THE SHERIFFS OFFICE WE DID HIS
12 WRITTEN FORM.

13 Q I MISHEARD YOU, I THOUGHT YOU SAID YOU DIDN'T READ
14 HIM HIS MIRANDA UNTIL HE GOT BACK, AND YOU HAVE GOT A
15 MIRANDA CARD.

16 A I HAVE GOT ONE BUT I PRETTY MUCH CAN READ EVERYTHING
17 WITHOUT IT.

18 Q AND YOU WOULD REPRESENT THAT WHAT YOU TOLD HIM ORALLY
19 WOULD BE THE SAME?

20 A YES.

21 Q OKAY. DID YOU SPEAK TO HIM AT ALL BEFORE YOU
22 HANDCUFFED HIM?

23 A I TOLD HIM THAT I HAD HANDCUFFED HIM AND HE WAS UNDER
24 ARREST AND I HAD TO HANDCUFF HIM AND I READ HIS RIGHTS AND
25 HE WAS VERY COOPERATIVE.

1 Q OKAY. IN COLUMBIA, WHAT WAS HIS SUM AND SUBSTANCE OF
2 HIS STATEMENT TO YOU?

3 A THE ONLY THING WAS ABOUT THE VAN THAT WAS USED IN THE
4 INCIDENT. HE TOLD ME THAT THAT WAS THE VAN THAT HE HAD
5 REGISTERED UNDER PIONEER FOODS WHICH WAS ANOTHER INCIDENT.
6 AND I PHOTOGRAPHED THE VAN AND TOLD HIM WE WOULD TALK IN
7 DETAIL WHEN WE GOT UP TO NEWBERRY.

8 Q WHAT DID YOU TELL HIM YOU WERE GOING TO QUESTION HIM
9 ABOUT?

10 A HE KNEW WHAT IT WAS ABOUT, AN ARMED ROBBERY THAT
11 HAPPENED AT THE CITGO, HE WAS FAMILIAR.

12 Q DID YOU IDENTIFY THE ARMED ROBBERY OR YOU SAID
13 ROBBERY?

14 A I TOLD HIM HE WAS UNDER ARREST FOR AN ARMED ROBBERY.

15 Q YOU ARRESTED HIM OFF, RIGHT OFF FROM THE BEGINNING
16 FOR AN ARMED ROBBERY?

17 A YES.

18 Q ANY OTHER CHARGES?

19 A AT THAT POINT THE ONLY THING THAT WE HAD WAS THE
20 ARMED ROBBERY FOR HIM AND HE WAS IN NCIC WITH THE NATIONAL
21 CRIME INFORMATION.

22 Q ARE YOU ABSOLUTELY SURE THAT THE ANSWER YES, BUT YOU
23 DID A TERRY FRISK OF HIM?

24 A YES, WE PATTED HIM DOWN.

25 Q IT WAS MORE THOROUGH THAN A TERRY FRISK, IT WAS JUST

1 TO MAKE SURE HE DIDN'T HAVE ANYTHING?

2 A ANY WEAPONS OR ANYTHING LIKE THAT.

3 Q DID YOU SEARCH THE VAN?

4 A NO, SIR. I DID PHOTOGRAPH THE OUTSIDE.

5 Q AND YOU WERE ALSO THE ONE WHO INTERROGATED HIM AT THE
6 DETENTION CENTER?

7 A THE SHERIFFS OFFICE, WE WENT TO THE NEWBERRY SHERIFFS
8 OFFICE.

9 Q THE SHERIFFS OFFICE?

10 A YES.

11 Q DO YOU HAVE A VIDEO CAMERA?

12 A DO I HAVE ONE?

13 Q DO HAVE ACCESS TO A VIDEO CAMERA?

14 A YES.

15 Q IS THERE A REASON YOU COULDN'T VIDEOTAPE?

16 A THAT IS NOT MY TYPICAL, THERE WAS NOTHING SET UP FOR
17 A VIDEO INTERROGATION OR ANYTHING.

18 Q DO YOU HAVE ACCESS IF YOU WANTED TO VIDEOTAPE A
19 CONFESSION?

20 A YES, I GUESS THERE IS A WAY TO SET IT UP, THAT IS NOT
21 A GENERAL PRACTICE THAT WE USE.

22 Q WELL, MY QUESTION IS, IS IT A POLICY TO NOT VIDEOTAPE
23 CONFESSIONS OR IS IT JUST IT TAKES EXTRA TIME.

24 A WE HAVE NEVER DONE IT BEFORE.

25 Q OKAY. HAS ANYBODY EVER TOLD YOU NOT TO VIDEOTAPE THE

1 CONFESSIONS?

2 A NO, SIR.

3 Q OKAY. HOW DID YOU ASK HIM TO WRITE HIS STATEMENT
4 DOWN?

5 A WE WENT OVER EVERYTHING VERBALLY.

6 Q SO, YOU TALKED TO HIM FOR ABOUT THREE OR FOUR HOURS?

7 A BETWEEN THE RIDE, HANDCUFFING HIM IN COLUMBIA, COMING
8 BACK FROM THE OTHER SIDE OF COLUMBIA TO THE NEWBERRY
9 SHERIFFS OFFICE, DOING THE RIGHTS FORM, DOING THE VERBAL,
10 WE ARE PROBABLY TALKING THREE HOURS, SOMEWHERE AROUND
11 THERE, FOR EVERYTHING.

12 Q AND YOU DIDN'T AUDIOTAPE THIS CONFESSION?

13 A NO, HE WAS VERY COOPERATIVE.

14 Q DID HE APPEAR TO BE UNDER THE INFLUENCE OF ANY DRUGS
15 OR ALCOHOL?

16 A I ASKED HIM, HE HAD ADMITTED TO AN ADDICTION, A
17 PROBLEM WITH CRACK COCAINE. BUT AT THE TIME OF
18 QUESTIONING, NO SIR, HE DID NOT APPEAR UNDER THE
19 INFLUENCE.

20 Q AND HE DIDN'T APPEAR TO BE?

21 A NO.

22 Q UNLESS THE COURT OR MR. HAMMACK HAS ANY MORE
23 QUESTIONS FOR YOU.

24 MR. HAMMACK: NOTHING FURTHER, YOUR HONOR.

25 THE COURT: YOU MAY STEP DOWN.

1 MR. HAMMACK: YOUR HONOR, THE STATE WOULD CALL
2 SERGEANT ROBERT DENNIS.

3 SERGEANT ROBERT DENNIS, AFTER BEING DULY SWORN,
4 TESTIFIED AS FOLLOWS:

5 DIRECT EXAMINATION

6 BY MR. HAMMACK:

7 Q HOW LONG HAVE YOU BEEN EMPLOYED BY THE SHERIFFS
8 OFFICE?

9 A AT THE SHERIFFS OFFICE, 6 YEARS.

10 Q AS A RESULT OF YOUR EMPLOYMENT WITH THE SHERIFFS
11 OFFICE, DID YOU HAVE A CHANCE TO INVESTIGATE AN ARMED
12 ROBBERY THAT OCCURRED AT THE CITGO STATION IN PROSPERITY
13 ON OCTOBER 30TH OF 2004?

14 A YES, I DID.

15 Q COULD YOU TELL ME WHAT YOUR ROLE IN THE INVESTIGATION
16 WAS?

17 A THE FIRST ROLE WAS FOR INVESTIGATOR BEN CHAPMAN, HE
18 WENT TO THE SCENE AND PROCESSED THE SCENE AND OBTAINED ANY
19 WITNESSES. ALSO LATER ON THERE WAS A FORENSIC ARTIST
20 CALLED IN TO GIVE A COMPOSITE DRAWING. THAT COMPOSITE
21 DRAWING WAS POSTED TO THE NEAREST CONVENIENT STORES AND
22 OTHER PLACES THROUGHOUT THE COUNTY. THAT FOLLOWING WEEK
23 MR. CHAPMAN TOOK OFF, HE WAS ON VACATION WHERE MYSELF AND
24 LIEUTENANT BOLAND PICKED UP THE INVESTIGATION.

25 Q AS THE RESULT OF BEING INVOLVED IN THE INVESTIGATION

1 DID YOU HAVE A CHANCE TO SPEAK TO THE DEFENDANT?

2 A YES SIR, AFTER INFORMATION WAS RECEIVED AND
3 INFORMATION WAS OBTAINED THROUGH THE INVESTIGATION MR.
4 ABNEY WAS IDENTIFIED AS THE INDIVIDUAL ALLEGEDLY TO HAVE
5 COMMITTED THE CRIME OF ARMED ROBBERY. ONCE THAT WAS DONE
6 AN ARREST WARRANT WAS ISSUED FOR HIM THROUGH THE COUNTY
7 COURT AND HIS INFORMATION, I BELIEVE, AIRED ON TV. DURING
8 THAT TIME WE HAD RECEIVED A PHONE CALL FROM EITHER MR.
9 ABNEY OR FAMILY FRIENDS OF MR. ABNEY, WHERE HE WAS AT AND
10 HE WAS WANTING TO TURN HIMSELF IN. AT THAT POINT AND TIME
11 I COULD NOT GO DOWN SO LIEUTENANT BOLAND WENT DOWN TO
12 COLUMBIA TO PICK UP MR. ABNEY.

13 Q DID YOU HAVE A CHANCE TO SPEAK TO MR. ABNEY?

14 A YES, I DID. ONCE LIEUTENANT BOLAND GOT BACK TO
15 NEWBERRY I WAS FREE AT THE TIME AND WAS ABLE TO ASSIST IN
16 THE INTERVIEW OF MR. ABNEY AT THE NEWBERRY SHERIFFS
17 OFFICE.

18 Q ABOUT WHAT TIME WAS THAT?

19 A IT WAS PROBABLY AROUND SOMETHING TO 4:00, 3:00, 4:00,
20 DURING THE TIME OF HIM GETTING THERE AT THE SHERIFFS
21 OFFICE, MAYBE A LITTLE BIT SOONER.

22 Q YOU HAVE IN YOUR HAND A MIRANDA WAIVER. WERE YOU
23 PRESENT WHEN MR. ABNEY SIGNED THAT DOCUMENT?

24 A YES SIR, I WAS.

25 Q WAS MR. ABNEY READ THOSE MIRANDA RIGHTS?

1 A YES SIR, HE WAS.

2 Q DO YOU KNOW IF YOURSELF OR LIEUTENANT BOLAND READ
3 THOSE?

4 A TAKING THE, LOOKING AT THE MIRANDA FORM, I FILLED IT
5 OUT AND USUALLY WENT OVER, EITHER ONE OF US DOES THE
6 FILLING OUT WE GO AHEAD AND READ DOWN VERBATIM TO THEM.
7 SO, THAT IS MY HANDWRITING AND FILLING OUT MR. ABNEY'S
8 INFORMATION. THE ONLY THING THAT WAS NOT PLACED AT THE
9 TOP WAS THE DATE AND TIME OF ACTUALLY COMING IN. JUST AN
10 ERROR ON MY PART. HOWEVER, WE DID DOCUMENT THE DATE AND
11 TIME ON THE DATE AT THE BOTTOM WHERE THE SIGNATURES WERE
12 SIGNED ON THE FIRST PAGE AND THEN ON THE STATEMENT FORM WE
13 DID DOCUMENT THE DATE AND TIME THAT IT WAS COMPLETED.

14 Q WAS MR. ABNEY READ EACH OF THESE RIGHTS?

15 A YES SIR, HE WAS.

16 Q DID HE INDICATE THAT HE UNDERSTOOD EACH OF THESE
17 RIGHTS?

18 A YES SIR, HE SO INDICATED BY PLACING HIS INITIALS NEXT
19 TO THOSE RIGHTS.

20 Q DID HE AT ANY TIME INDICATE ANY PROBLEMS
21 UNDERSTANDING?

22 A NO, SIR.

23 Q DID HE AT ANY TIME ASK TO SPEAK TO AN ATTORNEY?

24 A NO SIR, HE DID NOT.

25 Q DID HE AT ANY TIME ASK THAT THE QUESTIONING BE

1 STOPPED?

2 A NO, SIR.

3 Q AFTER MR. ABNEY WAS READ HIS RIGHTS AND SIGNED THE
4 WAIVER FORM DID MR. ABNEY GIVE A STATEMENT?

5 A YES SIR, HE DID.

6 Q AND I BELIEVE YOU HAVE THE STATEMENT THERE IN YOUR
7 HAND. THE HANDWRITING ON THE STATEMENT, WHO WROTE THE
8 STATEMENT.

9 A THE HANDWRITING AT THE TOP OF THE PAGE, IT IS THE
10 PERSONAL INFORMATION OF MYSELF AND TED ABNEY. I FILLED IN
11 THAT AREA. THE NEXT IS THE WAIVER, ONCE AGAIN, MIRANDA
12 RIGHTS IN A MORE PARAGRAPH FORM. ONCE HE WAS READY TO
13 WRITE THE STATEMENT I ASKED HIM TO MAKE SURE HE READ OVER
14 THAT AND HE UNDERSTOOD THAT AND IN HIS OWN HANDWRITING HE
15 WAS ABLE TO GIVE AN ACCOUNT OF WHAT HAPPENED ON THAT
16 NIGHT.

17 Q PRIOR TO MR. ABNEY GIVING HIS STATEMENT, DID YOU
18 ILLICIT FROM HIM INFORMATION REGARDING HIS AGE?

19 A YES SIR, WE DID.

20 Q AND HIS LEVEL OF EDUCATION?

21 A YES, SIR. AND ALSO THAT HE CAN READ AND WRITE.

22 Q DID HE INDICATE THAT THERE, THAT HE DID COMPLETELY
23 UNDERSTAND WHAT WAS GOING ON?

24 A THAT'S CORRECT.

25 Q YOU SAID THE QUESTIONING TOOK PLACE AT THE SHERIFFS

1 OFFICE. CAN YOU TELL ME, WAS HE HANDCUFFED AT THE TIME?

2 A NO SIR, HE WAS NOT. AND WE WERE IN LIEUTENANT
3 BOLAND'S OFFICE IN NEWBERRY SHERIFFS OFFICE LOCATED ON
4 MAIN STREET.

5 Q AND HOW MANY OFFICERS WERE PRESENT?

6 A JUST MYSELF AND LIEUTENANT BOLAND.

7 Q WAS THERE ANYONE ELSE PRESENT AT THE TIME OF
8 QUESTIONING?

9 A NO, SIR.

10 Q COULD YOU TELL ME HOW YOU WERE DRESSED THAT DAY?

11 A WE DRESSED IN GOLF SHIRT AND PANTS.

12 Q WERE YOU ARMED?

13 A NO, SIR.

14 Q DID MR. ABNEY HAVE ACCESS TO A TELEPHONE?

15 A YES SIR, HE DID.

16 Q DID HE HAVE ACCESS TO RESTROOMS, FOOD, DRINKS?

17 A YES, SIR.

18 Q DID HE MAKE ANY REQUEST THAT YOU CAN RECALL?

19 A HE DID REQUEST THAT HE HAVE SOME TYPE OF HELP FOR HIS
20 ADDICTION TO CRACK COCAINE.

21 Q DID HE MAKE ANY REQUEST THAT YOU DENIED?

22 A NO, SIR.

23 Q DID YOU MAKE ANY PROMISES TO MR. ABNEY?

24 A NO SIR, WE DID NOT.

25 Q DID YOU MAKE ANY THREATS OR COERCE MR. ABNEY IN ANY

1 WAY TO GET THE STATEMENT?

2 A NO, SIR.

3 MR. HAMMACK: YOUR HONOR, I HAVE NO FURTHER
4 QUESTIONS.

5 THE COURT: MR. VERNER.

6 CROSS-EXAMINATION

7 BY MR. VERNER:

8 Q SERGEANT DENNIS, ARE YOU AWARE OF ANY REASON WHY HIS
9 CONFESSION COULD NOT HAVE BEEN VIDEOTAPED?

10 A NO SIR, I AM NOT AWARE OF ONE. IT IS NOT OUR
11 STANDARD PROCEDURE AT THE SHERIFFS OFFICE AND THERE IS NO
12 POLICY IN PLACE.

13 Q WHAT ABOUT AUDIOTAPE?

14 A ONCE AGAIN, I AM SURE IT CAN BE BUT THERE IS NO
15 POLICY IN PLACE THAT MANDATES THAT WE DO EITHER OR.

16 Q IS THERE A POLICY IN PLACE THAT YOU SHOULDN'T
17 VIDEOTAPE?

18 A NO, SIR.

19 Q OKAY. SO, THERE WOULD BE NOTHING TO PREVENT YOU IF
20 YOU WANTED TO VIDEOTAPE?

21 A THAT'S RIGHT.

22 Q DID HE MAKE ANY STATEMENT BEYOND WHAT HE WROTE IN HIS
23 MIRANDA FORM TO YOU?

24 A NO, SIR. PRETTY MUCH WHAT HE WROTE IN FORM IS WHAT
25 WE TALKED ABOUT WITH THE ONLY EXCEPTION TO ASK THAT HE

1 RECEIVE SOME TYPE OF HELP FOR HIS DRUG ADDICTION.

2 Q OKAY. BUT HE WASN'T UNDER ARREST FOR ANY DRUG
3 CHARGE, WAS HE?

4 A NO SIR, HE WAS NOT.

5 Q AND JUST, A LOT OF THE SOLICITORS QUESTIONS WERE ON
6 THE ISSUE OF WHETHER, I GUESS, A REASONABLE PERSON WOULD
7 FEEL FREE TO LEAVE. THERE IS NO QUESTION HE CAME IN
8 CUSTODY AND HE WAS NOT FREE TO LEAVE?

9 A THAT'S CORRECT.

10 Q WHEN YOU COME IN HANDCUFFS HE KNEW HE WAS UNDER
11 ARREST AND NOT FREE TO DO WHAT HE WANT?

12 A YES, SIR. HE WAS VERY AWARE OF WHAT WAS GOING ON AND
13 COMPLETELY UNDERSTOOD WHAT WAS GOING ON.

14 Q OKAY. AND YOU WITNESSED AND YOU SIGNED WHERE YOU
15 HEARD HIM GIVE HIS STATEMENT AND WHAT HE WROTE IS
16 BASICALLY THE SUM AND SUBSTANCE?

17 A YES, SIR. I SO INDICATE, ONCE HE FINISHES HIS
18 STATEMENT HE INITIALS IN THE BEGINNING. AND AT THE END OF
19 THE STATEMENT AND THEN I CROSS IT OUT SO THAT THERE COULD
20 BE NOTHING ADDED TO IT WHEN HE SO MARKED THAT WITH HIS
21 INITIALS ON THE X.

22 Q DID YOU EVER ASK HIM ABOUT A WEAPON SPECIFICALLY?

23 A NO, SIR.

24 Q YOU JUST BASICALLY ASKED HIM WHAT HAPPENED THAT
25 NIGHT?

1 A YES.

2 Q HE NEVER INDICATED ANYTHING ABOUT A WEAPON?

3 A HE SAID THAT HE HAD NOT HAD A WEAPON.

4 Q OKAY. AND THEN HE WAS TAKEN FROM YOUR OFFICE TO THE
5 DETENTION CENTER?

6 A THAT'S CORRECT.

7 Q THE STATEMENT HE GAVE WAS AFTER HE WAS ARRESTED BY
8 INVESTIGATOR BOLAND AND BEFORE HE HAD BEEN BOOKED INTO THE
9 DETENTION CENTER?

10 A THAT'S CORRECT. HE COOPERATED THROUGH THE SHERIFFS
11 OFFICE.

12 Q UNLESS THE SOLICITOR AND THE JUDGE HAS A QUESTION FOR
13 YOU.

14 MR. HAMMACK: NONE FROM THE STATE, YOUR HONOR.

15 THE COURT: YOU MAY STEP DOWN.

16 MR. HAMMACK: YOUR HONOR, THE STATE DOESN'T HAVE
17 ANYTHING FURTHER.

18 MR. VERNER: YOUR HONOR, TALKING TO MY CLIENT AND
19 BASED ON THE TESTIMONY I FEEL AND HE FEELS THAT IF THE
20 COURT WOULD FIND, BY CLEAR AND CONVINCING EVIDENCE THAT
21 THE STATEMENT WAS VOLUNTARILY GIVEN. AND SO WITHOUT
22 NECESSARILY CONCEDED MY MOTION, YOUR HONOR, WE WILL PUT
23 THE STATEMENT WITH THE TESTIMONY HEARD. I GUESS WE WILL
24 CONCEDE THAT IT WAS A VOLUNTARY STATEMENT.

25 THE COURT: WITH THAT THEN I WON'T GET INTO ANY

1 FINDINGS. WELL, I GUESS THERE IS NO, I GUESS I WON'T HAVE
2 TO GET INTO FORMAL FINDINGS SUCH AS REQUIRED BY STATE V.
3 CHILDS. BUT WHAT IS BEFORE THE COURT I FIND THAT THE
4 STATEMENT WILL BE ADMISSIBLE AND WE WILL MOVE ON.

5 MR. HAMMACK: YOUR HONOR, I WOULD LIKE TO INTRODUCE
6 THE STATEMENTS.

7 THE COURT: COURT EXHIBIT?

8 MR. HAMMACK: COURT EXHIBIT.

9 (WHEREUPON, COURT'S EXHIBIT NOS. 1 AND 2 WERE MARKED
10 FOR IDENTIFICATION ONLY.)

11 THE COURT: ANYTHING ELSE?

12 MR. HAMMACK: YOUR HONOR, THE ONLY OTHER ISSUE I HAVE
13 IS THAT IT APPEARS THAT MR. ABNEY HAS NOT BEEN ARRAIGNED
14 ON THE POSSESSION OF THE FIREARM OR KNIFE DURING THE
15 COMMISSION OF A VIOLENT CRIME. I BELIEVE IT WOULD BE
16 PROPER TO HAVE HIM ARRAIGNED PRIOR TO TRIAL.

17 THE COURT: MR. VERNER.

18 MR. VERNER: YOUR HONOR, WE HAVE GONE OVER THAT, YOUR
19 HONOR. WE HAVE GONE OVER THAT CHARGE.

20 MR. HAMMACK: NOTHING FURTHER FROM THE STATE.

21 THE COURT: THANK YOU, GENTLEMEN.

22 MR. VERNER: I WOULD NOTE, YOUR HONOR, MY CLIENT IS
23 IN CUSTODY. ORDINARILY I ASKED THAT THEY BE RELEASED TO
24 ME.

25 THE COURT: WE WILL HAVE LUNCH RECESS UNTIL 2:30.

1 (WHEREUPON, A LUNCH BREAK WAS TAKEN)

2 THE COURT: ALL RIGHT, HAVE WE GOT EVERYBODY WE NEED.

3 MR. HAMMACK: THE STATE IS READY, YOUR HONOR.

4 MR. VERNER: WE ARE READY, YOUR HONOR.

5 THE COURT: BRING THE JURY IN, PLEASE.

6 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT
7 APPROXIMATELY 2:40 P.M.)

8 THE COURT: GOOD AFTERNOON, LADIES AND GENTLEMEN. IF
9 YOU ANSWER BY THE NAME OF DONALD LAYTON WOULD YOU PLEASE
10 RAISE YOUR RIGHT HAND. MR. LAYTON, THE COURT APPOINTS YOU
11 THE FOREPERSON OF THE JURY. YOU CAN KEEP THAT SEAT UNTIL
12 WE TAKE A BREAK AND AFTER WE COME BACK FROM THE BREAK IF
13 YOU WILL TAKE THE NORMAL SEAT THAT THE FOREPERSON HERE
14 SITS IN. ALL RIGHT, WE ARE READY TO GET STARTED. THE
15 FIRST THING WE HAVE GOT TO DO IS PUT YOU UNDER OATH AND I
16 WILL TURN THAT MATTER OVER TO MADAME CLERK.

17 MADAME CLERK: PLEASE STAND AND RAISE YOUR RIGHT
18 HAND.

19 (WHEREUPON, THE JURY WAS SWORN AT 2:45 P.M.)

20 THE COURT: I HAVE A FEW OPENING REMARKS TO TELL YOU
21 HOW WE ARE GOING TO PROCEED. YOU ALREADY KNOW THE CHARGES
22 IN THIS CASE AND YOU KNOW THAT WE ARE TRYING CRIMINAL
23 CASES THAT ARE PENDING HERE IN NEWBERRY CIRCUIT COURT.
24 BOTH THE STATE AND THE DEFENDANT HAVE A GUARANTEED RIGHT
25 THAT THEY HAVE A JURY TO HEAR THIS CASE AND BE ABLE TO

1 PRESENT THEIR CASES IN OPEN COURT ACCORDING TO THE SAME
2 RULES AND PROCEDURES. ONE OF THE MOST IMPORTANT ASPECTS
3 OF YOUR DUTIES AS THE JURY IS ESSENTIALLY THE OATH THAT
4 YOU JUST TOOK A FEW SECONDS AGO. THAT IS TO WELL AND
5 TRULY TRY AND TO DETERMINE THE FACTS OF THIS CASE. THAT
6 OATH SAYS THAT YOU ARE THE SOLE JUDGES OF THE FACTS IN
7 THIS CASE. OBVIOUSLY, ANY CASE TRIED IN COURT WILL
8 INVOLVE BY WHAT HAPPENS OR WHO, IF ANYONE, DID ANYTHING IN
9 A PARTICULAR OCCURRENCE OF CIRCUMSTANCES. FROM THIS POINT
10 FORWARD NO ONE IN THIS COURTROOM CAN BE CONCERNED OR WILL
11 BE CONCERNED WITH THE FINDING OF FACTS IN THIS CASE EXCEPT
12 YOU, THE JURY, THE FACTS ARE FOR YOUR RESOLUTIONS. THE
13 JUDGE IS THE JUDGE OF THE LAW IN THIS CASE. IT WILL BE
14 YOUR DUTY TO DETERMINE THE TRUTH OF THE CASE BY DECIDING
15 THE WEIGHT AND THE BELIEVABILITY OF EACH PART OF THE
16 EVIDENCE APPLYING THE LAW OF THE CASE THAT I WILL PROVE TO
17 YOU TO THOSE FACTS. THE END RESULT IN ANY CASE IN COURT,
18 LADIES AND GENTLEMEN, IS TO REACH A VERDICT. THE VERDICT
19 IS A LATIN DERIVATIVE WORD WHICH MEANS A TRUE SAYING.
20 THIS TRIAL IS A SEARCH FOR THE TRUTH. AS I SAID, THE END
21 RESULT OF THE CASE IS THE VERDICT. HOW DO YOU REACH THE
22 VERDICT. YOU FIND THE FACTS AND THE EVIDENCE PRESENTED
23 FROM THE STAND, IT MAY BE TESTIMONY, PHYSICAL TYPE ITEMS,
24 PHOTOGRAPHS, DOCUMENTS. YOU APPLY THE LAW OF THE CASE
25 THAT I WILL GIVE TO YOU IN REGARD TO THE LAW OF THE CASE

1 TO THOSE FACTS AND THUS REACH A VERDICT. I WILL GIVE YOU
2 A COMPLETE CHARGE OF THE LAW AT THE CONCLUSION OF IT AND I
3 WILL THOROUGHLY DISCUSS WITH YOU THE BURDEN OF PROOF. I
4 WILL TELL YOU NOW, THOUGH, THE BURDEN OF PROOF IS ON THE
5 STATE IN THIS CASE. THE STATE IN ANY CRIMINAL CASE MUST
6 PROVE GUILT BEYOND A REASONABLE DOUBT. UNDER OUR LAW THE
7 ACCUSED OR DEFENDANT IS PRESUMED INNOCENT IN THE LAW AND
8 REMAINS INNOCENT UNTIL THE STATE MEETS THE BURDEN OF PROOF
9 BY PROVING GUILT BEYOND A REASONABLE DOUBT. SHOULD THE
10 STATE FAIL IN THAT BURDEN OF PROOF IT WOULD BE YOUR DUTY
11 TO ACQUIT AND FIND THE DEFENDANT NOT GUILTY. SHOULD THE
12 STATE MEET ITS BURDEN OF PROOF AND PROVE THE GUILT OF THE
13 DEFENDANT BEYOND A REASONABLE DOUBT THEN IT WOULD BE YOUR
14 DUTY TO FIND THE DEFENDANT GUILTY. WE WILL PROCEED AS
15 FOLLOWS. I WILL ALLOW BOTH SIDES TO MAKE BRIEF OPENING
16 STATEMENTS TO YOU IF THEY SO DESIRE. IT IS AN OPTION LEFT
17 TO EACH SIDE. BECAUSE THE BURDEN OF PROOF IS ON THE STATE
18 THEY GO FIRST. THEN WILL COME THE PRESENTATION OF THE
19 EVIDENCE, WHAT WE CALL THE EVIDENTIARY PORTION OF THE
20 TRIAL WHERE YOU WILL RECEIVE THE EVIDENCE. AS I TOLD YOU,
21 THE EVIDENCE MAY TAKE MANY DIFFERENT FORMS. TESTIMONY,
22 DOCUMENTS, PHOTOGRAPHS, WHATEVER. AFTER THAT BOTH SIDES
23 WILL BE ALLOWED TO MAKE CLOSING ARGUMENTS WHERE THEY WILL
24 ARGUE, THE ATTORNEYS WILL ARGUE TO YOU TO TRY TO PERSUADE
25 YOU TO SEE THE EVIDENCE AS THEY SEE IT. AFTER THAT

1 BECOMES THE JUDGE'S CHARGE OF THE LAW WHERE I WILL READ
2 YOU, QUOTE TO YOU THE LAW OF THE CASE CALLED THE CHARGE.
3 ONLY AFTER THOSE PHASES ARE COMPLETED WILL YOU BE ASKED TO
4 DELIBERATE. SO, MY INSTRUCTIONS THAT I GAVE YOU BEFORE
5 LUNCH STILL APPLY, PLEASE DO NOT DISCUSS THIS CASE WITH
6 ANYONE. DO NOT EVEN DISCUSS IT AMONG YOURSELVES UNTIL YOU
7 ARE ASKED TO DELIBERATE. ONE OTHER THING I NEED TO TELL
8 YOU, WHEN YOU ARE ASKED TO DELIBERATE THIS CASE AND REACH
9 A VERDICT, IT HAS TO BE A UNANIMOUS VERDICT, ALL TWELVE
10 DELIBERATING JURORS WILL HAVE TO BE IN AGREEMENT ON THE
11 VERDICT, WHATEVER IT IS. THAT IS ALL I HAVE GOT TO SAY, I
12 WILL TURN IT OVER TO COUNSEL. THE STATE GETS TO GO FIRST.
13 SOLICITOR.

14 MR. HAMMACK: AS THE JUDGE SAID A MOMENT AGO. WE
15 WILL HAVE BRIEF OPENING STATEMENTS AND I WILL DO
16 EVERYTHING THAT I CAN TO KEEP IT BRIEF. I WANT TO WELCOME
17 YOU TO THE NEWBERRY COUNTY COURTHOUSE AND THANK YOU FOR
18 BEING UP HERE THIS AFTERNOON. MY NAME IS JACK HAMMACK AND
19 I AM THE DEPUTY SOLICITOR FOR NEWBERRY COUNTY. BEEN UP
20 HERE FOR A GOOD WHILE, HAVEN'T MET ANY OF YOU BUT I AM
21 GLAD YOU ARE HERE TO HEAR THIS CASE. THE CASE THAT WE ARE
22 TRYING AGAINST THE DEFENDANT, TED ABNEY, HE IS CHARGED
23 WITH ARMED ROBBERY, HE IS CHARGED WITH POSSESSION OF A
24 FIREARM OR KNIFE DURING THE COMMISSION OF A VIOLENT CRIME.
25 THE ELEMENTS OF ARMED ROBBERY THAT I AM GOING TO HAVE TO

1 PROVE TO YOU ARE THAT MR. ABNEY DID ROB THE VICTIM, MS.
2 ROOSEN AND HE WAS ARMED OR ALLEGED THAT HE WAS ARMED BY
3 HIS WORDS OR ACTIONS WHILE USING THE REPRESENTATION OF A
4 WEAPON OR ANY OBJECT. I HAVE ALSO GOT TO PROVE ON THE
5 CHARGE OF THE POSSESSION OF A FIREARM OR KNIFE DURING THE
6 COMMISSION OF A VIOLENT CRIME THAT THE DEFENDANT, TED
7 ABNEY, HAD IN HIS POSSESSION A FIREARM OR VISIBLY
8 DISPLAYED A KNIFE OR FIREARM DURING THE COMMISSION OF A
9 VIOLENT CRIME. AS THE JUDGE STATED A MOMENT AGO I HAVE
10 GOT TO PROVE THESE ELEMENTS BEYOND A REASONABLE DOUBT.
11 THE JUDGE WILL DEFINE THE TERM, REASONABLE DOUBT, FOR YOU
12 BUT I WILL DO MY BEST, BASED ON THE CASE LAW TO GIVE YOU A
13 DEFINITION TO GO BY DURING THE TRIAL. IT IS A DOUBT THAT
14 WOULD CAUSE A REASONABLE PERSON TO HESITATE TO ACT, GOOD
15 RULE OF THUMB I GUESS, A GOOD COMMON SENSE RULE TO GO BY
16 TO KIND OF EXPLAIN REASONABLE DOUBT. YOU ARE GOING TO
17 HEAR TESTIMONY FROM THE STAND. WHAT YOU ARE GOING TO HEAR
18 THAT ON OCTOBER THE 30TH OF 2004, THE VICTIM, MS. ROOSEN,
19 WENT UP TO THE CITGO STATION IN PROSPERITY ABOUT 10:00
20 O'CLOCK AT NIGHT. THE STATION WAS EXTREMELY BUSY, A LOT
21 OF PEOPLE AROUND, A LOT OF PEOPLE INSIDE. SHE HAD PLANNED
22 ON GOING TO GET GAS BUT DECIDED THAT IT WAS SO BUSY SHE
23 WOULD WAIT SO SHE JUST WENT IN TO PICK UP SOME ITEMS.
24 WHILE IN THE STORE SHE PICKED UP A TWELVE PACK OF BEER,
25 OTHER ITEMS, CAME BACK OUT OF HER VEHICLE WHICH WAS

1 OUTSIDE THE STORE, WALKED AROUND TO THE PASSENGER SIDE OF
2 HER VEHICLE, PLACED THE BEER IN THE FRONT PASSENGER SEAT
3 AREA, CAME BACK AROUND THE FRONT OF HER VEHICLE TO THE
4 DRIVER'S SIDE. SHE GOT OVER TO HER DRIVER'S SIDE DOOR,
5 THE DEFENDANT, MR. ABNEY, WALKED IN BEHIND HER, STUCK
6 SOMETHING INTO HER BACK, INTO HER RIB AREA OF HER BACK AND
7 TOLD HER THAT HE WAS ROBBING HER AND THREATENED TO KILL
8 HER, THREATENED HER. SHE WASN'T SURE EXACTLY WHAT WAS
9 GOING ON SO SHE TURNED AROUND TO FACE HIM. HE WAS RIGHT
10 THERE WITHIN INCHES OF HER. SHE TURNED AROUND AND FACED
11 HIM AND AGAIN, SHE LOOKED AT HIM AND SAID, WHAT, BECAUSE
12 SHE WAS SHOCKED. AGAIN, HE PUSHED SOMETHING, SHE COULD
13 NOT SEE IT. SHE WILL TELL YOU ON THE STAND, HE PUSHED
14 SOMETHING INTO HER RIBS AGAIN AND TOLD HER TO, NOT THE
15 EXACT WORDS BUT TO SHUT UP OR HE WOULD KILL HER. AND AT
16 THAT TIME HE TOOK HER PURSE, WENT AND GOT INTO HIS VAN
17 WHICH WAS PARKED RIGHT NEAR HER VEHICLE AND FLED THE SCENE
18 OF THE CRIME WITH MS. ROOSEN THERE TRYING TO GET HER PURSE
19 BACK. ACTUALLY, RAN OVER TO THE VAN THAT HE HAD GOTTEN
20 INTO, SCUFFLED WITH HIM AS HE WAS TRYING TO DRIVE OFF AND
21 WAS UNABLE TO GET HER PURSE BACK. HER PURSE WAS RECOVERED
22 IN COLUMBIA A COUPLE OF DAYS LATER. LUCKILY SHE WASN'T
23 SERIOUSLY INJURED BUT YOU WILL HEAR TESTIMONY TO THE
24 EFFECT THAT MR. ABNEY GAVE A STATEMENT REGARDING THIS
25 INCIDENT, YOU WILL HEAR ALL OF THAT. WE FEEL CONFIDENT AT

1 THE CLOSE OF THE TRIAL YOU WILL CONVICT HIM OF ARMED
2 ROBBERY. I BELIEVE THAT WE HAVE GOT MORE THAN SUFFICIENT
3 FACTS TO PROVE IT BEYOND A REASONABLE DOUBT. I APPRECIATE
4 YOUR TIME.

5 THE COURT: MR. VERNER.

6 MR. VERNER: MAY IT PLEASE THE COURT.

7 THE COURT: YES, SIR.

8 MR. VERNER: AGAIN, I AM CHARLES VERNER AND I AM A
9 LAWYER HERE IN NEWBERRY WITH MY FATHER, JAY VERNER. I AM
10 THE PUBLIC DEFENDER. FOR ABOUT 15 YEARS MY FATHER WAS THE
11 PUBLIC DEFENDER IN NEWBERRY UNTIL ABOUT 10 YEARS AGO. AS
12 LUCK WOULD HAVE IT I AM THE PUBLIC DEFENDER TODAY. MR.
13 ABNEY, GO AHEAD AND STAND UP, TED, JUST ONE SECOND. MY
14 CLIENT IS TED ABNEY. THAT IS FINE. THE LADY, HIS COMMON
15 LAW WIFE THAT HE HAS LIVED WITH FOR ABOUT 13 YEARS IS
16 STACI GALLMAN. I WILL TELL YOU WHAT THIS CASE IS ABOUT,
17 IS CHARGING THE GUY WITH WHAT THEY CAN PROVE HE IS GUILTY
18 OF. HE ADMITTED HE TOOK MS. ROOSEN'S POCKETBOOK. HE
19 TURNED HIMSELF IN WHEN HE HEARD THAT THE POLICE WERE
20 LOOKING FOR HIM. MS. ROOSEN, I SUBMIT AND I HAVE A LOT OF
21 RESPECT FOR MR. JACK HAMMACK, THE DEPUTY SOLICITOR. WAIT
22 UNTIL YOU HEAR THE TESTIMONY, WHAT THE LADY SAID WHEN SHE
23 WAS ROBBED WAS THAT SHE DIDN'T, HE IS ALLEGED WITH HAVING
24 A GUN WHEN HE ROBBED HER. NOBODY SAW THE GUN, SHE DIDN'T
25 SEE A GUN, THERE WAS NO GUN RECOVERED, HE DIDN'T ADMIT TO

1 HAVING A GUN. THERE WERE WITNESSES AT THE SCENE, NOBODY
2 SAW A GUN OR A KNIFE OR ANY DEADLY WEAPON AND YET THAT IS
3 WHAT HE IS CHARGED WITH. HE IS ALSO CHARGED WITH VISIBLY
4 DISPLAYING A DEADLY WEAPON. I SUBMIT TO YOU THAT YOU
5 CANNOT FIND HIM GUILTY ON THAT CHARGE IF NOBODY TESTIFIES
6 THAT ANY WEAPON WAS VISIBLY DISPLAYED. HE HAS ALLEGED
7 FROM DAY ONE HE ROBBED THE LADY. NO QUESTION ABOUT IT, HE
8 TOOK HER POCKETBOOK WHEN HE HAD THE OPPORTUNITY AT THE GAS
9 STATION AND HE FLED IN THE VAN. SHE IS GOING TO TESTIFY
10 AND I DON'T WANT TO GET INTO THAT POSITION EITHER OR
11 PRETELLING WHAT SHE IS GOING TO TESTIFY BECAUSE I DON'T
12 HAVE A WHOLE LOT OF KNOWLEDGE TO WHAT SHE IS GOING TO
13 TESTIFY. BUT I SUBMIT TO YOU THAT THERE IS NOT GOING TO
14 BE ANY TESTIMONY OR ANY DEADLY WEAPON, AT BEST IT IS GOING
15 TO BE THAT SHE FELT SOMETHING FIRM AGAINST HER. AND THAT
16 IS WHAT THEY WANT YOU TO DO, IS TO CONVICT THIS MAN OF
17 ARMED ROBBERY FOR. AND I SUBMIT TO YOU AND IT IS YOUR
18 OATH, THE JURY SYSTEM IS TO GIVE THIS MAN THE BENEFIT OF
19 THE DOUBT. I KNOW THESE ARE SERIOUS CHARGES AND NOBODY
20 OUGHT TO WALK TO FIND SOMEBODY NOT GUILTY OR OTHERWISE ON
21 SERIOUS CHARGES LIKE THIS. BUT WHEN THE STATE SAYS THIS
22 IS ARMED ROBBERY, THE STATE IS THE ONE THAT HAS TO PROVE
23 EVERY SINGLE ELEMENT OF THAT CRIME. FIRST OF ALL, THEY
24 HAVE TO PROVE THAT HE HAD A DEADLY WEAPON, THAT THERE IS
25 NO DEADLY WEAPON IN THIS CASE. THEY HAVE TO ALLEGE, BUT

1 . THEY DON'T ALWAYS HAVE TO PROVE HE HAS GOT A DEADLY
2 WEAPON. THEY COULD PROVE, IT IS NOT ALWAYS I HAVE GOT A
3 GUN AND I SAID, GIVE ME YOUR MONEY. IT COULD BE, I HAVE
4 GOT A GUN, GIVE ME YOUR MONEY. THAT IS A PERSON
5 REPRESENTING THAT HE HAD A DEADLY WEAPON, I HAVE GOT A
6 GUN, GIVE ME YOUR MONEY. THE PERSON HAS GOT A REASONABLE
7 RIGHT TO BELIEVE THAT THE MAN HAS GOT A GUN AND IS ROBBING
8 HER. THAT IS NOT THE SITUATION IN THIS CASE. THERE IS
9 NO, HIS REPRESENTATION IS NOT, I HAVE A GUN, I HAVE GOT A
10 KNIFE OR I HAVE GOT A WEAPON, I AM GOING TO KILL YOU. IT
11 IS, GIVE ME YOUR POCKETBOOK OR I WILL KILL YOU. IF HER
12 STATEMENT IS CORRECT AND I AM, NOBODY IS GOING TO COUNT ON
13 THE STATEMENT. THE JUDGE IS GOING TO CHARGE YOU, JUST THE
14 THREAT ALONE WITHOUT A DEADLY WEAPON DOES NOT MAKE IT AN
15 ARMED ROBBERY. THE STATE WANTS TO CONVICT A MAN OF ARMED
16 ROBBERY AND A WEAPON VISIBLY DISPLAYING A WEAPON DURING A
17 VIOLENT CRIME. I AM NOT SAYING THAT MY CLIENT WAS A
18 WONDERFUL FELLOW ON THAT NIGHT. THE JURY'S SYSTEM IS PUT
19 IN HERE, IT IS NOT TO FIND THE TRUTH, THAT IS NOT THE ROLE
20 OF THE JURY. THE JURY IS THE HEDGE BETWEEN THE STATE AND
21 THE PRIVATE INDIVIDUAL, BEFORE THE STATE CAN USE ITS
22 RESOURCES, COME AFTER AN INDIVIDUAL PERSON THEY HAVE TO
23 GET PAST THE JURY. THAT IS YOUR ROLE. YOUR ROLE IS NOT
24 TO FIND THE TRUTH HERE, YOUR ROLE IS TO FIND THE TRUTH
25 THAT THE STATE HAS PRODUCED EVIDENCE AND TESTIMONY BEYOND

1 A REASONABLE DOUBT THAT MY CLIENT HAD A GUN OR A KNIFE AND
2 THEY CAN'T DO THAT AND YET THEY ARE STILL GOING TO CHARGE
3 HIM WITH THAT. THAT IS THE ROLE OF THE JURY, IF THERE IS
4 ANY QUESTION ABOUT THAT AND IF YOU DON'T KNOW WHAT THE
5 WEAPON IS AGAINST THE CASE I WILL SUBMIT TO YOU THAT IT IS
6 NOT -- THE STANDARD THAT THE SOLICITOR USES, ABSOLUTELY
7 RIGHT, HESITATE TO ACT. IF AT THE END OF THIS CASE YOU
8 THINK FOR JUST A SECOND, MAYBE HE DIDN'T HAVE A GUN OR
9 WASN'T A GUN OR A KNIFE YOU HAVE HESITATED TO MAKE A
10 DECISION. THAT IS ALL THE LAW REQUIRES FOR AN ACQUITTAL
11 ON THE ARMED ROBBERY CHARGE. THE HESITATION TO ACT, THAT
12 IS IMPORTANT BECAUSE QUITE FRANKLY YOU HAVE TAKEN YOUR
13 OATH. WE TRY A LOT OF CASES HERE IN NEWBERRY, WE TRY A
14 LOT OF CASES AND HANDLE A LOT OF CASES. AND I WILL
15 RESPECT YOUR DECISION AT THE END OF THIS CASE REGARDLESS
16 OF WHAT IT IS BECAUSE I KNOW YA'LL WILL BE THOUGHTFUL
17 ABOUT IT. AND THE STATE WILL DO THE SAME, THERE IS NO
18 QUESTION ABOUT IT. UNDER YOUR STANDARD IT IS HESITATE TO
19 ACT, DID HE HAVE A KNIFE, DID HE HAVE A GUN, IT IS NOT
20 CLEAR, DID HE REPRESENT THAT HE HAD THE KNIFE OR A GUN,
21 NO. IF YOU HESITATE OR IF YOU THINK ABOUT IT OR IF YOU
22 HAVE QUESTIONS I SUBMIT TO YOU THAT ALL WE EXPECT YOU TO
23 DO IS AS A JURY IN NEWBERRY COUNTY IS WHAT WE ALL DO AND
24 THAT IS TO ABIDE BY YOUR WORK. IF YOU HESITATE TO CONVICT
25 BECAUSE YOU DON'T KNOW WHAT HE WAS ARMED WITH OR HE DIDN'T

1 ALLEGE, HE MAY NOT BE THE NICEST GUY IN THE WORLD, IS HE
2 GUILTY OF ARMED ROBBERY, HAVE THEY PRODUCED ENOUGH
3 EVIDENCE FOR THE ARMED ROBBERY CONVICTION. THAT IS GOING
4 TO BE YOUR DECISION AND I SUBMIT TO YOU AND I DON'T WANT
5 TO TESTIFY TO WHAT IS GOING TO BE HEARD. ALL I KNOW IS MY
6 SIDE IS PRETTY MUCH ANY WAY, BUT IF IT IS NOT MORE THAN
7 THAT THEN I SUBMIT TO YOU IT IS GOING TO BE A HARD TIME TO
8 FIND THIS MAN GUILTY OF ARMED ROBBERY. I APPRECIATE IT.

9 MR. HAMMACK: YOUR HONOR, THE STATE WOULD CALL ROY
10 PASCAL.

11 ROY PASCAL, AFTER BEING DULY SWORN, TESTIFIED AS
12 FOLLOWS:

13 DIRECT EXAMINATION

14 BY MR. HAMMACK:

15 Q BY WHOM ARE YOU EMPLOYED?

16 A I AM EMPLOYED BY THE STATE LAW ENFORCEMENT DIVISION
17 COMMONLY KNOWN AS SLED.

18 Q HOW LONG HAVE YOU WORKED WITH SLED?

19 A 27 YEARS.

20 Q WHAT ARE YOUR JOB DUTIES WITH SLED?

21 A I AM THE FORENSIC ARTIST, SKETCH ARTIST.

22 Q WHAT WOULD THAT BE COMPOSED OF, WHAT DO YOU DO?

23 A I MEET WITH VICTIMS FOR WITNESSES OF CRIME. THEY
24 GIVE ME A VERBAL DESCRIPTION OF WHAT THE PERPETRATOR
25 LOOKED LIKE AND FROM THAT VERBAL DESCRIPTION I DO THE

1 SKETCH.

2 Q HOW MANY COMPOSITES WOULD YOU SAY YOU HAVE DONE?

3 A EXCESS OF 1000.

4 Q HOW MANY TIMES HAVE YOU TESTIFIED?

5 A SOMEWHERE IN THE NEIGHBORHOOD OF 30 OR 40 TIMES.

6 Q WHAT KIND OF TRAINING DO YOU HAVE TO HAVE TO BE A
7 SKETCH ARTIST?

8 A I ATTENDED THE SCHOOL OF ART IN SARASOTA, FLORIDA.
9 THEN BEING EMPLOYED AT SLED I WENT THROUGH A EXTENSIVE
10 THREE COURSE AT THE FBI ACADEMY AT THE FEDERAL BUREAU
11 INVESTIGATION ACADEMY IN QUANTICO, VIRGINIA SPECIALIZING
12 IN COMPOSITE ART. I HAVE ALSO ATTENDED NUMEROUS WORKSHOPS
13 AND ARTIST SCHOOL CONCERNING THE AREA OF FORENSIC ARTIST
14 AND COMPOSITE ART. I HAVE ALSO ATTENDED CLASSES IN
15 OKLAHOMA FOR THE SAME SUBJECT MATTER.

16 MR. HAMMACK: YOUR HONOR, I WOULD MOVE TO INTRODUCE
17 MR. PASCAL AS AN EXPERT IN THE FIELD OF COMPOSITE DRAWING.

18 THE COURT: ANY QUESTIONS.

19 MR. VERNER: I THINK HE NEEDS TO BE QUALIFIED AS AN
20 EXPERT TO SAY HE DID A SKETCH. I MEAN WHAT IS HE GOING TO
21 GIVE AN OPINION ON. I THINK HE IS AN IMPROPER WITNESS TO
22 BE AN EXPERT, I DON'T HAVE ANY DOUBT ABOUT HIS
23 QUALIFICATIONS. I JUST DON'T THINK THE STATE NEEDS TO
24 QUALIFY HIM AS AN EXPERT AND SAY HE DID A SKETCH OF THE
25 DEFENDANT. SO, I DO OBJECT TO HIM BEING GIVEN THE SPECIAL

1 CONSIDERATION AND THE CHARGE OF THE JUDGE OF HIM BEING AN
2 EXPERT.

3 THE COURT: BUT YOU DON'T OBJECT TO THE--

4 MR. VERNER: BUT THE FOUNDATION TO LAY THAT HE DID
5 THE SKETCH ARTIST OF THE PERPETRATOR, I DON'T HAVE AN
6 OBJECTION.

7 THE COURT: ALL RIGHT, I THINK HE IS QUALIFIED.

8 Q DID YOU HAVE THE OCCASION TO BE INVOLVED IN DRAWING
9 THE SKETCH FOR AN ARMED ROBBERY THAT OCCURRED AT THE CITGO
10 STATION IN PROSPERITY BACK ON OCTOBER THE 30TH OF 2004?

11 A YES, I DID.

12 Q CAN YOU TELL ME ABOUT THAT.

13 A A REQUEST CAME IN TO GO TO NEWBERRY COUNTY SHERIFFS
14 OFFICE TO GET A COMPOSITE FOR TRACI ROOSEN AND I DID THAT
15 ON OCTOBER THE 31ST.

16 Q WHEN YOU MET WITH MS. ROOSEN, WAS SHE ABLE TO GIVE
17 YOU AN ACCURATE DESCRIPTION OF THE PERSON SHE HAD SEEN?

18 A SHE UNDERSTOOD THE PROCEDURE AND COOPERATED IN FULL.

19 Q WERE YOU ABLE TO PRODUCE THE SKETCH OR COMPOSITE FROM
20 MS. ROOSEN?

21 A YES, I WAS.

22 Q DO YOU HAVE THAT SKETCH OR COMPOSITE WITH YOU?

23 A YES, I DO.

24 MR. HAMMACK: YOUR HONOR, MAY I APPROACH THE WITNESS?

25 THE COURT: SURE.

1 Q CAN YOU IDENTIFY THE DOCUMENT YOU ARE HOLDING?

2 A YES, I CAN. THIS IS A COMPOSITE SKETCH, IF YOU WILL
3 OF THE INTERVIEW OF THE INTERVIEW OF OCTOBER THE 31ST. MY
4 NAME APPEARS ON THE FRONT AND THE PICTURES NAME APPEARS ON
5 THE BACK WITH A SIGNATURE.

6 Q DOES THAT APPEAR TO BE AN ACCURATE REPRESENTATION?

7 A YES.

8 MR. HAMMACK: YOUR HONOR, WE WOULD LIKE TO INTRODUCE
9 THIS.

10 MR. VERNER: CAN I JUST LOOK AT THE BACK OF IT.
11 WITHOUT OBJECTION.

12 THE COURT: IT IS ENTERED.

13 (WHEREUPON, STATE'S EXHIBIT NO. 1 WAS ADMITTED INTO
14 EVIDENCE.)

15 MR. HAMMACK: YOUR HONOR, THE STATE WOULD MOVE TO
16 PUBLISH THE EXHIBIT TO THE JURY.

17 THE COURT: ALL RIGHT.

18 MR. HAMMACK: THANK YOU. I HAVE NO FURTHER
19 QUESTIONS.

20 CROSS-EXAMINATION

21 BY MR. VERNER:

22 Q DID IT APPEAR THAT MS. ROOSEN HAD A PRETTY ATTENTIVE
23 EYE OR I AM NOT SURE HOW THE BEST WAY TO SAY IT BUT SHE
24 WAS PRETTY ATTENTIVE TO DETAIL?

25 A YES. SHE GAVE SOME DETAILS THAT WERE VERY SPECIFIC.

1 Q THAT WOULD INDICATE A HIGHER, THAT SHE HAD A HIGHER
2 AWARENESS OF WHAT WAS HAPPENING AND WHAT SHE SAW AT THAT
3 TIME?

4 A WELL, WE RECEIVE ALL KIND OF WITNESSES, WE RECEIVE,
5 THE LIGHT CONDITIONS SUCH AS THAT. BUT SHE GAVE
6 SUFFICIENT DETAIL AND SPECIFIC DETAIL.

7 Q YOU SEE MY CLIENT, TED ABNEY, NOW?

8 A YES, I DO.

9 Q WHAT IS YOUR OPINION ABOUT HOW CLOSE YOU CAME TO THE
10 MARK ON THE DRAWING.

11 A I CANNOT ELIMINATE HIM AS THE SUSPECT.

12 Q IT IS PRETTY CLOSE?

13 A YES.

14 Q AND I UNDERSTAND THAT WE ARE NOT ETHICALLY IN THE
15 SAME GROUP, WE DON'T KNOW HIM THAT WELL. IT IS NOT A BAD
16 LIGHTNESS, IS IT?

17 A NO.

18 Q WHICH INDICATES THE WITNESS HAD A FAIRLY HIGH DEGREE
19 OF ATTENTION THAT SHE WAS KEEPING THAT NIGHT.

20 A THERE IS NO QUESTION, IN MY OPINION SHE HAD A VERY
21 GOOD LOOK AT THE SUSPECT AND WAS ABLE TO ASSIST ON HER
22 OWN.

23 Q THAT IS MY QUESTION. I DIDN'T CATCH YOUR LAST NAME
24 AGAIN.

25 A PASCAL.

1 Q I APPRECIATE IT AGENT PASCAL.

2 MR. HAMMACK: YOUR HONOR, I HAVE NO FURTHER QUESTIONS
3 OF MR. PASCAL. I KNOW HE HAS GOT AN APPOINTMENT IN
4 COLUMBIA.

5 THE COURT: THAT IS FINE.

6 MR. HAMMACK: YOUR HONOR, THE STATE WOULD CALL TRACI
7 ROOSEN.

8 TRACI ROOSEN, AFTER BEING DULY SWORN, TESTIFIED
9 AS FOLLOWS:

10 DIRECT EXAMINATION

11 BY MR. HAMMACK:

12 Q IT IS KIND OF HARD TO HEAR SO STAY CLOSE TO THAT
13 MICROPHONE. MS. ROOSEN, DID YOU HAVE THE OCCASION TO GO
14 TO THE CITGO STATION IN PROSPERITY BACK ON OCTOBER 30TH OF
15 2004?

16 A YES.

17 Q CAN YOU TELL ME WHAT OCCURRED WHILE YOUR WERE THERE?

18 A I PULLED UP IN THE PARKING LOT AND IT WAS QUITE BUSY.
19 AND I PULLED INTO THE FIRST PARKING PLACE AND DECIDED TO
20 GO INTO THE STORE. AND I PURCHASED AN ITEM AND CAME BACK
21 OUT. AND I HAD A KEYLESS ENTRY SO I OPENED THE DOOR TO MY
22 PASSENGER SIDE, PUT THE TWELVE PACK OF BEER IN IT, WALKED
23 AROUND TO THE FRONT OF MY CAR. AND AT THAT TIME WHEN I
24 OPENED THE DOOR I SAW A WHITE VAN PARKED NEXT TO ME. AND
25 I WAS APPROACHED BY MR. ABNEY. WHEN I OPENED THE DOOR I

1 COULDN'T GO ANYWHERE BECAUSE TO GET INTO MY CAR, HE CAME
2 UP TO ME AND LEANED OVER ON ME WHERE I COULD NOT GO
3 ANYWHERE. AND HE LEANED OVER, HE LEANED OVER AND IN MY
4 LEFT EAR AND HE SAID, DON'T MOVE, DON'T SAY NOTHING OR I
5 WILL KILL YOU. AND AT THIS POINT I HAD MY KEYS IN MY HAND
6 BUT I COULDN'T DO ANYTHING AND I ALMOST COULD NOT BELIEVE
7 WHAT I HEARD. AND I LEANED BACK SOME FROM HIM AND I SAID,
8 WHAT. AND HE SAID, HE SAID, SHUT THE F UP. AND THE WHOLE
9 TIME I WAS STANDING THERE HE TOOK HIS RIGHT HAND AND KEPT
10 PUSHING IT IN MY RIBS TO LET ME KNOW AND I WAS SO SCARED
11 THAT EVEN WHEN I WAS LEANING I DIDN'T WANT, I HAVE A PANIC
12 BUTTON ON THE BACK OF MY KEY. BUT BY THE SECOND TIME THAT
13 HE TOLD ME I WAS SO AFRAID THAT HE WAS GOING TO SHOOT ME
14 THAT I WAS AFRAID TO HIT THE PANIC BUTTON OR DO ANYTHING
15 EXCEPT JUST STAND THERE. AT THAT POINT HE JUST STEPPED
16 BACK, HE JUST STEPPED BACK A LITTLE BIT FROM ME AND I
17 LOOKED AT HIM STRAIGHT IN THE FACE. I CANNOT TELL YOU
18 THAT I WAS THINKING ABOUT ANYTHING OTHER THAN I WAS AFRAID
19 FOR MYSELF AND WAS REALLY VERY SURPRISED. AND HE LOOKED
20 AT ME STRAIGHT IN THE FACE AS WELL AND I HAD MY PURSE ON
21 MY ARM LEANING BACK HE LOOKED DOWN AT IT. AND I KNEW AT
22 THAT POINT HE WAS GOING TO TRY TO GRAB IT WHICH HE DID AND
23 HIS CAR DOOR WAS OPEN AND MY CAR DOOR WAS OPEN AND I AM
24 NOT REAL LARGE SO YOU COULDN'T REALLY SEE, YOU KNOW, THAT
25 IT WAS A BOXED IN SITUATION. SO, HE THREW THE PURSE INTO

1 THE VAN AND HE TURNED AROUND AND GOT IN IT AND I SAW MY
2 PURSE SITTING ON TOP OF THE CONSOLE AND THE STRAPS WERE
3 STICKING UP. AND I ACTUALLY REACHED FOR IT AND HE
4 STRUGGLED WITH ME AND FOUNDERED AROUND IN THE CAR ALMOST
5 AS IF HE DIDN'T KNOW WHERE ANYTHING WAS. THE CAR, HE
6 FLOORED IT AND TOOK OFF WITH ME HOLDING ON FOR ABOUT SEVEN
7 OR EIGHT FEET. AND I DID NOT LET GO OF THAT, THE DOOR
8 FLEW BACK AND HIT ME AND WHEN IT DID I FINALLY LET GO AND
9 I LOOKED UP AND I TRIED TO GET THE LICENSE TAG BUT I COULD
10 NOT SEE IT WELL ENOUGH TO GET IT. YOU KNOW, TRYING TO GET
11 MYSELF TOGETHER. I TURNED AROUND AND I HOLLERED FOR
12 SOMEBODY TO PLEASE CALL 911, THAT MAN HAD JUST ROBBED ME.

13 Q DID YOU KNOW MR. ABNEY?

14 A NO, SIR.

15 Q HAD YOU EVER SEEN HIM BEFORE?

16 A NO.

17 Q DID YOU GET A GOOD LOOK AT THE SUBJECT THAT NIGHT?

18 A YES.

19 Q AND HOW DID YOU COME TO FIND OUT IT WAS TED ABNEY?

20 A WELL, I GAVE A--

21 MR. VERNER: YOUR HONOR, RESPECTFULLY, I APPRECIATE
22 IT, BUT IT CALLS FOR, THERE IS NO FOUNDATION FOR THAT
23 QUESTION YET. THAT WOULD CALL FOR HERESY LEADING UP TO,
24 IT IS REALLY NOT RELEVANT TO WHAT HER PERSONAL KNOWLEDGE
25 IS.

1 THE COURT: A PRETTY WIDE OPEN QUESTION.

2 MR. VERNER: YES, SIR. IT CALLS FOR JUST ANSWERS

3 THAT WOULD BE--

4 Q MS. ROOSEN, WERE YOU EVER SHOWN A PHOTO LINEUP?

5 A YES.

6 Q DID YOU IDENTIFY ANYONE FROM THAT LINEUP?

7 A YES, I DID.

8 MR. HAMMACK: YOUR HONOR, IF I MAY APPROACH THE
9 WITNESS.

10 THE COURT: OKAY.

11 Q DOES THIS APPEAR TO BE THE PHOTO LINEUP THAT YOU WERE
12 SHOWN?

13 A YES.

14 Q AND HOW DO YOU KNOW THAT IS THE LINEUP THAT YOU WERE
15 SHOWN.

16 A BECAUSE I SIGNED IT, IT IS MY INITIALS. THE ONE I
17 CHOSE CAME OUT OF THIS LINEUP.

18 Q AND HOW IS IT NOTED ON THAT LINEUP WHICH ONE YOU
19 CHOSE? HOW CAN YOU TELL FROM THE LINEUP WHICH PERSON YOU
20 CHOSE?

21 A IT IS CIRCLED WITH MY INITIALS.

22 Q SO, THAT WOULD APPEAR TO YOU TO BE THE LINEUP THAT
23 YOU WERE SHOWN?

24 A YES.

25 Q NOW, MS. ROOSEN, YOU MENTIONED THAT YOUR PURSE WAS

1 ACTUALLY TAKEN?

2 A YES.

3 Q WAS YOUR PURSE EVER RECOVERED?

4 A YES, IT WAS.

5 Q WHEN DID THAT OCCUR?

6 MR. VERNER: AGAIN, YOUR HONOR, THAT IS, UNLESS HE
7 LAYS A FOUNDATION THAT SHE IS THE ONE THAT RECOVERED IT
8 ALL SHE IS GOING TO DO IS TELL THEM WHAT THE OTHER PEOPLE
9 ARE BRINGING BACK TO HER AND THAT'S--

10 MR. HAMMACK: YOUR HONOR, I WAS THINKING THAT SHE
11 WOULD AT LEAST KNOW THE LOCATION WHERE IT WAS RECOVERED
12 BECAUSE SHE WOULD OF HAD TO GONE TO GET IT TO RECOVER IT.

13 MR. VERNER: WELL, IF YOU ASK IT, IF HE LAYS A
14 FOUNDATION FOR IT I DON'T MIND. BUT HE JUST CAN'T SAY
15 WHAT THE POLICE DID.

16 Q MS. ROOSEN, WAS THE PURSE RECOVERED?

17 A YES.

18 Q DID YOU RECOVER YOUR PURSE, DID YOU HAVE TO GO
19 RECEIVE YOUR PURSE?

20 A NO, I DID NOT.

21 Q WHO WENT AND GOT YOUR PURSE BACK?

22 A NEWBERRY SHERIFFS DEPARTMENT.

23 Q HAS IT BEEN RETURNED TO YOU?

24 A YES.

25 Q WHEN WAS IT RETURNED TO YOU?

1 A THE FOLLOWING SUNDAY, THE NEXT SUNDAY OR MONDAY OF
2 THE WEEK AFTER IT HAPPENED.

3 Q WAS THERE ANY ITEMS MISSING FROM YOUR PURSE WHEN YOU
4 RECOVERED IT?

5 A YES.

6 Q WHAT WAS MISSING?

7 A WELL, ALL OF MY MONEY WITH THE EXCEPTION OF A
8 TRAVELLERS CHECK THAT WAS IN THERE. MY FATHER'S, MY
9 GRANDFATHERS KNIFE THAT I HAD, MAKEUP.

10 Q MS. ROOSEN, DID YOU EVER SEE MR. ABNEY WITH A WEAPON.

11 MR. VERNER: THAT IS A LEADING QUESTION, YOUR HONOR.

12 I WITHDRAW THE OBJECTION.

13 Q DID YOU EVER SEE A WEAPON IN MR. ABNEY'S HAND?

14 A I DID NOT SEE IT.

15 Q DID YOU SEE ANY SORT OF KNIFE?

16 A NO.

17 Q FIREARM?

18 A NO.

19 Q ANYTHING?

20 A NO.

21 Q YOU MENTIONED EARLIER THAT MR. ABNEY PUSHED SOMETHING
22 UP AGAINST YOU, DO YOU KNOW WHAT THAT WAS.

23 A YES.

24 Q WHAT WAS THAT?

25 A IT WAS A GUN.

1 Q DID YOU EVER SEE A GUN?

2 A NO.

3 Q BUT YOU FEEL CONFIDENT THAT IT WAS A GUN?

4 A YES.

5 Q DID HE EVER REFER TO HAVING A GUN?

6 A NO.

7 Q YOU MENTIONED EARLIER THAT HE SAID, FIRST TIME, NOT,
8 THAT HE WOULD KILL YOU. TELL ME EXACTLY WHAT HE SAID
9 AGAIN?

10 A HE SAID, HE PUSHED INTO MY RIBS AND HE SAID, DON'T
11 MOVE, DON'T SAY NOTHING I WILL KILL YOU.

12 Q WERE YOU FACING HIM AT THAT TIME?

13 A AT THAT TIME HE WAS LEANING OVER ME AND WAS TALKING
14 INTO MY LEFT EAR.

15 Q AND WHERE WAS THE OBJECT, WHERE ON YOU WAS IT PUSHED
16 INTO, WHERE COULD YOU FEEL IT, SOMETHING?

17 A IN MY LEFT RIBS.

18 Q I BELIEVE YOU STATED THAT HE SAID SOMETHING TO YOU
19 AND HE AGAIN THREATENED YOU?

20 A HE DID. AT THIS TIME HE WAS MUCH MORE ANGRY AND MUCH
21 MORE FORCEFUL AND HE PUSHED HARDER ON ME AND HE SAID, HE
22 REPEATED HIMSELF WITH ANOTHER WORD.

23 Q WHAT DID HE SAY AT THAT POINT?

24 A EXACTLY?

25 Q YES, MA'AM.

1 A HE SAID, HE SAID, SHUT THE FUCK UP OR I WILL KILL YOU
2 HERE.

3 Q WERE THERE OTHER WITNESSES TO THE INCIDENT THAT YOU
4 SAW, MS. ROOSEN, TAKE YOUR TIME, TAKE YOUR TIME. LET ME
5 ASK YOU THE QUESTION AGAIN, I THINK YOU MENTIONED EARLIER,
6 THE STORE WAS PRETTY BUSY. WERE THERE MANY PEOPLE OUTSIDE
7 OF THE STORE?

8 A IT WAS VERY CROWDED. INSIDE THE STORE AND OUTSIDE AT
9 THE PUMPS.

10 Q WHAT WAS THE LIGHTING LIKE?

11 A IT WAS PRETTY BRIGHT.

12 Q DID YOU SEE MR. ABNEY PRIOR TO THE ROBBERY?

13 A NO, I DID NOT.

14 Q YOU STATED EARLIER THAT YOU HAD SEEN A WHITE VAN?

15 A I DID.

16 Q AND WHERE WAS IT?

17 A IT WAS BACKED IN BESIDE ME.

18 Q DID YOU SEE ANYONE IN THE VAN?

19 A I DID, I SAW HIM BECAUSE WHEN I CAME AROUND TO THE
20 DRIVERS SIDE, I HAD EVEN NOTICED THAT THE VAN WAS RUNNING
21 PARKED NEXT TO ME. BECAUSE IT IS NOT UNUSUAL FOR ME TO
22 NOTICE SOMEBODY IN A CAR.

23 Q DID YOU SEE HIM AS HE APPROACHED?

24 A NO, I DID NOT.

25 Q NO FURTHER QUESTIONS AT THIS TIME. PLEASE ANSWER ANY

1 QUESTIONS MR. VERNER HAS.

2 CROSS-EXAMINATION

3 BY MS. VERNER:

4 Q THIS IS ROBERTS CITGO IN PROSPERITY, A GAS STATION
5 YOU WERE AT?

6 A YES.

7 Q WHAT DO YOU DO FOR A LIVING?

8 A I AM A LOAN REVIEW ANALYST FOR CAROLINA FIRST.

9 Q FOR CAROLINA FIRST BANK?

10 A YES.

11 Q IN PROSPERITY?

12 A NO.

13 Q IN NEWBERRY?

14 A IN LEXINGTON.

15 Q OKAY. AND WHAT DOES YOUR HUSBAND DO FOR A LIVING?

16 A MY HUSBAND IS A CONSERVATION OFFICER.

17 Q HE IS A LAW ENFORCEMENT OFFICER?

18 A HE IS.

19 Q AND YOU DID HAVE A HIGH DEGREE ATTENTION, I

20 UNDERSTAND THIS WAS A TRAUMATIC NIGHT?

21 A YES.

22 Q OKAY. AND YOU STILL HAVE A PRETTY CLEAR RECOLLECTION
23 OF WHAT HAPPENED THAT NIGHT?

24 A YES.

25 Q OKAY. AND YOU GOT A GOOD LOOK AT TED ABNEY WHO

1 ROBBED YOU?

2 A YES.

3 Q OKAY. THE ROBERTS CITGO, ARE THE GAS PUMPS IN FRONT
4 OF THE GAS STATION OR ARE THEY ON THE SIDE?

5 A WHAT DO YOU MEAN.

6 Q IF YOU PULLED IN, IF I WAS PULLING IN TO ROBERTS
7 CITGO. WELL, LET'S JUST TELL THE JURY. ROBERTS CITGO, IS
8 THAT ON THE PROSPERITY, NEWBERRY HIGHWAY?

9 A IT IS ON 76.

10 Q AND THAT IS THE HIGHWAY, THAT IS THE EXTENSION OF
11 WILSON ROAD PRETTY MUCH GOING TOWARDS PROSPERITY?

12 A YES, IT IS.

13 Q AND IF I WAS GOING OUT TOWARDS PROSPERITY FROM
14 NEWBERRY, ROBERTS CITGO WOULD BE ON YOUR LEFT OR RIGHT?

15 A IT WOULD BE ON YOUR LEFT.

16 Q OKAY. AND IT IS ONE OF THOSE, IT IS A GAS STATION,
17 SLASH CONVENIENT STORE TYPE?

18 A YES, IT IS.

19 Q WHEN YOU FIRST PULLED INTO THE PARKING LOT ARE THE
20 GAS PUMPS OUT FRONT BETWEEN THE GAS STATION AND THE ROAD?

21 A YES.

22 Q OKAY. I THINK YOU HAD INDICATED THAT YOU HAD GONE
23 THERE ORIGINALLY TO PURCHASE GAS BUT THERE MUST BEEN TOO
24 MANY CARS AT THE PUMPS?

25 A RIGHT.

1 Q WHERE DID YOU PARK?

2 A I PARKED IN THE FIRST PARKING PLACE DIAGONALLY ON THE
3 LEFT SIDE OF THE FRONT OF THE STORE.

4 Q SO YOU WERE ACTUALLY NOT AT THE SIDE OF THE STORE,
5 YOU WERE ACTUALLY PARKED ON THE SIDE, I GUESS THE SIDEWALK
6 IN FRONT OF ROBERT'S CITGO AND YOU PARKED--

7 A IT HAS A SIDEWALK.

8 Q AND YOU WERE ACTUALLY PARKED ON THAT FRONT SIDEWALK
9 BUT ON THE LEFT HAND SIDE?

10 A YES.

11 Q OKAY. DO YOU RECALL SEEING THE WHITE VAN THERE WHEN
12 YOU FIRST ARRIVED?

13 A THE WHITE VAN WAS NOT THERE.

14 Q IF IT WAS YOU DIDN'T SEE IT?

15 A THERE WAS NO ONE PARKED NEXT TO ME AT THE TIME.

16 Q OKAY. COULD SOMEBODY HAVE PARKED ON YOUR LEFT OR
17 WAS, WERE YOU THE LAST PARKING SPACE?

18 A HE WAS ON MY LEFT.

19 Q MY QUESTION IS, WERE YOU THE LAST PARKING SPACE ON
20 THE LEFT OR WAS THERE MORE PARKING FURTHER ON TO YOUR
21 LEFT?

22 A THERE WAS, THERE IS ONLY APPROXIMATELY THREE PARKING
23 SPACES THERE.

24 Q OKAY.

25 A AND I WAS THE FIRST ONE FURTHEST TO THE DOOR.

1 Q OKAY. YOU WERE ON THE FAR LEFT PARKING SPACE AND IS
2 THERE FURTHER A DRIVEWAY. HOW MUCH PARKING AREA WAS THERE
3 FROM THE LEFT HAND SIDE OF THE STORE AS YOU ARE LOOKING
4 AT?

5 A HOW MUCH PARKING AREA?

6 Q YES, MA'AM.

7 A THERE IS ONLY MAYBE TWO MORE PARKING PLACES THERE.

8 Q OKAY. AND I BELIEVE YOU TESTIFIED YOU WENT INSIDE
9 AND YOU WERE BY YOURSELF OBVIOUSLY?

10 A YES.

11 Q OKAY. AND IT WAS, IT WAS 10:00 O'CLOCK AT NIGHT BUT
12 THERE WERE LIGHTS IN THE STORE ON?

13 A YES.

14 Q OKAY. AND CERTAINLY I GUESS THE GAS PUMPS WERE
15 PRETTY WELL LIT TOO?

16 A WHAT DO YOU MEAN?

17 Q IN PLACES IT WOULD HAVE BEEN DARK AND IN PLACES IT
18 WOULD HAVE BEEN FAIRLY BRIGHT?

19 A THE STORE IS PRETTY WELL LIT.

20 Q OKAY. AND WAS THIS A CAR OR A SUV?

21 A MY CAR?

22 Q YES MA'AM, THE VEHICLE YOU WERE IN THAT NIGHT?

23 A MY CAR IS A SUV.

24 Q IT WOULD BE LIKE A BLAZER OR A GRAND CHEROKEE TYPE
25 VEHICLE?

1 A YES.

2 Q AND YOU WENT IN AND THAT THERE, THERE WAS A VERY
3 CROWDED, WAS THIS A WEEKEND NIGHT OR WAS THIS A WEEKDAY
4 NIGHT OR DO YOU EVEN RECALL?

5 A I RECALL IT WAS A WEEKEND NIGHT, IT WAS SATURDAY.

6 Q SATURDAY NIGHT, SO THERE WAS A, THERE WERE PLENTY OF
7 PEOPLE THERE?

8 A YES.

9 Q AND YOU BOUGHT A, I THINK YOU BOUGHT TWELVE BEERS AND
10 BROUGHT THEM OUT TO YOUR CAR?

11 A I DID.

12 Q AND YOU PUT THEM IN ON THE PASSENGER SIDE?

13 A YES, I DID.

14 Q DO YOU RECALL SEEING THE WHITE VAN THEN AT THAT
15 POINT?

16 A NO, BECAUSE I CAME OUT OF THE FRONT DOOR AND I HIT MY
17 KEYLESS ENTRY AND WENT DIRECTLY TO THE PASSENGER SIDE TO
18 OPEN IT UP AND PUT THE TWELVE PACK IN IT, SHUT THE DOOR
19 AND THEN CAME AROUND.

20 Q OKAY. THE POCKETBOOK THAT WE ARE TALKING ABOUT THAT
21 WAS TAKEN, YOU DIDN'T BRING IT TO COURT TODAY, DID YOU?

22 A NO, I DID NOT.

23 Q JUST DESCRIBE IT FOR ME SO WE CAN SEE WHAT WE ARE
24 LOOKING AT. AND I AM NOT REALLY CONCERNED ABOUT THE
25 COLOR, I AM JUST CONCERNED MORE ABOUT THE HANDLES OR WHAT

1 TYPE OF BAG?

2 A IT HAS WHAT I CONSIDER A SMALL OR MEDIUM HANDLE. IT
3 IS A CASE THAT IS NOT REAL DEEP, IT IS LONG BUT IT IS NOT
4 A DEEP CUT BAG. IT IS PROBABLY EIGHT OR TEN INCHES DEEP.
5 AND IT HAS SMALL HANDLES ON IT. IT HAD A DOUBLE HANDLE.

6 Q SO, THE BAG ITSELF, AND I DON'T WANT TO PUT WORDS IN
7 YOUR MOUTH, BUT IT WOULD BE APPROXIMATELY ABOUT EIGHT
8 INCHES?

9 A IT IS ACTUALLY WIDER THAN THAT.

10 Q ABOUT THAT WIDE?

11 A RIGHT.

12 Q SO, FAIRLY BIG HANDBAG?

13 A IT IS.

14 Q BUT IT IS NOT AS TALL?

15 A NO.

16 Q LIKE AN ENVELOPE SHAPE?

17 A IT IS A CASE BAG.

18 Q I DON'T KNOW WHAT A CASE BAG IS BUT I ASSUME IT IS
19 LIKE AN ENVELOPE, IT IS LONGER THAN IT IS TALL?

20 A YES, IT IS.

21 Q AND THE HANDLES WOULD HANG DOWN, IF YOU HAD THE
22 HANDLES ON YOUR SHOULDER, ABOUT HOW MANY INCHES WOULD THE
23 BAG BE BELOW YOUR SHOULDER BECAUSE OF LENGTH AND STRAPS?

24 A IT WOULD FIT RIGHT UNDERNEATH MY ARM.

25 Q OKAY.

1 A IF I HAD IT ON MY SHOULDER.

2 Q SO, IT WOULD HANG DOWN ABOUT THAT LONG, ABOUT MIDWAY
3 THROUGH YOUR BODY?

4 A RIGHT.

5 Q AND WHEN YOU TYPICALLY AND I AM SURE YOU HAVE BEEN IN
6 A GROCERY STORE OR A CONVENIENT STORE THOUSANDS OF TIMES.
7 BUT TYPICALLY WHEN YOU GET IN YOUR CAR YOU HAVE GOT THAT
8 POCKETBOOK. HOW DO YOU GET IN THE CAR, DO YOU PUT THE
9 POCKETBOOK IN FIRST OR DO YOU JUST PUT IT AROUND YOUR
10 SHOULDER OR WHAT?

11 A WELL, NORMALLY I WOULD OPEN THE DOOR AND TAKE THE
12 PURSE OFF OF MY ARM AND PUT IT IN THE CAR AND THEN GET IN.

13 Q TYPICALLY, I DON'T KNOW, BUT WOULD YOU TYPICALLY
14 CARRY THE PURSE AROUND YOUR LEFT SHOULDER OR YOUR RIGHT
15 SHOULDER?

16 A I CARRY IT ON THE LEFT.

17 Q OKAY. SO, YOU PROBABLY WOULD OF OPENED THE DOOR, ARE
18 YOU RIGHT HANDED?

19 A NO, I AM LEFT HANDED.

20 Q OKAY, YOU ARE LEFT HANDED BUT YOU CARRY THE PURSE
21 OVER YOUR LEFT HAND TOO. YOU WOULD OF OPENED THE DOOR
22 WITH YOUR RIGHT OR LEFT HAND?

23 A I OPEN THE DOOR WITH MY RIGHT HAND.

24 Q OKAY. AND THEN YOU, HAD YOU ALREADY STARTED TO SIT
25 DOWN WHEN HE APPROACHED?

1 A NO, I NEVER GOT A CHANCE TO.

2 Q OKAY. I BELIEVE YOU INDICATED THAT AFTER HE TOOK THE
3 PURSE FROM YOU, HOW FAR AWAY WAS HIS VAN FROM YOUR CAR?

4 A NOT VERY FAR, IT WAS PROBABLY, YOU KNOW, IT WAS
5 FAIRLY CLOSE TO ME. I WOULD SAY MAYBE TWO AND A HALF
6 FEET.

7 Q DID HE GO AHEAD AND PULL INTO THE PARKING LOT, I MEAN
8 THE PARKING SPACE THAT WAS RIGHT NEXT TO YOU?

9 A YES, HE DID.

10 Q OKAY. SO, THERE WAS ANOTHER PARKING SPACE
11 IMMEDIATELY TO YOUR LEFT AND THAT IS THE PARKING SPACE
12 THAT THE VAN PULLED INTO?

13 A YES.

14 Q OKAY. WELL, I MEAN, WOULDN'T THE DRIVERS SIDE DOOR
15 BE ON THE PARKED SIDE THEN?

16 A HE WAS BACKED IN.

17 Q OH, HE BACKED IN TO IT?

18 A YES.

19 Q HAD HE ALREADY BACKED IN?

20 A YES, HE WAS BACKED IN ON READY WHEN I CAME AROUND
21 FROM THE FRONT OF MY CAR.

22 Q SO, THE DOORS WOULD BE EXACTLY SIDE BY SIDE SINCE HE
23 WAS BACKING IN. BUT HIS DRIVER'S DOOR WOULD BE ON YOUR
24 DRIVER'S SIDE DOOR JUST FACING A DIFFERENT DIRECTION?

25 A THAT'S RIGHT.

1 Q YOU FACING TOWARDS THE STORE AND HE FACING TOWARDS
2 THE ROAD?

3 A RIGHT.

4 Q OKAY. AND I BELIEVE THAT YOU TESTIFIED WHEN YOU
5 REACHED IN, WHERE IN THE CAR DID HE PUT THE POCKETBOOK,
6 WHERE IN THE VAN DID HE PUT THE POCKETBOOK?

7 A HE DID NOT PLACE IT, HE THREW IT.

8 Q WHERE DID YOU SEE IT IN THE VAN?

9 A I SAW A PERSON ON THE OTHER SIDE PICK IT UP AND PUT
10 IT ON THE CONSOLE IN BETWEEN THE SEATS.

11 Q THERE WAS A CONSOLE IN THE VAN?

12 A YES. IT IS THAT HIGH UP.

13 Q AND YOU REACHED IN AND TRIED TO GET IT BACK?

14 A YES, I DID.

15 Q AND I BELIEVE YOU TESTIFIED THAT HE WAS ACTING LIKE
16 HE DIDN'T KNOW WHAT TO DO. YOU SAID HE WAS REACHING
17 AROUND LIKE HE DIDN'T KNOW WHERE THINGS WERE?

18 A I SAW HIM STOMP ON THE GAS PEDAL SEVERAL TIMES AND HE
19 LOOKED LIKE HE WAS TRYING TO FIGURE OUT THE GEARS.

20 Q OKAY. HOW DID YOU TRY TO GET THE POCKETBOOK BACK?

21 A HE JUST SNATCHED A HOLD OF IT AND PUSHED IT
22 BACKWARDS.

23 Q HE JUST FORCIBLY GRABBED IT BACK AND TOOK IT BACK OUT
24 OF YOUR HANDS?

25 A WELL, HE NEVER GRABBED IT, HE JUST PUSHED IT BACK

1 WHEN I GRABBED THE HANDLE AND THEN HE JERKED IT BACK.

2 Q OKAY. BUT I MEAN WITH HIS HANDS, WHEN YOU GRABBED IT
3 AND PULLED IT BACK OUT I GUESS HE WOULD HAVE TO DO IT WITH
4 HIS HAND OR BODY?

5 A WELL, I GUESS HE JUST USED THE ONE HAND. I DIDN'T
6 SEE HIM GRAB IT WITH HANDS, HE JUST JERKED IT BACK.

7 Q AND THEN HOW FAR DID YOU, I THINK YOU INDICATED THERE
8 WAS SOME PERIOD OF TIME YOU WERE SIDE BY SIDE WITH THE VAN
9 BECAUSE YOU WERE CHASING HIM OUT OF THE PARKING LOT. I
10 THINK YOU TESTIFIED ABOUT FIVE OR SIX FEET UNTIL THE DOOR
11 HITS YOU. I GUESS YOU WERE SIDE BY SIDE WITH THE VAN AND
12 EVENTUALLY HE GOT AWAY. APPROXIMATELY HOW MANY STEPS DID
13 YOU RUN BESIDE THE VAN?

14 A I COULDN'T TELL YOU.

15 Q A COUPLE OF STEPS?

16 A MORE THAN A COUPLE, I JUST CONTINUED TO HANG ON THE
17 BEST I COULD. I DIDN'T COUNT THE STEPS.

18 Q DO YOU REMEMBER IF YOU GOT AS FAR AS THE GAS PUMPS?

19 A NO.

20 Q AND I SUPPOSE WHEN HE GOT IN THE VAN, HIS DRIVER
21 DOOR, WAS IT OPEN WHEN HE FIRST TOOK THE PURSE?

22 A HIS DOOR WAS OPEN THE WHOLE TIME.

23 Q AND WHEN YOU WERE CHASING ALONG BESIDE HIM HIS
24 DRIVERS DOOR WOULD HAVE BEEN OPEN?

25 A IT WAS OPEN.

1 MR. VERNER: OKAY. WITH THE COURT'S INDULGENCE,
2 JUST ONE SECOND.

3 Q I BELIEVE, YOU MET WITH LAW ENFORCEMENT OFFICERS AND
4 GAVE A WRITTEN STATEMENT OF WHAT HAPPENED THAT SAME NIGHT.
5 TO THE BEST OF YOUR RECOLLECTION, DO YOU REMEMBER MEETING
6 WITH THE POLICE AND GIVING YOUR WRITTEN STATEMENT OF WHAT
7 HAPPENED?

8 A YES.

9 Q OKAY. I DO APPRECIATE IT.

10 MR. HAMMACK: NOTHING ELSE FROM THE STATE, JUDGE.
11 YOUR HONOR, THE STATE CALLS JAMES HARMON TO THE STAND.

12 JAMES HARMON, AFTER BEING DULY SWORN, TESTIFIED
13 AS FOLLOWS:

14 DIRECT EXAMINATION

15 BY MR. HAMMACK:

16 Q MR. HARMON, WHERE DO YOU WORK?

17 A MICHELIN IN LEXINGTON.

18 Q DID YOU HAVE THE OPPORTUNITY TO BE AT THE ROBERTS
19 CITGO IN PROSPERITY ON OCTOBER THE 30TH OF 2004?

20 A YES, I WAS.

21 Q DID YOU WITNESS AN INCIDENT THAT OCCURRED THERE?

22 A YES, SOME WHAT.

23 Q CAN YOU TELL ME WHAT YOU SAW?

24 A I GOT IN THE PARKING LOT AND I NOTICED THAT THE STORE
25 WAS REAL CROWDED SO I REALLY DIDN'T WANT TO GO IN. AT

1 FIRST I WAS TRYING TO WAIT UNTIL SOME OF THE PEOPLE
2 FILTERED OUT SO I JUST SAT THERE FOR ABOUT, MAYBE A GOOD
3 FIVE MINUTES. AND I WAS OBSERVING PEOPLE, I GUESS, COMING
4 AND GOING. I SEEN THE LADY THERE, I SAW HER INSIDE WITH A
5 TWELVE PACK OF BEER. SHE WAS THE LAST ONE IN LINE. SO, I
6 THINK TWO GUYS CAME OUT OF TO THE GAS PUMPS. AND A YOUNG
7 LOOKING GUY WITH BUSHY HAIR CAME OUT, HE WALKED OUT AND
8 GOT IN THE WHITE VAN THAT WAS PARKED BESIDE HER. THEN
9 ANOTHER BLUE CAR CAME UP WITH A LADY AND A YOUNG GUY IN
10 IT. THEY PARKED ON HER PASSENGER SIDE. SO, I AM STILL
11 SITTING THERE AND I STEPPED OUT OF MY TRUCK. THE NEXT
12 THING I KNEW THE LADY RAN UP TO ME AND SAID, HELP, HELP, I
13 HAVE BEEN ROBBED, CALL 911. SO, WHAT I DID, I GOT BACK IN
14 MY TRUCK AND I TRIED TO FOLLOW THE VAN WHILE I WAS CALLING
15 911. SO, I WENT UP THE ROAD TO COLONY CHURCH ROAD. AND I
16 SAID, WELL, THAT VAN COULDN'T HAVE GOT THAT FAR. AND I
17 CALLED BACK TO THE SHERIFFS DEPARTMENT AND I SAID, HE HAD
18 TO TURN ON BACHMAN CHAPEL ROAD BECAUSE HE COULDN'T HAVE
19 GOT TO NEWBERRY THAT QUICK. SO, I WENT BACK TO THE CITGO
20 AND BY THAT TIME A BUNCH OF OFFICERS WERE THERE.

21 Q ABOUT WHAT TIME DID THAT OCCUR, MR. HARMON?

22 A I DON'T KNOW, I REALLY DON'T.

23 Q YOU STATED THAT YOU HAD JUST GOTTEN OFF OF WORK?

24 A YES.

25 Q ABOUT WHAT TIME DID YOU GET OFF OF WORK?

1 A I THOUGHT IT WAS EARLIER THAN IT WAS BECAUSE I GOT
2 OFF OF WORK AT 7:30, IT TOOK ME ABOUT 8:15 TO GET TO
3 PROSPERITY. I WAS THINKING, I MIGHT OF STOPPED SOMEWHERE
4 ELSE BEFORE I WENT TO THE CITGO. SO, THEY SAY IT WAS
5 ABOUT 10:00 SO THAT IS PROBABLY RIGHT.

6 Q AND DID YOU EVER SEE MR. ABNEY AT THE SCENE?

7 A NO.

8 Q DID YOU ACTUALLY SEE THE ROBBERY WHEN IT TOOK PLACE?

9 A LIKE I SAID, I SEEN HER WHEN SHE PUT THE BEER IN THE
10 PASSENGER SIDE AND IF I WERE LOOKING OVER THERE IT
11 PROBABLY WOULD OF BEEN HARD FOR ME TO SEE ANYWAY BECAUSE,
12 LIKE I SAID, SHE WAS IN THAT FIRST PARKING SPACE. THE
13 WHITE VAN WAS IN THE SECOND PARKING SPACE AND BY HER DOOR
14 BEING OPENED I PROBABLY COULDN'T SEE IN IT ANYWAY. I JUST
15 KNOW WHEN I STEPPED OUT OF MY TRUCK SHE RAN UP TO ME
16 SAYING, HELP, I HAVE BEEN ROBBED, CALL 911.

17 Q BUT YOU DID GET A LOOK AT THE VAN?

18 A YES, YES.

19 Q DID YOU SEE ANYONE IN THE VAN?

20 A I NOTICED THERE WAS TWO PEOPLE IN THE VAN.

21 Q AND I THINK YOU STATED THAT YOU HAD ATTEMPTED TO
22 FOLLOW THE VAN?

23 A YES, I FOLLOWED HIM UP THE ROAD. LIKE I SAID, I WENT
24 UP TO COLONY CHURCH AND I AM LIKE, IT IS A LONG STRETCH OF
25 76. HE COULDN'T HAVE MADE IT THAT FAR. SO, WHEN I TURNED

1 AROUND I SAID, LIKE I SAY, I CALLED 911 AGAIN AND I SAID
2 HE MUST OF TURNED OFF AND WENT DOWN BACHMAN CHAPEL.

3 Q I HAVE NOTHING FURTHER.

4 CROSS-EXAMINATION

5 BY MR. VERNER:

6 Q WHERE WERE YOU PARKED, MR. HARMON?

7 A I WAS PARKED IN THE FIRST PARKING SPACE.

8 Q JUST SO WE HAVE GOT IT CLEAR.

9 MR. VERNER: MAY I APPROACH MR. HARMON, YOUR HONOR.

10 THE COURT: SURE.

11 Q I AM NOT ASKING FOR A DETAILED DRAWING. DO YOU THINK
12 YOU CAN DRAW JUST A BASIC SKETCH OF WHAT ROBERTS JUST
13 LOOKS LIKE ON THE OUTSIDE.

14 MR. VERNER: CAN I GET HIM IN FRONT OF THE JURY SO WE
15 KNOW WHAT WE ARE TALKING ABOUT.

16 A THIS IS THE STORE, IF I AM COMING UP 76 FROM
17 PROSPERITY YOU HAVE GOT THREE PARKING SPACES OVER HERE AND
18 THREE OVER HERE AND A OPEN AREA ON THE SIDE HERE. OKAY,
19 THE VICTIM WAS PARKED HERE, I WAS PARKED HERE.

20 Q HOW MANY CARS WOULD OF BEEN BETWEEN YOU?

21 A BETWEEN ME?

22 Q YES AND MS. ROOSEN?

23 A NO CARS. WELL, LIKE I SAID AT FIRST THERE WAS NO
24 CARS, SHE WAS, LIKE I SAID, SHE WAS ON THE LEFT SIDE OF
25 THE STORE, I WAS ON THE RIGHT. BUT BOTH OF US WERE IN THE

1 FIRST PARKING SPACE.

2 Q I AM GOING TO, IF I CAN, THIS RECTANGLE HERE IS THE
3 STORE?

4 A YES.

5 Q AND THAT IS THE STORE, AND I THINK YOU SAID THIS IS
6 WHERE MS. ROOSEN PARKED?

7 A ON THE LEFT SIDE, YES.

8 Q AND I WILL PUT AN R, THAT IS WHERE SHE WAS PARKED?

9 A YES.

10 Q AND SHE WAS PARKED TOWARDS THE STORE OR AWAY FROM THE
11 STORE?

12 A TOWARDS THE STORE, IN FRONT OF THE STORE, HERE.

13 Q AND WHERE IS THE FRONT DOOR?

14 A THE FRONT DOOR IS HERE.

15 Q IS THERE A LITTLE WALKWAY IN FRONT OF THE STORE?

16 A A BIG WALKWAY, A SIDEWALK AND THEN A BIG--

17 Q YOU WERE PARKED RIGHT HERE?

18 A I WAS PARKED HERE.

19 Q WERE YOU FACING THE STORE?

20 A YES, I WAS RIGHT UP TO THE STORE.

21 Q WERE YOU BY YOURSELF?

22 A BY MYSELF.

23 Q I AM GOING, WHAT IS YOUR NAME AGAIN, LAST NAME?

24 A HARMON.

25 Q OKAY. THESE ARE THE GAS PUMPS?

- 1 A YES.
- 2 Q OKAY. AND ROAD 76 IS RIGHT HERE?
- 3 A YES.
- 4 Q AND THEN THE, I WILL DRAW A LITTLE WHITE VAN OVER
- 5 HERE. THAT IS WHERE THE WHITE VAN WOULD OF BEEN?
- 6 A YES.
- 7 Q I AM GOING TO PUT A STAR, THAT IS WHERE MR. ABNEY
- 8 WOULD OF BEEN, THAT IS THE WHITE VAN?
- 9 A YES, THAT IS THE WHITE VAN.
- 10 Q AND THEN YOU SAID THERE WAS A BLUE CAR?
- 11 A THE BLUE CAR THAT PULLED IN. AFTER IT PULLED UP, IT
- 12 IS NOT A PARKING SPACE, JUST PULLED INSIDE HERE, BESIDE
- 13 HER VAN, I MEAN HER TRUCK.
- 14 Q WERE THERE CARS AROUND THE GAS PUMPS?
- 15 A YES.
- 16 Q WERE THERE CARS AROUND THE GAS PUMPS WOULD OF BEEN IN
- 17 YOUR WAY OR YOU WOULD HAVE BEEN ABLE TO SEE?
- 18 A IT WAS KIND OF OFF FROM THE STORE.
- 19 Q BUT I ASSUME A CAR AT THE PUMPS WAS PARKED ON THIS
- 20 SIDE AND THIS SIDE?
- 21 A YOU GOT TWO SETS OF PUMPS. IT IS OPEN ENOUGH WIDE
- 22 SPACE IN THE MIDDLE FOR CARS TO PARK ON THE OUTSIDE OF THE
- 23 PUMPS AND THE INSIDE.
- 24 Q OKAY.
- 25 A TWO SETS OF CARS ON THE INSIDE AND OUTSIDE.

1 Q SO THERE WOULD BE THREE LINES OF CARS. THERE WERE TWO
2 THINGS OF GAS AND THEN THERE WOULD BE TWO ON EACH PUMP?

3 A YES.

4 Q OKAY. AND DO YOU REMEMBER THE NEWSPAPERS?

5 A THE NEWSPAPER RACKS ARE ON THE RIGHT HAND SIDE I WAS
6 ON.

7 Q I WILL DRAW RIGHT HERE, WAS THAT THE STATE?

8 A THAT WAS THE STATE PAPER, THE GREENVILLE NEWS AND USA
9 TODAY PAPER.

10 Q IS THERE ANYTHING ELSE AT ROBERTS CITGO THAT YOU CAN,
11 IS THERE ANY PHYSICAL FEATURE THAT YOU DIDN'T--

12 A LIKE I SAY, I COULD LOOK INSIDE OF THE STORE. THE
13 WAY THE STORE IS MADE, THE WAY THE GLASS IS ALL THE WAY
14 AROUND THE STORE.

15 Q ROUGHLY, HOW MUCH SPACE ON THIS SIDE OF THE DOOR, HOW
16 FAR IS IT INTO THE PARKING LOT THERE ON THIS SIDE OF THE
17 ROBERTS?

18 A I WOULD SAY--

19 Q WAS THE CAR PARKED OVER IN THIS AREA?

20 A THERE WAS A Kerosine PUMP OVER THERE.

21 Q OKAY, A Kerosine PUMP OVER HERE AND A FEW CARS OVER
22 THERE. OKAY. IS THAT ROUGHLY, I MEAN I KNOW THAT AIN'T
23 BEAUTIFUL BUT IS THAT ROUGHLY A PRETTY GOOD FAIR AND
24 ACCURATE PICTURE OF WHAT ROBERTS LOOKS LIKE?

25 A YES.

1 MR. VERNER: YOUR HONOR, I WANT TO MARK THIS AS
2 DEFENDANT'S 1 IF THE STATE DOESN'T OBJECT.

3 MR. HAMMACK: YOUR HONOR, I HAVE NO OBJECTION.

4 THE COURT: ALL RIGHT.

5 (WHEREUPON, DEFENDANT'S EXHIBIT NO. 1 WAS ADMITTED
6 INTO EVIDENCE.)

7 Q ALL RIGHT, WERE YOU BY YOURSELF?

8 A YES.

9 Q OKAY. JUST OUT OF CURIOSITY, WHAT WERE YOU DOING
10 SITTING THERE WATCHING THE STORE?

11 A I WASN'T WATCHING THE STORE, I WENT TO BUY SOMETHING
12 AND THE STORE WAS CROWDED.

13 Q SO YOU JUST DECIDED--

14 A YEAH, TO LET SOME PEOPLE COME OUT.

15 Q BEFORE YOU WENT IN.

16 A OKAY.

17 Q I AM NOT IMPLYING ANYTHING, I JUST WANT TO KNOW WHAT
18 YOU ARE DOING. SO, YOU HAD BEEN THERE FOR JUST A COUPLE
19 OF MINUTES WAITING?

20 A YES.

21 Q I KNOW IT IS GOING TO BE TOUGH, ROUGHLY HOW MANY
22 PEOPLE WOULD YOU ESTIMATE WERE IN THE STORE?

23 A IT WAS CROWDED.

24 Q DON'T SAY IT WAS CROWDED, ROUGHLY GIVE ME SOME KIND
25 OF--

1 A COULD OF BEEN ABOUT 15.

2 Q OKAY. HOW MANY PEOPLE WOULD OF BEEN BUYING GAS
3 OUTSIDE OF THE STORE, HOW MANY CARS?

4 A I THOUGHT ALL OF THE PUMPS WERE KIND OF FILLED UP
5 WHEN I PULLED UP IN THERE.

6 Q WOULD BE EIGHT BE A NUMBER?

7 A I DON'T THINK IT WAS EIGHT. I MOSTLY SEEN THE PUMP
8 WHEN I, THE FIRST PUMP CLOSEST TO THE STORE.

9 Q BUT IT COULD BE UP TO EIGHT PEOPLE GETTING GAS AT A
10 TIME?

11 A IT COULD OF BEEN.

12 Q AND JUST OUT OF CURIOSITY, WHEN YOU WALK INTO ROBERTS
13 THROUGH THE FRONT DOOR THE CHECKOUT COUNTER IS IN THE
14 MIDDLE OF THE STORE OR THE LEFT OF THE STORE OR ON THE
15 RIGHT HAND SIDE?

16 A WHEN YOU WALK IN THE STORE YOU TURN TO YOUR RIGHT.
17 WELL, IT DEPENDS ON HOW YOU COME IN THE STORE.

18 Q IT WOULD BE TO THE SIDE OF THE STORE THAT YOU WERE
19 PARKED ON OR WAS IT ON THE SIDE OF THE STORE THAT MS.
20 ROOSEN WAS PARKED ON?

21 A IT WAS TO THE SIDE THAT I WAS PARKED ON.

22 Q TYPICALLY TO WHERE YOU CHECK OUT THE ITEMS?

23 A YES.

24 Q OKAY. AND THEN ON, IT WAS PRETTY WELL LIT?

25 A YES.

1 Q AND YOU ARE THE MAN WHO CALLED 911?

2 A I THINK ANYBODY WOULD HAVE CALLED 911.

3 Q BUT YOU ARE THE MAN THAT CALLED 911?

4 A YES.

5 Q ALL RIGHT. IF MR. HAMMACK OR THE COURT HAS ANY
6 QUESTIONS FOR YOU GO AHEAD AND ANSWER THEM.

7 MR. HAMMACK: YOUR HONOR, I HAVE NO FURTHER
8 QUESTIONS.

9 THE COURT: ALL RIGHT, COUNSEL, LET'S TAKE ABOUT A
10 FIFTEEN MINUTE BREAK.

11 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

12 THE COURT: BRING THE JURY IN.

13 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT
14 APPROXIMATELY 4:05 P.M.)

15 THE COURT: ALL RIGHT, SOLICITOR.

16 MR. HAMMACK: YOUR HONOR, THE STATE CALLS JESSE
17 GALLMAN TO THE STAND.

18 JESSE GALLMAN, AFTER BEING DULY SWORN, TESTIFIED
19 AS FOLLOWS:

20 DIRECT EXAMINATION

21 BY MR. HAMMACK:

22 Q MR. GALLMAN, DID YOU HAVE THE OPPORTUNITY TO BE AT
23 ROBERTS CITGO IN PROSPERITY ON OCTOBER 30 OF 2004?

24 A REPEAT THAT.

25 Q DID YOU HAVE THE OPPORTUNITY TO BE UP AT THE ROBERTS

1 CITGO IN PROSPERITY ON OCTOBER THE 30TH OF 2004?

2 A YES.

3 Q DO YOU REMEMBER ABOUT WHAT TIME IT WAS?

4 A IT WAS ABOUT 9:30.

5 Q ALL RIGHT, DID YOU SEE AN INCIDENT THAT OCCURRED
6 THERE AT THE ROBERTS CITGO?

7 A THE ONLY THING I SAW, I PARKED BESIDE THE FRONT DOOR
8 AND I SAW HER--

9 Q WHO IS HER?

10 A THAT LADY SITTING RIGHT THERE.

11 Q MS. ROOSEN, THE VICTIM?

12 A YES.

13 Q GO HEAD.

14 A I PULLED UP AND I WENT IN THE STORE. AND THEN THE
15 VAN, PEOPLE CAME OUT AND WALKED BESIDE MY CAR AND HAD A
16 BAG, I DON'T KNOW. AND THEN SHE CAME OUT, AND WENT ON THE
17 PASSENGER SIDE. I HEARD A CAR GO REAL FAST. AND I WENT
18 BACK AND I ASKED HER WHAT IS GOING ON AND SHE SAID CALL
19 THE POLICE, THEY HAVE GOT HER POCKETBOOK.

20 Q DID YOU SEE, YOU MENTIONED A VAN, DID YOU SEE THE
21 VAN.

22 A YES.

23 Q DID YOU SEE ANYONE IN THE VAN?

24 A YES, THERE WAS TWO PEOPLE.

25 Q DID YOU KNOW EITHER ONE OF THEM?

1 A I DIDN'T KNOW WHO IT WAS.

2 Q BUT YOU DID SEE TWO BLACK MALES, YOU ARE NOT SURE WHO
3 IT WAS?

4 A YES.

5 Q DID YOU SEE THE ROBBERY ACTUALLY TAKE PLACE?

6 A NO.

7 Q DID YOU, YOU SAW THE WHITE VAN, IS THAT CORRECT?

8 A YES.

9 Q AND SAW THE VICTIM?

10 A YES.

11 Q AND WHAT DID SHE SAY, WHEN YOU SAW HER WHAT DID SHE
12 SAY?

13 A CALL THE POLICE, THAT THEY HAD HER POCKETBOOK.

14 MR. HAMMACK: I HAVE NOTHING FURTHER.

15 THE COURT: MR. VERNER.

16 CROSS-EXAMINATION

17 BY MR. VERNER:

18 Q MR. GALLMAN, I BELIEVE YOU MET WITH THE POLICE THE
19 NIGHT THIS HAPPENED, DIDN'T YOU?

20 A YES.

21 Q AND YOU GAVE A STATEMENT SAYING YOU SAW THE WHITE
22 VAN, TWO BLACK MEN AND SHE WAS RUNNING BESIDE IT?

23 A YES.

24 Q IS THAT A FAIR CHARACTERIZATION OF WHAT YOU SAW?

25 A YES.

1 Q OKAY. HOW LONG OF A DISTANCE DID YOU SEE MS. ROOSEN
2 RUNNING BESIDE THE VAN?

3 A RIGHT BESIDE IT, THE VAN TOOK OFF REAL FAST AND I
4 LOOKED BACK AND SHE WAS RUNNING BESIDE IT, AND SHE PULLED
5 AWAY FROM THE CAR.

6 Q ABOUT HOW FAR A DISTANCE WAS THAT. DID SHE GET ALL
7 THE WAY TO THE GAS PUMPS?

8 A NO.

9 Q DID SHE GET CLOSE TO THE GAS PUMPS?

10 A SHE WAS LIKE RIGHT THERE.

11 Q I MEAN YOU TESTIFIED YOU SAW HER RUNNING BESIDE THE
12 VAN?

13 A YES.

14 Q WAS THE VAN DOOR OPENED OR CLOSED?

15 A OPENEED.

16 Q AND HOW MANY STEPS DO YOU REMEMBER HER TAKING AS SHE
17 WAS RUNNING ALONG SIDE THE VAN?

18 A A FEW.

19 Q MORE THAN ONE?

20 A YES.

21 Q OKAY. WE APPRECIATE IT. UNLESS MR. HAMMACK HAS GOT
22 ANYTHING.

23 MR. HAMMACK: NO FURTHER QUESTIONS, YOUR HONOR.

24 THE COURT: ALL RIGHT, THANK YOU, YOU MAY STEP DOWN.

25 MR. HAMMACK: YOUR HONOR, THE STATE CALLS BILLY

1 HILLER TO THE STAND.

2 BILLY HILLER, AFTER BEING DULY SWORN, TESTIFIED
3 AS FOLLOWS:

4 DIRECT EXAMINATION

5 BY MR. HAMMACK:

6 Q GOOD AFTERNOON, MR. HILLER.

7 A GOOD AFTERNOON.

8 Q WHERE DO YOU LIVE, MR. HILLER?

9 A PROSPERITY.

10 Q HOW LONG HAVE YOU LIVED IN PROSPERITY?

11 A ALL OF MY LIFE.

12 Q DID YOU HAVE THE OCCASION TO BE UP AT THE ROBERTS
13 CITGO ON OCTOBER THE 30TH OF 2004?

14 A YES, SIR.

15 Q ABOUT WHAT TIME WAS IT?

16 A ABOUT 10:00 O'CLOCK AT NIGHT.

17 Q DID YOU WITNESS AN INCIDENT THAT OCCURRED UP THERE?

18 A YES, SIR.

19 Q TELL ME WHAT YOU SAW?

20 A I PULLED INTO THE SERVICE STATION, THE CONVENIENT
21 STORE. THE PARKING ON THE RIGHT SIDE WAS FULL, I WENT
22 BEHIND THE STORE AND I BACKED TO THE OTHER SIDE. I SAW
23 TWO PEOPLE STRUGGLING IN A VEHICLE.

24 Q DID YOU KNOW WHAT WAS GOING ON AT THE TIME?

25 A NO SIR, I DIDN'T.

1 Q DID YOU RECOGNIZE EITHER OF THE TWO PEOPLE?

2 A NO, SIR.

3 Q AFTER YOU SAW THIS TROUBLE TELL ME WHAT HAPPENED?

4 A I SAW THE VEHICLE MOVE FORWARD AND I COULD SEE
5 THROUGH THE WINDOWS OF THE VAN. IT WAS SOMEBODY TRYING TO
6 GET INTO THE VAN THROUGH OPENING THE DOOR. AND ALL OF A
7 SUDDEN THE VAN WENT FORWARD, SAY FIVE OR SIX FEET. AND
8 MS. ROOSEN LEFT THE VEHICLE, RUNNING BACK TOWARDS THE
9 STORE. AND I HEARD HER HOLLER, SOMEONE CALL 911, I HAVE
10 BEEN ROBBED. THEN I WENT BACK AND THE VAN HAD LEFT THE
11 PARKING SPACE ON THE HIGHWAY OF 76 AND MAKE A RIGHT HAND
12 TURN.

13 Q YOU STATED IT WAS MS. ROOSEN, DID YOU KNOW MS.
14 ROOSEN?

15 A I DIDN'T UNTIL SHE EXITED THE VEHICLE AND THEN I
16 SAID, MY GOD, THAT IS THE GAME WARDENS WIFE.

17 Q SO, YOU KNEW MS. ROOSEN?

18 A OH, YES.

19 Q DID YOU KNOW MR. ABNEY?

20 A NO, SIR.

21 Q DID YOU SEE MR. ABNEY THAT NIGHT?

22 A ALL I SEEN WAS THE BACK OF TWO PEOPLES HEAD IN THE
23 VAN.

24 Q CAN YOU DESCRIBE THE VAN YOU SAW?

25 A YES. WHITE IN COLOR.

1 Q WHAT HAPPENED AFTER SHE RAN UP AND STATED THAT SHE
2 HAD BEEN ROBBED?

3 A LIKE I SAID, I SAW THE VAN, IT MADE IT TO THE HIGHWAY
4 AND TURNED ON HIGHWAY 76. I TRIED TO GET THE TAG NUMBER
5 AND WHEN I GOT TO THE ROAD I HAD TO YIELD TO ANOTHER
6 VEHICLE COMING BY. WHEN I GOT OUT AND MAYBE GOT A QUARTER
7 MILE UP TO WISE'S EXXON, WHEN I TURNED THE CURVE I DIDN'T
8 SEE ANYONE ON THE HIGHWAY. I THOUGHT, MAYBE HE COULDN'T
9 GET THAT FAR AHEAD OF ME. SO, I TURNED ON BACHMAN CHAPEL
10 ROAD AND GO AWAY.

11 MR. HAMMACK: NOTHING FURTHER.

12 CROSS-EXAMINATION

13 BY MR. VERNER:

14 Q ARE YOU WORKING NOW?

15 A YES, SIR.

16 Q WHAT IS YOUR EMPLOYMENT, TRADE?

17 A WHAT?

18 Q WHAT DO YOU DO FOR A LIVING?

19 A I WORK AT GEORGIA PACIFIC.

20 Q OKAY. I BELIEVE YOU ALSO MET WITH THE POLICE
21 OFFICERS ON THE NIGHT THAT THIS HAPPENED, DIDN'T YOU?

22 A THAT IS RIGHT.

23 Q AND I DON'T KNOW, WE HAD DONE A MAP GENERALLY OF WHAT
24 CITGO'S LOOKS LIKE. ROUGHLY, WHERE WERE YOU PARKED, DO
25 YOU REMEMBER WHERE YOU WERE PARKED?

- 1 A OH, YES.
- 2 Q WHERE?
- 3 A LET ME SEE THE MAP.
- 4 Q OKAY. DO YOU MIND STEPPING DOWN.
- 5 A ALL RIGHT.
- 6 Q I AM GOING TO GIVE YOU MY BLACK PEN AND JUST, WHAT IS
- 7 YOUR LAST NAME?
- 8 A HILLER.
- 9 Q AND YOU ARE MR. HILLER?
- 10 A YES, SIR.
- 11 Q DRAW A BIG X WHERE YOU WERE PARKED IN THE PARKING
- 12 LOT?
- 13 A RIGHT HERE, IN THIS AREA.
- 14 Q OKAY. SHE HAS TO HEAR YOU. THIS IS 76 HIGHWAY HERE
- 15 AND THE GAS PUMPS AND THAT IS THE STORE. WHERE WERE YOU.
- 16 A COMING AROUND THE BUILDING, AND STOPPED HERE.
- 17 Q OKAY AND I WILL ASK YOU WHY YOU DID IT THAT WAY?
- 18 A BECAUSE THIS WAS FULL.
- 19 Q YOU WERE JUST LOOKING FOR A PLACE TO PARK AND GO
- 20 INSIDE THE STORE?
- 21 A THAT'S RIGHT.
- 22 Q WHERE DID YOU COME TO A STOP?
- 23 A IN THIS PARKING PLACE HERE.
- 24 Q SO, YOU CIRCLE RIGHT THERE.. AND YOU ARE MR. HILLER?
- 25 A THAT'S RIGHT.

1 Q AND I WILL PUT HILLER RIGHT THERE AND YOU WILL AGREE
2 WITH THAT, THAT IS WHERE YOU PARKED?

3 A YES.

4 Q OKAY, THAT IS FINE. YOU CAN SIT DOWN. LET ME GO
5 AHEAD, DO YOU REMEMBER WHAT KIND OF CAR YOU WERE IN THAT
6 NIGHT?

7 A I WAS IN MY TRUCK.

8 Q A PICKUP TRUCK?

9 A YES, SIR.

10 Q WERE YOU BY YOURSELF?

11 A RIGHT.

12 Q OKAY. IS IT DARK BEHIND THE STORE OR WELL LIT?

13 A WELL LIT, THE WHOLE STORE.

14 Q WELL LIT, THE WHOLE STORE, BEHIND IT?

15 A YES.

16 Q WELL LIT. OKAY. BUT YOU WOULD OF BEEN ON THE
17 PASSENGER SIDE OF THE VAN, IS THAT RIGHT, THE WHITE VAN?

18 A RIGHT, YES SIR.

19 Q OKAY. SO, AND MS. ROOSEN'S CAR WOULD OF BEEN PARKED
20 ON THE FAR SIDE OF THE VAN?

21 A OUT TO THE SIDE.

22 Q OKAY. THE WHITE VAN, WAS THAT A NEW VAN OR WAS IT A
23 OLD MODEL VAN?

24 A IT WAS KIND OF BOX TYPE.

25 Q I TELL YOU, I HAVEN'T SEEN IT BUT WHEN I THINK OF

1 VANS I THINK OF A DRIVERS DOOR AND A PASSENGERS DOOR AND
2 THEN ONE BIG DOOR ON THE PASSENGER SIDE THAT SLIDES. IS
3 THAT THE WAY THIS VAN WAS?

4 A I DON'T KNOW.

5 Q OKAY. WERE THERE WINDOWS, WHERE WERE THE WINDOWS IN
6 THE VAN?

7 A THE ONE THAT I LOOKED THROUGH WAS ON THE PASSENGER
8 SIDE.

9 Q DID IT HAVE WINDOWS BEHIND IT, LIKE THE BIG LONG
10 WINDOW?

11 A I THINK SO.

12 Q TO THE BEST OF YOUR KNOWLEDGE IT DID?

13 A TO THE BEST OF MY KNOWLEDGE, SIR.

14 Q OKAY. JUST SO THE JURY KNOWS WHAT VAN WE ARE TALKING
15 ABOUT CAN YOU IDENTIFY THIS VEHICLE.

16 A THAT IS THE VAN.

17 Q THAT IS THE SIDE YOU HAD SEEN?

18 A YES, SIR.

19 Q ALL RIGHT, WE ARE GOING TO MARK THIS ONE AS, WHAT
20 NUMBER IS THIS, 2. DEFENDANT'S 2 WOULD BE THE SIDE OF THE
21 VAN THAT YOU WERE LOOKING AT.

22 MR. HAMMACK: NO OBJECTION, YOUR HONOR.

23 THE COURT: IT IS IN.

24 Q AND DEFENDANT'S 3, I TAKE, IT WOULD BE THE DRIVERS
25 SIDE OF THE VAN.

1 A CORRECT.

2 Q DEFENDANT'S 3.

3 MR. VERNER: IF I MAY, YOUR HONOR, PUBLISH THESE AND
4 LET THE JURY LOOK AT THESE.

5 (WHEREUPON, DEFENDANT'S EXHIBIT NOS. 2 AND 3 WERE
6 ADMITTED INTO EVIDENCE.)

7 Q AND THAT IS THE VAN YOU SAW?

8 A YES, SIR.

9 Q IT HAS GOT TINTED WINDOWS IN IT?

10 A I DON'T KNOW.

11 Q YOU DON'T REMEMBER WHETHER IT HAD TINTED WINDOWS IN
12 IT. IT IS A LITTLE BIT HARD TO TELL.

13 A REAL LIGHTLY TINTED.

14 Q OKAY. DID YOU EVER GET OUT OF YOUR TRUCK?

15 A NO.

16 Q BUT YOU HEARD THE LADY YELL, YOU SAW THE VAN TAKE
17 OFF, YOU TOOK OFF AFTER THE VAN?

18 A THAT IS RIGHT.

19 Q IS THAT A FAIR CHARACTERIZATION?

20 A YES, AFTER I SEEN THE LADY, YES.

21 Q OKAY. AND I BELIEVE THAT NIGHT YOU WROTE A STATEMENT
22 TO LAW ENFORCEMENT ON WHAT HAPPENED.

23 A YES.

24 Q ARE THOSE YOUR READING GLASSES?

25 A YES.

1 Q WOULD YOU PRETTY MUCH READ WHAT YOU TOLD LAW
2 ENFORCEMENT THAT NIGHT. AND YOU ARE GOING TO HAVE TO
3 SPEAK UP SO EVERYBODY CAN HEAR YOU.

4 A YOU WANT ME TO READ THIS?

5 Q JUST READ THE STATEMENT, DON'T READ, JUST READ WHERE
6 YOUR FIRST PART IS YOU STARTED WRITING. AND YOU NEED TO
7 SPEAK UP, MR. HILLER, SO EVERYBODY CAN HEAR YOU.

8 A YOU WANT ME TO READ THIS?

9 Q JUST READ THE STATEMENT, DON'T READ--, JUST READ
10 WHERE YOUR FIRST PART YOU STARTED WRITING.

11 A I DON'T UNDERSTAND.

12 Q JUST READ WHAT YOUR STATEMENT WAS.

13 A YOU WANT ME TO READ THE WHOLE STATEMENT?

14 Q YES, SIR.

15 A OKAY. I PULLED AROUND TO ROBERTS CITGO AND I SAW A
16 WHITE FEMALE TRYING TO GET INTO A WHITE VAN BY THE DRIVERS
17 SIDE DOOR WHERE A BLACK MALE WAS SEATED. I SAW THE WHITE
18 VAN DRIVE AWAY, THE WHITE FEMALE, SHE WAS TRYING TO REACH
19 INSIDE.

20 Q OKAY.

21 A THE VAN MADE A GETAWAY, I KNEW WHO THE LADY WAS. SHE
22 WAS THE DNA OFFICER, WIFE WHO LIVES ON CHURCH STREET IN
23 PROSPERITY. I TRIED TO FOLLOW THE VEHICLE BUT HE GOT AWAY
24 FROM ME.

25 Q OKAY. IS THAT STILL CONSISTENT WITH WHAT HAPPENED

1 THAT NIGHT?

2 A YES.

3 Q OKAY. WAS THE DRIVERS DOOR OPEN WHEN MS. ROOSEN WAS
4 CHASING AFTER THE VEHICLE?

5 A YES, SIR.

6 Q APPROXIMATELY HOW FAR DID SHE CHASE AFTER THE
7 VEHICLE?

8 A FROM HER DOOR TO THE BACK, WELL, HER VEHICLE WHICH
9 WAS PROBABLY FIVE OR SIX FEET.

10 Q OKAY. DID SHE RUN BESIDE THE VEHICLE OR DID IT LEAVE
11 WHEN SHE CHASED IT. WHAT WAS SHE DOING?

12 A SHE WAS IN THE, THE DOOR WAS SHUT AND SHE WAS IN THE
13 DOOR TRYING TO GET HER POCKETBOOK OR SOMETHING LIKE THAT.

14 Q SHE WAS REACHING INTO THE CAR AND THE CAR DOOR WAS
15 OPEN?

16 A THAT'S RIGHT.

17 Q DID IT LOOK LIKE SHE WAS DOING THAT OF HER OWN
18 ACCORD, THAT SHE WAS REACHING IN OR DID IT LOOK LIKE SHE
19 WAS BEING HELD IN THERE?

20 A IT LOOKED LIKE SHE WAS TRYING TO GET SOMETHING OUT.

21 Q OKAY. SO, IT LOOKED LIKE SHE WAS THE ONE REACHING
22 INTO IT?

23 A THAT'S RIGHT.

24 Q OKAY. I TAKE IT YOU DIDN'T HAVE A CELL PHONE ON YOU,
25 YOU DIDN'T CALL 911?

1 A WELL, I THOUGHT IT WAS A DOMESTIC PROBLEM.

2 Q AT FIRST?

3 A YES.

4 Q OKAY. IF MR. HAMMACK HAS ANY MORE QUESTIONS FOR YOU.

5 MR. HAMMACK: I DON'T HAVE ANY MORE QUESTIONS, YOUR
6 HONOR.

7 THE COURT: YOU MAY STEP DOWN, THANK YOU.

8 MR. HAMMACK: YOUR HONOR, THE STATE WOULD CALL MELVIN
9 GALLMAN TO THE STAND.

10 MELVIN GALLMAN, AFTER BEING DULY SWORN,
11 TESTIFIED AS FOLLOWS:

12 DIRECT EXAMINATION

13 BY MR. HAMMACK:

14 Q MR. GALLMAN, DID YOU HAVE THE OPPORTUNITY TO SPEAK OR
15 TO SEE TED ABNEY ON SATURDAY, OCTOBER 30TH OF 2004?

16 A YES.

17 Q AND WHERE WAS THAT?

18 A IT WAS IN MY FRONT YARD.

19 Q WHERE IS YOUR FRONT YARD?

20 A 134 CHURCH STREET, PROSPERITY.

21 Q ABOUT WHAT TIME WAS IT THAT YOU TALKED TO MR. ABNEY?

22 A AROUND 9:00 O'CLOCK IN THE MORNING.

23 Q DO YOU REMEMBER WHAT HE WAS DRIVING?

24 A HE WAS DRIVING A WHITE VAN.

25 Q DID YOU GET A GOOD LOOK AT THE VAN?

1 A NO.

2 Q DO YOU KNOW WHO THE VAN BELONGED TO?

3 A NO.

4 Q WAS ANYONE ELSE IN THE VAN?

5 A YES, HE HAD ANOTHER GUY WITH HIM WITH A BUSHY HAIR.

6 MR. HAMMACK: YOUR HONOR, IF I MAY APPROACH.

7 THE COURT: OKAY.

8 Q THESE HAVE BEEN PLACED INTO EVIDENCE EARLIER BY THE
9 DEFENSE. WILL YOU TAKE A LOOK AT THOSE TWO PHOTOGRAPHS.
10 WHAT DO THOSE PHOTOGRAPHS DEPICT?

11 MR. VERNER: RESPECTFULLY, YOUR HONOR, I THINK WE
12 HAVE ESTABLISHED THE VAN, IF HE WANTS TO PURSUE THIS LINE
13 FURTHER. BUT I THINK IT HAS BEEN ESTABLISHED.

14 THE COURT: THE COURT WILL PERMIT IT.

15 A THAT IS THE VAN, IT LOOKS THE SAME.

16 Q DOES IT APPEAR, SO THAT APPEARS TO BE THE VAN THAT
17 MR. ABNEY WAS DRIVING?

18 A YES.

19 Q DID YOU SEE MR. ABNEY AGAIN THAT DAY?

20 A I SEEN HIM RIDE BY ABOUT 4:00 O'CLOCK THAT EVENING.

21 Q DID HE COME TO YOUR HOUSE AGAIN?

22 A NO, SIR.

23 Q WHEN YOU SAW HIM, WHAT WAS HE DOING?

24 A HE WAS JUST DRIVING BY THE LAST TIME.

25 Q DID YOU SEE ANYONE ELSE IN THE VAN WITH HIM?

1 A YES, THERE WAS A PASSENGER.

2 Q DO YOU KNOW WHO THE PASSENGER WAS?

3 A IT APPEARED TO BE THE SAME GUY THAT WAS THERE
4 EARLIER.

5 Q WAS HE IN THE SAME VAN AT THAT POINT?

6 A YES.

7 Q HOW DO YOU KNOW MR. ABNEY?

8 A WE ARE FROM THE SAME TOWN, HAVE KNOWN EACH OTHER FOR
9 ABOUT 30 YEARS.

10 Q I HAVE NOTHING FURTHER.

11 CROSS-EXAMINATION

12 BY MR. VERNER:

13 Q YOU ARE NOT ANY RELATION TO THAT OTHER YOUNG MAN WHO
14 JUST TESTIFIED, JESSE GALLMAN, ARE YOU?

15 A HIS FAMILY IS DIFFERENT.

16 Q AND I TAKE IT YOU SAID YOU WAIVED AT HIM, SO YOU ARE
17 ON PRETTY GOOD TERMS WITH MR. ABNEY?

18 A YES.

19 Q OKAY. AND YOU SAW HIM DRIVING THE WHITE VAN WITH THE
20 BLACK MAN, YOU GAVE A STATEMENT TO LAW ENFORCEMENT
21 NOVEMBER THE 3RD. IS THAT ROUGHLY--

22 A YES.

23 Q DO YOU REMEMBER HAVING THE POLICE OFFICER WRITE YOUR
24 STATEMENT WHEN YOU MET WITH HIM?

25 A YES.

1 Q AND YOU SAID, BASICALLY, YOU REMEMBER SEEING HIM THAT
2 NIGHT WITH ANOTHER BLACK GUY NAMED, WHAT WAS HIS NAME OR
3 NICKNAME?

4 A NO, IT WAS THAT MORNING.

5 Q OH, THAT MORNING. WHAT WAS THE GUYS NICKNAME?

6 A HIS NAME IS SOMETHING CRUCIAL.

7 Q CRUCIAL. OKAY, I WAS JUST -- I DIDN'T KNOW THAT
8 NICKNAME BUT THAT IS NOT HOW YOU SPELL CRUCIAL BUT HE WAS
9 WITH A GUY NAMED CRUCIAL OR NICKNAMED CRUCIAL?

10 A YES.

11 Q AND THAT WAS THE YOUNG MAN WITH THE BUSHY HAIR?

12 A YES.

13 Q AND I GUESS BUSHY HAIR IS KIND OF LIKE AN AFRO?

14 A YES.

15 Q AND THEY STAYED WITH YOU FOR ABOUT AN HOUR AND THEY
16 LEFT?

17 A THAT'S RIGHT.

18 Q ALL RIGHT. AND I BELIEVE YOU HAD TESTIFIED THAT THEY
19 HAD LEFT TO GO SEE A GIRL NAMED MARY JANE ROSE, IS THAT
20 RIGHT?

21 A YES.

22 Q DO YOU KNOW WHO MARY JANE ROSE IS?

23 A SHE IS--

24 Q OKAY, OKAY. AND YOU KNOW TED BECAUSE HE IS MARRIED
25 TO YOUR SISTER, STACY GALLMAN?

1 A YES.

2 Q OKAY. AND STACY WOULD BE THIS LADY?

3 A YES.

4 Q OKAY. AT ABOUT 4:00 O'CLOCK THAT AFTERNOON YOU SAW
5 HIM DRIVE BY AGAIN LATER AND YOU WAIVED AT HIM?

6 A YES.

7 Q WERE YOU AT YOUR HOUSE OR WHERE WERE YOU?

8 A YES, I WAS AT MY HOUSE.

9 Q BUT HE DIDN'T STOP BY TO SEE YOU, HE WAS JUST DRIVING
10 BY?

11 A YEAH.

12 Q OKAY. THAT IS THE LAST TIME ON OCTOBER 30TH THAT YOU
13 SAW TED ABNEY?

14 A YES.

15 Q OKAY. IF MR. HAMMACK HAS ANY MORE QUESTIONS FOR YOU
16 YOU NEED TO ANSWER THEM.

17 MR. HAMMACK: I HAVE NOTHING FURTHER.

18 THE COURT: YOU MAY STEP DOWN.

19 MR. HAMMACK: YOUR HONOR, IT IS ABOUT 4:30, THE ONLY
20 WITNESS I HAVE LEFT ARE THE THREE OFFICERS. I EXPECT
21 THERE ARE GOING TO BE RELATIVELY LENGTHY.

22 THE COURT: WE WILL STOP UNTIL THE MORNING. I HAVE
23 GOT A LITTLE WAYS OF A DRIVE BACK IN THE MORNING SO WE
24 WILL START AT 10:00 O'CLOCK. EVERYBODY NEEDS TO BE BACK
25 HERE AT 10:00 AND REMEMBER MY INSTRUCTIONS. IF ANYBODY

1 TRIES TO CONTACT YOU NOT TO DISCUSS IT AND NOTIFY THE
2 SHERIFFS DEPARTMENT. HAVE A GOOD NIGHT AND WE WILL SEE
3 YOU IN THE MORNING.

4 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT.)

5 THE COURT: WE WILL SEE YOU ALL IN THE MORNING AT
6 10:00 O'CLOCK.

7 (WHEREUPON, COURT WILL RESUME THE NEXT MORNING AT
8 10:00 O'CLOCK)

9 THE COURT: IS THE STATE READY?

10 MR. HAMMACK: THE STATE IS READY, YOUR HONOR.

11 THE COURT: ARE YOU READY, MR. VERNER?

12 MR. VERNER: YES, YOUR HONOR.

13 THE COURT: BRING THE JURY IN, PLEASE.

14 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT
15 APPROXIMATELY 10:10 A.M.)

16 THE COURT: SOLICITOR CALL YOUR NEXT WITNESS.

17 MR. HAMMACK: YOUR HONOR, THE STATE WOULD CALL BEN
18 CHAPMAN.

19 BEN CHAPMAN, AFTER BEING DULY SWORN, TESTIFIED
20 AS FOLLOWS:

21 DIRECT EXAMINATION

22 BY MR. HAMMACK:

23 Q MR. CHAPMAN, BY WHOM ARE YOU EMPLOYED?

24 A NEWBERRY COUNTY SHERIFFS OFFICE.

25 Q WHAT IS YOUR POSITION WITH THE SHERIFFS OFFICE?

1 A INVESTIGATOR.

2 Q WERE YOU EMPLOYED AS AN INVESTIGATOR WITH THE
3 SHERIFFS OFFICE ON OCTOBER THE 30TH OF 2004?

4 A YES, SIR.

5 Q DID YOU HAVE AN OPPORTUNITY TO INVESTIGATE THE ARMED
6 ROBBERY AT THE CITGO STATION IN PROSPERITY THAT OCCURRED
7 THAT EVENING?

8 A YES, SIR.

9 Q CAN YOU TELL ME WHAT HAPPENED?

10 A I RESPONDED TO THE CITGO IN PROSPERITY, ARRIVED ON
11 THE SCENE, I SPOKE WITH MS. ROOSEN, I ALSO SPOKE WITH THE
12 DEPUTIES THAT WERE ALREADY ON THE SCENE WHO GAVE ME A
13 BRIEF SYNOPSIS OF WHAT WAS GOING ON. WE GOT TOGETHER WITH
14 WITNESSES, TOOK STATEMENTS AND PROCESSED THE SCENE.

15 Q WHAT DID YOU LEARN AS THE RESULT OF YOUR
16 INVESTIGATION?

17 A MS. ROOSEN STATED THAT SHE HAD GONE INTO THE STORE,
18 SHE CAME OUT, SHE PLACED HER PURCHASE IN THE VEHICLE ON
19 THE PASSENGER SIDE, WALKED AROUND TO THE DRIVERS SIDE TO
20 ENTER THE VEHICLE WHEN MR. ABNEY APPROACHED HER FROM
21 BEHIND.

22 MR. VERNER: YOUR HONOR, RESPECTFULLY, MS. ROOSEN HAS
23 ALREADY TESTIFIED, THIS WOULD BE HERESY. •

24 THE COURT: TRY TO AVOID IN GOING INTO WHAT OTHER
25 PEOPLE SAID.

1 Q DO YOU REMEMBER WHO YOU HAD THE CHANCE TO INTERVIEW
2 THAT NIGHT?

3 A I PERSONALLY INTERVIEWED MS. ROOSEN.

4 Q DID YOU HAVE ANY MORE INVOLVEMENT IN THE CASE BEYOND
5 THAT NIGHT?

6 A YES.

7 Q TELL ME WHAT HAPPENED OR WHAT YOU KNOW?

8 A I FOLLOWED UP ON THE CASE, I FOLLOWED UP ON LEADS,
9 LET ME SEE. ONE OF THE FIRST LEADS WAS A PHONE CALL THAT
10 WE HAD GOT FROM ONE OF THE FLIERS THAT WAS POSTED IN A
11 GROCERY STORE IN PROSPERITY, THAT THE PICTURE RESEMBLED
12 MR. ABNEY.

13 MR. HAMMACK: YOUR HONOR, IF I MAY APPROACH.

14 Q STATE'S EXHIBIT 1 HAS BEEN PLACED INTO EVIDENCE.
15 THAT IS THE COMPOSITE, WOULD THAT BE THE PICTURE THAT WAS
16 SEEN?

17 A YES.

18 Q DO YOU REMEMBER WHEN YOU RECEIVED THAT PHONE CALL?

19 A NO, SIR.

20 Q DO YOU KNOW WHO POSTED THE PICTURE THERE?

21 A YES.

22 Q WHO WAS THAT?

23 A INVESTIGATOR DENNIS.

24 Q DOES THAT APPEAR TO BE A FAIR AND ACCURATE
25 REPRESENTATION OF THE PICTURE THAT WAS POSTED?

1 A YES.

2 Q YOU MENTIONED JUST THEN INVESTIGATOR DENNIS WAS ALSO
3 INVOLVED?

4 A YES.

5 Q CAN YOU TELL ME ANYMORE INVOLVEMENT THAT YOU HAD IN
6 THE MATTER?

7 A YES, SIR. WE ALSO RECEIVED A CALL FROM A SHELL
8 STATION ON BROAD RIVER ROAD IN COLUMBIA AS WELL AS MR.
9 ROOSEN, THAT THEY HAD FOUND MS. ROOSEN'S POCKETBOOK IN THE
10 TRASH CAN. I RESPONDED TO THE SHELL STATION AND COLLECTED
11 THE EVIDENCE AND PROCESSED IT.

12 Q AND WERE THERE OTHER OFFICERS INVOLVED IN THE
13 INVESTIGATION?

14 A YES, INVESTIGATOR DENNIS AND LIEUTENANT BOLAND WERE
15 INVOLVED IN THE INVESTIGATION.

16 Q NOTHING FURTHER.

17 CROSS-EXAMINATION

18 BY MR. VERNER:

19 Q AFTER YA'LL POSTED, I GUESS THE SKETCH ARTIST,
20 SOMEBODY IN THE COMMUNITY SAID THAT LOOKS LIKE TED ABNEY?

21 A YES.

22 Q OKAY. THAT IS ALL. I APPRECIATE IT.

23 MR. HAMMACK: YOUR HONOR, THE STATE CALLS LIEUTENANT
24 WESLEY BOLAND TO THE STAND.

25 LIEUTENANT WESLEY BOLAND, AFTER BEING DULY

1 SWORN, TESTIFIED AS FOLLOWS:

2 DIRECT EXAMINATION

3 BY MR. HAMMACK:

4 Q LIEUTENANT BOLAND, BY WHOM ARE YOU EMPLOYED?

5 A NEWBERRY COUNTY SHERIFFS OFFICE.

6 Q HOW LONG HAVE YOU WORKED FOR THE SHERIFFS OFFICE?

7 A 13 YEARS.

8 Q WERE YOU EMPLOYED THERE ON THE NIGHT OF OCTOBER THE
9 30TH OF 2004?

10 A YES, SIR.

11 Q WERE YOU AWARE OF AN ARMED ROBBERY THAT TOOK PLACE
12 OVER AT THE CITGO IN PROSPERITY THAT NIGHT?

13 A YES SIR, I WAS.

14 Q DID YOU HAVE THE OPPORTUNITY TO INVESTIGATE THAT
15 INCIDENT?

16 A IT WAS INITIALLY HANDLED BY INVESTIGATOR CHAPMAN, HE
17 WAS THE ONE ON CALL THAT NIGHT. SO, HE INITIALLY DID THE
18 RESPONSE AND AND THE INITIAL INVESTIGATION. THE NEXT WEEK
19 HE HAD SOME DAYS OFF AND THERE WERE MYSELF AND
20 INVESTIGATOR DENNIS WHILE HE WAS OFF.

21 Q COULD YOU TELL ME WHAT ROLE YOU PLAYED IN THE
22 INVESTIGATION?

23 A THEY HAD FOLLOWED UP WITH SOME LEADS AND SHOWED A
24 PHOTO ID AFTER MR. ABNEY'S NAME CAME UP. AND IN WHICH THE
25 VICTIM HAD PICKED HIM OUT OF A LINEUP. AT THAT POINT AN

1 ARREST WARRANT WAS ISSUED FOR ARMED ROBBERY, HE HAD ALSO
2 BEEN PUT ON THE NEWS TO TRY TO LOCATE MR. ABNEY BECAUSE
3 THEY HAD TRIED SEVERAL PLACES AND HAD NOT BEEN ABLE TO
4 LOCATE HIM. AND THEN LATER THAT, WELL, WITHIN A COUPLE OF
5 DAYS, I DON'T KNOW EXACTLY WHICH DAY IT WAS HE CALLED THE
6 SHERIFFS OFFICE AND SPOKE WITH ME AND TOLD ME HE WANTED TO
7 TURN HIMSELF IN. HE WAS IN COLOMBIA AND HE GAVE ME HIS
8 ADDRESS AND ASKED IF I WOULD COME PICK HIM UP.

9 Q DID YOU PROCEED TO COLUMBIA TO PICK UP MR. ABNEY?

10 A I DID. I GOT DIRECTIONS, I NOTIFIED RICHLAND COUNTY,
11 I LOCATED THE AREA AND RICHLAND COUNTY SHERIFFS OFFICE
12 SENT UNITS AND MET ME THERE AND WENT ON TO THE RESIDENCE.
13 AND WHEN WE GOT THERE MR. ABNEY WAS SITTING ON THE PORCH.

14 Q WAS MR. ABNEY ARRESTED?

15 A YES, SIR. AT THAT TIME I WENT UP TO HIM, I PLACED
16 HIM IN HANDCUFFS AND READ HIM HIS MIRANDA RIGHTS AND THE
17 VAN WAS IN THE YARD WHICH MATCHED THE DESCRIPTION. AFTER
18 I READ HIM HIS MIRANDA RIGHTS, HE UNDERSTOOD THOSE, HE
19 SAID HE WAS WILLING TO TALK TO ME. HE DID ADMIT THAT THAT
20 WAS THE VAN THAT HE HAD BEEN IN.

21 MR. HAMMACK: YOUR HONOR, IF I MAY APPROACH.

22 Q THESE HAVE BEEN PLACED INTO EVIDENCE, IT IS
23 DEFENDANT'S 2 AND DEFENDANT'S 3. DOES THAT APPEAR TO BE
24 THE VAN THAT YOU JUST MENTIONED?

25 A THOSE ARE THE PHOTOS THAT I TOOK AT HIS RESIDENCE IN

1 COLUMBIA, YES.

2 Q ALL RIGHT. YOU STATED EARLIER THAT MR. ABNEY ADVISED
3 YOU THAT IS THE VAN HE HAD BEEN IN THAT NIGHT. WHY DID
4 YOU TAKE PHOTOGRAPHS OF IT?

5 A THAT WAS THE VAN THAT WAS USED IN THE CRIME. ALSO
6 THERE HAD BEEN A REPORT FILED BY THE HIGHWAY PATROL THAT
7 WE THOUGHT MAY HAVE BEEN INVOLVED BUT WASN'T SURE IT WAS
8 THAT. AN ACCIDENT WHERE A SIGN HAD BEEN HIT AT THE CORNER
9 OF BACHMAN CHAPEL AND 76, PIONEER FOODS. AND I CONSULTED
10 MR. ABNEY ABOUT THAT AND HE SAID, YES, THE SIGN WAS HIT
11 AND HE TOLD ME THERE WAS DAMAGE ON THE VAN WAS FROM THAT.

12 Q DID YOU SEARCH THE VAN?

13 A NO, SIR. I DID ASK MR. ABNEY BEFORE WE LEFT WAS
14 THERE ANYTHING ELSE DOWN THERE IN COLUMBIA THAT I NEEDED
15 BEFORE I CAME BACK TO NEWBERRY AND HE SAID NO.

16 Q DID YOU SEARCH MR. ABNEY?

17 A YES, SIR. I DID PAT HIM DOWN, FOR HIS ARREST, FOR
18 ANY WEAPONS, ANYTHING ON HIS PERSON. BUT HE HAD CALLED
19 AND SAID HE WANTED TO TURN HIMSELF IN.

20 Q DID YOU FIND ANY WEAPONS ON MR. ABNEY?

21 A NO, SIR.

22 Q DID YOU FIND WEAPONS IN HIS PROXIMITY?

23 A NO, SIR.

24 Q COULD YOU TELL ME WHAT HAPPENED FROM THERE?

25 A AT THAT TIME RICHLAND COUNTY, THROUGH NCIC WHICH IS

1 NATIONAL CRIME INFORMATION, HE HAD BEEN ENTERED AS WANTED
2 IN THERE. THEY DID GET CONFIRMATION AND CONFIRMED IT AND
3 I PUT HIM IN MY VEHICLE AND FILLED OUT ALL THE PAPERWORK
4 THEY NEEDED AND WE CAME BACK TO NEWBERRY. WE CAME UP TO
5 THE SHERIFFS OFFICE WHERE I MET INVESTIGATOR DENNIS AT
6 WHICH POINT WE WERE IN MY OFFICE AND SAT DOWN AND DID A
7 WRITTEN MIRANDA FORM. READ HIM HIS RIGHTS, MIRANDA RIGHTS
8 AND HE WAIVED HIS RIGHTS AGAIN ON PAPER. AND THEN WE SAT
9 DOWN AND DISCUSSED THE ISSUE PERTINENT.

10 Q YOU SAY YOU DID A WRITTEN MIRANDA FORM, DO YOU KNOW
11 WHAT WOULD BE INCLUDED ON THAT FORM?

12 A IT IS YOUR LEGAL RIGHTS, THE RIGHT TO REMAIN SILENT.
13 ANYTHING YOU SAY CAN AND WILL BE USED AGAINST YOU IN A
14 COURT OF LAW. YOU HAVE A RIGHT TO AN ATTORNEY, IF YOU
15 CANNOT AFFORD AN ATTORNEY ONE WILL BE APPOINTED FOR YOU.
16 I ASK YOU, DO YOU UNDERSTAND YOUR RIGHTS AND YOU SAY THAT
17 YOU DO UNDERSTAND YOUR RIGHTS AND THE WAIVER UNDERNEATH
18 THAT SAYS, ARE YOU WILLING TO TALK AND ANSWER QUESTIONS AT
19 THIS TIME WITHOUT A LAWYER PRESENT AT THIS TIME.

20 MR. HAMMACK: YOUR HONOR, IF I MAY APPROACH.

21 Q YOU SEE THIS IS MARKED AS COURT'S EXHIBIT NUMBER 1.
22 DOES THAT APPEAR TO BE THE FORM THAT WAS FILLED OUT THAT
23 NIGHT?

24 A IT WAS THAT AFTERNOON, IT WAS TOWARDS AFTER LUNCH
25 WHEN HE CALLED AND UNTIL WE GOT BACK TO NEWBERRY IT WAS

1 STILL THAT AFTERNOON. YES SIR, THAT IS THE FORM THAT WAS
2 FILLED OUT. IT IS INITIALED AND SIGNED BY MR. ABNEY WITH
3 PERTINENT INFORMATION ON TOP FILLED OUT BY HIM AND MR.
4 ABNEY'S SIGNATURE.

5 Q YOU WITNESSED MR. ABNEY ACTUALLY SIGN THE FORM?

6 A YES SIR, I DID.

7 Q DID HE APPEAR TO UNDERSTAND THOSE RIGHTS?

8 A YES SIR, HE DID.

9 Q DID HE MAKE A STATEMENT?

10 A YES SIR, HE DID.

11 MR. HAMMACK: ONE MOMENT.

12 MR. VERNER: YOUR HONOR, THERE IS AN ISSUE THAT I
13 PREFER TO TAKE UP JUST OUTSIDE THE PRESENCE OF THE JURY OR
14 AT LEAST SIDEBAR.

15 THE COURT: COME ON UP.

16 (WHEREUPON, A BENCH CONFERENCE WAS HELD IN THE
17 PRESENCE OF THE JURY BUT OUT OF THE HEARING OF THE
18 JURY.)

19 Q I WILL ASK THE QUESTION AGAIN. DID YOU HAVE A
20 CHANCE, AFTER THE MIRANDA FORM WAS FILLED OUT, AFTER YOU
21 SPOKE WITH MR. ABNEY DID YOU HAVE A CHANCE TO GET A
22 STATEMENT FROM HIM.

23 A YES, SIR. WE SAT DOWN AND DISCUSSED THE VERBAL
24 STATEMENT AND THEN LATER WE DID A WRITTEN STATEMENT.

25 Q WHAT INFORMATION DID YOU OBTAIN FROM YOUR

1 CONVERSATION WITH MR. ABNEY?

2 A FROM PART OF THE INVESTIGATION I WAS AWARE THAT MR.
3 ABNEY HAD A DRUG USE PROBLEM. WE DISCUSSED THAT, WE ALSO
4 DISCUSSED WHAT HAD HAPPENED. HE INSISTED THAT HE DIDN'T
5 HAVE A WEAPON BUT HE ADMITTED THAT HE WAS THE ONE THERE
6 AND THAT HE WAS THE ONE WHO TOOK THE POCKETBOOK AND ALSO
7 FOUND OUT IT WAS A JUVENILE INVOLVED IN THE VEHICLE WITH
8 HIM. HE SAID HE WAS NOT INVOLVED IN ANY WAY OTHER THAN HE
9 WAS IN THE VEHICLE.

10 Q YOU STATED YOU GOT A WRITTEN STATEMENT FROM MR.
11 ABNEY, IS THAT CORRECT?

12 A YES, SIR.

13 MR. HAMMACK: YOUR HONOR, MAY I APPROACH THE WITNESS.
14 THE COURT: YES.

15 Q THIS IS COURT'S EXHIBIT 2, WOULD YOU TAKE A LOOK AT
16 THAT, DOES THAT APPEAR TO BE MR. ABNEY'S STATEMENT?

17 A YES, SIR. THAT IS OUR SHERIFFS VOLUNTARY STATEMENT
18 FORM, THE TOP OF THE INFORMATION FILLED OUT, ME AND
19 INVESTIGATOR DENNIS. AND MR. ABNEY'S STATEMENT WRITTEN IN
20 HIS OWN WORDS, SIGNED BY MR. ABNEY AND WITNESSED BY MYSELF
21 AND INVESTIGATOR DENNIS.

22 Q SO, YOU DID WITNESS MR. ABNEY SIGN THAT STATEMENT?

23 A YES, SIR.

24 Q IS THAT CONSISTENT WITH WHAT HE TOLD YOU THAT NIGHT?

25 A IT IS CONSISTENT, HE IS NOT AS MUCH IN DETAIL AS WE

1 WENT OVER VERBALLY BUT IT IS VERY MUCH THE SAME AS IN THE
2 WRITTEN STATEMENT.

3 Q AND THESE DO APPEAR TO BE THE ORIGINAL DOCUMENTS?

4 A YES, SIR.

5 MR. HAMMACK: YOUR HONOR, I WOULD MOVE TO ENTER THESE
6 INTO EVIDENCE AS A STATE'S EXHIBIT.

7 MR. VERNER: YOUR HONOR, AGAIN, TO MAKE IT CLEAR.
8 THAT PORTION THAT DEALS WITH DRUG USE, IT PUTS MY CLIENT'S
9 CHARACTER IN EVIDENCE, IT IS UNFAIRLY PREJUDICIAL BECAUSE
10 IT LETS THE JURY SPECULATE ABOUT OTHER THINGS OTHER THAN
11 THE ACTUAL CRIME HE IS CHARGED WITH. I DON'T THINK IT IS
12 RELEVANT TO WHETHER HE COMMITTED AN ARMED ROBBERY OR NOT.
13 AND THOSE WOULD BE THE THREE GROUNDS FOR MY OBJECTION,
14 YOUR HONOR.

15 THE COURT: THEY ARE MOVED IN.

16 (WHEREUPON, STATE'S EXHIBIT NOS. 2 AND 3 WAS ADMITTED
17 INTO EVIDENCE.)

18 MR. HAMMACK: YOUR HONOR, THE STATE WOULD MOVE TO
19 PUBLISH THESE EXHIBITS TO THE JURY.

20 THE COURT: OKAY.

21 Q FOLLOWING THE STATEMENT OF MR. ABNEY, DID YOU HAVE
22 ANY MORE CONTACT WITH MR. ABNEY?

23 A AFTER WE FINISHED WITH THE WRITTEN STATEMENT HE WAS
24 TRANSPORTED TO THE JAIL AND SERVED WITH AN ARREST WARRANT.
25 I DON'T BELIEVE I HAD ANY MORE CONTACT WITH HIM.

1 Q DID YOU HAVE THE OCCASION TO DO ANY FURTHER
2 INVESTIGATION ON THIS INCIDENT?

3 A PRETTY MUCH EVERYTHING ELSE WAS FOLLOWED UP BY
4 SERGEANT DENNIS.

5 Q I HAVE NOTHING FURTHER AT THIS TIME.

6 CROSS-EXAMINATION

7 BY MR. VERNER:

8 Q INVESTIGATOR BOLAND, ON NOVEMBER 4TH IS WHEN TED
9 ABNEY OR A FRIEND CALLED AND SAID HE WANTED TO TURN
10 HIMSELF IN TO LAW ENFORCEMENT?

11 A WHEN I TALKED TO TED, OR IT WAS HIS FRIEND. BUT HE
12 WAS THERE AT THE HOUSE, HE CALLED.

13 Q AND HE WOULD BE WAITING FOR YOU TO PICK HIM UP AND
14 ARREST HIM?

15 A YES, SIR.

16 Q AND THIS WAS, THE DAY YOU INTERVIEWED HIM WAS THE
17 SAME DAY HE TURNED HIMSELF IN?

18 A YES, SIR. I WENT STRAIGHT TO COLUMBIA, WENT DOWN
19 THERE AND MET HIM AND CAME STRAIGHT BACK THE SAME.

20 Q OKAY. AND THE ROBBERY OCCURRED AT, JUST SHY OF
21 MIDNIGHT ON OCTOBER 30TH?

22 A I BELIEVE IT WAS ABOUT 10:00, I THINK, WAS THE
23 INITIAL CALL.

24 Q AND THE POLICE RESPONDED ABOUT 11:00, IT WAS LATE AT
25 NIGHT?

1 A YES.

2 Q AND SO, AT BEST THE SKETCH WOULDN'T HAVE BEEN PUT OUT
3 UNTIL THE NEXT DAY AT THE VERY QUICKEST, WOULD IT?

4 A I BELIEVE THE NEXT DAY IS WHEN THEY DID THE SKETCH,
5 YES.

6 Q OKAY.

7 A AND WE MET AT THE SHERIFFS OFFICE AND DID THE SKETCH.

8 Q OKAY, THE SKETCH WOULD HAVE FIRST COME OUT ON OCTOBER
9 THE 31ST. SO, AND THEN THREE DAYS AFTER THAT TED TURNED
10 HIMSELF IN?

11 A YES.

12 Q OKAY. AND I ASSUME THAT IS BECAUSE MEDIA PUT OUT THE
13 WORD THAT WE WERE LOOKING TO SPEAK TO TED ABNEY?

14 A YES, AND WE ALREADY HAD AN ARREST WARRANT FOR HIM.

15 Q OKAY, JUST BASED ON--

16 A AND WE HAD ATTEMPTED TO LOCATE HIM AND WE PUT ON THE
17 NEWS AND AS A MATTER OF FACT I BELIEVE THAT IT IS WHERE
18 MR. ABNEY, HE SAW HIMSELF ON THE NEWS.

19 Q WHEN MS. ROOSEN, I GUESS, DID THE PHOTO LINEUP AND
20 THE SKETCH CAME FIRST AND THEN THE TIP CAME THAT MIGHT BE
21 TED ABNEY. SO YA'LL PUT TED ABNEY'S PICTURE IN A SIX
22 PERSON PHOTO LINEUP, MS. ROOSEN IDENTIFIED TED ABNEY'S
23 PICTURE AS THE PERSON SHE BELIEVED ROBBED HER. AND THEN
24 ON THAT BASIS YOU OBTAINED THE ARREST WARRANT?

25 A YES.

1 Q AND THEN SUBSEQUENTLY TED OR HIS FRIEND CALLED AND
2 SAID TED WILL BE IN COLUMBIA WAITING FOR YOU TO PICK HIM
3 UP?

4 A YES.

5 Q OKAY. AFTER YOU CAME AND PICKED HIM UP WAS HE
6 COOPERATIVE?

7 A YES, VERY COOPERATIVE.

8 Q DID YOU KNOW TED?

9 A I HAD KNOWN TED'S NAME, MAYBE SEEN HIM ONCE BEFORE
10 BUT NOT PERSONALLY OR ANYTHING.

11 Q BUT YOU KNEW WHO HE WAS?

12 A I KNEW OF HIM, YES.

13 Q AND WHEN YOU DROVE TO THE HOUSE HE WAS IN COLUMBIA,
14 HE WAS SITTING ON THE PORCH I THINK YOU SAID?

15 A YES.

16 Q OKAY. AND JUST BASICALLY WHAT HAPPENED AS FAR AS THE
17 ARREST?

18 A I TOLD HIM HE WAS UNDER ARREST, I PLACED CUFFS ON
19 HIM, READ HIM HIS MIRANDA RIGHTS, ASKED HIM IF THAT WAS
20 THE VAN, HE SAID YES.

21 Q THAT IS FINE, HE COOPERATED WITH THE ARREST?

22 A YES, WITHOUT ANY PROBLEM.

23 Q AND THE VAN WAS ACTUALLY IN THE YARD TOO?

24 A YES, SIR. IT WAS HIS FRIENDS VAN, WHOEVER WAS AT THE
25 HOUSE OR WHATEVER.

1 Q AND JUST TO CLARIFY THAT THERE ARE NO ALLEGATIONS
2 THAT THE VAN WAS STOLEN OR ANYTHING LIKE THAT, HE HAD
3 PERMISSION TO USE THE VAN ON THAT NIGHT OR YOU HAVEN'T
4 LEARNED OF ANYTHING WHERE HE DIDN'T HAVE PERMISSION THAT
5 NIGHT?

6 A IT WAS REPORTED BY RICHLAND COUNTY THAT HE HAD NOT
7 RETURNED THE VAN FROM THE PEOPLE AT THE HOUSE?

8 Q AFTER THE INCIDENT HAD HAPPENED?

9 A YES.

10 Q AND THE SIGN THAT GUY HIT WAS WHEN TED WAS DRIVING
11 AWAY FROM THE INCIDENT THAT NIGHT?

12 A YES.

13 Q OKAY.

14 A THE SIGN WAS ON THE ROAD, WHEN HE TRIED TO TURN ON
15 BACHMAN CHAPEL ROAD.

16 Q AND WE HAVE ALL HEARD HE WAS GOING FAST AND MUST HAVE
17 TURNED ON BACHMAN CHAPEL ROAD. DID YOU AUDIOTAPE TED'S
18 CONFESSION?

19 A NO, SIR.

20 Q HOW LONG DO YOU THINK YA'LL TALKED TO HIM IN THE
21 DETENTION CENTER?

22 A I JUST TALKED TO HIM IN MY OFFICE.

23 Q I APOLOGIZE, AT THE SHERIFFS OFFICE?

24 A THEY CALLED RIGHT AROUND LUNCH TIME BECAUSE I GOT TO
25 COLUMBIA AND GOT HIM AND GOT BACK AND I WOULD SAY IT WAS

1 AFTER 3:00, TO 3:30 TO 4:00, ACTUALLY TO SIT DOWN AND TALK
2 TO HIM PROBABLY LESS THAN, ROUGHLY AN HOUR.

3 Q AND DID YOU EVER INTERVIEW THE JUVENILE THAT WAS WITH
4 TED ABNEY?

5 A THEY TRIED, THEY TALKED TO HIS MOTHER AND ALL BUT AS
6 FAR AS INTERVIEW, NO, HE WAS NOT INTERVIEWED.

7 Q SO, YOU WERE ABLE TO IDENTIFY WHO IT WAS THOUGH?

8 A YES.

9 Q BECAUSE YOU TALKED TO HIS MOTHER?

10 A YES.

11 Q SO, YOU KNEW HIS NAME AND ADDRESS?

12 A JAMAL DAVIS.

13 Q JAMAL DAVIS, CRUCIAL IS HIS NICKNAME?

14 A YES.

15 Q OKAY. AND THEN ON NOVEMBER THE 4TH TED GAVE YOU THE
16 WRITTEN STATEMENT THAT YOU INTRODUCED AND THEN YA'LL TOOK
17 HIM TO THE DETENTION CENTER AND BOOKED HIM WITH THE
18 CHARGES?

19 A YES.

20 Q OKAY. IF THE SOLICITOR HAS ANY MORE QUESTIONS FOR
21 YOU.

22 REDIRECT EXAMINATION

23 BY MR. HAMMACK:

24 A LIEUTENANT BOLAND, JUST BRIEFLY. MR. VERNER ASKED
25 YOU ABOUT THE OWNERSHIP OF THE VAN AND MR. ABNEY HAD

1 PERMISSION TO DRIVE THE VAN.

2 MR. HAMMACK: MAY I APPROACH THE WITNESS, YOUR HONOR.

3 THE COURT: YES.

4 Q DO YOU KNOW WHAT THAT APPEARS TO BE?

5 A THAT IS AN INCIDENT REPORT FROM RICHLAND COUNTY
6 SHERIFFS OFFICE ON OCTOBER THE 30TH OF '04 AT 7:55 P.M.

7 Q ARE YOU FAMILIAR WITH THAT INCIDENT REPORT?

8 A YES, SIR. THAT IS ONE THAT I GOT A COPY OF WHERE
9 THEY REPORTED THAT THE BREACH OF TRUST OF THE VAN OR USE
10 OF VEHICLE, HOWEVER YOU WANT TO SAY IT.

11 Q COULD YOU TELL ME WHAT THE REPORTS STATES?

12 MR. VERNER: YOUR HONOR, FIRST OF ALL THE INCIDENT
13 REPORT IS NOT ADMISSIBLE SPECIFICALLY BY STATUTE, IS NOT
14 ADMISSIBLE INTO EVIDENCE. AND THE OFFICERS HAVE ALREADY
15 TESTIFIED, THE SUM AND SUBSTANCE OF IT IS TO MAKE IT EVEN
16 FURTHER IS THAT THE FRIEND LOANED TED ABNEY THE VAN AND
17 TED DID NOT RETURN THE VAN. THAT, THE INCIDENT REPORT IS
18 ABSOLUTELY BY STATUTE, BY LAW, IS NOT ADMISSIBLE. I DID
19 OPEN THE DOOR BY ASKING SOME QUESTIONS ABOUT IT, YOUR
20 HONOR, THAT STILL DOES NOT MEAN THAT THE STATUTE, THAT IT
21 IS ABROGATED BY THE ADMISSION OF AN INCIDENT REPORT. IT
22 IS CUMULATIVE TO WHAT WE HAVE ALREADY.

23 Q BASED ON THE INFORMATION THAT YOU HAVE AND YOUR
24 KNOWLEDGE DID MR. ABNEY HAVE PERMISSION TO HAVE THE
25 VEHICLE AT THE TIME OF THE ROBBERY?

1 A NO, SIR.

2 Q THANK YOU.

3 RECROSS-EXAMINATION

4 BY MR. VERNER:

5 Q THE VICTIM STATES THAT HE LENT HIS VEHICLE TO HIS
6 NEPHEW TO GO TO THE STORE. THAT MEANS THAT TED ABNEY DID
7 HAVE PERMISSION TO TAKE THE VAN, DIDN'T IT?

8 A IT ALSO SAYS--

9 Q THAT HE DIDN'T RETURN IT.

10 A YES.

11 Q SO, HE DID HAVE PERMISSION TO TAKE THE VAN.

12 MR. HAMMACK: YOUR HONOR, I WOULD OBJECT. HE IS
13 CLEAR THAT AT THE TIME OF THE INCIDENT IS WHAT HE ASKED.

14 THE COURT: OKAY. THE JURY HEARD EXACTLY WHAT WAS
15 SAID, LET'S GO ON.

16 Q THAT IS ALL I HAVE.

17 MR. HAMMACK: I NOTHING FURTHER.

18 THE COURT: YOU MAY STEP DOWN, THANK YOU.

19 MR. HAMMACK: YOUR HONOR, THE STATE WOULD CALL ROBERT
20 DENNIS.

21 ROBERT DENNIS, AFTER BEING DULY SWORN, TESTIFIED
22 AS FOLLOWS:

23 DIRECT EXAMINATION

24 BY MR. HAMMACK:

25 Q CAN YOU TELL ME BY WHOM ARE YOU EMPLOYED?

1 A NEWBERRY COUNTY SHERIFFS OFFICE.

2 Q HOW LONG HAVE YOU BEEN WITH THE SHERIFFS OFFICE?

3 A I HAVE BEEN AT THE SHERIFFS OFFICE RIGHT AT SIX YEARS
4 NOW.

5 Q WHAT IS YOUR POSITION WITH THE SHERIFFS OFFICE?

6 A SERGEANT OVER INVESTIGATIONS.

7 Q SERGEANT DENNIS, DID YOU HAVE THE OPPORTUNITY TO BE
8 INVOLVED IN THE INVESTIGATION OF AN ARMED ROBBERY AT
9 ROBERTS CITGO OVER IN PROSPERITY BACK IN OCTOBER 30TH OF
10 2004?

11 A YES SIR, I WAS.

12 Q AND ROBERTS CITGO IS IN NEWBERRY COUNTY, IS THAT
13 CORRECT?

14 A YES, SIR. IN PROSPERITY AREA.

15 Q COULD YOU TELL ME WHAT YOUR INVOLVEMENT OF THE
16 INVESTIGATION WAS?

17 A I WAS NOTIFIED THE NIGHT OF THE ROBBERY ON SATURDAY
18 NIGHT, THAT IT HAS BEEN ROBBED BUT UNFORTUNATELY I WAS OUT
19 OF TOWN. THE FOLLOWING MORNING WHICH WAS SUNDAY MORNING,
20 AFTER SPEAKING WITH INVESTIGATOR CHAPMAN, I TRIED TO GET
21 THE FACTS, I MADE THE PHONE CALL FOR ROY PASCHAL FROM SLED
22 TO COME UP AND DO A COMPOSITE DRAWING ON SUNDAY MORNING.

23 MR. HAMMACK: YOUR HONOR, MAY I APPROACH THE WITNESS?

24 THE COURT: YES.

25 Q DOES THIS APPEAR TO BE THE COMPOSITE DRAWING, STATE'S

1 EXHIBIT 1?

2 A IT IS.

3 Q YOU CAN PROCEED.

4 A ONCE WE GOT THE COMPOSITE DRAWING DONE, WHICH
5 PROBABLY WAS AROUND LUNCH TIME BEFORE WE WERE ABLE TO GET
6 FINISHED. I TOOK THE COMPOSITE DRAWING, SCANNED IT AND
7 PRODUCED SEVERAL FLIERS THAT WE COULD GET OUT AROUND THE
8 NEIGHBORING STORES TO SEE IF WE COULD ELICIT ANY TYPE OF
9 CALLBACKS FROM THE COMMUNITY AS FAR AS IDENTIFYING THE
10 INDIVIDUAL.

11 MR. HAMMACK: YOUR HONOR, IF I MAY APPROACH THE
12 WITNESS.

13 Q TAKE A LOOK AT THOSE, DO THOSE APPEAR TO BE A FAIR
14 AND ACCURATE REPRESENTATION OR ARE THOSE THE FLIERS THAT
15 YOU PASSED OUT?

16 A YES, THEY ARE.

17 Q AND WHAT LOCATIONS WERE THE FLIERS PASSED OUT?

18 A THEY WERE THROUGHOUT THE COUNTY AT SEVERAL DIFFERENT
19 LOCATIONS IN THE PROSPERITY AREA MAINLY. AND THEN WE
20 BROUGHT BACK UP THIS WAY TO SEVERAL CONVENIENT STORES TO
21 MAKE THEM AWARE OF WHAT WAS GOING ON AND SEE IF THEY HAD
22 ANY SIMILAR ACTIVITIES THAT THEY COULD, YOU KNOW,
23 CORROBORATE THIS INDIVIDUAL OR IDENTIFY THIS INDIVIDUAL.

24 Q DID YOU RECEIVE ANY TIPS AS A RESULT OF THOSE FLIERS?

25 A YES, WE DID. WE RECEIVED A PHONE CALL THAT THE PHOTO

1 RESEMBLED TED ABNEY WHO USED TO LIVE DOWN THE PROSPERITY
2 AREA.

3 Q AS A RESULT OF THIS PHONE CALL WHAT DID YOU DO?

4 A AS A RESULT OF THE PHONE CALL, WE HAVE LOG TRACK
5 WHICH IS A COMPUTER SYSTEM THAT WE HAVE TO DO INCIDENT
6 REPORTS. WE ARE ABLE TO GO INTO LOG TRACK AND PULL AN
7 INDIVIDUALS NAME, PICTURE AND OTHER INFORMATION. WE DID
8 FIND MR. ABNEY IN OUR COMPUTER AND THERE WAS A PHOTO OF
9 HIM. ONCE I GOT HIS INFORMATION, BUT THE PHOTO WAS NOT
10 THAT GOOD IN OUR SYSTEM TO FORMULATE A PHOTO LINEUP. SO,
11 I TOOK HIS NAME AND DRIVERS LICENSE AND SENT IT TO SLED,
12 THEY PULLED HIS PICTURE AND THEY WERE ABLE TO GENERATE A
13 PHOTO LINEUP FOR US.

14 Q ARE YOU FAMILIAR WITH THE PHOTO LINEUP THAT WAS
15 GENERATED?

16 A YES, SIR.

17 Q COULD YOU EXPLAIN TO ME HOW A PHOTO LINEUP WOULD BE
18 GENERATED, WHAT FACTORS YOU LOOK FOR.

19 A WHAT WE LOOK FOR IS SOME SIMILAR RELATIONSHIPS
20 BETWEEN THE PERSON THAT YOU ARE ACTUALLY GOING TO PUT IN
21 THERE. WHETHER IT IS HEIGHT, WEIGHT, COMPLEXION, HAIR,
22 DIFFERENT THINGS LIKE THAT SO WE HAVE GOT SOME TYPE OF
23 SIMILARITY WITHIN THE PICTURES.

24 Q AND DID YOU OBTAIN THE PHOTO LINEUP FROM SLED?

25 A YES, I DID. ONCE IT WAS SUBMITTED TO SLED THEY IN

1 TURN GO THROUGH THE DATA BANK OF PHOTOS, DRIVERS LICENSE,
2 COMPILE A PHOTO LINEUP AND THEN THEY EMAIL IT BACK TO US.

3 MR. HAMMACK: YOUR HONOR, MAY I APPROACH THE WITNESS.

4 THE COURT: YES.

5 Q DOES THIS APPEAR TO BE THE PHOTO LINEUP THAT YOU
6 OBTAINED?

7 A YES, THIS IS IT.

8 Q DID YOU HAVE THE OPPORTUNITY TO SHOW THAT PHOTO
9 LINEUP TO THE VICTIM?

10 A WE DID. MYSELF AND INVESTIGATOR CHAPMAN WENT OVER TO
11 MS. ROOSEN'S HOUSE ON NOVEMBER THE 2ND, 2004 AND SHOWED
12 HER THIS SIX PERSON LINEUP.

13 Q DID SHE CHOOSE SOMEONE OUT OF THE LINEUP?

14 A YES, SHE DID. SHE LOOKED IT OVER AND SHE SHOWED US
15 NUMBER 3 WHICH IS A PICTURE OF TED ABNEY. ONCE SHE CHOSE
16 SHE SO INDICATED BY CIRCLING IT AND PUTTING HER INITIALS.
17 I DID DATE IT AND PUT MY INITIALS AND INVESTIGATOR CHAPMAN
18 PUT HIS INITIALS.

19 MR. HAMMACK: YOUR HONOR, THE STATE WOULD MOVE TO
20 INTRODUCE THIS INTO EVIDENCE.

21 MR. VERNER: WITHOUT OBJECTION.

22 THE COURT: IT WILL BE.

23 (WHEREUPON, STATE'S EXHIBIT NO. 4 WAS ADMITTED INTO
24 EVIDENCE.)

25 MR. HAMMACK: YOUR HONOR, THE STATE WOULD LIKE TO

1 PUBLISH IT.

2 THE COURT: GO AHEAD.

3 Q INVESTIGATOR DENNIS, YOU STATED THAT YOU HAD RECEIVED
4 TELEPHONE CALLS REGARDING THE FLIERS. DO YOU KNOW HOW
5 MANY CALLS YOU RECEIVED.

6 A NOT OFF HAND, JUST ONE IN PARTICULAR, YOU KNOW,
7 WHENEVER THEY CALL ME THEY GIVE IT LOOKED LIKE TED ABNEY
8 WHICH PUT US KIND OF ON THE HUNT OF LOOKING AT HIM AND
9 GETTING INFORMATION, THINGS LIKE THAT. AND THEN ONCE WE
10 GOT THAT AND KNEW WHERE HE WORKED AT AND DIFFERENT THINGS
11 OR FORMALLY WAS EMPLOYED WE BEGAN TALKING TO OTHER
12 WITNESSES TRYING TO OBTAIN INFORMATION ON HIM.

13 Q AND DO YOU KNOW WHICH STORE THEY SEEN THE FLIER AT?

14 A NO SIR, THAT DIDN'T COME OUT. WE HAD THEM PUBLISHED
15 AT THE CITGO, WISE'S EXXON, BOWERS BP ON DOWN IN
16 PROSPERITY SECTION, LITTLE MOUNTAIN SECTION, JUST THAT
17 INFORMATION WASN'T OBTAINED.

18 Q I SEE THERE IS TWO DIFFERENT FLIERS, DO YOU KNOW
19 WHICH ONE WAS USED OR WERE THEY BOTH USED?

20 A THEY WERE PRETTY MUCH BOTH USED. ONCE I HAD STARTED
21 RUNNING THEM OFF I REALIZED THAT I HAD THE REWARD UP THERE
22 AND I HAD NOT CLARIFIED THAT THERE WOULD BE A REWARD YET.
23 SO, WE STILL POSTED IT AFTER TALKING TO THE SHERIFF AND I
24 HAD PRINTED UP SEVERAL OTHER WANTED POSTERS. SO, THEY
25 WERE ALL MIXED UP AND DISTRIBUTED AMONGST MYSELF, DEPUTIES

1 TO GO AND POST THEM.

2 Q AND I BELIEVE YOU STATED EARLIER THOSE ARE FAIR AND
3 ACCURATE REPRESENTATIONS OF THE POSTER THAT WERE POSTED?

4 A YES.

5 MR. HAMMACK: YOUR HONOR, I WOULD MOVE TO ENTER THESE
6 INTO EVIDENCE.

7 MR. VERNER: I THOUGHT THE DARK ONE WAS JUST A PHOTO
8 COPY, I JUST WANT TO MAKE SURE. OKAY. WITHOUT OBJECTION,
9 YOUR HONOR.

10 THE COURT: ALL RIGHT.

11 (WHEREUPON, STATE'S EXHIBIT NOS. 5 AND 6 WAS ADMITTED
12 INTO EVIDENCE.)

13 MR. HAMMACK: YOUR HONOR, MAY WE PUBLISH THESE TO THE
14 JURY.

15 THE COURT: OKAY.

16 Q SERGEANT DENNIS, DID YOU HAVE ANY FURTHER INVOLVEMENT
17 IN THIS MATTER?

18 A YES, SIR. ONCE WE GOT THE PHOTO LINEUP COMPLETED AND
19 MR. ABNEY WAS IDENTIFIED WE OBTAINED A WARRANT ON HIM.
20 ONCE WE OBTAINED A WARRANT IT WAS ENTERED INTO THE CRIME
21 COMPUTER AS A WANTED PERSON AND WE ALSO PUBLISHED IT ON
22 THE TELEVISION AND NEWSPAPER SO WE COULD GET THE WORD OUT
23 AND LOCATE THIS INDIVIDUAL.

24 Q WERE YOU PRESENT WHEN MR. ABNEY WAS ARRESTED?

25 A NO SIR, I WAS NOT. I HAD SOME PREVIOUS THINGS I WAS

1 WORKING ON AND WE RECEIVED A PHONE CALL AND LIEUTENANT
2 BOLAND WENT DOWN TO PICK HIM UP.

3 Q DID YOU HAVE THE OPPORTUNITY TO MEET WITH MR. ABNEY
4 AT ANY TIME?

5 A YES, SIR. ONCE LIEUTENANT BOLAND AND MR. ABNEY GOT
6 BACK TO NEWBERRY I MET THEM AT THE SHERIFFS OFFICE.

7 Q DID YOU HAVE THE OPPORTUNITY TO SPEAK TO MR. ABNEY?

8 A YES.

9 Q WERE YOU PRESENT WHEN MR. ABNEY WAS READ HIS MIRANDA
10 RIGHTS?

11 A YES SIR, I WAS.

12 Q AND DID YOU QUESTION MR. ABNEY IN REFERENCE TO THE
13 INCIDENT?

14 A YES, SIR.

15 Q TELL ME ABOUT THE CONVERSATION WITH MR. ABNEY?

16 A THE FIRST, ONCE HE WAS BROUGHT INTO THE SHERIFFS
17 OFFICE HE WAS ALREADY HANDCUFFED, WE REMOVED THE HANDCUFFS
18 FOR HIM, HE WAS GIVEN HIS MIRANDA RIGHTS IN A WRITTEN FORM
19 WHICH IS ON THE SHERIFFS OFFICE TYPE FORM. WE FILLED OUT
20 INFORMATION AT THE TOP WHICH ELICITS HIS NAME, DATE OF
21 BIRTH, SOCIAL SECURITY NUMBER, HOME ADDRESS, HOW OLD HE IS
22 AND HIS FORMAL EDUCATION AS WELL AS IF HE CAN READ AND
23 WRITE. ONCE THAT IS DONE THEN WE GO DOWN THROUGH THE
24 WAIVER, READING HIM HIS RIGHTS AND HE INITIALS EACH ONE OF
25 THEM THAT HE UNDERSTANDS. HE ALSO SIGNS THAT HE

1 UNDERSTANDS IT. THERE IS ALSO A WAIVER DOWN AT THE BOTTOM
2 WHICH ASKED, YOU KNOW, ARE YOU WILLING TO TALK TO US AND
3 ANSWER QUESTIONS WITHOUT A LAWYER PRESENT. UNDERSTANDING
4 THAT HE IS NOT UNDER ANY PRESSURE OR COERCION, NO THREATS
5 HAD BEEN MADE TO HIM I USUALLY TELL THEM WE ARE NOT
6 PROMISING YOU A TRIP TO HAWAII OR MAKE ANY THREATS AGAINST
7 YOU. AND HE UNDERSTOOD THAT AND HE WAIVED HIS RIGHTS BY
8 HIS SIGNATURE AND THE DAYS DATE.

9 Q GO AHEAD.

10 A ONCE WE DID THAT HE HAD A VERBAL EXPLANATION OF WHAT
11 HAD HAPPENED, WHAT TOOK PLACE AND THEN WE FILLED OUT
12 ANOTHER FORM WHICH IS A VOLUNTARY STATEMENT FORM THAT HE
13 IS WILLING TO GIVE A STATEMENT. HIS INFORMATION, ONCE
14 AGAIN, IS PLACED AT THE TOP, HE IS ALSO GIVEN THE
15 OPPORTUNITY AGAIN TO READ OVER HIS RIGHTS, TO MAKE SURE HE
16 UNDERSTANDS THEM. AND THEN HE IS GIVEN A PARAGRAPH TYPE
17 FORM WITH LINES WHERE HE CAN GIVE US A STATEMENT TO WHAT
18 WE VERBALLY TALKED ABOUT.

19 Q DID MR. ABNEY ADMIT THAT HE HAD ROBBED THE VICTIM?

20 A YES, SIR.

21 Q DID HE EVER INDICATE WHETHER HE HAD A WEAPON OR NOT?

22 A NO, SIR. ACTUALLY HE SAID HE DID NOT HAVE A WEAPON.

23 Q NOTHING FURTHER AT THIS TIME.

24 CROSS-EXAMINATION

25 BY MR. VERNER:

1 Q INVESTIGATOR DENNIS, JUST OUT OF CURIOSITY, WHERE ARE
2 THESE TYPICALLY CIRCULATED, THESE WANTED PAPERS?

3 A WHAT DO YOU--

4 Q WHERE DO YOU PUT THEM AFTER YOU GET THEM PRINTED UP,
5 WHERE DO YOU POST THEM?

6 A ONCE WE GET THEM WE PLACE THEM IN THE AREA CONVENIENT
7 STORES, SOMETIMES WE GIVE THEM TO THE CLERKS AND ASK THEM
8 TO POST THEM OR THE CLERK ASK US TO POST THEM ON THE
9 WINDOW WHERE THEY CAN BE SEEN GOING IN AND OUT OF THE
10 ESTABLISHMENT.

11 Q THE FIRST PLACE YOU DO YOU GO TO THE CONVENIENT?

12 A THAT'S CORRECT.

13 Q PUBLIC STORES?

14 A THAT'S CORRECT.

15 Q AND I GUESS IT IS POSSIBLE YOU ALSO GO IN THE
16 NEIGHBORHOOD AND GO DOOR TO DOOR SOMETIMES I GUESS AND ASK
17 PEOPLE IF THEY--

18 A IF IT IS AN AREA WHERE THERE ARE HOMES ALONG EACH
19 SIDE THAT THEY WOULD BE INDIVIDUALS OUT AND ABOUT, YES
20 SIR, WE WOULD GO DOOR TO DOOR, SHOW THEM THE FLIERS, HAND
21 THEM THE FLIERS SO THAT WE CAN ELICIT SOME TYPE OF
22 RESPONSE.

23 Q OKAY. WHO TYPED UP THE DETAILS OF THE WANTED POSTER?

24 A I WOULD HAVE.

25 Q AND WHEN DID YOU FIRST GET INVOLVED IN THE CASE?

1 A I WAS NOTIFIED THE NIGHT OF THE ACTUAL ROBBERY ON
2 SATURDAY NIGHT THROUGH A PHONE CALL AND THE FOLLOWING
3 MORNING WHICH WAS SUNDAY MORNING ON THE 31ST IS WHEN I
4 BECAME INITIALLY INVOLVED WITH BEING ABLE TO SIT DOWN WITH
5 MS. ROOSEN AND ROY PASCHAL.

6 Q AND YOU ALSO INTERVIEWED MS. ROOSEN, THE VICTIM?

7 A I WAS IN THE ROOM WITH ROY PASCHAL, WHEN HE WAS DOING
8 THE INTERVIEW, WHEN HE WAS TRYING TO GET SOME INFORMATION.

9 Q AND YOU PRODUCED THIS DOCUMENT. I ASSUME THIS DATE
10 OF NOVEMBER THE 1ST IS WHEN YOU PRINTED OUT THE DOCUMENT?

11 A THAT'S CORRECT.

12 Q OKAY. AND YOUR CHARACTERIZATION, THE BLACK MALE WAS
13 POSSIBLY ARMED BUT UNKNOWN AS TO WHAT TYPE OF WEAPON?

14 A THAT'S CORRECT.

15 Q OKAY. DO YA'LL EVER DO ARMED AND DANGEROUS WANTED
16 POSTERS?

17 A ON THE SYSTEM THAT WE HAVE TO DO THAT THERE IS A
18 PLACE FOR THAT.

19 Q OKAY. AND TWO DAYS AFTER THE INCIDENT, AT THAT TIME
20 IT WAS AT THE, THE ASSAILANT WAS POSSIBLY ARMED, THAT IS
21 YOUR WORDS, ISN'T IT?

22 A THAT IS PRETTY STANDARD. I WASN'T THERE SO I CAN'T
23 SAY WHETHER HE WAS OR WASN'T.

24 Q BUT YOU TYPED UP THE REPORT AND TWO DAYS AFTER THE
25 INCIDENT YOU FELT THE WORDS YOU SHOULD USE IS THAT HE IS

1 POSSIBLY ARMED?

2 A I WENT THROUGH THE REPORT AS WELL AS WHAT THE VICTIM
3 HAD SAID. AND, YES SIR, I WASN'T THERE SO I PUT THAT OUT.

4 Q YOU THINK A LITTLE BIT ABOUT WHAT YOU ARE GOING TO
5 TYPE, I ASSUME, BEFORE YOU TYPE IT UP?

6 A YOU DO.

7 Q AND TWO DAYS AFTER THE INCIDENT YOU THOUGHT IT A FAIR
8 NARRATIVE OF THIS REPORT WOULD BE THAT HE WAS POSSIBLY
9 ARMED?

10 A HE COULD BE OR HE COULD NOT BE.

11 Q THAT IS ABSOLUTELY RIGHT. AND AT THAT TIME YOU
12 DIDN'T THINK THE CIRCUMSTANCES WARRANTED AN ARMED AND
13 DANGEROUS, YOU COULD HAVE CHOSEN AN ARMED AND DANGEROUS
14 CAPTION ON TOP OF IT TOO?

15 A I COULD HAVE.

16 Q OKAY. BUT YOU FELT LIKE THIS WAS APPROPRIATE AT THAT
17 TIME AND THIS COULD BE AMENDED AT ANY TIME TO CHANGE?

18 A THAT'S CORRECT.

19 Q OKAY. DO YOU KNOW RATHER THE CONVENIENT STORE,
20 ROBERTS CITGO HAD VIDEO CAMERAS?

21 A I THINK THEY ARE EQUIPPED WITH THEM.

22 Q BUT YOU DON'T KNOW IF THEY WERE WORKING THIS NIGHT.
23 YOU HAVEN'T SEEN A VIDEO TAPE?

24 A THEY HAVE A VIDEO IN THE EVIDENCE DEPARTMENT.

25 Q I GUESS THIS IS A \$64,000.00 THOUSAND DOLLAR

1 QUESTION. WAS ANY WEAPON EVER RECOVERED BY LAW
2 ENFORCEMENT?

3 A NOT BY LAW ENFORCEMENT.

4 Q ARE YOU AWARE OF ANY WEAPON IN THIS CASE?

5 A I AM NOT AWARE OF ANY WEAPON.

6 Q OKAY. IF THE DEPUTY SOLICITOR HAS ANY FOLLOW-UP
7 QUESTIONS FOR YOU, MR. DENNIS.

8 REDIRECT EXAMINATION

9 BY MR. HAMMACK:

10 Q IF I COULD SEE THAT WANTED POSTER AGAIN. ON THE
11 WANTED POSTER, AS MR. VERNER POINTED OUT, IT SAYS HE WAS
12 POSSIBLY ARMED.

13 A THAT'S CORRECT.

14 Q WHEN YOU DO THESE TYPE OF POSTERS WOULD THERE BE
15 TIMES WHEN YOU PUT THAT HE WAS ARMED?

16 A THE ONLY TIME THAT WE WOULD ACTUALLY PUT IF HE WAS
17 ARMED IS IF THE VICTIM OR OTHER WITNESSES ARE ACTUALLY
18 ABLE TO CONFIRM THEY ACTUALLY SAW SOME TYPE OF WEAPON IN
19 THEIR HAND.

20 Q WOULD IT BE ANYTHING UNUSUAL TO PUT POSSIBLY ARMED ON
21 YOUR WANTED POSTER IN THIS TYPE OF CASE?

22 A NO, IT IS NOT.

23 Q DOES THAT TO SAY THAT YOU, BY PUTTING POSSIBLY ARMED
24 DOES THAT SAY HE WAS NOT ARMED?

25 A THAT'S CORRECT.

1 MR. VERNER: YOUR HONOR, I WOULD ASK THAT STRIKE,
2 THAT IS NOT THIS WITNESS'S PERSONAL KNOWLEDGE, YOUR HONOR.
3 THAT IS CALLING FOR SPECULATION ON THE PART OF THIS
4 WITNESS.

5 MR. HAMMACK: YOUR HONOR, HE WROTE THIS POSTER, HE
6 KNEW WHAT HE WAS THINKING WHEN HE WROTE IT.

7 THE COURT: I WILL OVERRULE THAT AT THIS TIME.

8 MR. HAMMACK: I HAVE NOTHING FURTHER.

9 THE COURT: MR. VERNER, ANYTHING ELSE?

10 MR. VERNER: NO, YOUR HONOR.

11 THE COURT: YOU MAY STEP DOWN.

12 MR. HAMMACK: YOUR HONOR, THE STATE WOULD BRIEFLY
13 RECALL INVESTIGATOR CHAPMAN BACK TO THE STAND.

14 THE COURT: YOU ARE STILL UNDER OATH.

15 DIRECT EXAMINATION

16 BY MR. HAMMACK:

17 Q MR. VERNER WAS JUST ASKING ABOUT THE VIDEO TAPE, HAVE
18 YOU HAD THE OPPORTUNITY TO VIEW THE VIDEO TAPE?

19 A YES, I HAVE.

20 Q COULD YOU TELL ME WHAT WAS ON THE VIDEO TAPE?

21 A THE VIDEO TAPE IS FROM INSIDE THE STORE AND IT SHOWS
22 MS. ROOSEN ENTER THE STORE AND MAKE A PURCHASE. IT ALSO
23 SHOWED THE JUVENILE WE WERE TALKING ABOUT EARLIER ENTER
24 THE STORE AND USE THE RESTROOM.

25 Q IS THERE ANY VIDEO TAPE OF THE OUTSIDE OF THE STORE?

1 A NO, SIR. THE CAM SYSTEM PRIMARILY RECORDS INSIDE THE
2 STORE, BEHIND THE REGISTER AND I AM GOING TO SPECULATE, I
3 BELIEVE THERE IS A CAM ON THE GAS PUMPS.

4 Q WOULD THE VIDEO BEEN ABLE TO CATCH THE ACTUAL
5 INCIDENT?

6 A NO, SIR.

7 Q I HAVE NOTHING FURTHER.

8 CROSS-EXAMINATION

9 BY MR. VERNER:

10 Q IS THIS THE VIDEO RIGHT HERE?

11 A YES.

12 Q OKAY. WHEN IS THE LAST TIME YOU LOOKED AT IT?

13 A I CAN'T TELL YOU EXACTLY, IT WAS CLOSE TIME TO THE
14 INCIDENT.

15 Q WHICH IS ABOUT SIX MONTHS AGO?

16 A YES.

17 Q YOU DIDN'T WATCH IT RIGHT BEFORE THIS TRIAL?

18 A NO, SIR.

19 Q YOU MAY NOT REMEMBER AND IF YOU DON'T THAT IS FINE.

20 DO YOU REMEMBER IF THE STORE WAS CROWDED THAT NIGHT?

21 A THERE WAS SOME PEOPLE IN THE STORE.

22 Q THERE WERE ALSO OTHER PEOPLE IN THE STORE AND CLEARLY
23 THE CASHIER?

24 A YES.

25 Q BUT YOU DON'T REMEMBER WHETHER IT WAS CROWDED OR NOT?

1 A NO.

2 Q OKAY. I APPRECIATE IT.

3 MR. HAMMACK: NOTHING FURTHER, YOUR HONOR.

4 THE COURT: YOU MAY STEP DOWN.

5 MR. HAMMACK: YOUR HONOR, THE STATE REST.

6 MR. VERNER: YOUR HONOR, I WOULD HAVE SOME MOTIONS.

7 THE COURT: LADIES AND GENTLEMEN OF THE JURY, IF YOU
8 WILL STEP BACK TO YOUR ROOM AND RELAX A FEW MINUTES. I
9 HAVE TO TAKE UP A MATTER OF LAW AT THIS TIME.

10 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT.)

11 THE COURT: ALL RIGHT, MR. VERNER.

12 MR. VERNER: MAY IT PLEASE THE COURT, YOUR HONOR. I
13 BELIEVE WE ALL ACCEPT THE FACT THAT THIS IS A
14 CIRCUMSTANTIAL EVIDENCE CASE. THERE HAS BEEN NO DIRECT
15 EVIDENCE WHATSOEVER OF THE WEAPON, IN FACT THAT WAS
16 CONCEDED BY SERGEANT DENNIS. FOR THE STATE IN THIS CASE
17 HAS TO RELY UPON CIRCUMSTANTIAL EVIDENCE OF THE ARMED
18 ROBBERY. AT THIS TIME I WOULD MOVE FOR A DIRECTED VERDICT
19 ON THE ARMED ROBBERY CHARGE. AND I WILL CITE TO THE COURT
20 THE STANDARD OF REVIEW FOR THE TRIAL COURT. IN A MOTION
21 FOR A DIRECTED VERDICT IS THAT THE COURT MUST SUBMIT THIS
22 CASE TO THE JURY IF THERE IS ANY DIRECT EVIDENCE OF THE
23 CRIME BEING COMMITTED. BUT IN THE CASE OF CIRCUMSTANTIAL
24 EVIDENCE THERE IS A HIGHER STANDARD, THE COURT HAS TO FIND
25 THAT THERE IS SUBSTANTIAL CIRCUMSTANTIAL EVIDENCE WHICH

1 REASONABLY TENDS TO PROVE THE GUILT OF THE ACCUSED OR FROM
2 WHICH HIS GUILT MAY BE FAIRLY AND LOGICALLY DEDUCED. THE
3 COURT HEARD THE VICTIM'S TESTIMONY AND CERTAINLY IT IS
4 RECORDED AND I WILL, NOT HARP ON EVERY DETAIL OF IT.
5 THERE IS NO, THE ONLY BASIS THAT MY CLIENT HAD A GUN WAS
6 INDIRECTLY IS THAT THE VICTIM SAID, I FELT HE HAD A GUN.
7 SHE DIDN'T EVEN SAY THAT. SHE SAID HE HAD A GUN, SHE
8 DIDN'T SEE THE GUN, SHE INDICATES THAT HE PRESSED UPON HER
9 IN THE VAN. YOUR HONOR, MY CLIENT IS INDICTED FOR HAVING
10 A GUN IN AN ARMED ROBBERY, THERE IS NO FOUNDATION FOR HER
11 TESTIMONY THAT THAT WAS A GUN. SHE DIDN'T TESTIFY IT WAS
12 A METALLIC OBJECT, HARD OBJECT, SHE DIDN'T TESTIFY THAT HE
13 HAD SOMETHING UNDER HIS COAT. THE EVIDENCE IS NOT THAT HE
14 REPRESENTED, HE HAD A GUN, HE DIDN'T REPRESENT TO EVEN
15 SHOOT HER. ASSUMING THAT THE COURT CAN BOOTSTRAP THE
16 EVIDENCE FROM HER SAYING HE PUSHED AGAINST MY STOMACH
17 WHILE HE WAS PUSHING HER INTO THE CAR, THAT MAKES IT A
18 GUN. BUT THE PROBLEMS ARE THAT, IT COULD BE JUST MANY
19 DIFFERENT, EVEN IF THERE WAS A HARD OBJECT THERE IT COULD
20 BE MANY DIFFERENT ITEMS. IT COULD BE HIS BELT BUCKLE, IT
21 COULD OF BEEN HER POCKETBOOK PRESSING AGAINST HER. THE
22 COURT IS, THAT IS ABSOLUTELY GOING TO REQUIRE THE TRIER OF
23 FACT TO SPECULATE AND CONJECTURE WHAT WAS THE OBJECT, IF
24 THERE WAS ANY OBJECT. AND IN A CIRCUMSTANTIAL EVIDENCE
25 THAT IS THE ONLY CHAIN, THAT IS THE ONLY LINK, IN THIS

1 LINK, IN THIS CHAIN FOR CIRCUMSTANTIAL EVIDENCE IS THAT HE
2 PUSHED AGAINST ME, I FELT HE HAD A GUN. SHE DIDN'T EVEN
3 SAY I FELT HE HAD A GUN, THERE IS NO FOUNDATION APPLIED AS
4 A GUN. WE STRUGGLED OVER THE GUN, WE DIDN'T STRUGGLE OVER
5 THE GUN, WE STRUGGLED OVER THE POCKETBOOK. HE WAS PUSHING
6 HER INTO THE CAR AND PULLING THE POCKETBOOK AT THE SAME
7 TIME, SHE CHASED HIM. THERE IS NO EVIDENCE THAT SHE SAW
8 HIM ONCE INSIDE THE VAN WITH THE DOOR OPEN, PUT THE GUN
9 ANYWHERE. AND IN FACT HER EVIDENCE WAS ACTUALLY TO THE
10 CONTRARY THAT SHE SAW HIM THROW THE POCKETBOOK ON ONE HAND
11 AND THEN HE WAS FLAILING AROUND TRYING TO PUT THE CAR INTO
12 DRIVE. IT WAS IN A WELL LIT ENVIRONMENT WHERE SHE GAVE
13 VERY DETAILED DESCRIPTION. THERE IS NO GUN RECOVERED,
14 THERE IS NO WITNESS TESTIMONY, THERE ARE THREE EYE
15 WITNESSES, NOT TO THE ACTUAL MUGGING. BUT THERE ARE THREE
16 EYE WITNESSES WHO TESTIFIED, NONE OF THEM HAVE SEEN A
17 WEAPON. THE VAN IS RECOVERED AND THERE IS NO WEAPON. THE
18 ONLY EVIDENCE AND HER TESTIMONY IS NOT EVEN I FELT AN
19 OBJECT BEING PUSHED INTO MY STOMACH THAT FELT LIKE A GUN.
20 THAT IS NOT HER TESTIMONY. SHE SAID, SHE MENTIONED THE
21 GUN ONE TIME IN HER TESTIMONY AND THAT WAS TO SAY IN A
22 CONCLUSORY FASHION, HE HAD A GUN. SHE GAVE ABSOLUTELY NO
23 FOUNDATION FOR IT. THE ONLY TIME SHE MENTIONED GUN IN HER
24 TESTIMONY AS THE ONE TIME WHEN SHE SAID HE HAD A GUN.
25 THAT IS A CONCLUSORY STATEMENT AND WITHOUT ANY FOUNDATION

1 THAT IS AT BEST ONE LINK OF A CHAIN IN CIRCUMSTANTIAL
2 EVIDENCE WHICH WOULD ABSOLUTELY REQUIRE THE COURT TO HAVE
3 EITHER THE JURY OR THE COURT MAKE A DECISION THAT IS BASED
4 ON CONJECTURE AND SPECULATION. AND THERE ARE A PLETHORA
5 OF CASES THAT SAYS YOU CANNOT MAKE YOUR VERDICT ON
6 SPECULATION. AND ABSOLUTELY, ARMED ROBBERY IS THE
7 ESSENTIAL LINK IN THAT CHAIN. I CAN'T IMAGINE A MORE
8 CRUCIAL IN THE CHAIN THAN TO PROVE THE WEAPON AND THEY ARE
9 BASING IT ON HER ONE CONCLUSORY STATEMENT, HE HAD A GUN.
10 YOU JUST HAVE ABSOLUTELY NO FOUNDATION. IT DIDN'T FEEL
11 LIKE A GUN IN HER STOMACH, SHE DIDN'T SEE THE GUN, SHE
12 DIDN'T RATTLE THE GUN, THERE ARE NO BULLETS, THERE ARE NO
13 EYE WITNESSES. THEY KNEW WHO THE PASSENGER WAS IN THE
14 CAR, THERE IS NO TESTIMONY THAT THERE WAS A GUN. AND
15 JUST, I MEAN THE MOST IMPORTANT LINK IN THE CASE AND THAT
16 IS WHAT THEY WANT TO BASE THIS CONVICTION ON. THE LADIES
17 TESTIMONY ONE TIME, HE HAD A GUN. AND WE ABSOLUTELY WOULD
18 ASK FOR A DIRECTED VERDICT, YOUR HONOR.

19 MR. HAMMACK: YOUR HONOR, THE STATE WOULD ALLEGE
20 THERE IS SUFFICIENT EVIDENCE ON THE RECORD TO PROVE THAT
21 MR. ABNEY DID COMMIT ARMED ROBBERY. YOUR HONOR, THE
22 VICTIM TESTIFIED THAT SHE NOT ONLY FELT AN OBJECT BEING
23 PUSHED UP INTO HER RIBS, SHE TESTIFIED THAT HE THREATENED
24 TO KILL HER. AND SHE WAS STARTLED AND SAID WHAT. AND HE
25 AGAIN THREATENED TO KILL HER BUT THIS TIME USED ABUSIVE

1 LANGUAGE AND PUSHED HARDER INTO HER SIDE. YOUR HONOR, THE
2 STATE DOESN'T HAVE TO SHOW THAT HE VISIBLY DISPLAYED ANY
3 GUN OR ANY OTHER WEAPON. I BELIEVE MR. VERNER SAYS THE
4 INDICTMENT ALLEGES THAT HE HAD A FIREARM. YOUR HONOR, A
5 FIREARM OR WHILE ALLEGING EITHER BY ACTIONS OR WORDS THAT
6 HE WAS ARMED WHILE USING THE REPRESENTATION OF A DEADLY
7 WEAPON, IT GOES ON, IT DOESN'T SAY IT NECESSARILY HAS TO
8 BE A FIREARM. OBVIOUSLY YOU HEARD THE VICTIM TESTIFY THAT
9 SHE FEELS CONFIDENT THAT IT WAS AND SHE FELT WHAT WAS
10 PUSHED INTO HER SIDE. SHE HEARD MR. ABNEY THREATENING HER
11 LIFE, NOT ONCE BUT TWICE AND IF SHE WAS ABSOLUTELY
12 POSITIVELY AFRAID AND FELT THAT MR. ABNEY WAS GOING TO
13 SHOOT HER OR OTHERWISE KILL HER AT THAT POINT. SHE
14 TESTIFIED, I BELIEVE, THAT SHE WAS SO SCARED SHE COULDN'T
15 EVEN PUSH THE PANIC BUTTON ON HER KEY CHAIN. SHE WAS
16 TERRIFIED OF MR. ABNEY. YOUR HONOR, THE STATE WOULD ARGUE
17 THAT THE VICTIM ABSOLUTELY REASONABLY BELIEVED THAT HE WAS
18 ARMED AND THERE IS SUFFICIENT EVIDENCE TO TAKE IT TO THE
19 JURY AND FOR THE JURY TO DECIDE IF HE WAS ARMED.

20 MR. VERNER: YOUR HONOR, OBVIOUSLY THIS IS THE
21 ESSENTIAL QUESTION FOR THIS COURT TODAY. SHE DID NOT
22 TESTIFY THAT HE PUSHED THE GUN INTO HER. SHE TESTIFIED
23 THAT HE PUSHED INTO HER. SHE MENTIONED GUN ONE TIME, HE
24 HAD A GUN. SHE DID NOT TESTIFY, THAT IS A
25 MISCHARACTERIZATION THAT SHE TESTIFIED THAT HE PUSHED A

1 GUN. HER TESTIMONY WAS THAT HE PUSHED INTO ME AND SHE
2 FELT SOMETHING HARD IN MY ABDOMEN OR SOMETHING LIKE THAT
3 ON THE END. AND I DON'T EVEN THINK SHE SAID IT QUITE LIKE
4 THAT. IF THE STATE NOW CONCEDES THAT THERE IS NO DIRECT
5 EVIDENCE AS HE IS INDICTED, THAT HE HAD A FIREARM, THAT
6 THEY HAD ON THE SECOND PART OF THE ARMED ROBBERY, WHICH
7 REQUIRES TWO DIFFERENT ELEMENTS. THAT IS THAT HE MADE
8 SOME KIND OF REPRESENTATION THAT HE HAD A GUN WHILE USING
9 A WEAPON. AND I HAVE GOT SEVERAL CASES THAT SAY THREATS
10 ALONE DO NOT MAKE A ROBBERY ARMED ROBBERY UNLESS YOU
11 REPRESENT AND THE MULDROW CASE IS WHERE THE DEFENDANT
12 PASSED A NOTE UP. AND SAYS, I HAVE GOT A GUN, I WILL
13 KILL, I WILL SHOOT YOU IF YOU DON'T HAND ME THE MONEY,
14 BANK TELLER. HE MADE NO REPRESENTATIONS, HE DIDN'T PUT
15 HIS HAND IN HIS POCKET. MAKING THE DEATH THREAT ALONE
16 DOES NOT BUMP COMMON LAW ROBBERY TO ARMED ROBBERY UNLESS
17 YOU REPRESENT THAT YOU HAVE A WEAPON, A DEADLY WEAPON.
18 AND THAT IS JUST, AND THE THRESHOLD REQUIRES TWO ELEMENTS.
19 WORDS ALONE ARE NOT SUFFICIENT TO ESTABLISH A
20 REPRESENTATION OF A DEADLY WEAPON FOR PURPOSES OF THE
21 ARMED ROBBERY STATUTE WHICH ALLOWS A FINDING OF ARMED
22 ROBBERY WHEN THE ROBBER ALLEGES, WHEN THE ROBBER ALLEGED
23 HE WAS ARMED WITH A DEADLY WEAPON. EITHER BY ACTION OR
24 WORDS WHILE USING A REPRESENTATION OF A DEADLY WEAPON TO
25 ESTABLISH THE GREATER THAN ARMED ROBBERY OFFENSE. THE

1 STATE HAD TO SHOW EVIDENCE CORROBORATING ALLEGATIONS OF
2 BEING ARMED OR IN OTHER WORDS, THE USE OF A PHYSICAL
3 REPRESENTATION OF A DEADLY WEAPON. THAT IS THE MULROW
4 CASE, JUSTICE MOORE.

5 THE COURT: THAT IS WHERE YOUR ARGUMENT FAILS. THE
6 LEGISLATURE, SEVERAL YEARS AGO, SPECIFICALLY AMENDED THIS
7 STATUTE. AND YOU TAKE ALL OF THE EVIDENCE TESTIFIED TO
8 AND WHAT I HAVE HEARD, I AM GOING TO HAVE TO DENY YOUR
9 MOTION. THAT IS EXACTLY WHERE IT FAILS AND THE ISSUE OR
10 REPRESENTATION. HOWEVER, SPEAK OF BOOTSTRAPPING, I AM
11 GOING TO BOOTSTRAP THAT MOTION OVER TO THE OTHER DEFENSE
12 AND I AM GOING TO GRANT YOUR MOTION ON THE COUNT TWO.

13 MR. VERNER: VISIBLY DISPLAYING THE DEADLY WEAPON.

14 THE COURT: BECAUSE IF YOU CAREFULLY READ THAT,
15 SOLICITOR, IT SAYS POSSES OF A FIREARM OR VISIBLY
16 DISPLAYED WHAT APPEARED TO BE A FIREARM. THE CASE FALLS
17 RIGHT THERE.

18 MR. HAMMACK: YES, SIR.

19 MR. VERNER: AND I JUST, I APPRECIATE IT AND I AM
20 VERY BRIEFLY, I AM ONLY GOING TO POINT TO THE STATUTE.
21 THE STATUE WAS AMENDED IN 1996, THE MULROW CASE IS 2002.

22 THE COURT: LET'S TAKE 10 MINUTES.

23 MR. VERNER: WE ARE NOT GOING TO PUT UP A DEFENSE.

24 THE COURT: ALL RIGHT, 10 MINUTES.

25 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

1 THE COURT: LET'S BRING THE JURY IN, PLEASE.

2 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT
3 APPROXIMATELY 11:25 A.M.)

4 THE COURT: ALL RIGHT, THE DEFENSE REST, THE STATE
5 WILL BEGIN OPENING ARGUMENTS.

6 MR. HAMMACK: THANK YOU, YOUR HONOR. LADIES AND
7 GENTLEMEN OF THE JURY, WELCOME BACK AND THIS GIVES ME AN
8 OPPORTUNITY TO TALK TO YOU AGAIN. THE STATE HAS COMPLETED
9 THEIR CASE, YOU HAVE HEARD ALL OF THE EVIDENCE. WHAT YOU
10 ARE GOING TO HEAR NOW IS THE ARGUMENTS. THE ARGUMENTS
11 THAT I MAKE, THE ARGUMENTS THAT THE DEFENSE ATTORNEY
12 MAKES. OBVIOUSLY, THE JUDGE WILL CHARGE YOU AND YOU ARE
13 AWARE THAT OUR ARGUMENTS ARE NOT EVIDENCE. THE ONLY
14 EVIDENCE YOU WILL HEAR IS FROM THE STAND. LADIES AND
15 GENTLEMEN, THE STATE WILL CONTEND THAT WE HAVE
16 SUFFICIENTLY PROVEN OUR ELEMENTS OF ARMED ROBBERY AGAINST
17 THE DEFENDANT. YOU HAVE HEARD TESTIMONY FROM THE STAND
18 THAT THE ROBBERY OBVIOUSLY TOOK PLACE, THAT MS. ROOSEN WAS
19 ROBBED. YOU HAVE HEARD TESTIMONY THAT MR. ABNEY ADMITTED
20 TO ROBBING MS. ROOSEN. YOU HAVE SEEN IN HIS OWN WRITTEN
21 WORDS THAT HE ADMITTED TO ROBBERY HER. YOU HAVE HEARD
22 TESTIMONY THAT MS. ROOSEN BELIEVES, REASONABLY BELIEVES
23 THAT MR. ABNEY WAS ARMED AT THE TIME. SHE TESTIFIED THAT
24 SHE FELT AN OBJECT BEING PUSHED INTO HER RIBS, NOT ONCE
25 BUT TWICE.

1 MR. VERNER: I DO OBJECT, THE EVIDENCE THAT THE JURY
2 WILL RECALL IS THAT, I OBJECT. THAT IS NOT A
3 CHARACTERIZATION IN MY OPINION, A FAIR CHARACTERIZATION OF
4 WHAT THE TESTIMONY WAS.

5 MR. HAMMACK: YOUR HONOR, I BELIEVE THAT IS A FAIR
6 CHARACTERIZATION.

7 THE COURT: WELL, MY RESPONSE IS TO THAT, IS THAT THE
8 JURY CAN DETERMINE THAT WITH THE EVIDENCE. GO AHEAD.

9 MR. HAMMACK: YOU HEARD MS. ROOSEN STATE THAT SHE
10 FELT AN OBJECT PUSHED INTO HER RIBS. SHE WAS THREATENED,
11 HE THREATENED TO KILL HER, NOT ONCE BUT TWICE WHEN HE WAS
12 PUSHING SOMETHING INTO HER. YOU HEARD MS. ROOSEN TESTIFY
13 THAT SHE BELIEVES IT WAS A GUN. LADIES AND GENTLEMEN, THE
14 STATE DOES NOT HAVE TO PROVE THAT A GUN WAS DISPLAYED OR A
15 WEAPON WAS DISPLAYED. THE STATE HAS TO PROVE THAT MR.
16 ABNEY ROBBED MS. ROOSEN AND DURING THE COMMISSION OF THAT
17 ROBBERY HE RECOMMENDED TO HER THAT HE HAD A WEAPON BY HIS
18 ACTIONS OR WORDS. AND THAT SHE REASONABLY BELIEVED THAT
19 HE HAD A WEAPON. LADIES AND GENTLEMEN, WE BELIEVE, I KNOW
20 WITHOUT A DOUBT THAT SHE BELIEVED, SHE REASONABLY BELIEVED
21 THAT HE HAD A WEAPON. WITH THE THREAT AND THE, WHAT SHE
22 FELT IN HER SIDE SHE REASONABLY BELIEVED THAT. THE
23 DEFENSE WANTS YOU TO BELIEVE THAT NO WEAPON WAS FOUND FOUR
24 OR FIVE DAYS LATER WHEN MR. ABNEY WAS ARRESTED, THAT HE
25 COULDN'T HAVE HAD A WEAPON THE NIGHT THAT IT OCCURRED.

1 THE DEFENSE WANTS YOU TO BELIEVE THAT THE OFFICERS SAYS
2 THAT MR. ABNEY TOLD THEM THAT HE DIDN'T HAVE A WEAPON AND
3 HE DIDN'T HAVE A WEAPON WHEN HE DID THIS ROBBERY. BUT
4 LADIES AND GENTLEMEN, YOU HAVE HEARD THE TESTIMONY. IT IS
5 YOUR JOB AS JURORS TO ACCESS THE CREDIBILITY OF THE
6 WITNESSES. YOU SEE THE WITNESSES THERE ON THE STAND, YOU
7 HEAR WHAT THEY HAVE TO SAY, IT IS YOUR JOB TO ACCEPT THEIR
8 CREDIBILITY. YOU SAW MS. ROOSEN AND YOU HEARD WHAT SHE
9 HAD TO SAY. LADIES AND GENTLEMEN, YOU HAVE HEARD
10 TESTIMONY THAT MS. ROOSEN ACTUALLY RAN ALONG SIDE THE VAN
11 TRYING TO GET HER PURSE BACK. YOU ALSO HEARD MS. ROOSEN
12 SAY THAT SHE WAS EXTREMELY SCARED, THAT THE MAN WAS
13 LEANING OVER PRESSING THIS OBJECT INTO HER SIDE THAT SHE
14 FELT WAS A GUN. I THINK MS. ROOSEN WOULD OBVIOUSLY TELL
15 YOU, IT PROBABLY WASN'T THE BEST IDEA TO RUN ALONG THE
16 SIDE OF THAT VAN. BUT SHE DID. AND THE DEFENSE IS GOING
17 TO GET UP AND WANT YOU TO BELIEVE, WELL, HE COULDN'T HAVE
18 BEEN ARMED OR SHE WOULDN'T HAVE RAN UP TO THAT VAN. SHE
19 WOULD HAVE BEEN STUPID TO RUN UP TO A VAN TO A MAN THAT
20 MIGHT BE ARMED. AND YOU HAVE HEARD EVERYTHING THAT WAS
21 OUT THERE. YOU HAVE SEEN THE STATEMENT, YOU KNOW EXACTLY
22 WHAT HAPPENED. OBVIOUSLY IT IS THAT HE ROBBED HER. MS.
23 ROOSEN TELLS YOU THAT SHE FELT THAT OBJECT AND SHE FELT
24 NOT ONCE BUT TWICE THE SECOND TIME PUSHING SOMETHING INTO
25 HER EVEN HARDER TO MAKE IT CLEAR.

1 LADIES AND GENTLEMEN, THE FACTS ARE SIMPLE THAT ON
2 OCTOBER THE 30TH OF 2004 RIGHT AT 10:00 O'CLOCK AT NIGHT
3 MS. ROOSEN WENT UP TO THE PROSPERITY, ROBERTS CITGO IN
4 PROSPERITY TO GET SOME ITEMS. SHE WENT TO THE STORE, SHE
5 WAITED IN LINE. YOU HEARD A WITNESS SAY HE ACTUALLY SAW
6 HER IN THERE, SAW HER PURCHASE SOME BEER, WENT BACK OUT TO
7 HER CAR AND PUT IT IN THE PASSENGER SEAT. WHEN SHE CAME
8 BACK AROUND TO GET INTO HER CAR MR. ABNEY CAME OUT OF HIS
9 VAN WHICH IS PARKED RIGHT NEXT TO HER. THE TESTIMONY IS
10 CLEAR, CAME OUT OF HIS VAN, LEANED OVER HER. AS YOU CAN
11 SEE THERE IS A GREAT DEAL OF DISPARITY, LEANED OVER ON TO
12 HER, THREATENED HER, PUSHED SOMETHING INTO HER SIDE. SHE
13 IS STANDING THERE, SHE DOESN'T KNOW WHAT TO DO. SHE
14 STATED ON THE STAND THAT SHE WAS KIND OF IN SHOCK SO SHE
15 SAID WHAT. SHE WASN'T SURE EXACTLY WHAT TO DO. I BELIEVE
16 SHE STATED ON THE STAND THAT SHE WAS SO SCARED SHE
17 COULDN'T EVEN PRESS HER PANIC BUTTON ON HER REMOTE. SHE
18 DIDN'T KNOW WHAT TO DO. SO, SHE SAYS WHAT TO HIM, AND HE
19 AGAIN PRESSES INTO HER SIDE EVEN HARDER AND SAYS, I AM
20 GOING TO KILL YOU. NOT HIS EXACT WORDS BUT THAT I AM
21 GOING TO KILL YOU. YOU HEARD THE TESTIMONY, YOU HEARD IT
22 EXACTLY, SHE SAID IT AS HE SAID IT. LADIES AND GENTLEMEN,
23 I BELIEVE THAT THERE IS NO DOUBT IN MY MIND--

24 MR. VERNER: AGAIN, YOUR HONOR, IT IS IMPROPER TO--

25 MR. HAMMACK: LADIES AND GENTLEMEN, THERE SHOULD BE

1 NO DOUBT IN YOUR MIND THAT ON OCTOBER THE 30TH OF 2004
2 THIS MAN RIGHT HERE WENT TO THE ROBERTS EXXON IN
3 PROSPERITY AND ROBBED HER, TOOK HER PURSE WHILE HE WAS
4 ARMED WITH A DEADLY WEAPON. THANK YOU.

5 THE COURT: MR. VERNER.

6 MR. VERNER: MAY IT PLEASE THE COURT, MR. HAMMACK AND
7 MR. FOREMAN AND MEMBERS OF THE JURY. IF YOU BELIEVE IN
8 JUSTICE BEING THAT EVERYBODY GETS WHAT THEY DESERVE THEN
9 YOU WILL CONVICT HIM. THAT IS CARNAGE, PEOPLE GET WHAT
10 THEY DESERVE, WHAT COMES AROUND GOES AROUND. AND INDIA
11 AND THE FAREAST AND THE BUDDHIST BELIEVES IN CARNAGE,
12 PEOPLE GET WHAT THEY DESERVE. IT IS QUIET SIMPLE, THIS
13 CASE IS NOT ABOUT WHAT HAPPENED TO MS. ROOSEN, IT REALLY
14 ISN'T. IT IS ABOUT, I CAN'T STRESS THAT POINT ANY MORE
15 THAN, IT IS NOT THE RULE OF LAW. THE STATE HAS PICKED UP
16 THIS CHARGE AND THE STATE HAS CHOSEN TO CHARGE AND TO GO
17 FORWARD WITH ARMED ROBBERY. THEY HAVE REALLY PUT A BITTER
18 CUP IN FRONT OF YOU AND ASK YOU TO BELIEVE IN IT. BECAUSE
19 YOU ARE GOING TO HAVE A STAR CONTRAST. THIS MAN IS GUILTY
20 OF ARMED ROBBERY OF SOMETHING WHERE THE STATE CAN'T PROVE
21 ALL OF THE ELEMENTS OR FIND HIM NOT GUILTY. AND I
22 UNDERSTAND, THAT IS TOUGH. BY FINDING HIM NOT GUILTY DOES
23 NOT MEAN THAT THIS DIDN'T HAPPEN. IT MEANS THAT THE STATE
24 FAILED TO PROVE ONE PART OF THE, THE MOST ESSENTIAL PART
25 OF THEIR PACE. WHAT IS THE WEAPON. THIS IS JUST A

1 PHOTOCOPY OF PART OF THE STATUTE, THE LEGISLATURE, ALL OF
2 THESE BLUE BOOKS ARE JUST DIFFERENT LAWS. AT LEAST 56
3 DIFFERENT BOOKS OF LAW AND THE STATE CHOSE THIS ONE
4 PARTICULAR CASE, ARMED ROBBERY TO GO FORWARD ON. THE
5 ARMED ROBBERY STATUTE, I DIDN'T MAKE THIS UP. THIS IS THE
6 STATUTE AND WE LIVE BY THE RULE OF LAW. IT SAYS A MAN IS
7 GUILTY OF ARMED ROBBERY IF THE STATE, THE STATE, THE STATE
8 PROVES HE HAD A WEAPON. THEY CAN'T, THERE IS NO DIRECT
9 EVIDENCE HE HAD A WEAPON.

10 MR. HAMMACK: YOUR HONOR, I WOULD OBJECT, I BELIEVE
11 THAT IS A MISCHARACTERIZATION OF THE STATUTE. IT IS A LOT
12 MORE THAN THAT.

13 MR. VERNER: AGAIN, THERE ARE TWO PARTS OF THE
14 STATUTE, YOUR HONOR, AND I WILL GET TO BOTH OF THEM.

15 THE COURT: ALL RIGHT. BOTH OF YOU REMEMBER I WILL
16 CHARGE THE LAW. GO HEAD.

17 MR. VERNER: A PERSON WHO COMMITS ROBBERY WHILE ARMED
18 WITH A PISTOL, DURCH, SLINGSHOT, METAL KNUCKLES, RAZOR OR
19 OTHER DEADLY WEAPON. THAT IS THE FIRST WAY THEY CAN PROVE
20 ARMED ROBBERY. THEY CAN PROVE A MAN HAD A WEAPON THAT HE
21 TOOK SOMETHING OF VALUE FROM SOMEBODY ELSE. THAT IS ARMED
22 ROBBERY. THE SECOND WAY THE STATE COULD PROVE ARMED
23 ROBBERY IS THAT THE PERPETRATOR, MR. ABNEY, ALLEGED AT THE
24 TIME OF THE ROBBERY, HE ALLEGED EITHER BY ACTION OR WORDS
25 THAT HE WAS ARMED WHILE HE WAS ACTUALLY USING THE

1 REPRESENTATION OF A DEADLY WEAPON OR ANY OTHER OBJECT
2 WHICH THE PERSON ROBBED REASONABLY BELIEVED WAS A DEADLY
3 WEAPON. THE STATE, THERE ARE TWO WAYS TO PROVE ARMED
4 ROBBERY. THEY HAVE TO HAVE DIRECT EVIDENCE THAT THE MAN
5 WAS ARMED WITH WHAT WE CONSIDER A DEADLY WEAPON, A GUN, A
6 KNIFE, A BASEBALL BAT, A CHAIN OR THEY PROVE THE TWO-PART
7 ELEMENT. THAT THE ROBBERY HAPPENED AND THAT THE
8 PERPETRATOR, MR. ABNEY, ALLEGED HE HAD A WEAPON EITHER BY
9 ACTION OR WORD. AND THAT HE ALSO REPRESENTED TO HER SOME
10 SORT OF WEAPON. AND THAT IS, THAT IS THE BITTER CUP
11 BEFORE YOU. YOU HEARD IN DETAIL THE THREATS THAT WERE
12 MADE TO THE LADY. THE JUDGE IS GOING TO CHARGE YOU UNLESS
13 HE ALLEGES HE HAS A DEADLY WEAPON THREATS DO NOT MAKE THE
14 CRIME ARMED ROBBERY. I AM GOING TO KILL YOU--

15 THE COURT: COUNSEL, WAIT A MINUTE NOW. I AM GOING
16 TO HAVE TO STEP IN ON THAT. IT SAYS BY ACTION OR WORDS.

17 MR. VERNER: YES, SIR.

18 THE COURT: OKAY.

19 MR. VERNER: THE WORDS AND I -- I TAKE THE POSITION,
20 YOUR HONOR, THAT THE WORDS HAVE TO ALLEGE THE
21 REPRESENTATION OF A WEAPON AND I AM GOING TO CITE THE CASE
22 I BROUGHT.

23 THE COURT: I AM GOING TO CHARGE EXACTLY WHAT THE LAW
24 SAYS AND I AM POINTING OUT TO YOU, IT SAYS EITHER BY
25 ACTION OR WORDS.

1 MR. VERNER: YES, SIR. AND I AM GOING TO ASK THE
2 JUDGE TO CHARGE THE JURY ALSO THAT THE MERE USE OF THE
3 WORDS ALONE DOES NOT MAKE IT ARMED ROBBERY. WE WILL COME
4 BACK TO THAT ON THE CHARGE, YOUR HONOR, I WILL GO FORWARD.
5 AND AT THE END OF MY CLOSING ARGUMENT I WOULD ASK FOR AN
6 ARGUMENT, JUST A CLOSING CHARGES MOTION.

7 THE COURT: OKAY.

8 MR. VERNER: I HAVE GOT ONE SIDE I AM ON, WE ARE ALL
9 ON THE SIDE AND THE QUESTION OF JUSTICE. AND THERE, THIS
10 IS NOT A THREAT IN EVIDENCE OF THE CASE. THIS IS A
11 CIRCUMSTANTIAL EVIDENCE CASE. DIRECT EVIDENCE I SAW A
12 GUN. WE RECOVERED A GUN. THAT IS DIRECT EVIDENCE, IT IS
13 SOMETHING THAT HAS ACTUALLY HAPPENED. CIRCUMSTANTIAL
14 EVIDENCE MEANS, WELL WE DON'T, IT IS GOOD AS DIRECT
15 EVIDENCE. BUT IN CIRCUMSTANTIAL EVIDENCE THEY HAVE TO
16 PROVE A LINK OF CHAINS TO PROVE SOMETHING. BUT WE, THEY
17 HAVE TO PROVE THIS HAPPENED, SO THEREFORE THIS HAPPENED
18 AND THEREFORE THIS HAPPENED, THEREFORE THIS MUST HAVE
19 HAPPENED. ENOUGH FOR THE CHAIN TO MAKE SOMETHING TRUE.
20 AND THE BURDEN OF PROOF IS ENTIRELY ON THE STATE. WHEN
21 THE STATE TAKES UP A CHARGE AND PROSECUTES IT THEY ARE
22 REPRESENTING TO YOU THAT THEY HAVE ENOUGH EVIDENCE TO
23 CONVICT A MAN. TWO DAYS AFTER THIS INCIDENT HAPPENED THE
24 INVESTIGATORS SAID THAT MR. ABNEY WAS POSSIBLY ARMED. AND
25 THEY ARE ASKING YOU TO SPECULATE THAT THIS MAN HAD A GUN

1 WHICH IN ALL FRANKNESS HE MAY HAVE. I WASN'T THERE, HE
2 MAY OF HAD A GUN, HE MAY OF HAD A KNIFE, I DON'T KNOW.
3 NOBODY WAS THERE EXCEPT MS. ROOSEN AND MR. ABNEY. BUT HE
4 MAY NOT HAVE. IT IS A CLOSE CALL. WHO DOES THE LAW SAY
5 TO GIVE A CLOSE CALL TO. WELL, THE JUDGE SAYS YOU CAN ONLY
6 CONVICT MR. ABNEY IF YOU DO NOT HESITATE TO ACT. IF YOU
7 ARE ABSOLUTELY SURE THAT HE HAD A GUN OR A DEADLY WEAPON
8 THEN YOUR DUTY IS TO CONVICT HIM. AND ONCE THE CASE IS
9 OVER IT IS OVER. I WOULD JUST ASK YOU TO MAKE A DECISION
10 THAT TEN YEARS FROM NOW YOU DON'T SAY, WELL, IT WAS A
11 CLOSE CALL BUT OUR DUTY IS TO DECIDE WHAT IS NOT. YOUR
12 DUTY IS TO FIND WHETHER THE STATE WENT BEYOND A REASONABLE
13 DOUBT WHICH IS DO WE HESITATE ON EACH PART OF THEIR CLAIM
14 WHETHER THEY HAVE PRODUCED ENOUGH EVIDENCE. THERE ARE
15 THREE WITNESSES THEY BROUGHT TO THE COURT, NONE OF THEM
16 SAW WHAT WAS DONE. THE MAN'S STATEMENT THAT THEY USED
17 AGAINST HIM. THEY HAD A MAN, THEY HAD TED ABNEY, THAT
18 THEY HAD SEVEN MONTHS TO COME UP WITH A SYSTEM OF EVIDENCE
19 TO CONVICT HIM. AND YET THEY WANT YOU TO CONVICT A MAN OF
20 ARMED ROBBERY BECAUSE THEY SAY THIS IS ARMED ROBBERY
21 BECAUSE OF THE TESTIMONY OF MS. ROOSEN. I DON'T KNOW HOW
22 YOU MAKE YOUR DECISION. JOY HERE, MS. HOLSTON, WRITE DOWN
23 EVERYTHING THAT IS SAID UNDER OATH AT THIS POINT. IF YOU
24 HAVE ANY QUESTIONS ABOUT WHAT THE LADY TESTIFIED TO, MS.
25 ROOSEN, MS. HOLSTON CAN READ IT TO YOU. SHE CAN READ IT

1 VERBATIM, EVERYTHING THAT IS SAID IN THIS COURTROOM. I
2 SUBMIT TO YOU MS. ROOSEN DID NOT SAY THAT HE SHOVED A GUN
3 INTO MY STOMACH. SHE SAID HE PUSHED INTO MY STOMACH, SHE
4 DIDN'T TESTIFY SHE FELT A HARD METAL OBJECT. IF THERE IS
5 ANY QUESTION ABOUT WHAT SHE TESTIFIED TO MS. HOLSTON CAN
6 PRODUCE IT TO YOU. AND THAT IS WHAT YOU HAVE, DIRECT
7 EVIDENCE, YOUR OATH TO MAKE A DECISION ON. I UNDERSTAND
8 IT IS A CLOSE CALL. I DON'T WANT TO GO OVER THE FACTS, WE
9 ALL KNOW. SHE WAS STANDING IN THE OPEN DOOR OF HER CAR
10 ABOUT TO GET INTO THE SUV. MR. ABNEY STEPS OUT OF HIS CAR
11 AND HE IMMEDIATELY GRABS HER AND PUSHES INTO HER. AND HE
12 MAKES ACCORDING TO HER THESE TERRIBLE THREATS TO HER. HE
13 SAYS STAY HERE OR I WILL KILL YOU. AND THE JUDGE IS GOING
14 TO CHARGE YOU ON THE LAW WHETHER THAT CONSTITUTES ARMED
15 ROBBERY. I SUBMIT TO YOU THAT IT DOESN'T. COULD SHE HAVE
16 BEEN MISTAKEN. HEY, COULD SOMETHING BE PUSHED INTO HER
17 AND SOMETHING ELSE BE PUSHED INTO HER THAT SHE FELT
18 HONESTLY COULD BE A WEAPON. IF THAT IS THE CASE, HE
19 CANNOT BE FOUND GUILTY OF ARMED ROBBERY. I SUBMIT TO YOU
20 A REASONABLE PERSON WHO HAS A GUN STOPS INTO THEIR
21 STOMACH. SHE HAD GOOD, I MEAN ABSOLUTELY MS. ROOSEN KEPT
22 A CLEAR HEAD FOR THE MOST PART. SHE GAVE IT, IN MY
23 OPINION A PRETTY GOOD WELL LIT AREA. THE MAN IS RIGHT UP
24 IN HER FACE AND IN A WELL LIT AREA OUTSIDE IN A CONVENIENT
25 STORE PRESSING AGAINST HER. SHE HAS GOT HER POCKETBOOK

1 HERE, HE IS TRYING TO PULL IT OFF HER ARM, SHE IS TRYING
2 TO KEEP IT. COULD SOMETHING ELSE BEEN PRESSED AGAINST HER
3 STOMACH THAT SHE TOOK AS A HARD OBJECT. I UNDERSTAND SHE
4 IS UNDER THE TRAUMA OF A SITUATION. COULD SHE HAVE MISSED
5 APPREHENDED. WELL, IF SHE DID IT IS POSSIBLE SHE DID, THAT
6 IS NOT A GUILTY OR ARMED ROBBERY. IT IS NOT WHETHER SHE
7 WAS ROBBED OR NOT, IT IS IF IT WAS AN ARMED ROBBERY. AND
8 HER ONLY EVIDENCE IS THAT HE PUSHED INTO HER, IT SAYS HE
9 HAD A GUN. IT DOESN'T SAY HE HAD A HARD GUN, SHE DIDN'T
10 SAY I LOOKED DOWN AND SAW A BLACK SHINEY OBJECT. SHE
11 DOESN'T SAY HE SAID HE, HAD A GUN, IT DOESN'T SAY THAT IT
12 FELT LIKE A GUN. SHE JUST SAID HE HAD A GUN. WELL, HE
13 HAS GOT SOMETHING IN HER STOMACH SHE SAYS THAT A
14 REASONABLE PERSON WOULD THINK IS A GUN. HE MANAGES TO
15 PULL, HE SOMEHOW MANAGES TO KEEP HER PUSHED INTO THE CAR,
16 PULL THE POCKETBOOK AND THE GUN OUT AND GET BACK TO THE
17 CAR WITH THE DOOR WIDE OPEN AND SHE FOLLOWS HIM TO HIS CAR
18 DOOR AND SHE CHASES THE CAR FOR SEVERAL STEPS. THERE IS
19 NO TESTIMONY, SHE SAYS I SAW HIM WITH THE POCKETBOOK IN
20 THE CAR. WHAT HAPPENED TO THE GUN. DID HE GET FROM THERE
21 TO THERE WITH HER ON HIM AND THROW THE POCKETBOOK AND SHE
22 SAID HE WAS FLAILING AROUND TO TRY TO GET THE CAR IN GEAR
23 AND GO. WHAT HAPPENED TO THE GUN, I THOUGHT HE THREW THE
24 POCKETBOOK TO THE PASSENGER. WHAT DID HE DO WITH THE GUN.
25 HE GOT THE CAR IN GEAR. AND THEN SHE REACHES IN WHILE THE

1 CAR IS STILL RUNNING UNDER THE STRESS AND SITUATION TO GET
2 HER POCKETBOOK AND I DON'T BLAME HER FOR THAT. I DON'T
3 BLAME MS. ROOSEN. AND I UNDERSTAND THIS ALL HAPPENED VERY
4 FAST. WOULD A REASONABLE PERSON WHO HAD A GUN STUCK IN
5 THEIR CHEST AND I UNDERSTAND. BUT WHEN YOU GET MUGGED YOU
6 ARE NOT IN A REASONABLE STATE OF MIND. THAT BEING SAID,
7 IF SOMEONE HAD PUT A GUN TO YOU DO YOU STILL CONTINUE TO
8 CHARGE THEM. THAT IS ERRATIC BEHAVIOR. HE GETS BACK IN
9 THE CAR, SHE DOESN'T SEE WHAT HAPPENS WITH THE GUN. I
10 WOULD ABSOLUTELY ASK YOU AGAIN THAT MS. HOLSTON CAN TYPE
11 VERBATIM NOT WHAT MR. HAMMACK, THE DEPUTY SOLICITOR SAID
12 AND NOT WHAT I SAID SHE SAID. BUT THE ABSOLUTE, THE SWORN
13 OATH TESTIMONY THAT YOU AGREED TO MAKE A DECISION ON. AND
14 IT IS THERE FOR YOU TO REACH OUT AND TOUCH IT, IF YOU DO
15 NOT REMEMBER EXACTLY WHAT HAPPENED. I KNEW BASICALLY WHAT
16 THESE CHARGES WERE GOING IN AND I WAS LISTENING TO THE
17 DETAILS AND YA'LL WERE TAKING THIS CASE IN AS KIND OF A
18 WHOLE. THAT BEING SAID, YOU KNOW WHAT YOU NEED TO DO, AND
19 I DON'T WANT TO CHANGE YOUR MIND IF YA'LL DIDN'T HEAR IT
20 IN THE BEGINNING. IT IS THERE FOR YOU TO REACH OUT AND
21 TOUCH IF YOU HAVE ANY QUESTIONS. IF YOU DO HAVE ANY
22 QUESTIONS IN YOUR MIND, YOU ARE DUTY BOUND, IT IS, THE
23 STATE HAS PUT THIS BEFORE YOU AS ARMED ROBBERY. MR.
24 ABNEY, HE MADE HIS OWN BED BUT HE DIDN'T DO THAT. IT IS
25 ARMED ROBBERY OR NOTHING. I SUBMIT TO YOU THAT IS NOT THE

1 RULE OF LAW, THAT IS NOT WHAT THE LAW SAYS. THE STATE
2 CANNOT MEET THE MOST CRUCIAL ELEMENT AND I SUBMIT TO YOU
3 THAT IT IS A NOT GUILTY VERDICT. NOT BECAUSE WHAT MS.
4 ROOSEN SAID, THIS CASE IS WHETHER THE STATE CAN PROVE
5 BEYOND A REASONABLE DOUBT ALL THE ELEMENTS THEY ARE SAYING
6 THEY PUT AND THEY BROUGHT TO THIS CASE. I WOULD ASK FOR A
7 NOT GUILTY VERDICT.

8 THE COURT: THANK YOU, MR. VERNER. MR. FOREMAN AND
9 LADIES AND GENTLEMEN OF THE JURY, NOW BECOMES MY DUTY TO
10 CHARGE THE LAW OF THE CASE AND AT THIS TIME I THANK
11 COUNSEL FOR THEIR ABLE ARGUMENTS AND THEIR PRESENTATION OF
12 THE CASE TO THE COURT. AS JURORS IT IS YOUR EXCLUSIVE
13 DUTY TO DECIDE ALL THE ISSUES OF THE FACT OF THE CASE FOR
14 THAT PURPOSE TO DETERMINE THE EFFECT, THE VALUE, THE
15 WEIGHT, THE PROOF OF THE EVIDENCE. BOTH THE STATE AND THE
16 DEFENDANT HAS A RIGHT TO EXPECT THAT YOU WILL
17 CONSCIENTIOUSLY CONSIDER AND EVALUATE THE EVIDENCE AND
18 APPLY THE LAW OF THE CASE THERETO. IN THE END BOTH THE
19 STATE OF SOUTH CAROLINA AND THE DEFENDANT WILL RECEIVE AND
20 OBTAIN A FAIR AND IMPARTIAL TRIAL IN THIS CASE.

21 THE STATE OF SOUTH CAROLINA BY AN INDICTMENT IN THIS
22 CASE CHARGES THE DEFENDANT, THE DEFENSE UNDER THE LAW OF
23 ARMED ROBBERY. TO THIS CHARGE TO THE INDICTMENT THE
24 DEFENDANT HAS PRESENTED A PLEA OF NOT GUILTY. THIS PLEA
25 OF NOT GUILTY BY THE DEFENDANT PLACES THE BURDEN OF PROOF

1 ON THE STATE TO PROVE BY EVIDENCE THE GUILT OF THE
2 DEFENDANT BEYOND A REASONABLE DOUBT FOR YOU THE JURY TO
3 FIND THE DEFENDANT GUILTY. THE DEFENDANT IS PRESUMED IN
4 LAW INNOCENT OF THE CHARGES CONTAINED IN THE INDICTMENT.
5 IT IS A CARDINAL AND FUNDAMENTAL RULE OF THE LAW OF
6 EVIDENCE THAT THE DEFENDANT IRRESPECTIVELY WITH ENORMITY
7 OF THE CHARGE AGAINST HIM WILL ALWAYS BE PRESUMED INNOCENT
8 OF THE CRIME IN WHICH HE IS INDICTED UNLESS AND UNTIL THE
9 GUILT OF THE DEFENDANT HAS PROVED BY EVIDENCE THAT
10 SATISFIES YOU, THE JURY, OF HIS GUILT BEYOND A REASONABLE
11 DOUBT. THE PRESUMPTION OF INNOCENCE IS NOT A MERE LEGAL
12 THEORY, IT IS NOT JUST A LEGAL PHRASE. THE PRESUMPTION OF
13 INNOCENCE IS A SUBSTANTIAL RIGHT WHICH EVERY ACCUSED IS
14 ENTITLED. OUR SUPREME COURT HAS PLEDGED THAT THE
15 PRESUMPTION OF INNOCENCE IS LIKE A ROBE OF RIGHTEOUSNESS
16 PLACED ABOUT THE SHOULDERS OF THE DEFENDANT AND IT REMAINS
17 WITH HIM AND ASSIGNS TO HIM THAT CLASS OF INNOCENCE.
18 UNTIL THAT PRESUMPTIVE ROBE OF RIGHTEOUSNESS IS STRIPPED
19 FROM A PERSON BY EVIDENCE SATISFYING YOU THE JURY OF THE
20 GUILT OF THE DEFENDANT BEYOND A REASONABLE DOUBT. THE
21 PRESUMPTION OF INNOCENCE ACCOMPANIES THE DEFENDANT FROM
22 THE TIME OF HIS ARRAIGNMENT AND CARRIES TO COURT AND
23 CONTINUES WITH THE DEFENDANT THROUGHOUT EVERY STAGE OF THE
24 TRIAL, IT CONTINUES WITH THE DEFENDANT UNTIL YOU OR AFTER
25 YOU RETIRE TO THE JURY ROOM TO DELIBERATE YOUR VERDICT.

1 THE PRESUMPTION OF INNOCENCE CONTINUES WITH THE DEFENDANT
2 UNTIL YOU THE JURY REACH A CONCLUSION THAT THE STATE HAS
3 PROVEN GUILT OF THE DEFENDANT BEYOND A REASONABLE DOUBT.

4 LADIES AND GENTLEMEN, THE STATE DOES NOT REQUIRE TO
5 PROVE THE GUILT OF THE DEFENDANT BEYOND ALL DOUBT OR
6 BEYOND EVERY DOUBT BUT BEYOND A REASONABLE DOUBT. SOME OF
7 YOU MAY OF SERVED AS JURORS IN CIVIL CASES WHERE YOU WERE
8 TOLD IT WAS ONLY NECESSARY TO PROVE THE FACT IS MORE
9 LIKELY TRUE THAN NOT TRUE. THE GOVERNMENTS PROOF MUST BE
10 MORE POWERFUL THAN THAT, IT MUST BE BEYOND A REASONABLE
11 DOUBT. PROOF BEYOND A REASONABLE DOUBT IS PROOF THAT
12 LEAVES YOU FIRMLY CONVINCED OF THE DEFENDANT'S GUILT.
13 THERE ARE VERY FEW THINGS IN THIS WORLD THAT YOU KNOW WITH
14 ABSOLUTE CERTAINTY, IN SOME CASES THE LAW DOES NOT REQUIRE
15 PROOF THAT OVERCOMES EVERY POSSIBLE DOUBT. IF BASED ON
16 YOUR CONSIDERATION OF THE EVIDENCE, YOU ARE FIRMLY
17 CONVINCED THAT THE DEFENDANT IS GUILTY OF THE CRIME
18 CHARGED YOU MUST FIND HIM GUILTY. IF ON THE OTHER HAND
19 YOU THINK THAT THERE IS A REAL POSSIBILITY THAT HE IS NOT
20 GUILTY YOU MUST GIVE HIM THE BENEFIT OF THE DOUBT AND FIND
21 HIM NOT GUILTY.

22 I CHARGE YOU THAT THE DEFENDANT IS ENTITLED TO EVERY
23 REASONABLE DOUBT ARISING IN THE CASE. UPON ANY ISSUE OF
24 FACT THAT IS ESSENTIAL TO CONVICTION AND THE VERDICT OF
25 GUILTY AND YOU HAVE A REASONABLE DOUBT AS TO HOW THAT

1 ISSUE SHOULD BE RESOLVED IT WOULD BE YOUR DUTY TO RESOLVE
2 THAT REASONABLE DOUBT IN FAVOR OF THE DEFENDANT. A
3 DEFENDANT IS NOT REQUIRED TO PROVE HIS INNOCENCE BUT THE
4 STATE IS REQUIRED BY LAW TO PROVE EVERY ESSENTIAL ELEMENT
5 OF THE OFFENSE CHARGED AGAINST THE DEFENDANT BY EVIDENCE
6 THAT SATISFIES YOU, THE JURY, OF THE GUILT OF THE
7 DEFENDANT BEYOND A REASONABLE DOUBT BEFORE YOU CAN CONVICT
8 THE DEFENDANT AND FIND HIM GUILTY. IF UPON THE WHOLE CASE
9 YOU HAVE A REASONABLE DOUBT AS TO THE GUILT OR THE
10 INNOCENCE OF THE DEFENDANT HE IS ENTITLED TO THAT
11 REASONABLE DOUBT AND WOULD BE ENTITLED TO AN ACQUITTAL AND
12 A VERDICT OF NOT GUILTY. BUT ON THE OTHER HAND IF UPON
13 THE WHOLE CASE YOU FIND THAT THE STATE HAS PROVEN BY
14 EVIDENCE THAT SATISFIES YOU, THE JURY, OF THE GUILT OF THE
15 DEFENDANT BEYOND A REASONABLE DOUBT THEN IN SUCH
16 CIRCUMSTANCE IT WOULD EQUALLY BE YOUR DUTY TO CONVICT THE
17 DEFENDANT AND FIND HIM GUILTY.

18 I INSTRUCT YOU THAT THE INDICTMENT IN THIS CASE IS
19 NOT EVIDENCE, IT CANNOT BE CONSIDERED BY THE JURY AS
20 EVIDENCE IN THE CASE. AN INDICTMENT IS SIMPLY THE FORMAL
21 WRITTEN INSTRUMENT WHICH CONTAINS THE CHARGE AGAINST THE
22 DEFENDANT AND IT SERVES AS THE FORMAL DOCUMENT BY WHICH
23 THIS CASE IS PROCESSED INTO THE COURT.

24 NOW, DURING THE TRIAL EACH OF US, YOU AND I HAVE
25 CERTAIN DUTIES TO PERFORM. AS THE TRIAL JUDGE IT IS MY

1 RESPONSIBILITY TO PRESIDE OVER THE TRIAL OF THIS CASE.
2 AND I ALSO HAVE THE DUTY TO RULE UPON OR PASS UPON THE
3 ADMISSIBILITY OF THE EVIDENCE OFFERED DURING THE PROGRESS
4 OF THIS TRIAL. YOU ARE TO CONSIDER ONLY COMPETENT
5 EVIDENCE BEFORE YOU AND YOU ARE TO DISREGARD AND DISABUSE
6 IN YOUR MIND ANY TESTIMONY ORDERED STRICKEN FROM THE
7 RECORD OF THIS CASE DURING THE PROGRESS OF THE TRIAL IF
8 THERE BE ANY. YOU ARE TO CONSIDER ONLY THE TESTIMONY
9 WHICH COMES FROM THE WITNESS STAND, TOGETHER WITH ANY
10 EXHIBITS ADMITTED INTO THE RECORD OF THIS CASE AND ANY
11 STIPULATIONS THAT ARE MADE INTO THE RECORD IF THERE BE
12 ANY. I WILL POINT OUT TO YOU WHAT THE LAWYERS SAY WHEN
13 THEY ARGUE IS NOT NECESSARILY THE EVIDENCE. THEY MAY
14 REPEAT SOME OF THE EVIDENCE BUT YOU BASE YOUR DECISION ON
15 PROPER EVIDENCE THAT WAS PRESENTED TO YOU BY THE EXHIBITS
16 OR BY THE WITNESS STAND.

17 NOW, I ALSO HAVE THE ADDITIONAL DUTY TO CHARGE YOU
18 THE APPLICABLE LAW IN THE CASE. AS THE PRESIDING JUDGE I
19 AM THE SOLE JUDGE OF THE LAW IN THE CASE AND IT IS YOUR
20 DUTY TO ACCEPT AND APPLY THE LAW AS I STATE IT TO YOU. IF
21 YOU HAVE A PRECONCEIVED IDEA OF WHAT THE LAW IS OR WHAT
22 THE LAW OUGHT TO BE IN THE CASE AND SHOULD NOT AGREE WITH
23 WHAT I TELL YOU THE LAW IS YOU ARE OBLIGATED UNDER YOUR
24 OATH TO ABANDON THIS PRECONCEPTION ON YOUR PART BECAUSE
25 YOU ARE SWORN TO ACCEPT THE LAW PRECISELY AS I STATE IT TO

1 YOU. EVERY CASE TRIED IN THIS COURT BEFORE A JURY, THE
2 JURY BECOMES THE SOLE AND EXCLUSIVE JUDGE OF THE FACTS OF
3 THE CASE. YOU, THE JURY, ARE THE SOLE JUDGE OF THE FACTS
4 OF THIS CASE. THE COURT IS THE JUDGE OF THE LAW IN THIS
5 CASE. THE CONSTITUTION OF THIS STATE DECLARES THAT THE
6 TRIAL JUDGE SHALL NOT STATE, COMMENT UPON, OR MAKE ANY
7 STATEMENT TO A TRIAL JURY ABOUT THE FACTS IN THE CASE.
8 SINCE YOU ARE THE SOLE JUDGE OF THE FACTS YOU ARE NOT TO
9 INFER ANYTHING THAT I HAVE SAID DURING THE PROGRESS OF
10 THIS TRIAL AND RULING UPON THE ADMISSIBILITY OF EVIDENCE
11 OR OTHERWISE OR ANYTHING THAT I SAY DURING THE COURSE OF
12 THESE CHARGES TO YOU THAT I HAVE ANY OPINION ABOUT THE
13 FACTS IN THIS CASE. THE LAW DOES NOT PERMIT ME TO HAVE AN
14 OPINION ABOUT THE FACTS IN THE CASE. THAT IS A MATTER
15 SOLELY FOR YOU, THE JURY, TO DETERMINE. AS JURORS THEN IT
16 IS YOUR DUTY TO DETERMINE AS I HAVE STRESSED AND STATED TO
17 YOU THE EFFECT, THE VALUE, THE WEIGHT, THE TRUTH OF THE
18 EVIDENCE PRESENTED HERE DURING THE COURSE OF THIS TRIAL.

19 NECESSARILY THEN YOU MUST ACCESS THE CREDIBILITY OF
20 THE WITNESSES WHO HAVE TESTIFIED IN THE CASE. CREDIBILITY
21 IS SIMPLY A LEGALISTIC TERM WHICH MEANS BELIEVABILITY. IT
22 BECOMES YOUR DUTY THEN TO ANALYZE AND EVALUATE THE
23 EVIDENCE AND DETERMINE THAT EVIDENCE AS IT CONVINCES YOU
24 OF IT'S TRUTH. I CHARGE YOU IN DETERMINING THE QUESTION
25 OF CREDIBILITY OR BELIEVABILITY OF WITNESSES YOU MAY

1 BELIEVE ONE WITNESS AS AGAINST SEVERAL WITNESSES OR
2 SEVERAL WITNESSES AGAINST ONE WITNESS. YOU MAY BELIEVE A
3 PART OF THE TESTIMONY OF A WITNESS AND REJECT THE
4 REMAINING PART OF THE TESTIMONY OF THAT SAME WITNESS. YOU
5 MAY BELIEVE THE TESTIMONY OF A WITNESS IN IT'S ENTIRETY OR
6 REJECT THE TESTIMONY OF A WITNESS IN IT'S ENTIRETY. YOU
7 MAY CONSIDER WHETHER ANY WITNESS HAS EXHIBITED ANY
8 INTEREST, ANY BIASED OR ANY PREJUDICE IN THE CASE. YOU MAY
9 CONSIDER THE Demeanor OF A WITNESS AND THE APPEARANCE OF A
10 WITNESS FROM THE WITNESS STAND. AND YOU MAY CONSIDER THE
11 OPPORTUNITY, THE KNOWLEDGE CONCERNING THOSE THINGS ABOUT
12 WHAT THE WITNESS TESTIFIED. AND IN DOING SO AND
13 EXERCISING YOUR MENTAL PROCESS AND DETERMINING WHAT YOU
14 CONSIDER, THE LAW SIMPLY REQUIRES THAT YOU EXERCISE YOUR
15 GOOD JUDGEMENT, YOUR COMMON SENSE, YOUR SENSE OF LOGIC AND
16 REASON AND YOUR EXPERIENCES IN LIFE. THEN APPLY THESE
17 ATTRIBUTES AND ABILITY TO THE EVIDENCE AND DETERMINE WHAT
18 YOU CONSIDER THE TRUTHFUL EVIDENCE AND TO THESE STATE OF
19 FACTS DETERMINED BY YOU THE JURY, YOU TAKE AND APPLY THE
20 LAW AS I STATE IT TO YOU AND THUS ARRIVE AT A TRUE VERDICT
21 IN THE CASE.

22 NOW, I INSTRUCT YOU AND EMPHASIZE TO YOU THAT THE
23 ELECTION OF A DEFENDANT IN A TRIAL IN A CRIMINAL CASE NOT
24 TO TESTIFY IS NOT A FACTOR TO BE CONSIDERED BY YOU IN ANY
25 WAY IN YOUR DELIBERATION AND IN YOUR CONSIDERATION ON THE

1 QUESTION OF THE GUILT OR THE INNOCENCE OF THE ACCUSED. IT
2 MUST NOT BE CONSIDERED BY YOU IN ANY MANNER WHATSOEVER
3 AGAINST THE DEFENDANT OR MITIGATE AGAINST HIM IN ANY
4 RESPECT WHATSOEVER. A DEFENDANT HAS THE CONSTITUTIONAL
5 RIGHT TO REMAIN SILENT AND THE ASSERTION OF SUCH A
6 CONSTITUTIONAL RIGHT CANNOT AND MUST NOT BE CONSIDERED BY
7 YOU IN YOUR DELIBERATION. UNDER YOUR OATH YOU ARE NOT TO
8 REACH NO INTEREST OR DRAW NO CONCLUSION WHATSOEVER FROM
9 THE FACT THAT THE DEFENDANT IN THIS CASE HAS NOT HIMSELF
10 TESTIFIED. I WILL POINT OUT TO YOU THAT THIS SHOULD NOT
11 EVEN BE DISCUSSED IN THE JURY ROOM.

12 NOW, IN THIS CASE YOU HAVE HEARD THE TERM,
13 CIRCUMSTANTIAL EVIDENCE, DIRECT EVIDENCE AND I AM GOING TO
14 GIVE YOU A CHARGE ON THAT. THERE ARE FEW TYPES OF
15 EVIDENCE WHICH ARE GENERALLY PRESENTED DURING A TRIAL. I
16 AM NOT TELLING YOU WHAT IS PRESENT HERE, YOU HAVE TO
17 DETERMINE THAT. DIRECT EVIDENCE AND CIRCUMSTANTIAL
18 EVIDENCE, IN A TRIAL THERE MAY BE ONE OR THE OTHER OR
19 BOTH, A COMBINATION OF BOTH. DIRECT EVIDENCE IS THE
20 TESTIMONY OF A PERSON WHO ASSERTS OR CLAIMS WHO HAS HAD
21 ACTUAL KNOWLEDGE OF THE FACTS SUCH AS AN EYEWITNESS.
22 CIRCUMSTANTIAL EVIDENCE IS THE PROOF OF A CHAIN OF FACTS
23 OF CIRCUMSTANCES INDICATING THE EXISTENCE OF A FACT. THE
24 LAW MAKES ABSOLUTELY NO DISTINCTION BETWEEN THE WEIGHT OR
25 THE VALUE THAT YOU GIVE TO EITHER DIRECT OR CIRCUMSTANTIAL

1 EVIDENCE. NOR IS IT A GREATER DEGREE OF CERTAINTY
2 REQUIRED IN CIRCUMSTANTIAL EVIDENCE THAN THAT OF DIRECT
3 EVIDENCE. YOU SHOULD WEIGH ALL THE EVIDENCE IN THE CASE,
4 AFTER WEIGHING ALL OF THE EVIDENCE AND YOU ARE NOT
5 CONVINCED OF THE GUILT OF THE DEFENDANT BEYOND A
6 REASONABLE DOUBT YOU MUST FIND THE DEFENDANT NOT GUILTY.

7 NOW, AS I TOLD YOU IN THIS INDICTMENT IS CHARGED WITH
8 THE OFFENSE OF ARMED ROBBERY AND I AM GOING TO GIVE YOU A
9 CHARGE ON THAT SPECIFIC LAW AT THIS TIME. I AM GOING TO
10 CHARGE YOU ON SECTION 16-11-330 OF THE CODE OF LAWS OF THE
11 STATE OF SOUTH CAROLINA, 1976 AS AMENDED. A PERSON WHO
12 COMMITS ROBBERY WHILE ARMED WITH A PISTOL, DURCH,
13 SLINGSHOT, METAL KNUCKLES, RAZOR OR OTHER DEADLY WEAPON OR
14 WHILE ALLEGING EITHER BY ACTION OR WORDS HE WAS ARMED
15 WHILE USING A REPRESENTATION OF A DEADLY WEAPON OR ANY
16 OBJECT WHICH A PERSON PRESENT DURING THE COMMISSION OF THE
17 ROBBERY REASONABLY BELIEVED TO BE A DEADLY WEAPON IS
18 GUILTY OF ARMED ROBBERY. NOW, THE CRIME OF ARMED ROBBERY
19 INCLUDES ALL OF THE ELEMENTS OF THE OFFENSE OF ROBBERY.
20 AND, OF COURSE, ROBBERY CONTAINS ALL THE ELEMENTS OF THAT
21 OFFENSE WE KNOW AS LARCENY. ROBBERY IS THE FELONIOUS
22 TAKING AWAY OF THE GOODS OF ANOTHER AGAINST THE OWNERS
23 WILL WITHOUT HIS OR HER CONSENT, BY FORCE, INTIMIDATION OR
24 VIOLENCE. IT IS ESSENTIALLY SOMETIMES CALLED LARCENY BY
25 FORCE. NOW, I NEED TO DEFINE FOR YOU THE ELEMENTS OF

1 LARCENY SINCE THAT IS ALSO APPLIED TO ARMED ROBBERY,
2 ROBBERY AND LARCENY. JUST TO GIVE YOU A GENERAL IDEA OF
3 THE LAWS OF WHOLE. THE ELEMENTS ARE FIRST, IS IT WAS
4 TAKEN. SECOND, THAT TAKING OF WAS THE PERSONAL PROPERTY
5 OF ANOTHER. THIRD, THAT WHILE BEING TAKEN THE PROPERTY
6 WAS CARRIED AWAY AND FORTH, THAT THE TAKING AND CARRYING
7 AWAY OF THE PROPERTY WAS DONE WITHOUT THE CONSENT OR
8 AGAINST THE WILL OF THE OWNER AND WAS DONE WITH THE INTENT
9 TO STEAL.

10 LADIES AND GENTLEMEN, YOU ARE NOT PARTISANS OR
11 ADVOCATES OF THE STATE OF SOUTH CAROLINA OR THE DEFENDANT.
12 YOU DO NOT SERVE AS JURORS TO REWARD FRIENDS OR PUNISH
13 ENEMIES. YOU HAVE BEEN SELECTED BY BOTH THE STATE AND THE
14 DEFENDANT AS FAIR AND IMPARTIAL JURORS. IT IS YOUR DUTY
15 THEN BY YOUR JOINT DELIBERATIONS TO DETERMINE THE TRUTH IN
16 THIS CASE GIVEN TO THIS DEFENDANT THE BENEFIT OF EVERY
17 REASONABLE DOUBT OF EACH AND EVERY ISSUE. THEN TO THE
18 FACTS YOU DETERMINE TO BE TRUE AND THEN TAKE AND APPLY THE
19 LAW THAT I HAVE JUST GIVEN TO YOU AND THUS ARRIVE AT A
20 VERDICT WHICH DOES SPEAK THE TRUTH OF THIS CASE. ONCE
21 AGAIN, I TELL YOU THE WORD, VERDICT, HAS THE LATIN
22 DERIVATIVE, IT MEANS THE TRUTH. WHEN YOU HAVE
23 ACCOMPLISHED THESE RESPONSIBILITIES YOU WILL HAVE
24 SATISFIED YOUR OATH AS JURORS AND YOU WILL HAVE DISCHARGED
25 YOUR DUTIES IN THE COURT. I NOW WILL INSTRUCT YOU TO

1 PERFORM THE VERDICT IN THIS CASE. IF THE STATE FAILED TO
2 PROVE THE GUILT OF THE DEFENDANT BEYOND A REASONABLE DOUBT
3 YOUR VERDICT WILL BE TWO WORDS, NOT GUILTY. IF THE STATE
4 HAS PROVEN THE GUILT OF THIS DEFENDANT BEYOND A REASONABLE
5 DOUBT YOUR VERDICT WILL BE ONE WORD, GUILTY. THE VERDICT
6 THAT YOU RENDER IN THIS CASE MUST BE THE VERDICT OF EACH
7 AND EVERY JUROR, IT MUST BE YOUR UNANIMOUS VERDICT, ALL
8 TWELVE JURORS MUST COMPLETE THE VERDICT. YOU AUTHORIZE,
9 MR. FOREMAN, YOU WRITE FOR THE JURY. MR. FOREMAN, ON THE
10 BACK OF THE INDICTMENT THERE IS AN AREA THAT SAYS VERDICT,
11 IT WILL BE YOUR DUTY TO WRITE THE APPROPRIATE VERDICT,
12 GUILTY OR NOT GUILTY. SIGN YOUR NAME AND DATE IT. OKAY.
13 ANY PROBLEMS YOU HAVE LET MADAME BAILIFF KNOW, SHE WILL BE
14 STATIONED OUTSIDE OF YOUR DOOR. ONCE YOU HAVE REACHED A
15 VERDICT IF YOU WILL KNOCK ON THE DOOR, WE WILL RECEIVE THE
16 VERDICT. ONCE AGAIN, I TOLD YOU YOUR VERDICT, WHATEVER IT
17 WILL BE, HAS TO BE A UNANIMOUS VERDICT, ALL TWELVE JURORS
18 WILL HAVE TO BE IN AGREEMENT. NOW, I HAVE GOT ALTERNATE
19 JURORS. AS SOON AS I SEND THE JURY BACK THE TWO ALTERNATE
20 JURORS MAY BE RELEASED. WE NEED YOU TO CALL IN AFTER 6:00
21 THIS EVENING. THANK YOU FOR TAKING THE TIME AND YOUR
22 PATIENCE WITH THE COURT TO SIT ON THIS CASE AND YOU KNOW
23 AN ALTERNATE JUROR SITS IN CASE ONE OF THE FIRST TWELVE
24 BECOMES INCAPACITATED. AND FORTUNATELY THAT DID NOT
25 HAPPEN. SO, YOUR DUTIES ARE NOW AT AN END. NOW, I AM

1 GOING TO SEND YOU BACK TO THE JURY ROOM, I AM GOING TO ASK
2 THE FIRST TWELVE JURORS NOT TO BEGIN YOUR DELIBERATIONS
3 UNTIL I SEND THE INDICTMENT ALONG WITH THE EXHIBITS BACK
4 TO YOU. I HAVE GOT TO CHECK WITH COUNSEL AND THEY HAVE TO
5 CHECK OFF THE EXHIBITS AND MAKE SURE WE HAVE EVERYTHING.
6 ONCE I SEND THE INDICTMENT AND THE EXHIBITS BACK YOU MAY
7 BEGIN YOUR DELIBERATIONS. LUNCH HAS BEEN ORDERED FOR YOU
8 AND WILL BE PROVIDED IN A FEW MINUTES. NOW, SHOULD ANYONE
9 NEED A RESTROOM BREAK OR YOU DESIRE A SMOKE BREAK AND
10 ANYONE SHOULD LEAVE THE JURY ROOM FOR ANY REASON, MR.
11 FOREMAN, DELIBERATIONS WILL CEASE UNTIL ALL TWELVE ARE
12 BACK AND INTACT. ALL RIGHT, IF YOU WILL STEP BACK AND WE
13 WILL HAVE THESE SENT BACK TO YOU IN JUST A FEW MINUTES.

14 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT AT
15 12:05 P.M.)

16 THE COURT: ANY ADDITIONS OR ANYTHING FROM THE STATE?

17 MR. HAMMACK: NONE FROM THE STATE.

18 MR. VERNER: YOUR HONOR, RESPECTFULLY, I WAS FOCUSED
19 ON OTHER THINGS AND I DID NOT HEAR THE COURT CHARGE THAT
20 THE JURY REQUIRED A UNANIMOUS VERDICT.

21 THE COURT: I DID.

22 MR. VERNER: OKAY.

23 THE COURT: THERE AT THE VERY LAST.

24 MR. VERNER: I HAD MY ATTENTION ON OTHER THINGS BUT I
25 WANTED TO MAKE SURE THE COURT WAS CERTAIN THAT THAT WAS

1 PUT IN. YOUR HONOR, AS A COURT EXHIBIT INTRODUCE THE CASE
2 OF STATE V. MULBROW WHICH AGAIN MY REQUEST FOR THE JUDGE
3 TO CHARGE WORDS ALONE ARE NOT SUFFICIENT TO ESTABLISH A
4 REPRESENTATION OF A DEADLY WEAPON FOR PURPOSES OF THE
5 ARMED ROBBERY STATUTE WHICH ALLOWS A FINDING OF ARMED
6 ROBBERY WHEN THE ROBBER ALLEGED, WHEN THE ROBBERY ALLEGED
7 HE IS ARMED WITH A DEADLY WEAPON EITHER BY ACTIONS OR
8 WORDS WHILE USING A REPRESENTATION OF A DEADLY WEAPON TO
9 ESTABLISH ARMED ROBBERY OFFENSE. UNDER THIS PROVISION THE
10 STATE HAS TO SHOW EVIDENCE CORROBORATING AN ALLEGATION OF
11 BEING ARMED EITHER BY WORDS OR THE USE OF A PHYSICAL
12 REPRESENTATION OF A DEADLY WEAPON. THAT IS THE CHARGE AND
13 THE RATIONALE IS AS THE JUSTICE HAS NOTED, THE LEGISLATURE
14 AMENDMENT TO SECTION 16-11-338 SIMPLY INSURES THAT THE USE
15 OF A WEAPON WHICH IS IN FACT NOT A DEADLY WEAPON WILL
16 SUPPORT A CONVICTION OF ARMED ROBBERY. UNDER THIS PRONG
17 THE STATE MUST STILL SHOW EVIDENCE CORROBORATING THE
18 ALLEGATION OF BEING ARMED, THAT IS THE USE OF A PHYSICAL
19 REPRESENTATION OF A DEADLY WEAPON TO ESTABLISH ARMED
20 ROBBERY. AS THE SUPREME COURT NOTED, THE STATUTE WAS
21 AMENDED SO THAT THE DEFENDANT COULD NOT GET A LESSOR
22 INCLUDED CHARGE BY USING A TOY GUN OR ALLEGING THAT HE HAD
23 A TOY, IF THE VICTIM REASONABLY BELIEVED THAT THE WEAPON
24 AND THERE WAS A PHYSICAL MANIFESTATION OR REPRESENTATION
25 OF THE WEAPON. IT WAS NO LONGER A CHARGE FOR A LESSOR

1 INCLUDED OFFENSE THAT THE WEAPON TURNED OUT TO BE A TOY
2 GUN OR A FAKE GUN. THAT IS WHY THE STATUTE WAS AMENDED.
3 THIS IS THE SUPREME COURT 2002 CASE, SIX YEARS AFTER THE
4 STATUTE WAS AMENDED. 348, SC 264, JUSTICE MOORE AND I
5 WOULD OFFER THAT AS A COURT'S EXHIBIT. AND I WOULD ASK
6 THE COURT, OF COURSE, ASK THE COURT TO CHARGE IT. AND I
7 OBJECT TO THE CHARGES.

8 MR. HAMMACK: YOUR HONOR, THE STATE ALREADY ARGUED
9 THAT THE COURT HAS SUFFICIENT TO CHARGE THE JURY, YOU HAVE
10 GIVEN THEM THE LAW THAT IS APPLIED TO THIS CASE. AND I
11 AGREE WITH MR. VERNER THAT THE CASE IS OUT THERE BUT I
12 BELIEVE IT HAS BEEN SUFFICIENTLY COVERED.

13 THE COURT: I AM AWARE OF THAT CASE. AND I AM AWARE
14 OF THE POINT YOU ARE TRYING TO MAKE BUT I AM ALSO AWARE
15 EXACTLY WHAT THE STATUTE SAYS AND YOU ARE LOOKING FOR
16 WORDS PART OF IT. IT SAYS ACTION OR WORDS AND YOU GET
17 INTO THE REPRESENTATION PART. SO, I THINK THEY HAVE
18 ACCURATELY BEEN CHARGED, I AM NOT GOING TO ADD ANY WORDS
19 TO THEM ESPECIALLY AFTER THE SCENE WE HAD EARLIER.

20 MR. VERNER: THANK YOU.

21 THE COURT: MAKE THIS A COURT EXHIBIT.

22 (WHEREUPON, COURT'S EXHIBIT NO. 3 WAS MARKED FOR
23 IDENTIFICATION ONLY.)

24 THE COURT: CHECK ALL OF THE EXHIBITS PLEASE.

25 (WHEREUPON, EXHIBITS WERE CHECKED.)

1 THE COURT: ALL RIGHT, TAKE THESE TO THE JURY AND
2 TELL THEM TO START DELIBERATIONS.

3 (WHEREUPON, THE JURY STARTED DELIBERATIONS AT
4 APPROXIMATELY 12:15 P.M.)

5 THE COURT: I UNDERSTAND THE JURY HAS REACHED A
6 VERDICT. BRING THEM IN, PLEASE.

7 (WHEREUPON, THE JURY CAME INTO OPEN COURT WITH THE
8 VERDICT AT APPROXIMATELY 1:38 P.M.)

9 CLERK OF COURT: MR. FOREMAN, HAVE YOU REACHED A
10 VERDICT.

11 MR. FOREMAN: WE HAVE.

12 CLERK OF COURT: OKAY.

13 THE COURT: YOU CAN PUBLISH THE VERDICT.

14 CLERK OF COURT: THE STATE VERSUS TED EDWARD ABNEY,
15 INDICTMENT 2005-GS-36-43, INDICTMENT FOR ARMED ROBBERY.
16 THE VERDICT OF THE JURY IS GUILTY AND IT IS SIGNED JAMES
17 BROWN, I AM SORRY, DONALD LAYTON, 5/18/05. MR. FOREMAN
18 AND LADIES AND GENTLEMEN, IF THIS IS YOUR VERDICT PLEASE
19 INDICATE BY RAISING YOUR RIGHT HAND.

20 (WHEREUPON, ALL JURORS RAISED THEIR RIGHT HAND.)

21 THE COURT: TO ALL THE JURORS, I WANT TO THANK YOU
22 FOR SERVING ON THIS CASE, YOUR PATIENCE WITH THE COURT.
23 THAT NOW ENDS YOUR DUTIES IN THIS CASE AND I WILL HAVE THE
24 SENTENCING PHASE. SOME JUDGES WOULD EXCUSE YOU AT THIS
25 TIME. WHAT I DO, I WILL ASK YOU TO STAY IF YOU SO DESIRE

1 OR IF YOU WOULD LIKE TO STEP OUT THAT WILL BE FINE TOO.
2 IF ANYBODY WANTS TO LEAVE AND IF YOU DO LEAVE I DO NEED
3 FOR YOU TO CALL IN AFTER 6:00 FOR AN UPDATE. OKAY. SO,
4 IF ANYBODY WOULD LIKE TO STEP OUT JUST QUIETLY DO SO THAT
5 WILL BE FINE.

6 MR. VERNER: RESPECTFULLY, YOUR HONOR, I DO WANT THE
7 JURY POLLED BEFORE THEY LEFT.

8 THE COURT: I AM SORRY, POLL THE JURY.

9 CLERK OF COURT: MEMBERS OF THE JURY, AS I CALL YOUR
10 NAME RAISE YOUR HAND AND RESPOND.

11 THE CLERK: SUSAN KINARD, WAS THIS YOUR VERDICT?

12 JUROR: YES.

13 THE CLERK: IS IT STILL YOUR VERDICT?

14 JUROR: YES.

15 THE CLERK: ROBERT REYNOLDS, WAS THIS YOUR VERDICT?

16 JUROR: YES.

17 THE CLERK: IS IT STILL YOUR VERDICT?

18 JUROR: YES.

19 THE CLERK: EARL LEITZSEY, WAS THIS YOUR VERDICT?

20 JUROR: YES.

21 THE CLERK: IS IT STILL YOUR VERDICT?

22 JUROR: YES.

23 THE CLERK: ANN WICKER, WAS THIS YOUR VERDICT?

24 JUROR: YES.

25 THE CLERK: IS IT STILL YOUR VERDICT?

1 JUROR: YES.

2 THE CLERK: DONALD LAYTON, WAS THIS YOUR VERDICT?

3 JUROR: YES.

4 THE CLERK: IS IT STILL YOUR VERDICT?

5 JUROR: YES.

6 THE CLERK: STACIE MARTIN, WAS THIS YOUR VERDICT?

7 Juror: YES.

8 THE CLERK: IS IT STILL YOUR VERDICT?

9 JUROR: YES.

10 THE CLERK: ELLEN BUTTNER, WAS THIS YOUR VERDICT?

11 JUROR: YES.

12 THE CLERK: IS IT STILL YOUR VERDICT?

13 JUROR: YES.

14 THE CLERK: WILLIAM CUNNINGHAM, WAS THIS YOUR
15 VERDICT?

16 JUROR: YES.

17 THE CLERK: IS IT STILL YOUR VERDICT?

18 JUROR: YES.

19 THE CLERK: KATHY YARBOROUGH, WAS THIS YOUR VERDICT?

20 JUROR: YES.

21 THE CLERK: IS IT STILL YOUR VERDICT?

22 JUROR: YES.

23 THE CLERK: DOROTHY TOLBERT, WAS THIS YOUR VERDICT?

24 JUROR: YES.

25 THE CLERK: IS IT STILL YOUR VERDICT?

1 JUROR: YES.

2 THE CLERK: ANDREA REEL, WAS THIS YOUR VERDICT?

3 JUROR: YES.

4 THE CLERK: IS IT STILL YOUR VERDICT?

5 JUROR: YES.

6 THE CLERK: EARL WORTHY, WAS THIS YOUR VERDICT?

7 JUROR: YES.

8 THE CLERK: IS IT STILL YOUR VERDICT?

9 JUROR: YES.

10 MR. VERNER: THANK YOU, YOUR HONOR.

11 THE COURT: ALL RIGHT. SHERIFF, IF YOU WILL COME
12 AROUND AND TAKE THE DEFENDANT INTO CUSTODY, PLEASE, AND
13 BRING HIM TO THE BENCH.

14 OKAY. ARMED ROBBERY IN WHICH THE DEFENDANT STANDS
15 CONVICTED CARRIES A MAXIMUM SENTENCE OF 30 YEARS, A
16 MINIMUM SENTENCE OF 10 YEARS, A CLASS FELONY, VIOLENT AND
17 NO SUSPENDED SENTENCE, A MOST SERIOUS OFFENSE, NO PAROLE
18 AND NO YOA. SOLICITOR.

19 MR. HAMMACK: YOUR HONOR, YOU HAVE HEARD THE FACTS OF
20 THE CASE, YOU HAVE GOT THE VICTIM IMPACT UP THERE. MS.
21 ROOSEN MAY WANT TO SPEAK WHEN APPROPRIATE. YOUR HONOR, WE
22 WOULD ASK FOR A SUBSTANTIAL SENTENCE. MR. ABNEY HAS A
23 RELATIVELY LIMITED CRIMINAL RECORD. HE HAS GOT A
24 DISTRIBUTION OF COCAINE FOR BACK IN 1990 AND A PROXIMITY
25 BACK IN 1990. BEYOND THAT HIS ONLY RECORD APPEARS TO BE

1 MAGISTRATE COURT OFFENSES, THE LAST ONE BEING DISORDERLY
2 CONDUCT IN 2004. YOUR HONOR, WE WOULD JUST CONTEND THIS
3 IS A VERY SERIOUS OFFENSE, IT HAS HAD A GREAT EFFECT ON
4 MS. ROOSEN'S LIFE. IT IS A VERY VIOLENT OFFENSE AND THAT
5 SHE DID SUFFER GREATLY FROM THIS INCIDENT WHEN IT
6 OCCURRED. I BELIEVE SHE COULD ELABORATE ON THAT, YOUR
7 HONOR, WHEN APPROPRIATE.

8 THE COURT: MS. ROOSEN, I WILL HEAR FROM YOU NOW BUT
9 I WOULD RATHER HEAR FROM YOU AFTER WE HEAR FROM THE
10 DEFENDANT. I ALWAYS LIKE TO LET THE VICTIMS HAVE THE LAST
11 SAY. ANYTHING ELSE?

12 MR. HAMMACK: NO, SIR.

13 THE COURT: MR. VERNER.

14 MR. VERNER: MAY IT PLEASE THE COURT, YOUR HONOR. OF
15 COURSE, TED, HIS PRIOR RECORD OTHER THAN THE SELLING
16 COCAINE TWELVE YEARS AGO HAS NOT GOTTEN IN ANY SUBSTANTIAL
17 LEGAL TROUBLE. HE IS IN A COMMON LAW MARRIAGE, HIS WIFE
18 IS SITTING WITH HIM, HE HAS GOT A 13-YEAR-OLD CHILD AND A
19 10-YEAR-OLD CHILD. JUST A LONG TIME NEWBERRY RESIDENT, NO
20 QUESTION ON THIS NIGHT HE WAS DRINKING AND UNDER THE
21 INFLUENCE OF DRUGS. WE UNDERSTAND THE SERIOUSNESS OF THE
22 CHARGES ON HIM, YOUR HONOR. BASED ON JUST THE ONE TIME
23 AND AS THE COURT IS AWARE, OF COURSE, HE HAS BEEN
24 INCARCERATED SINCE NOVEMBER THE 4TH OF THE LAST YEAR, 7
25 MONTHS. AND, OF COURSE, HE IS ENTITLED AND DEMANDS CREDIT

1 FOR THAT JAIL TIME. YOUR HONOR, HE IS A RELIGIOUS MAN WHO
2 DID A VERY BAD THING THAT I WOULD SUBMIT TO THE COURT IS
3 OUT OF CHARACTER FOR HIM. THE COURT HAS HEARD AND WE
4 APPRECIATE THE COURT'S PATIENCE DURING THIS TRIAL. THE
5 COURT IS WELL AWARE AS FROM DAY ONE HE GOT ARRESTED, TED
6 HAS ALWAYS ADMITTED THAT HE ROBBED THE LADY. THE ONLY
7 DISPUTE HAS BEEN WHETHER OR NOT HE HAD A GUN WHICH IS OF
8 COURSE WHY WE TRIED THE CASE AND THAT HAS BEEN SETTLED
9 CONCLUSIVELY THAT HE DID. THAT BEING SAID WE WOULD
10 APPRECIATE, YOUR HONOR, ANY CONSIDERATION AND LENIENCY
11 THAT YOU CAN SHOW TED. YOU WANT TO SAY ANYTHING, TED?

12 MR. ABNEY: YOUR HONOR, PEOPLE OF THE JURY, LADIES
13 AND GENTLEMEN, OFFICERS, MS. ROOSEN. SIR, MA'AM, I CAN'T
14 SAY I UNDERSTAND YOUR PAIN, IT WAS A TERRIBLE NIGHT OF MY
15 LIFE, REALLY, REALLY TERRIBLE NIGHT OF MY LIFE. I ALSO
16 HAVE KIDS, I HAD A MOTHER. LIKE I SAY, I CAN'T BEGIN TO
17 EXPLAIN THAT A DRUG EVER WOULD TAKE ME INTO THIS TYPE OF,
18 I HAVE BEEN WORKING SINCE I WAS 13 YEARS OLD, I AM NOT
19 TRYING TO ASK FOR SYMPATHY OR ANYTHING BECAUSE IT DID TAKE
20 PLACE. I ADMIT FROM DAY ONE TO THE LAW ENFORCEMENT
21 OFFICERS. I UNDERSTOOD THAT. MY PAIN, I CAN'T BEGIN TO
22 EXPLAIN HOW I HURT YOU, I MEAN I CANNOT, SOMEBODY COMING
23 UP TO YOU, YOU GOING ABOUT YOUR BUSINESS. THAT IS ONE
24 THING, ME AND MY WIFE, WE ARE CAREFUL AND HERE I AM ON A
25 NIGHT OF DRUGS JUST OUT OF CONTROL, A DRUG HABIT I HAD FOR

1 20 YEARS, BEEN TRYING TO FIND A WAY TO BEAT IT AND FINALLY
2 I HAVE, YOUR HONOR. I HAVE BEAT THIS DRUG HABIT. I
3 FINALLY, I HAD TO FIND IT IN JAIL BUT I HAVE BEAT IT. AND
4 I HONESTLY AND SINCERELY, I AM GOING TO BE A MAN, YOU CAN
5 ONLY BE A MALE, YOU ARE NOT A MAN UNTIL YOU FACE REALITY.
6 SO, TODAY I AM FACING IT IN FRONT OF THE JUDGE, A HIGHER
7 JUDGE AND THE JURY, YOU DID A SPECTACULAR JOB. YOU HEARD
8 THE CASES, I DID THAT, I NEVER OWNED A WEAPON.

9 MR. VERNER: DON'T, DON'T ARGUE--

10 MR. ABNEY: I'M NOT, I AM SORRY. I DON'T KNOW THE
11 SYSTEM THAT WELL. MY PRIOR RECORD, I HAD, WAS ON DRUGS.
12 I HAD SUPERVISED FURLOUGH AND WAS IN A ROOM WITH BOTH OF
13 MY KIDS, BIRTH RIGHTS AND I LOVE THEM DEARLY AND THEY
14 UNDERSTAND. THEY ARE GOING THROUGH THIS WITH US ALSO BUT
15 I CANNOT EXPLAIN, I KNOW HOW SHE FEELS. I WAS THERE, I
16 KNOW HOW SHE FEELS. I AM SO SORRY, I CAN'T SAY ENOUGH. I
17 HOPE AND PRAY THAT YOUR PAIN HAS REALLY STOPPED OR GOING
18 TO STOP AND YOU GET SOME KIND OF SATISFACTION. YOUR
19 HONOR, I JUST THANK YOU FOR GIVING ME THIS TIME AND THIS
20 IS THE FIRST TIME I HAVE REALLY SEEN HER FACE TO FACE AND
21 HER HUSBAND RIGHT HERE, I DIDN'T STALK HER OR ANYTHING AND
22 I AM TRULY SORRY. I DON'T WANT TO BLAME IT ON DRUGS BUT
23 JUST TO SAY TO KICK MY HABIT. SO, THAT IS ALL. I THANK
24 EVERYBODY FOR LISTENING TO ME AND GIVING ME THIS
25 OPPORTUNITY TO EXPLAIN.

1 MR. VERNER: I WOULD JUST ASK UNTIL FRIDAY, IF I DO
2 HAVE ANY MOTIONS THAT THE COURT WOULD ACCEPT THEM UP UNTIL
3 FRIDAY.

4 THE COURT: YES, SIR.

5 MR. VERNER: OKAY.

6 THE COURT: MS. ROOSEN.

7 MS. ROOSEN: I AM TRACI ROOSEN AND I WOULD LIKE TO
8 LET YOU KNOW THAT I AM ALSO THE MOTHER OF CHILDREN. AND
9 ALTHOUGH THAT ONE NIGHT MIGHT OF HAPPENED I STILL HAVE A
10 HARD TIME AND I HOPE IT WILL GET BETTER. I AM NOT A
11 VICIOUS PERSON AT ALL AND HAVE NO INTENTION OF MAKING
12 ANYBODY SUFFER. BUT I WOULD LIKE TO FEEL, I WOULD LIKE TO
13 AT LEAST MAKE A DIFFERENCE TO OTHERS THAT MIGHT BE OUT
14 THERE THAT COULD BE CONFRONTED THE SAME AND THAT YOU
15 PLEASE CONSIDER THE MAXIMUM AMOUNT OF PENALTY ALLOWED FOR
16 THIS. SO THAT MAYBE SOME TIME FOR HIM WILL CONSIDER A
17 CHANGE THAT WILL MAKE A DIFFERENCE.

18 THE COURT: MR. ROOSEN, ANYTHING THAT YOU WOULD LIKE
19 TO SAY.

20 MR. ROOSEN: OTHER THAN I HAVE SEEN HOW THIS HAS
21 AFFECTED MY WIFE. YOU KNOW, THE ITEMS IN THE PURSE CAN BE
22 REPLACED, WHAT CANNOT BE REPLACED IS HER SENSE OF
23 INDEPENDENCE, HER SELF ESTEEM, HER TRUST IN OTHERS AND I
24 WOULD CONCUR IN MY WIFE IN SAYING THAT WE WOULD REQUEST
25 THE MAXIMUM PENALTY. WE BOTH FEEL HE IS A VERY DANGEROUS

1 INDIVIDUAL AND MAYBE IN PRISON HE CAN GET SOME HELP.

2 THE COURT: THANK YOU, VERY MUCH. WELL, THERE IS NO
3 POINT IN ME SITTING UP HERE PREACHING. ALMOST 14 YEARS ON
4 THIS JOB I HAVE BEEN AROUND THE STATE IT IS THE SAME STORY
5 OVER AND OVER AND OVER AGAIN. COCAINE, ROCK COCAINE,
6 CRACK COCAINE, AND NOW THAT IS EVEN MORE WORSE,
7 METHAMPHETAMINE. PEOPLE NOT USING JUDGMENT BECAUSE OF
8 INFLUENCE OF THE POWERFUL SUBSTANCES, TAKING ADVANTAGE OF
9 SOMEBODY, I AM JUST TIRED OF IT AND I WANT TO DO SOMETHING
10 ABOUT IT AND IT IS MY JOB TO DO SOMETHING ABOUT IT. NO, I
11 DON'T THINK YOU NEED TO BE MAXED. I ALWAYS LOOK AT THESE
12 THINGS WITH EVERY TYPE OF MITIGATION TO TRY TO FIND THE
13 MIDDLE ROAD AND I LISTEN TO EVERYTHING AND I SUBTRACT A
14 LITTLE BIT AND I ADD A LITTLE BIT AND I TRY TO COME UP
15 WITH THE BEST SOLUTION THAT I CAN ON IT. I AM GOING TO
16 TELL YOU SOME FACTORS THAT REALLY WORRIED ME ABOUT THIS
17 CASE. YOU HAVE ALREADY DONE TIME, YOU SHOULD HAVE LEARNED
18 YOUR LESSON. THAT MITIGATES HEAVILY. THE AVERAGE PERSON
19 OUT OF HERE UNSUSPECTED GOING ABOUT THEIR DAILY BUSINESS.
20 THEY ARE APPROACHED FROM BEHIND AND YOU STICK A FINGER OR
21 A KNUCKLE IN THEIR BACK IS NO WAY THEY COULD TELL THE
22 DIFFERENCE IN THAT AND WHETHER IT WAS A GUN OR A KNIFE OR
23 WHATEVER. THAT IS WHY THE LEGISLATURE CHANGED THIS LAW SO
24 IT IS THAT FEAR AND APPREHENSION PUT INTO SOMEONE EVEN IF
25 YOU DON'T HAVE THAT WEAPON, THEY DON'T KNOW. WE DON'T

1 KNOW EVERYTHING THAT WENT ON HERE. I SUSPECT THAT MS.
2 ROOSEN AND AFTER SHE WAS INITIALLY ROBBED OF HER PURSE SHE
3 PROBABLY SAW YOU RUN BACK TOWARDS THE VAN AND REALIZED
4 THAT SHE MIGHT STAND A CHANCE OF GETTING HER PURSE BACK
5 AND THAT IS WHY SHE WENT TOWARDS THE VAN. I THINK SHE
6 PROBABLY HAD IN HER MIND BY THEN THAT MAYBE YOU DIDN'T
7 HAVE A WEAPON AND THAT SHE MIGHT STAND A CHANCE. I DON'T
8 KNOW IF THAT IS THE CASE. THAT IS SORT OF A COMMON SENSE,
9 LOGICAL THING THAT COMES TO MIND. BUT WHAT WORRIES ME THE
10 MOST ABOUT THESE THINGS BESIDES THE ACTUAL ROBBERY IS IT
11 IS JUST BY THE GRACE OF GOD SHE DIDN'T GET HURT BY GETTING
12 HUNG UP ON THAT VAN. WE HAVE SEEN IT TIME AND TIME AGAIN
13 PEOPLE GET THEIR HAND HUNG IN A DOOR HANDLE OR PEOPLE GET
14 THEIR ARM LEVERAGED IN THE WINDOW WRONG AND THEY ARE DRUG
15 DOWN THE ROAD. IT IS AN UNFORTUNATE SITUATION, SEVERAL
16 YEARS AGO WHERE A HIGHWAY PATROLMAN WAS DRUG DOWN THE ROAD
17 FOR ABOUT THREE CITY BLOCKS AND WAS TORN OFF THE SIDE OF
18 THE CAR BY THE MAN DRIVING THE CAR, INTENTIONALLY RUNNING
19 INTO A TREE. MS. ROOSEN, YOU ARE VERY, VERY FORTUNATE
20 THAT YOU DIDN'T GET HURT. AND CERTAINLY WASN'T YOUR
21 FAULT. NO FAULT WHATSOEVER ON THE SIDE OF THIS ISSUE IS
22 POINTING TOWARD THE VICTIM. YOU HAVE DIFFERENT CASES,
23 SOMETIMES YOU HAVE GOT A VICTIM WHO IS UNDER THE INFLUENCE
24 AND PUT THEMSELVES IN A PRECARIOUS SITUATION. ALL RIGHT,
25 BASED ON THAT PRIOR RECORD AND FROM WHAT ALL I HAVE HEARD

1 HERE I HAVE GOT TO COME DOWN HARD ON YOU. NO, I DON'T
2 THINK YOU SHOULD BE THROWN AWAY FOR THE REST OF YOUR LIFE
3 BUT I AGREE WITH THE VICTIM AND I AGREE WITH THE STATE.
4 YOU DON'T NEED TO BE ON THE STREET ANY TIME SOON. I AM
5 GOING TO SENTENCE YOU TO 26 YEARS. YOU GET CREDIT FOR
6 YOUR JAIL TIME.

7 MR. HAMMACK: THANK YOU, YOUR HONOR.

8 THE COURT: THANK YOU, VERY MUCH. CHECK BACK IN WITH
9 US AT 6:00 O'CLOCK AND YOU ARE DISMISSED.

10 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

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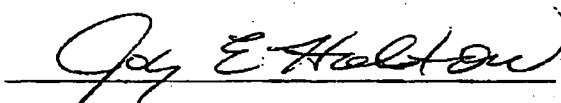
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

I, JOY E. HOLSTON, OFFICIAL COURT REPORTER FOR THE
EIGHTH 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
NEWBERRY COUNTY, SOUTH CAROLINA, ON THE 17TH DAY OF MAY,
2005.

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

NOVEMBER 28, 2005



JOY E. HOLSTON, COURT REPORTER

MY COMMISSION EXPIRES: MARCH 13, 2006

FORM 5

STATE OF SOUTH CAROLINA)
)
 County of Newberry)

IN THE COURT OF COMMON PLEAS

Ted Abney - 169743)
 Full name and prison number (if any) of Applicant)

2009CP00-107

2009 MAR 12 A 11:56

v.)

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be written (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 an additional page. Applicant shall make clear to which questions any such continued answer refers.

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

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

1. Place of detention KIRKLAND CORRECTIONAL INSTITUTION
2. Name and location of Court which imposed sentence NEWBERRY COUNTY
3. Name(s) of co-defendant(s) (if any) NONE
4. The indictments number or numbers (if known) upon which and the offences for which sentence was imposed:
 (a) 04-65-36-43

- (b) _____
- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) MARCH 17, 2003
- (b) 26 YEARS
- (c) _____
6. Check whether a finding of guilty plea was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence? yes
8. If you answer "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. State of South Carolina - In the Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Denied the Appeal
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. MARCH 17, 2008
- ii. _____
- iii. _____
- (d) if known, citations of written opinion entered pursuant to such results:
- i. _____

ii. _____

iii. _____

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

(a) _____

(b) _____

(c) _____

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

(a) FAILURE to Advise client the full extent of charge/mislead(b) Failure to maintain adequate focus toward primary element.

(c) _____

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

(a) COMMUNICATION was unestablished in Client-LAWYER relation(b) Diligence pursuing matter pertaining element indicating CAC

(c) _____

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

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

(b) Any petition in State or Federal Courts for habeas corpus or post - convictions relief? _____

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

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

No

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

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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

No _____

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

- i. _____
- ii. _____
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) _____
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? Yes
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence?
Yes
- (e) preparation, presentation or consideration of any petition, motion or applications with respect to this conviction, which you filed? _____
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Charles Verner, P.O. Box 484 Newberry S.C. 29108
- ii. Robert M. Dudek 1330 Lady St. Ste. 401 Columbia S.C. 29201
- iii. _____
- (b) the proceeding at which each attorney represented you:
- i. ARRAIGNMENT, trial, sentencing
- ii. Appeal
- iii. _____
19. State concisely the relief you seek in filing this application:

Resentencing

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

No

Revised 3/2003

STATE OF SOUTH CAROLINA)
County of _____)

VERIFICATION

I, Ted Abney, 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 include 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.

Ted Abney

SWORN to and subscribed before me this 10
Day of March, 2009

Helen Pratt (L.S.)
Notary Public

My Commission Expires: November 8, 2017

2009 MAR 12 A 11:56

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

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

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

Ted Abney
Applicant

SWORN to and subscribed before me this 10
Day of March, 2009

Hain Brook (L.S.)
Notary Public

My Commission Expires: My Commission Expires November 8, 2017

2009 MAR 12 A 11:56

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF NEWBERRY)	FOR THE 8TH JUDICIAL CIRCUIT
	Case No.: 2009-CP-36-0107
Ted E. Abney, #169743,	)
	)
Applicant,	)
	)
v.	)
	)
State of South Carolina,	)
	)
Respondent.	)
_____	)

RETURN

Respondent, making its Return to the application for post conviction relief (PCR) filed March 12, 2009, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Newberry County Clerk of Court. Applicant was indicted at the January 2005, term of the Newberry County Grand Jury for Armed Robbery (2005-GS-36-0043). Charles V. Verner, Esquire, represented him. On May 18, 2005, Applicant underwent trial, pursuant to which he was found guilty as indicted. The Honorable Paul M. Burch sentenced him to confinement for a period of twenty-six (26) years.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. A brief was filed on the Applicant's behalf pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed

Attached herewith and incorporated herein by reference are the records of the Newberry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the appellate court records, and the trial transcript.

II.

In his current application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel.

III.

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). First, a PCR applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Alexander v. State, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991). Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry v. State, 300 S.C. 115 at 117, 386 S.E.2d 624 at 625 (1989), *citing Strickland*.

Second, an applicant must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; Alexander, 303 S.C. at 541-42, 402 S.E.2d at 485. The Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

judgment. Strickland, Id. Applicant must overcome this presumption in order to receive relief. Cherry, Id.

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

IV.

The State therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel and appellate counsel. As to all other allegations, the State 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.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that a hearing be held.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

ASHLEY A. McMAHAN
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

June 5th, 2009.

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

TED E. ABNEY,

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

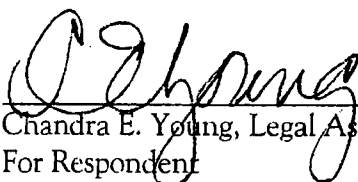
2009-CP-36-0107

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Gwendlyne Y. Smalls, Esquire
 Post Office Box 30
 Winnsboro, SC 29180

DATED this 5th day of June, 2009.


 Chandra E. Young, Legal Assistant
 For Respondent

COURT OF COMMON PLEAS
2009-CP-36-107

COUNTY OF NEWBERRY

TED E. ABNEY,

- VS -

STATE OF SOUTH CAROLINA,

Defendant.

March 9, 2010

B E F O R E:

HONORABLE D. GARRISON HILL

A P P E A R A N C E S:

GWENDLYNE YOUNG SMALLS, Esquire
Attorney for the Plaintiff

JENNIFER A. KINZELER, Esquire
Attorney for the Defendant

Henry P. Young
Court Reporter

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I-N-D-E-X

WITNESS:

Ted Abney

Direct Examination by Ms. Smalls:	4
Cross Examination by Ms. Kinzeler:	18

Charles Verner

Direct Examination by Ms. Smalls:	24
Cross Examination by Ms. Kinzeler:	36

1 P-R-O-C-E-E-D-I-N-G-S

2 THE COURT: All right.

3 MS. KINZELER: We've got one more, Your
4 Honor, if you want to go forward and have a later
5 lunch.

6 THE COURT: Let's go ahead and do it.

7 MS. KINZELER: I believe we're ready to go
8 forward with the case of Ted Abney versus the State
9 of South Carolina, case number 2009-CP-36-0107.

10 A brief procedural background. Mr. Abney was
11 indicted by the Newberry County Clerk, I'm sorry,
12 by the Newberry County grand jury for armed
13 robbery. He was represented by Mr. Charles Verner.
14 On May 18th of 2005 Mr. Abney went to trial and was
15 found guilty of armed robbery. Judge Burch
16 sentenced Mr. Abney to twenty-six years in prison.

17 There was an appeal filed on Mr. Abney's
18 behalf, there was a brief filed and the Court of
19 Appeals dismissed the applicant's appeal. I
20 believe he is proceeding today on an ineffective
21 assistance of counsel allegation, although I don't
22 have a lot of specifics regarding that allegation.
23 Today he is represented by Miss Smalls, the future
24 Judge Smalls, and I will turn it over to her at
25 this time.

1 THE COURT: Yes, ma'am.

2 MS. SMALLS: I would like to call Ted Abney
3 to the stand.

4 THE COURT: All right.

5 Yes, sir, Mr. Abney.

6 TED ABENY,

7 after being first duly sworn, testified as follows:

8 THE CLERK: You may be seated and state your
9 name for the record.

10 THE WITNESS: Ted Abney.

11 MS. SMALLS: If it please the Court.

12 THE COURT: Yes, ma'am.

13 DIRECT EXAMINATION

14 BY MS. SMALLS:

15 Q State your name for the record.

16 A Ted Abney.

17 Q Mr. Abney, you're currently serving time, is
18 that correct?

19 A Yes ma'am.

20 Q And how much time are you serving?

21 A Twenty-six years.

22 Q Twenty-six years?

23 A Yes, ma'am.

24 Q Where are you currently housed?

25 A Kirkland Correctional.

1 Q And you testified that you are serving
2 twenty-six years. What is that for?

3 A Armed robbery with a deadly weapon.

4 Q Did you receive that sentence as a result of
5 a guilty plea or a trial?

6 A A trial.

7 Q And who represented you at that trial?

8 A Mr. Charles Verner.

9 Q Was Mr. Verner retained or appointed to
10 represent you?

11 A He was appointed.

12 Q Okay. Do you know approximately when you
13 actually were arrested for the charge?

14 A It was right around October. I can't give
15 you a specific date but I know it was October,
16 around my daughter's birthday.

17 Q Let me ask you. How long after you were
18 arrested for the charge was it that Mr. Verner came
19 to represent you?

20 A At least four months, three or four or five
21 months, something like that.

22 Q So you had been in jail four or five months
23 before you met Mr. Verner?

24 A Yes, ma'am.

25 Q When you first met him was it at the

1 detention center?

2 A Yes, ma'am. He came out with the Solicitor
3 or prosecutor, one or the two.

4 Q During that meeting did you and Mr. Verner go
5 over the facts of your case?

6 A No, ma'am. I was just offered a plea.

7 Q During your first meeting you were offered a
8 plea?

9 A Yes, ma'am, as I recall.

10 Q Approximately how long did that meeting last?

11 A It was kind of quick because seems like
12 everybody was waiting on his arrival and it was
13 quite a few, so it didn't take much time and they
14 just laid it on the table, a nineteen year
15 sentence, something like that.

16 Q And how much time were you offered?

17 A Right then?

18 Q The first time.

19 A The first time I think it was nineteen years.

20 Q Nineteen years?

21 A Yes, ma'am.

22 Q When Mr. Verner came to see you and gave you
23 that offer was he by himself?

24 A No, ma'am.

25 Q Okay. Who was with him?

1 A I can't recall his name. I think they was
2 against me, Solicitor or prosecutor.

3 Q A prosecutor was with him?

4 A Yes, ma'am.

5 Q When they offered you nineteen years what did
6 they tell you that was for?

7 A Armed robbery.

8 Q It was for armed robbery?

9 A Armed robbery.

10 Q Okay. And I think you testified that meeting
11 was kind of brief?

12 A Yes, ma'am.

13 Q Did you accept the offer at that time?

14 A No, ma'am.

15 Q When did you meet with Mr. Verner again?

16 A I think when we, after that right there, I
17 think we set up something like a trial date and
18 when I come out here to the courtroom, come out to
19 the courtroom when they was getting ready to
20 actually go to trial, I believe.

21 Q So, the next time you saw Mr. Verner was
22 actually at the courthouse?

23 A I believe so.

24 Q Okay. Did you go to trial during that time
25 period or was it for another day?

1 A I didn't go to trial that day, that specific
2 day. I think the jury was picked and I left back
3 out and I think we came back and resumed the next
4 day.

5 Q When you saw Mr. Verner again it was actually
6 at the courthouse and actually a jury was drawn?

7 A Yes, and then he came.

8 Q For your trial?

9 A Yes, ma'am.

10 Q And it started the following day?

11 A Yes. He came out that evening, he come out
12 that evening to see me after we had picked the
13 trial.

14 Q Okay. Do you recall going over the evidence
15 that the State had against you?

16 A No, ma'am.

17 Q Other than that initial meeting that you
18 indicated lasted only a few minutes where the
19 nineteen years sentence was offered, when did you
20 have another conversation with Mr. Verner?

21 A When me, him and my fiance and another friend
22 was in one of the offices back there.

23 Q That was at the courthouse as well?

24 A Yes, ma'am.

25 Q Approximately how long did that meeting last?

1 A In and out with other situations going on, he
2 was kind of brief, in and out and kind of went over
3 what the case would be.

4 Q Let me ask you this. Was that conversation
5 still about a guilty plea?

6 A No, ma'am.

7 Q Okay. Were you getting ready for trial then?

8 A Yes, ma'am, I was getting ready for trial.

9 Q In preparation for trial did the two of you
10 discuss trial strategies, what it is, what your
11 defenses were going to be?

12 A No, because the first time I understood what
13 armed robbery was I kind of got it in this right
14 here, I never, what I thought was armed robbery, we
15 talked about actually having a weapon, that is the
16 only indication. I never knew that statute had
17 changed.

18 Q Let me ask you this. Did you give a
19 statement in your case, did you admit your
20 involvement in the case?

21 A Yes, ma'am, I admitted, I gave a written --

22 Q But at no time did you ever admit that you
23 had a weapon?

24 A No, ma'am.

25 Q So, the second time you actually met with Mr.

1 Verner was actually when the trial started?

2 A The second, yes, the second and third time.

3 Well, the second time, all that was together.

4 Q Okay. How long would you say that the two of
5 you discussed the defenses of which you needed in
6 order to go forward with your trial?

7 A Repeat the question, please.

8 Q How long did you meet with him before you
9 actually, before the trial started?

10 A Roughly ten or fifteen minutes at the most,
11 perhaps.

12 Q Did the two of you talk about a defense?

13 A Not really a defense tactic. What he would
14 say at the trial, but as for as defense, I can't
15 really recall him describing what I have right here
16 in my hand as an armed robbery charge. I never
17 discussed the actual, what armed robbery really --

18 Q Let me ask you this. Did the two of you ever
19 discuss strong armed robbery?

20 A No, ma'am..

21 Q So, the two of you never talked about a
22 lesser included offense --

23 A No, ma'am.

24 Q -- of armed robbery?

25 A Not as I can remember.

1 Q Were there any witnesses or anybody that you
2 asked Mr. Verner to talk to in preparation for the
3 trial?

4 A Witnesses? Not on my behalf.

5 Q So you didn't give him anybody that you
6 needed him to contact?

7 A Well, I think I probably gave him the name of
8 Ashley Wilson. That was my boss man.

9 Q Was that more like a character witness?

10 A Yes, ma'am.

11 Q Was there anybody else you wanted him to talk
12 to, that he failed to talk to on your behalf?

13 A No, ma'am.

14 Q How long would you say the trial lasted? Do
15 you remember?

16 A As I recall, it was picked the jury that
17 evening or sometime and the next, the next morning,
18 the next morning I think it started and I can't say
19 how long it really lasted but I know by that
20 evening time I think it was over and I was back, I
21 had already been sentenced.

22 Q You didn't testify, did you?

23 A No, ma'am.

24 Q Okay. During your brief conversations with
25 Mr. Verner at all times did you tell him that you

1 did not have a weapon?

2 A I always stood firm on that.

3 Q You always said you did not have a weapon?

4 A I never had a weapon.

5 Q Was a weapon found?

6 A No, ma'am.

7 Q Do you recall whether or not at the
8 conclusion of the trial when the judge gave the
9 jury instructions on what they could consider,
10 whether or not the judge told the jury that they
11 could find you guilty of a lesser charge?

12 A No, ma'am.

13 Q Okay. Did you and Mr. Verner discuss that?

14 A No, ma'am.

15 Q Is it your contention that as your lawyer,
16 since you told him you did not have a weapon, that
17 the lesser included charge should have been
18 discussed?

19 A I can't recall.

20 Q Do you feel like he should have discussed it
21 with you?

22 A If I would have -- can I explain something?
23 If I would have understood what armed robbery
24 meant, if it is all right, I can read it here, is
25 it all right? I can read it here. Is that all

1 right?

2 THE COURT: Yes, sir.

3 A It says armed robbery. It says a person who
4 commits robbery while armed with a pistol, dirk,
5 slingshot, metal knuckles, razor or other deadly
6 weapon or while alleging either by actions or words
7 he was armed while using a representative of a
8 deadly weapon or any other object which a person
9 present during commission of the robbery have
10 reason to believe to be a deadly weapon is guilty
11 of a felony and upon conviction must be imprisoned
12 for a mandatory minimum of ten, not less than ten
13 years or more than thirty years, no pardon. No
14 part may be suspended on probation. A person
15 convicted under this subsection is not eligible for
16 parole until the person has served at least seven
17 years of the sentence.

18 Q Let me ask you this. You just read the
19 statute for armed robbery?

20 A Right, right.

21 Q Were you ever advised what the elements were
22 for a strong armed robbery?

23 A This is the first I heard of it. It come
24 through the mail through my fiancée.

25 Q So you never had a discussion about the

1 charge that does not require a weapon?

2 A No, ma'am.

3 Q Do you feel like that is something your
4 lawyer should have discussed with you?

5 A Yes, ma'am.

6 Q So it's your testimony that you always
7 admitted to being involved in this crime, is that
8 correct?

9 A Exactly, yes, ma'am.

10 Q But you did not have a weapon?

11 A Right.

12 Q And it is your testimony that you feel that
13 you should have been apprised of the law, of
14 everything surrounding that?

15 A Yes, ma'am.

16 Q So, not only should you have talked about
17 armed robbery, but strong arm robbery or what we
18 call common law robbery as well?

19 A Yes, ma'am.

20 Q Now, if you had actually had that
21 conversation with your lawyer is it your testimony
22 that you feel the result would have been different?

23 A I believe so, I believe so.

24 Q Do you feel that the jury should have had an
25 opportunity to find you guilty of strong armed

1 robbery, common law robbery?

2 A It probably could have been but at the same
3 time, like I said, I wasn't informed of what I'm
4 thinking armed robbery is actually, because I was
5 ignorant to the facts.

6 Q Plus you had a lawyer, right?

7 A I just didn't know. Can I read this? I
8 don't want to get out of, take anything over but
9 just something I just want to read and this is what
10 was said and this is what I was led to believe.

11 THE COURT: Sure.

12 A This is Mr. Verner's opening statement, just
13 a line that I kind of dabbed over. He said, "He is
14 also charged with visibly displaying a deadly
15 weapon. I submit to you that they cannot find him
16 guilty on that charge if nobody testifies that any
17 weapon was visibly shown." So, that is what I was
18 led to believe, that a visible weapon had to be
19 submitted for me to be, for armed robbery charge,
20 to be convicted of that weapon.

21 Q Okay.

22 A And like I said, I don't want to jump out of
23 line on anything but here is a statement Mr.
24 Hammack asked the victim. He said, "Did you ever
25 see a weapon in Mr. Abney's hand?" "I did not see

1 it." "Did you --"

2 MS. KINZELER: Your Honor, can I obtain a
3 reference to where you are reading?

4 A Yes, Ma'am, I'm sorry. On page 54, lines 13
5 through 25.

6 MS. KINZELER: Thank you.

7 A "Did you ever see a weapon in Mr. Abney's
8 hand?" "I did not see it." "Did you see any sort
9 of knife?" "No." "Firearm?" "No." "Anything?"
10 "No."

11 Q Okay. Let me stop you there.

12 A Okay.

13 Q Were you ever advised that the fact that the
14 victim never saw any type of weapon, that you might
15 be guilty of something less? Did anybody ever tell
16 you that?

17 A Because she didn't see the weapon?

18 Q Right.

19 A That I would have a lesser charge?

20 Q Did your lawyer ever tell you that there is
21 another crime that fits when there is not a weapon
22 involved?

23 A It was all armed robbery, it was armed
24 robbery or nothing.

25 Q That is all you talked about, was armed

1 robbery?

2 A Really just armed robbery.

3 Q Okay. Other than you're not given a lesser
4 included jury charge, what other manner do you feel
5 that Mr. Verner failed to properly represent you?

6 A Really I don't have a lot of complaint
7 against Mr. Verner, I really don't. I know this is
8 his field and this is his study and I don't claim
9 to be a lawyer and I'm not coming up here to make a
10 lot of accusations toward him. It may be just a
11 mistake that he overlooked by not referring to
12 letting me know that this is the armed robbery
13 statute right here. I really don't come to kind of
14 juke at him or really to say anything because he's
15 a man, he has been doing this for awhile, so I
16 really don't want to come, that is not the reason I
17 am here, truly, and I thank you for the time, it is
18 a privilege really for me to stand here and have
19 any kind of defense, you know, because I was dead
20 wrong from what happened.

21 Q Okay.

22 A You know, I solely admit that, but the only
23 thing I really was touching on was I never was
24 informed of, like you said, a lesser included
25 charge or I was led to believe that armed robbery

1 was armed robbery and that is with a weapon and it
2 had to be seen, and I just ain't never studied the
3 law and I don't claim to be today.

4 Q Okay.

5 MS. SMALLS: I don't have anything further.
6 Answer any questions the Assistant Attorney General
7 may have. Okay?

8 THE WITNESS: Thank you.

9 CROSS EXAMINATION

10 BY MS. KINZELER:

11 Q Hi, Mr. Abney. Do you recall Mr. Verner
12 having a Jackson v. Deno hearing on your behalf to
13 try to suppress that statement you gave?

14 A What is that, ma'am?

15 Q A Jackson versus Deno hearing where Mr.
16 Verner tried to suppress the statement you had
17 given the police, do you remember that?

18 A A Jackson versus Deno?

19 Q Do you remember that happening? You don't
20 have to remember the specific name but do you
21 remember him --

22 A I remember, I have seen Jackson-Deno, I have
23 seen --

24 Q Is that in the transcript?

25 A I probably remember more in the --

1 Q I'm not trying to trick you. I'm just asking
2 you if you remember Mr. Verner tried to suppress
3 that statement?

4 A It may have been, it may have been.

5 Q Okay. But in that statement you never
6 admitted to having a gun, right?

7 A No, I never.

8 Q Okay. Do you remember your attorney making
9 several objections throughout your trial?

10 A Yes, he made objections, yes, he made some
11 objections.

12 Q Do you remember Mr. Verner made a motion for
13 a directed verdict sort of in the middle, toward
14 the end of your trial, about that possession of a
15 weapon charge that you were also charged with?

16 A Yes, I remember him making that.

17 Q Do you remember the judge granting Mr.
18 Verner's motion and dismissed that charge because
19 there was no weapon ever found or any evidence of
20 any weapon?

21 A Vaguely.

22 Q If the transcript indicates that the judge
23 granted Mr. Verner's motion to get rid of that
24 charge would you agree with what the transcript
25 says?

1 A Yes, ma'am.

2 Q This is the charge that accompanied the armed
3 robbery, just the possession of weapon charge.

4 A Weapons charge.

5 Q That you were able to get rid of that, a
6 directed verdict motion, do you remember that?

7 A I was able to get rid of --

8 Q He moved for a directed verdict --

9 A Okay.

10 Q -- on the possession of a weapon charge.

11 A Uh-huh (Affirmative).

12 Q Because there was no weapon.

13 A Right.

14 Q Or evidence of any weapon.

15 A Okay.

16 Q And the Judge granted that motion.

17 A Okay.

18 Q Do you remember that?

19 A Will, I can't say I remember it.

20 Q If the transcript indicates that is what
21 happened would you agree with the transcript?

22 A Sure.

23 Q Okay. Do you remember that Mr. Verner's
24 entire trial strategy throughout the trial and his
25 whole argument and closing argument was the fact

1 that no one ever saw a weapon, including the victim
2 that you're talking about, that line you reference?

3 A Yes, ma'am.

4 Q That was his whole point throughout your
5 trial?

6 A Was that the whole point? Whatever is this
7 right here, that point right there was the opening
8 statement.

9 Q Do you remember Mr. Verner's closing
10 argument?

11 A Yes, it was the closing argument.

12 Q Do you remember that closing argument being
13 all about how there was never a gun or never a
14 weapon?

15 A Yes, uh-huh (Affirmative).

16 Q That was Mr. Verner?

17 A Yes, that's him.

18 Q Do you remember Mr. Verner asking for a
19 specific jury charge about how words alone aren't
20 enough to establish an armed robbery?

21 A Vaguely. That is what, I think that is where
22 the tricky part came toward me, it done turned over
23 from the statement of visibly displaying, and now
24 it's your word or your actions.

25 Q Right.

1 A And now this is armed robbery. That is what
2 kind of throwed me off. I really got no
3 understanding that communication had, really, it
4 wasn't there from the beginning.

5 Q If you don't understand it, though, do you
6 recall Mr. Verner doing that on your behalf?

7 A Yes, ma'am.

8 Q Do you recall him asking for that, asking
9 that?

10 A Yes, ma'am.

11 Q Do you remember he gave the judge some case
12 law to support that request for that jury charge?

13 A Yes, he did that, yes, ma'am.

14 Q Do you recall the judge denied that request?

15 A Uh-huh (Affirmative).

16 Q Was that a yes?

17 A I think so, I think I vaguely remember that.

18 Q And when you were being sentenced by the
19 judge I think that you also told him, you know, "It
20 did take place but I didn't have a weapon"?

21 A Yes.

22 Q You tried to tell the judge that again?

23 A Yes.

24 Q Okay. Didn't Mr. Verner try to get a plea
25 with the Solicitor about this lesser included,

1 about the common law robbery, the strong arm with
2 no weapon?

3 A Ma'am?

4 Q Didn't Mr. Verner try to get a plea
5 negotiation for you to that lesser included offense
6 that we have been talking about?

7 A What, the nineteen years?

8 Q To the lesser offense with the robbery with
9 no gun, didn't he try to do that for you?

10 A At which meeting? I really can't remember.

11 Q Did Mr. Verner enter into plea negotiations
12 on your behalf before trial or try to talk to the
13 Solicitor?

14 A The only thing I talked to Mr. Verner about
15 was when we was in the meeting room with my fiance
16 and the other lady that was there and I can't
17 remember a plea bargaining. The only thing he was
18 saying, "If you go to trial you're going to get the
19 max."

20 Q So you don't remember anything about Mr.
21 Verner trying to get a plea to this lesser included
22 offense that you're talking about now?

23 A The lesser included, that common law?

24 Q Right, the charge without the weapon.

25 A No, I can't recall.

1 Q You don't remember?

2 A No, ma'am, I don't remember.

3 MS. KINZELER: Okay, I think that's all I
4 have. Thank you.

5 THE WITNESS: You're welcome.

6 MS. SMALLS: No further questions.

7 THE COURT: All right, thank you.

8 (Witness excused).

9 MS. SMALLS: I call Charles Verner.

10 THE COURT: Yes, ma'am.

11 CHARLES VERNER,

12 after being first duly sworn, testified as follows:

13 THE CLERK: Have a seat and state your full
14 name for the record.

15 THE WITNESS: Charles Verner.

16 DIRECT EXAMINATION

17 BY MS. SMALLS:

18 Q Mr. Verner, how long have you been practicing
19 law?

20 A I graduated law school in 1995, I clerked for
21 a year or so after I graduated, and then I became a
22 Public Defender in about '97 or '98 in Greenwood,
23 and I have been a Public Defender in some capacity
24 since that time.

25 Q So you have been practicing in the criminal

1 arena at least since 1997?

2 A '97, '98.

3 Q Okay. Do you remember your representation of
4 Mr. Ted Abney?

5 A I do.

6 Q You heard him testify earlier regarding the
7 number of meetings the two of you had. Do you
8 recall how many times you met with Mr. Abney and
9 the length of time?

10 A I met with him many times. He was
11 incarcerated in November of 2004, was when he was
12 first arrested. I have got an undated note where
13 we would have met him sometime between probably
14 December and January, December of '04 or '05, where
15 he told me he snatched a pocketbook from a lady at
16 Roberts' Citgo but they got everything back and he
17 turned himself in. "I want to plead guilty but I'm
18 not guilty of armed robbery, I had no kind of
19 weapon and definitely not a gun. I just snatched a
20 purse." That is probably in January of 2005.

21 I met with him, I met with Stacy Gallagan,
22 who is his fiance, on February 3rd and discussed
23 the case.

24 I met with Ted, I have got notes on May 11th,
25 I don't know how many times. I met with him on

1 March 30 at the detention center, where he first
2 mentioned that he worked for Ashley Wilson. I
3 called up Ashley Wilson. And again he told me it
4 was just a purse snatching, and my notes from that
5 meeting indicate I told him that purse snatching a
6 purse would carry up to fifteen years in prison,
7 which is the common law charge. So, I met with him
8 at least a half a dozen times and probably more
9 than that.

10 Q And is it your testimony that the very first
11 meeting he told you that he actually had taken the
12 lady's purse?

13 A Right.

14 Q And that he did not have a weapon?

15 A Right.

16 Q As a matter of fact, throughout your entire
17 representation did he ever say he had a weapon?

18 A No.

19 Q Of any sort?

20 A No.

21 Q Is it fair to say approximately, I guess, six
22 months from your initial meeting this case was
23 called to trial?

24 A I think the case was called for trial around
25 May 16th, May 17th of 2005 and I probably didn't

1 meet him until January of '05, so four months.

2 Q Okay. During your representation of Mr.
3 Abney do you recall the nineteen years plea offer
4 being made to him?

5 A Not to that amount. I remember the State was
6 represented by Deputy Solicitor Hammack, Jack
7 Hammack, and he did refuse to reduce the armed
8 robbery charge to a common law robbery charge and I
9 think his plea offer was fairly lengthy if we took
10 a number. Obviously he could have pled straight up
11 to the charges, but nineteen sounds about what the
12 State, for some reason he was refusing to drop it
13 from armed robbery to common law.

14 Q So there was never an offer on the table to
15 common law robbery?

16 A Never. We tried hard to get the State to
17 offer him a common law robbery and I truly believe
18 it was probably an appropriate resolution but the
19 State refused to offer common law.

20 Q What was, I guess knowing that the State was
21 not going to recommend a reduction in the charge,
22 what was the trial strategy that you had?

23 A Our trial strategy was that essentially
24 through me admit he was guilty of the charge but
25 that it was a common law, that it was an unarmed

1 purse snatching and that the State had over charged
2 him. I guess we went into the trial, the initial
3 trial strategy would have been to try to get a
4 common law verdict but that changed. But I guess
5 the initial would have been, "I'm guilty of a crime
6 but it's not, I didn't rob somebody with a weapon."

7 Q So it's your testimony that from the very
8 beginning Mr. Abney made an admission to committing
9 a robbery but was adamant there was no weapon
10 involved?

11 A Both to law enforcement when he turned
12 himself in and to me.

13 Q So that was consistent?

14 A We made it clear to the State from the start
15 he wanted to plead guilty but to common law
16 robbery.

17 Q Okay. And during the course of the trial,
18 and I know in some of your examination there was
19 evidence or testimony of the lack of a weapon, is
20 that correct, from the victim herself?

21 A The only evidence from the victim was that
22 she felt something hard press into her ribs or in
23 her belly or ribs, which we tried to show were his
24 longer fingernails but the only evidence that he
25 had a weapon was that she felt something hard

1 pressed into her side.

2 Q There was no testimony ever that she saw him
3 with any type of weapon, is that correct?

4 A We focused -- there is no evidence that she
5 saw a weapon at all and in fact Judge Burch I
6 believe directed a verdict on the display of a
7 weapon during a violent crime on the lack of
8 testimony. Either the jury found him not guilty or
9 Judge Burch directed that, that nobody had seen a
10 weapon.

11 Q You heard Mr. Abney testify that pretty much,
12 you know, he admitted to a certain extent what his
13 involvement was in this case and he didn't really
14 have a lot of complaint about you other than the
15 fact that he never got a strong armed robbery
16 charge in the end from the judge. Can you tell the
17 Court why it is that you did not request such a
18 charge when there was evidence of it?

19 A Okay. If I understand the question, our
20 initial trial strategy was that he was guilty of
21 common law robbery. At the end of the State's case
22 I moved for a directed verdict on the armed robbery
23 charge and Judge Burch denied the motion and then I
24 think we took a recess after the State's case and
25 Judge Burch invited both me and Deputy Solicitor

1 Hammack back into the judge's chambers and he said,
2 pretty much quote to the Solicitor, "Mr. Hammack, I
3 tell you what you're going to do, you're going to
4 let this man plead guilty to common law robbery,
5 and Mr. Verner, you are going to go out there and
6 tell your client to be prepared for a stiff
7 sentence and we'll go ahead and get this over
8 with," and Mr. Hammack indicated that he did not
9 want to dismiss, to reduce the charge from armed
10 robbery to common law and then I guess the judge
11 let him think about it and go talk to the victim
12 for a little bit and then we came back and Mr.
13 Hammack said he wanted to try it as an armed
14 robbery case and he declined to let the defendant
15 plead guilty to common law robbery and then Judge
16 Burch said, "All right, Mr. Prosecutor, that's fine
17 for you to do but I'm telling you if you don't
18 resolve it by plea I'm not letting you have your
19 cake and eat it, too, don't ask me for a lesser
20 included sentence because you're making a strategic
21 decision to go forward on armed robbery and I'm not
22 going to be the safety net to give you a lesser
23 included charge, so you better win your case
24 because you're making a tactical decision not to
25 let him plead guilty, then you're going to come

1 back to me and ask for lesser included charge and
2 I'm not going to give it to you." And we indicated
3 to Judge Burch at that time my client wanted to
4 plead guilty and he would be prepared to take a
5 lengthy sentence but it was the State's decision to
6 decline the offer to Mr. Abney.

7 Q So Mr. Abney was willing to plead to common
8 law robbery but the prosecution would not offer it.
9 Is that correct?

10 A In the beginning and even during trial,
11 through trial we wanted to plead guilty to common
12 law robbery, even assuming he was going to take a
13 maximum sentence. I tell you, at the end of the
14 State's case we thought we were winning the case.
15 I thought as the lawyer that we were winning the
16 case. Mr. Abney thought we were winning the case.
17 A lot of the courtroom personnel talked to us.

18 There was a concern, you know, even after he
19 snatched the purse, the lady chased him and he got
20 into a car, started a car and drove away while she
21 testified he was holding the pocketbook in one hand
22 and pushing her away with the other hand. She
23 clearly had the opportunity to see a weapon at that
24 point and still didn't. And we thought we were
25 winning the case.

1 Ted and I had discussed the possibility,
2 after the directed verdict motion, of not putting
3 in a lesser included, Ted and I specifically talked
4 about, "Do you want a lesser included charge on
5 common law robbery?" We thought, we both thought
6 we were winning the case and so we didn't ask for a
7 lesser included charge for common law robbery.

8 I will say in hindsight I believe that was
9 legally wrong for me to do, not legally wrong, but
10 it was clearly a tactical decision, we made a
11 conscious choice not to ask the judge to charge
12 common law robbery. The judge had already
13 indicated he wasn't going to charge common law
14 robbery anyway in chambers. It doesn't appear on
15 the record because he made his decision in
16 chambers, but all through the trial it was clear,
17 when you read the transcript, I'm telling the jury
18 he's guilty of purse snatching, which is common
19 robbery, my closing, my opening. My problem in
20 hindsight now is when we didn't charge common law
21 robbery that was a trial decision we made, I think
22 in hindsight that was an objectively wrong decision
23 to make when you're telling the jury he's guilty of
24 common law robbery but then not give them the
25 option. We went for broke, basically, and lost. I

1 think the attorney at the end of the day has to
2 make the decision to include it. I know the case
3 law indicates that if the defense asks for a lesser
4 included charge to be put in and there is any
5 evidence of it, it has to be charged. But we kind
6 of did it the opposite way, we thought we were
7 winning the case and didn't press it. That was
8 inconsistent with my original strategy in talking
9 to the jury.

10 You know, I know it's not really relevant but
11 one of the -- well, I mean, I did go to lunch with
12 the deputies and the sheriff after the case and a
13 member of the jury indicated, well, he didn't think
14 that the defendant was actually armed, "But we
15 aren't letting a creep like that just go home
16 either," and I will note interestingly the sheriff
17 in his report to the newspaper, was kind of an odd
18 statement, saying to me, "It doesn't matter whether
19 he was armed or not, you know, we got a criminal
20 off the street," which just indicated to me even
21 more that the jury probably would have found a
22 lesser included charge which he was willing to
23 plead guilty to in the very beginning but the State
24 refused to let us plead guilty to it. But that is
25 what I regret in Ted's case, is Ted was a part of

1 it, he had a decision to make, too, to not charge
2 lesser included because I asked him whether he
3 wanted me to do that or not.

4 Q Let me ask you this. You testified earlier
5 that the judge in chambers had indicated that he
6 was not going to charge a lesser included but you
7 also testified that even if the State wanted it.
8 Are you of the opinion that he would not have
9 charged it if it was a request of yours, when there
10 was evidence of it?

11 A No, I think he would have been obligated. I
12 can't speak for him but I feel sure, he indicated
13 he was going to charge it, we didn't ask him to but
14 it was clear that was our strategy the whole way
15 and it was clear the judge was anticipating that
16 common law was going to be charged as a lesser
17 included offense but in a case, obviously, you
18 know, of course the Court directed the verdict on
19 the visible display of a weapon so, I mean, I don't
20 think there is any question he would have charged
21 common law robbery had we requested it. He didn't
22 really give us the option to, when he was talking
23 to the Solicitor about not charging it, he didn't
24 talk to me as a lawyer and say, "Do you want me to
25 charge it," he just basically told the Solicitor,

1 "I'm not charging it and giving you the safety
2 net," and I will say in fairness we were already
3 contemplating asking the judge not to charge common
4 law anyway.

5 Q Let me ask you this. You indicated that Mr.
6 Abney was involved in the final decision making
7 regarding the charge?

8 A Right.

9 Q You heard him testify earlier that in his
10 mind all the conversation was about the armed
11 robbery even though he indicated that he did not
12 have a weapon just because that is what he
13 understood the law to be. Is it your testimony
14 that you specifically explained to Mr. Abney that
15 he could be found guilty of something less than
16 armed robbery?

17 A There is no way I did not -- Ted was aware,
18 our strategy was, "There was no visible display of
19 a weapon but the lady thinks you had a weapon
20 because she felt something hard in her ribs," and
21 then I explained to Ted about the statute having
22 been amended to include a representation, even when
23 no deadly weapon was found, that someone can
24 represent they have a weapon. I feel fairly
25 confident in saying that I explained that to him

1 because that is essentially our whole defense, 'was
2 that she thought he had a weapon, he said he didn't
3 and there was no evidence he had a weapon.

4 Q Let me ask you this. But for your counseling
5 of Mr. Abney of the I guess all or nothing with the
6 jury, thinking they would come back with a not
7 guilty, but for your counseling and advice to Mr.
8 Abney regarding that, had you requested the strong
9 armed or common law charge do you feel that the
10 result in all probability would have been
11 different?

12 A I think it is to an even greater than
13 probable because he would have been found guilty of
14 common law robbery and would have been sentenced to
15 fifteen years under common law. I don't have any
16 doubt in my mind that would be the likely result.

17 MS. SMALLS: Okay, nothing further. Answer
18 any questions from the Attorney General.

19 CROSS EXAMINATION

20 BY MS. KINZELER:

21 Q Hi, Mr. Verner. You testified that you met
22 with Mr. Abney at least a half dozen times if not
23 more?

24 A I have notes of about a half a dozen times.
25 I'm sure I met with him even more than that.

1 Q Throughout all of those meetings, throughout
2 the four months you represented him did you all
3 discuss this lesser included of strong armed
4 robbery? However you may have phrased it to him,
5 did you all discuss the possibility of a charge
6 other than armed robbery?

7 A Probably every time.

8 Q Every time, all right. And did you discuss
9 with him your attempts to get a plea from the
10 Solicitor and that the Solicitor wouldn't drop the
11 armed robbery, did you discuss that with Mr. Abney?

12 A And not only that but at that time, too, the
13 Solicitor conveyed most of his plea offers in
14 person, so Ted would have participated in plea
15 negotiations with the State but they knew Ted was
16 willing to plead guilty to common law, he knew the
17 State was refusing to reduce the armed robbery.

18 Q So he knew of it, the lesser included
19 offense, because he was willing to plead guilty to
20 it?

21 A Yes, oh, yes.

22 Q I believe you testified you were able to get
23 that possession of a weapon charge dismissed on a
24 directed verdict?

25 A The jury may have found him not guilty of

1 that or Judge Burch directed that but they did try
2 him on that charge, too, and it was acquitted
3 either by Judge Burch or the jury.

4 Q I think the transcript indicates it was a
5 directed verdict motion. Either way, there was no
6 conviction for that weapons charge?

7 A No.

8 Q Because of your effort to make it clear to
9 the jury there was no weapon?

10 A Right.

11 Q You testified that you spoke with Ashley
12 Wilson?

13 A I called Ashley. I know Ashley personally,
14 too, but I did call Ashley. Ashley was just a
15 character witness. Ashley was a former employer, I
16 guess a former part-time employer, but Ashley would
17 have only been a character witness.

18 Q Did you believe it would have been helpful or
19 hurtful to call Mr. Wilson, or Miss Wilson?

20 A No, I think at that point our decision was we
21 didn't offer any evidence because we wanted to
22 argue last to the jury.

23 Q Because if you put up a case, if you put up
24 witnesses, then you lose the right to have the last
25 closing argument?

1 A Right, and you know, I told, I basically told
2 the jury he's not contesting he robbed the lady, so
3 I mean a character reference, a character witness
4 really doesn't help him when he's admitting he was
5 a purse snatcher. I think we knew all along we
6 were going to be arguing -- well, in this case I
7 don't know but, I mean, I think we had anticipated
8 Ted was probably going to testify but then at the
9 end of the State's case decided not to.

10 Q And you talked about all this with Mr. Abney?

11 A Yes.

12 Q You testified in hindsight you should have
13 requested that lesser included. When did you
14 determine that that may have been a better thing to
15 do? Was it after he was convicted and sentenced to
16 twenty-six years?

17 A Well, yes, when he got the twenty-six year
18 sentence but that, accumulated with the jury that
19 we saw at lunch, or dinner, probably lunch
20 afterward saying -- you know, I don't know if we
21 saw the jury the same day or next day, the day of,
22 but they indicated, "We really didn't know whether
23 he had a weapon but we're not letting a man like
24 that go home, either."

25 Q All of that happened after he was already

1 convicted and sentenced?

2 A Oh, yes. Actually I did some on line
3 research of it probably months or years afterward
4 and, you know, at the time we refused, or at the
5 time we didn't ask for lesser included charge, we
6 knowingly were making a conscious decision not to
7 do it, that we thought was right at the time. This
8 is only in hindsight that we thought, well, when
9 you're basically telling the jury you're guilty of
10 a lesser included charge you probably shouldn't
11 take it off the table for them to consider. I
12 mean, in fairness, at the time we felt we were
13 winning the case, you know, there were people in
14 the courtroom telling us we were winning the case
15 and --

16 Q Was Mr. Abney involved in those discussions?

17 A He was.

18 Q Did he ever indicate to you that he wanted
19 you to request that jury charge?

20 A In the beginning we wanted to request the
21 jury charge. Before the trial started our whole
22 defense was he was guilty of a lesser included
23 offense. After the State's case which we felt was
24 particularly weak I came back, Ted was sitting at
25 the little table where Miss Smalls is sitting right

1 now, and I indicated to him, you know, that the
2 judge was not going to charge common law robbery
3 and I told Ted, "You know, it's an all or nothing,
4 it's basically a roll of the dice, you're going to
5 win big or going to lose big time because the judge
6 had said he's not going to give the State a lesser
7 included offense and do you want to go for all or
8 nothing or do you want me to put it in there," and
9 he said, "All or nothing," and I said, "I agree
10 with you, I think we're winning."

11 Q So, it was actually Mr. Abney that said all
12 or nothing and then you agreed with him?

13 A Well, I said, "Do you want all or nothing,"
14 and he said, "All or nothing," was his fatal last
15 words, but but even before I spoke to him in the
16 courtroom we had talked about it before trial, the
17 day before at least, and in private and other
18 places.

19 Q I believe you testified that initially you
20 thought you would probably ask for that lesser
21 included jury charge but after you saw the State's
22 case you decided that may not be a good idea. You
23 testified with Miss Smalls' question you were
24 already contemplating not asking for the strong
25 armed robbery charge anyway?

1 A Even before Judge Burch basically seized upon
2 that on his own and took it off the menu Ted and I
3 had already discussed after some of the witnesses
4 that we might go for broke and just go for an
5 outright acquittal. So, we had already
6 contemplated we might not even request it.

7 Q Do you believe that Mr. Abney was able to
8 make some kind of meaningful contribution or
9 decision to that decision not to request that jury
10 charge?

11 A Oh, I think he understood, he was certainly
12 told armed robbery was ten to thirty, non
13 paroleable, and strong armed robbery was fifteen,
14 so when I explained it to him the second time I
15 told him, you know, "Common law is up to fifteen,
16 armed robbery is ten to thirty, if you don't charge
17 it you're going for broke," and he said, you know,
18 "Let's go for it and not charge it." I agreed, I
19 thought we were winning, too, and I said, "I agree
20 with you."

21 MS. KINZELER: I think that's all I have.
22 Thank you.

23 MS. SMALLS: No further questions.

24 THE COURT: Let me ask you a question.

25 THE WITNESS: Yes, sir.

1 THE COURT: If a judge indicates he's not
2 going to charge something and that might be
3 consistent with your trial strategy would you lose
4 anything by asking for it anyway?

5 THE WITNESS: No, I think, Judge, if I had
6 thanked the judge for his opinion but said we still
7 want it anyway, I think he would have charged it
8 for us.

9 THE COURT: Okay.

10 THE WITNESS: He made that clear to us.

11 THE COURT: Okay, all right.

12 THE WITNESS: That if we had asked for it he
13 would have put the common law in there and so if we
14 had said, you know, "We appreciate it, Judge, but
15 we still want the common law for our safety net," I
16 feel strongly Judge Burch would have charged it for
17 us.

18 THE COURT: Okay. That's the only question I
19 have. Thank you

20 (Witness excused).

21 MS. SMALLS: I don't have any further
22 witnesses.

23 MS. KINZELER: Nothing from the State, Your
24 Honor.

25 THE COURT: Do you want to make statements?

1 MS. SMALLS: Briefly.

2 THE COURT: Yes, ma'am.

3 MS. SMALLS: Your Honor, it is quite obvious
4 by Mr. Abney's testimony and even in all of his
5 meetings with Mr. Verner he snatched this lady's
6 purse, he just didn't have a weapon of any sort.
7 It seems as if that rang throughout not only the
8 representation by Mr. Verner but throughout the
9 course of the trial and Mr. Verner echoed that as
10 well.

11 On cross-examination Mr. Abney indicated that
12 even though he didn't know the terminology, he
13 conceded the record indicated that Mr. Verner held
14 a Jackson v. Deno hearing where he tried to
15 actually keep a statement out, even though he
16 didn't have a problem with that statement because
17 he readily admitted from the very beginning of his
18 involvement not only with Mr. Verner but with law
19 enforcement. He acknowledged that Mr. Verner made
20 objections and that there may have been a motion
21 for directed verdict even though he may not have
22 recognized the proper language of it.

23 However, throughout he indicates that he
24 never had any type of weapon. And Mr. Verner's
25 testimony, he acknowledged that from the very

1 beginning, all the way to the end, they felt that
2 it was a common law or strong armed robbery type
3 case. But for the conversation in chambers where
4 the judge apparently indicated to the prosecution
5 that, "If you don't offer this, then I'm not going
6 to give you the safety net," it would be reasonable
7 to believe that it looks like it might be going for
8 an all or nothing situation. However, in
9 questioning Mr. Abney it appears that all of his
10 thought processes are armed robbery and what has to
11 be proven and he left everything up to his counsel
12 to advise him what he should do. There is no doubt
13 he may have participated in those conversations.
14 However, it is our position that the standard of
15 norms for representation in this instance
16 definitely fell below that which is expected and by
17 counsel's own admission he has no doubt that the
18 result would have been different in this case had
19 there been a jury charge of strong armed or common
20 law robbery, Mr. Verner feels with certainty that
21 would have been the verdict that the jury would
22 have returned, and based on that I would ask that
23 the relief requested in the application be granted.

24 THE COURT: Thank you very much, Miss Smalls.
25 Yes, ma'am, Miss Kinzeler.

1 MS. KINZELER: Your Honor, with all due
2 respect to Miss Smalls, the testimony didn't
3 represent that but for the in-chambers conversation
4 Mr. Verner may have requested that jury charge.
5 Mr. Verner actually testified that they were
6 already considering not asking for a strong armed
7 robbery charge because they thought they were
8 winning. And, Your Honor, I'm not a Solicitor, not
9 a Public Defender, but it is my position and the
10 State's position that is a gamble you take when you
11 go to trial. The State would not give them a plea
12 offer to strong armed robbery so Mr. Verner and Mr.
13 Abney together had a decision whether to go forward
14 on armed robbery, ask for the lesser included which
15 would have almost guaranteed a conviction, which
16 would have been a maximum fifteen, so it would have
17 been a lesser sentence. But that is the defense
18 they were presenting the whole time, "We're guilty
19 of something but not this."

20 It was as equally possible that Mr. Abney
21 could have been acquitted and it just didn't turn
22 out that way. I think there is substantial case
23 law regarding ineffective assistance of counsel
24 claims and how hindsight doesn't establish
25 ineffective assistance of counsel, and Mr. Verner

1 is the Public Defender now, he had been a Public
2 Defender now for ten years at the time of this
3 trial, eight years, nine years at the time of this
4 trial, and I think that it was both Mr. Verner's
5 and Mr. Abney's position that they were winning at
6 that time and that that was a gamble they chose to
7 take. Because Mr. Abney may be prejudiced by no
8 jury charge for a strong armed robbery, that
9 doesn't mean that that is the result of any
10 inefficient performance on the part of Mr. Verner
11 and it is the State's position this PCR should not
12 be granted.

13 THE COURT: Okay. I understand the issues
14 and thank you for your argument and presentation.
15 I will take it under advisement. Hopefully I will
16 have an order out in the next several weeks.

17 Thank you very much.

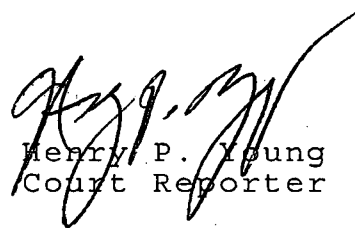
18 (Hearing concluded at 1:45 p.m.).
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I, the undersigned Henry P. Young, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case in the Circuit Court for Newberry County, South Carolina, on the 9th day of March, 2010.

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

July 14, 2010


Henry P. Young
Court Reporter

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	EIGHTH JUDICIAL CIRCUIT
COUNTY OF NEWBERRY	)	Case No.: 2009-CP-36-0107
	)	
Ted E. Abney, # 169743,	)	
	)	
Applicant,	)	
	)	
v.	)	ORDER OF DISMISSAL
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

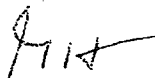
FILED
 NEWBERRY COUNTY
 2010 MAY 26 A 11:29
 JACQUEE B. BOWEN
 CLERK OF COURT

This matter comes before the Court by way of an application for Post-Conviction Relief (PCR) filed March 12, 2009. The Respondent made its Return on or about June 5, 2009. An evidentiary hearing into the matter was convened on March 9, 2010 at the Newberry County Courthouse. The Applicant was present at the hearing and was represented by Gwendlyne Y. Smalls, Esquire. Jennifer A. Kinzeler, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Charles V. Verner, Esquire, also testified. This Court also had before it a copy of the records of the Newberry County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the Appellate Court records, and the trial transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Newberry County Clerk of Court. Applicant was indicted at the January 2005, term of the Newberry County Grand Jury for Armed Robbery (2005-GS-36-0043). Charles V. Verner, Esquire, represented him. On May 18, 2005, the Applicant proceeded to trial pursuant to which he was found guilty as indicted. The Honorable Paul M. Burch sentenced him to confinement for a period of twenty-six (26) years.



A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. A brief was filed on the Applicant's behalf pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the Applicant's appeal. State v. Abney, Op. No. 2008-UP-184 (S.C. Ct. App. filed March 17, 2008). The Remittitur was issued on April 2, 2008.

ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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 v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate

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assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

The Applicant testified that he is currently incarcerated at Kirkland Correctional Institution where he is serving a twenty (20) year sentence for armed robbery. He testified that Charles Verner was appointed to represent him on this charge and that he was convicted by a jury trial. The Applicant testified that he was arrested on November 4, 2004 and that he was incarcerated for approximately three to five months before trial counsel met with him. He stated that the first time trial counsel came to visit him in jail, the prosecutor came with him. He stated further that during that meeting trial counsel did not go over any of the facts of case; rather, he was offered a plea.

The Applicant testified about a subsequent meeting with trial counsel during which they discussed a nineteen (19) year plea offer to armed robbery. He stated the meeting was short, and that he did not accept that plea offer. He testified that the only other time he met with trial counsel was at the courthouse the night before his trial started, but that trial counsel did not go over the State's evidence with him. The Applicant testified that he, his fiancée, and friend all met with trial counsel in an office at the courthouse, and that counsel was "in and out," so their actual meeting time was brief. He stated that meeting was about getting ready for trial, not about pleading guilty.

The Applicant testified that trial counsel never discussed possible defenses or the lesser-included offense of strong-arm robbery with him. He stated he thought "armed robbery" meant he had to have a weapon to be convicted. The Applicant also stated that he and trial counsel met one more time, for approximately ten to fifteen minutes, before the trial started, but they did not discuss defenses or what "armed robbery" really meant. He stated that trial counsel should have discussed strong-arm robbery with him, and that he believed the result of the trial would have been different if trial counsel had done so.

The Applicant acknowledged that he gave a statement to law enforcement in which he admitted to robbing the woman and stated he has always admitted to being involved in the crime but that he never admitted to having a weapon. The Applicant testified that at all times he maintained he did not have a weapon when he committed the crime and that a weapon was never found. He also testified that he gave trial counsel the name of a character witness to call on his behalf but that trial counsel never called her to testify at trial. The Applicant stated he could not recall whether the trial judge gave a jury instruction for strong-arm robbery, and stated he would not have understood it then anyway because he did not understand what armed robbery meant.

The Applicant acknowledged that the fact he did not have a weapon when he committed this crime was the main theme throughout trial counsel's opening statement. He also agreed that the trial court judge granted trial counsel's motion for a directed verdict on the possession of a weapon charge, because there was no evidence or testimony supporting that charge. The Applicant testified that, nonetheless, he was led to believe that he had to have a weapon to be convicted of armed robbery. He testified that, other than trial counsel's failure to discuss strong-arm robbery with him, he had no other complaints about trial counsel.

Trial counsel testified that he served as a judicial law clerk before working with the Public Defender's Office, and that he has been practicing criminal law since 1997. Counsel testified that he

met with the Applicant several times while the Applicant was in jail. He stated the Applicant was arrested in November 2004, and that he met with him in either late December 2004 or early January 2005. He referred to his notes from that meeting during which the Applicant told him he snatched the woman's purse. Trial counsel testified that he knows he met with the Applicant at least six times, but possibly more. Of his meetings with the Applicant, counsel could specifically recall meeting with the Applicant and his fiancée on February 3, 2005 to discuss the case further, as well as meeting with the Applicant again on March 30, 2005 and May 11, 2005.

Trial counsel testified that the Applicant was interested in a guilty plea, but that he did not want to plead guilty to armed robbery because he always maintained he never had a gun. He testified that he spoke with Ashley Wilson, the character witness to whom the Applicant referred. Counsel stated she was a former employer who would have testified about the Applicant's good character, but that he decided not to call her to testify because he did not want to put the Applicant's character at issue and because he wanted to preserve their right to give the last closing argument.

Counsel stated that six months elapsed between the Applicant's arrest and trial during which time he entered into plea negotiations with the solicitor on the Applicant's behalf. Counsel testified that the solicitor extended a nineteen (19) year plea offer to armed robbery but the Applicant did not want to accept it. Counsel stated that he knows the Applicant was aware of the difference between armed robbery and strong-arm robbery because the Applicant was willing to plead guilty to strong-arm robbery, but not armed robbery, because he always insisted he never had a weapon. Counsel testified further that he tried to convince the solicitor to offer the Applicant a plea to strong-arm robbery, but that the solicitor refused. He emphasized how hard he tried to get the solicitor to offer the Applicant a plea to strong-arm robbery, but the solicitor was unwilling to reduce the armed robbery to a strong-arm robbery. Counsel testified that the Applicant always admitted he was guilty of a charge, but complained the State overcharged him ~~because~~ given he was unarmed.

Counsel testified that his initial trial strategy was to prove Applicant was not guilty of armed robbery because he was not armed, given that the Applicant already gave a statement to law enforcement and always admitted he was guilty of a crime, just not armed robbery. Counsel stated the Applicant always knew that their trial strategy was – that he could not be guilty of armed robbery because he did not have a weapon. He testified that the only evidence in support of armed robbery came from the victim's testimony at trial, during which she described something "hard pressing into her stomach" and that "it was a gun," but also testified that she never saw a gun. Counsel stated that there was no other evidence of a weapon, and that as a result, the trial judge granted his motion for a directed verdict on count two of the indictment charging the Applicant with possession of a weapon.

Counsel then testified about his decision not to request a jury charge for strong-arm robbery as a lesser-included offense of armed robbery. He stated that his trial strategy regarding common law or strong-arm robbery changed during one of the breaks at trial during which the trial judge met with him and the solicitor in chambers. Counsel testified that, before the meeting in chambers, he already told both the trial judge and the solicitor that the Applicant wanted to plead guilty to strong-arm robbery, but the solicitor already refused to extend that offer during their plea negotiations before trial. Counsel testified that the trial court judge urged the solicitor to offer the Applicant a plea to strong-arm robbery. When the solicitor refused, the trial court judge told the solicitor he could not "have his cake and eat it too." He told the solicitor that, because he was unwilling to resolve the Applicant's case through a plea to strong-arm robbery, that he was not going to charge the jury on strong-arm robbery because he was not going to give the solicitor safety net of a lesser-included offense.

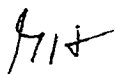
Counsel stated that, even though the trial court judge already said in chambers he was not going to give the jury an instruction for strong-arm robbery, he believed if he had requested the lesser-included offense jury instruction, the trial court judge would have had to give it. However, counsel

further stated that he and Applicant were already contemplating not asking the judge to give a strong-arm robbery jury charge for statutory reasons.

Counsel testified that at the end of the State's case, he and the Applicant believed they were winning the trial. He stated the only evidence presented to the jury was that the Applicant snatched the woman's purse, she chased him, and he drove away. He stated further that the only evidence before the jury regarding an "armed robbery" was the victim's testimony, and that the victim could not even see a weapon when she was trying to get her purse back. Counsel testified that he and the Applicant discussed together whether counsel should ask for a jury charge on strong-arm robbery. He testified that the Applicant knew he was facing ten to thirty years, no parole, if the jury convicted him of armed robbery, and that strong-arm robbery carried a maximum fifteen year sentence. Counsel testified that the Applicant understood the possible sentences, and that he specifically explained to him he could be found guilty of the lesser-included offense of strong-arm robbery, rather than armed robbery, if they requested the jury charge from the trial court judge. Counsel stated that he and the Applicant both thought they were winning the case, so they both decided not to ask for the strong-arm jury charge.

At this point, he and the Applicant believed the Applicant might be acquitted and go home; but, if they requested a jury charge on the lesser-included offense of strong-arm robbery, it was almost guaranteed the Applicant would be convicted of that offense because he had always admitted that he committed the crime but always contended he did not have a weapon when he did it. Counsel testified that he and the Applicant made a conscious choice not to request a jury instruction for strong-arm robbery.

Counsel also testified that although that was the decision they made during trial, in hindsight, he should have asked for a strong-arm robbery jury charge. He stated that he essentially argued the Applicant only committed strong-arm robbery, not armed robbery, in his opening, closing, and throughout trial, and that when he did not request the lesser-included jury charge, he essentially took the



option away from the jury to convict him of that offense. Counsel testified that at the time, however, he and the Applicant believed they were winning, so they did not press the strong-arm robbery issue.

Counsel stated that nonetheless, he believed they made the right decision at the time, and that they knowingly made the decision not to request the strong-arm jury charge because they felt they were winning. He testified that the Applicant was a part of this decision, that they discussed it, that he told the Applicant it was up to him. Counsel testified that the Applicant agreed it was a good decision not to request the strong-arm robbery jury charge. He reiterated that he talked about all of this with the Applicant and that the Applicant agreed he felt they were winning the case. He testified that the Applicant told him he wanted to go forward "all or nothing."

This Court finds that the Applicant's testimony that trial counsel never discussed strong-arm robbery with him is not credible, while also finding trial counsel's testimony is credible. The Applicant, in consultation with his counsel, made the strategic choice not to request the jury be charged with the lesser-included offense of strong-arm robbery. The choice was made based on sound and experienced professional judgment, and was valid under the circumstances. Accordingly, Mr. Verner's performance was not deficient. Therefore, this allegation is denied.

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.

This Court cautions Applicant that he 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), SCRCR, 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 24th day of May, 2010.

D. Garrison Hill
Circuit Judge

Greenville, South Carolina.

WITNESSES

Todd Johnson

WARRANT NUMBERS

I-317310

VERDICT

GUILTY

James Brown
Foreman of the Grand Jury

Date: *1/10/05* **TRUE BILL**

Donald A. Layton
Foreman
5/18/05

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

COURT OF GENERAL SESSIONS

January Term, 2005

Indictment # 05GS36-*43*

THE STATE

vs.

TED EDWARD ABNEY

INDICTMENT FOR

- 1) ARMED ROBBERY
2) ~~POSSESSION OF A FIREARM OR KNIFE DURING~~
~~THE COMMISSION OF A VIOLENT CRIME~~

I, TED EDWARD ABNEY, THE DEFENDANT, IN MY OWN PROPER PERSON, COME TO THE BAR OF THIS COURT, WAIVE GRAND JURY ACTION, AND FREELY AND VOLUNTARILY PLEAD _____ GUILTY TO THE CHARGE(S) OF:

THIS _____ DAY OF _____ A.D. _____

ATTEST:

DEFENDANT'S SIGNATURE

CLERK OF COURT, NEWBERRY, S.C.

THE STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

INDICTMENT FOR

1. ARMED ROBBERY
2. POSSESSION OF A FIREARM OR KNIFE DURING THE COMMISSION OF A VIOLENT CRIME

At a Court of General Sessions, convened on the 10th day of January, 2005, the Grand Jurors of Newberry County present upon their oath:

COUNT ONE

That TED EDWARD ABNEY, did in Newberry County, state aforesaid, on or about the 30th day of October, 2004, wilfully and unlawfully commit robbery while armed with a deadly weapon, to wit: a firearm, or while alleging, either by action or words, that he was armed while using a representation of a deadly weapon, or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, by wilfully, unlawfully and feloniously taking goods and/or monies from the person of Traci Roosen by means of force or intimidation, the said goods and/or monies being described: good and lawful money of these United States of America, and being owned by Traci Roosen, in violation of Section 16-11-330 of the South Carolina Code of Laws, 1976, as amended

~~COUNT TWO~~

~~That TED EDWARD ABNEY did in Newberry County, state aforesaid, on or about the 30th day of October, 2004, possess a firearm or visibly displayed what appeared to be a firearm, or visibly displayed a knife during the commission of a violent offense, to wit: Armed Robbery, or any lesser included violent offense, said offense being defined as a violent offense in Section 16-1-60 of the 1976 Code of Laws of South Carolina, as amended, and the said defendant(s) was/were convicted of committing or attempting to commit the said violent crime, Armed Robbery, or any lesser included violent offense, in violation of Section 16-23-490 of the South Carolina Code of Laws, 1976, as amended~~

PMB

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.

W. Thomas Jones
 Solicitor