

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge **S.C. Supreme Court**

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THOMAS A. SMART,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001808

A P P E N D I X

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF GENERAL SESSIONS
COUNTY OF HORRY)

STATE OF SOUTH CAROLINA

-VS-

THOMAS ALAN SMART,

THE FOLLOWING PROCEEDINGS WERE HELD BEFORE THE HONORABLE

IN THE CIRCUIT COURT OF HORRY COUNTY, BEGINNING AT 2:09
PM ON THE 19TH DAY OF JULY, 2010, AT THE HORRY COUNTY
COURTHOUSE, 15TH JUDICIAL DISTRICT, HORRY COUNTY GENERAL
SESSIONS COURT, CONWAY, SOUTH CAROLINA.

ORIGINAL

APPEARANCES:

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1 BAILIFF:

2 Order in the court. All rise,
3 please.

4 THE COURT:

5 Thank you. Everybody keep your
6 seat. Thank you very much.

7 All right, Solicitor, if you
8 would, call your first case?

9 MR. BRYAN:

10 Thank Your Honor.

11 If it please The Court?

12 The State calls Thomas Smart -- uh
13 -- on Indictments 2010-GS-26-682, for throwing bodily
14 fluids on a law enforcement officer;

15 2010-GS-26-683, for the failure to
16 stop for a blue light;

17 2010-GS-26-684, for threatening
18 the life of an officer; and

19 2010-GS-26-685 for resisting
20 arrest.

21 THE COURT:

22 All right. Thank you very much.

23 Is that correct, Mr. Von Herrmann?

24 MR. VON HERRMANN:

25 Yes, Your Honor.

1 THE COURT:

2 All right, thank you.

3 All right, members of the jury,
4 what we're going to do now is:

5 We have to choose 12 people to
6 serve on a jury, as well as one alternate.

7 This morning you were qualified to
8 serve as jurors. But what we need to do right now is to
9 make sure you are qualified to serve on a particular
10 case.

11 And what we are looking for is a
12 jury that can be fair and impartial. It's as simple as
13 that.

14 And to do that, I need to ask you
15 certain questions; and if any of these questions apply to
16 you, I need for you to respond.

17 They're very simple. They're very
18 straight forward. And please remember you are still
19 under oath.

20 In this particular case, the State
21 alleges that:

22 On or about December 26, 2009,
23 Thomas Alan Smart in Horry County did resist arrest.

24 Also, the State alleges that:

25 On or about December 26, 2009, in

1 Horry County, the Defendant Thomas Allen Smart did
2 threaten a public official.

3 Also on December 26, 2009, in
4 Horry County, Thomas Alan Smart did fail to stop for a
5 blue light.

6 And also on that same date in
7 Horry County, the Defendant Thomas Allen Smart did throw
8 bodily fluids on a correctional officer.

9 Now in that regard, the Defendant
10 has pled not guilty.

11 Thus I need to know if any of you
12 seen, heard, read, or have any knowledge from any source
13 whatsoever about this case, including but not limited to
14 the newspaper, the Internet, or the television?

15 In other words, do you know
16 anything at all about this case?

17 If you do, please stand.

18 (No response.)

19 THE COURT:

20 All right. No one stood.

21 If she would have the victim
22 please stand, if he is in the courtroom and introduce
23 himself to the jury.

24 MR. BRYAN:

25 It's Officer John Brantly.

1 THE COURT:

2 All right. If you will, turn
3 around and face the jury panel.

4 WHEREUPON: The victim did as
5 instructed by The Court.

6 COURT REPORTER:

7 Officer John whom? I'm sorry.

8 MR. BRYAN:

9 Brantly.

10 THE COURT:

11 Brantly.

12 All right. You may be seated.

13 Thank you.

14 Are any of you related by blood or
15 marriage, or have a close personal or social relationship
16 with this officer in this case?

17 If so, please stand.

18 (No response.)

19 THE COURT:

20 All right. Let the record
21 reflect that no one stood.

22 Mr. Thomas Smart, if you would
23 please stand and face the jury panel.

24 WHEREUPON: The Defendant did as
25 instructed by The Court.

1 THE COURT:

2 All right. You may be seated.

3 Thank you.

4 Are any of you related by blood or
5 marriage, or have any close personal or social
6 relationship with the Defendant Thomas Smart in this
7 case?

8 If so, please stand.

9 (No response.)

10 THE COURT:

11 All right. Let the record
12 reflect that no one stood.

13 And Mr. Bryan, if will stand and
14 introduce yourself and any members of your staff.

15 MR. BRYAN:

16 My name is Robert Bryan. I also
17 go by Bo Bryan.

18 Uh -- I don't have any members of
19 my staff with me. We'll just have Officer Brantly and
20 Officer Crews, Your Honor.

21 THE COURT:

22 All right, thank you.

23 Are any of you related by blood or
24 marriage, or have a close personal or social relationship
25 with Mr. Bryan in this case; or have been represented by

1 him at any point in time in the past?

2 If so please stand.

3 (No response.)

4 THE COURT:

5 All right. Let the record
6 reflect that no one stood.

7 Mr. Von Herrmann, if you would
8 stand and introduce yourself and any members of your
9 firm.

10 MR. VON HERRMANN:

11 Thank Your Honor.

12 My name's Burt Von Herrmann. I
13 was a prosecutor her in Horry County for 10 years.

14 And I've been in private practice.
15 I have my own law firm across the street for the last 2
16 to 2 and 1/2 years.

17 THE COURT:

18 All right, thank you very much.

19 Are any of you related by blood or
20 marriage or have a close personal or social relationship
21 with Mr. Von Herrmann in this case; or have been
22 represented by him at any time in the past, or are
23 currently being represented by him?

24 If so, please stand.

25 (No response.)

1 THE COURT:

2 Let the record reflect that no one
3 stood.

4 The witnesses in this case will be
5 an Officer John Brantly and an Officer Jeremy Crews and
6 an Officer Tim Cast.

7 In that regard, are any of you
8 related by blood or marriage, or have a close personal or
9 social relationship with any of these witnesses?

10 If so, please stand.

11 (No response.)

12 THE COURT:

13 All right. Let the record
14 reflect that no one stood.

15 Are any of you aware of or
16 conscious of any bias or prejudice for or against the
17 State in this case?

18 If so, please stand.

19 (No response.)

20 THE COURT:

21 No one stood.

22 Has any member of the jury panel
23 formed an opinion as to the guilt or innocence of the
24 Defendant, Mr. Thomas Smart, in this case?

25 If so, please stand.

1 (No response.)

2 THE COURT:

3 All right. Let the record
4 reflect that no one stood.

5 Is there any member of the jury
6 who is a member or a contributor to any group which has
7 as its primary concern the promotion of law-enforcement
8 or victims rights?

9 These groups would include, but
10 certainly not be limited to: MADD, SADD, or CAVE,
11 Citizens Against Violent Crime.

12 If so, please stand.

13 (No response.)

14 THE COURT:

15 All right. Let the record
16 reflect that no one stood.

17 Have you or any member of your
18 immediate family ever been involved in a crime of
19 personal violence?

20 A crime of personal violence could
21 be criminal sexual conduct, assault and battery of a high
22 and aggravated nature, assault and battery with intent
23 with intent to kill, murder, manslaughter, kidnapping or
24 armed robbery, et cetera.

25 Those are just some examples.

1 If you or any member of your
2 immediate family have been involved in crimes such as
3 this, please stand.

4 (No response.)

5 THE COURT:

6 All right. Let the record
7 reflect that no one stood.

8 Is there any member of the jury
9 panel who knows of any reason whatsoever why they could
10 not give the parties in this case a fair and impartial
11 trial?

12 If so, please stand.

13 (No response.)

14 THE COURT:

15 All right. No one stood.

16 Does any member of the jury panel
17 have any religious or philosophical objections to
18 rendering judgment against their fellow man?

19 If so, please stand.

20 (No response.)

21 THE COURT:

22 All right. No one stood.

23 Has any member of the jury panel
24 or any member of their family ever been prosecuted by
25 this solicitor or any member of the Solicitor's staff,

1 regardless of whether the case was dismissed or not?

2 If so, please stand.

3 (No response.)

4 THE COURT:

5 All right. Let the record
6 reflect that no one stood.

7 Anything further from the State?

8 MR. BRYAN:

9 No, Your Honor.

10 THE COURT:

11 Anything further from the Defense?

12 MR. VON HERRMANN:

13 Nothing from the Defense, Your
14 Honor.

15 THE COURT:

16 All right.

17 For the record, I find the jury
18 panel of qualified for this case.

19 Ms. Clerk, if you would give us 12
20 jurors and one alternate.

21 CLERK:

22 Yes sir.

23 THE COURT:

24 It's 5 and 5, 2 and 1.

25 CLERK:

1 Okay.

2 When I call you name, if you
3 please stand. And if you would come to the front and
4 bring any belongings that you have with you.

5 Juror Number 110, is Cheryl Evans.

6 (WHEREUPON: The juror came
7 forward and turned and faced counsel table as
8 instructed.)

9 CLERK:

10 What say the State?

11 MR. BRYAN:

12 Please present Ms. Evans.

13 JUROR EVANS:

14 Pardon?

15 CLERK:

16 Defense?

17 MR. VON HERRMANN:

18 Please present the juror.

19 CLERK:

20 Okay. Please be seated in the
21 jury box.

22 (WHEREUPON: This juror, having
23 been accepted by the parties, was seated as a juror in
24 this case.)

25 CLERK:

1 66, Anita Cooper.

2 (WHEREUPON: The juror came
3 forward and turned and faced counsel table as
4 instructed.)

5 CLERK:

6 What say the State?

7 MR. BRYAN:

8 Please present Ms. Cooper.

9 CLERK:

10 Defense?

11 MR. VON HERRMANN:

12 Please present the juror.

13 CLERK:

14 Please be seated in the jury box.

15 (WHEREUPON: This juror, having
16 been accepted by the parties, was seated as a juror in
17 this case.)

18 CLERK:

19 234, Robert Maybry, Jr.

20 (WHEREUPON: The juror came
21 forward and turned and faced counsel table as
22 instructed.)

23 CLERK:

24 What say the State?

25 MR. BRYAN:

1 Please present Mr. Mabry.

2 CLERK:

3 Defense?

4 MR. VON HERRMANN:

5 Please present the juror.

6 CLERK:

7 Please be seated in the jury box.

8 (WHEREUPON: This juror, having

9 been accepted by the parties, was seated as a juror in
10 this case.)

11 CLERK:

12 393, Jessica Volinski.

13 (WHEREUPON: The juror came
14 forward and turned and faced counsel table as
15 instructed.)

16 CLERK:

17 What say the State?

18 Solicitor

19 I'm sorry. What was that number
20 again?

21 CLERK:

22 393.

23 MR. BRYAN:

24 Please present the juror.

25 CLERK:

1 Defense?

2 MR. VON HERRMANN:

3 Please excuse the juror from the
4 trial of this case.

5 CLERK:

6 You're excused from this
7 particular case.

8 If you would just go back and be
9 seated.

10 (WHEREUPON: This jury panel
11 member, not being accepted by all parties, returned to
12 the panel and was not seated as a juror in this case.)

13 CLERK:

14 47, June Carroll.

15 (WHEREUPON: The juror came
16 forward and turned and faced counsel table as
17 instructed.)

18 CLERK:

19 What say the State?

20 MR. BRYAN:

21 Please excuse Ms. Carroll.

22 CLERK:

23 You are excused from this
24 particular case.

25 (WHEREUPON: This jury panel

1 member, not being accepted by all parties, returned to
2 the panel and was not seated as a juror in this case.)

3 CLERK:

4 2, Flora Abraham.

5 (WHEREUPON: The juror came
6 forward and turned and faced counsel table as
7 instructed.)

8 CLERK:

9 What say the State?

10 MR. VON HERRMANN:

11 Your Honor, if we could approach
12 one second?

13 THE COURT:

14 Sure. Solicitor.

15 (WHEREUPON: Counsel for each party
16 conferred off the record with The Court at the bench at
17 2:18 PM, July 19, 2010.)

18 THE COURT:

19 All right.

20 Ma'am, you may go back and sit out
21 in the audience. Thank you.

22 (WHEREUPON: This jury panel
23 member, being challenged for cause by the Defense during
24 the bench conference because of her employment as a
25 security guard and the challenge being upheld by The

1 Court, returned to the panel and was not seated as a
2 juror in this case.)

3 CLERK:

4 161, Katherine Hayes.

5 (WHEREUPON: The juror came
6 forward and turned and faced counsel table as
7 instructed.)

8 CLERK:

9 What say the State?

10 MR. BRYAN:

11 Please present Ms. Hayes.

12 CLERK:

13 Defense?

14 MR. VON HERRMANN:

15 Please excuse the juror in the
16 trial of this case.

17 CLERK:

18 You are excused from this
19 particular case.

20 (WHEREUPON: This jury panel
21 member, not being accepted by all parties, returned to
22 the panel and was not seated as a juror in this case.)

23 CLERK:

24 18, Clarence Bell.

25 (WHEREUPON: The juror came

1 forward and turned and faced counsel table as
2 instructed.)

3 CLERK:

4 What say the State?

5 MR. BRYAN:

6 Please present Mr. Bell.

7 MR. VON HERRMANN:

8 Please --

9 CLERK:

10 Defense?

11 MR. VON HERRMANN:

12 Please excuse the juror in the

13 trial of this case.

14 CLERK:

15 You're excused from this

16 particular case.

17 (WHEREUPON: This jury panel
18 member, not being accepted by all parties, returned to
19 the panel and was not seated as a juror in this case.)

20 CLERK:

21 44, Tracy Cannon Long.

22 (WHEREUPON: The juror came

23 forward and turned and faced counsel table as

24 instructed.)

25 CLERK:

1 What say the State?

2 MR. BRYAN:

3 Please present the juror.

4 CLERK:

5 Defense?

6 MR. VON HERRMANN:

7 Please present the juror.

8 CLERK:

9 Please be seated in the juror box.

10 (WHEREUPON: This juror, having
11 been accepted by the parties, was seated as a juror in
12 this case.)

13 CLERK:

14 240, Kristen Marciniak? 240?

15 Kris -- Kristen Marciniak.

16 (No response.)

17 CLERK:

18 You want me to just get another
19 one, Judge?

20 THE COURT:

21 (Nods in the affirmative.)

22 CLERK:

23 332, Mark Roach.

24 (WHEREUPON: The juror came
25 forward and turned and faced counsel table as

1 instructed.)

2 CLERK:

3 What say the State?

4 MR. BRYAN:

5 Please present Mr. Roach.

6 CLERK:

7 Defense?

8 MR. VON HERRMANN:

9 Please excuse the juror in the
10 trial of this case.

11 CLERK:

12 You are excused from this
13 particular case.

14 (WHEREUPON: This jury panel
15 member, not being accepted by all parties, returned to
16 the panel and was not seated as a juror in this case.)

17 CLERK:

18 206, Ronald Kamp.

19 (WHEREUPON: The juror came
20 forward and turned and faced counsel table as
21 instructed.)

22 CLERK:

23 What say the State?

24 MR. BRYAN:

25 Please present Mr. Kamp.

1 CLERK:

2 Defense?

3 MR. VON HERRMANN:

4 Please present the juror.

5 CLERK:

6 Please be seated in the jury box.

7 (WHEREUPON: This juror, having
8 been accepted by the parties, was seated as a juror in
9 this case.)

10 CLERK:

11 195, Glenn dell Jernigan.

12 (WHEREUPON: The juror came
13 forward and turned and faced counsel table as
14 instructed.)

15 CLERK:

16 What say the State?

17 MR. BRYAN:

18 Please present Mr. Jernigan.

19 CLERK:

20 Defense?

21 MR. VON HERRMANN:

22 Please present the juror.

23 CLERK:

24 Please be seated in the jury box.

25 (WHEREUPON: This juror, having

1 been accepted by the parties, was seated as a juror in
2 this case.)

3 CLERK:

4 64, Kevin Collins.

5 (WHEREUPON: The juror came
6 forward and turned and faced counsel table as
7 instructed.)

8 CLERK:

9 What say the State?

10 MR. BRYAN:

11 Please present Mr. Collins.

12 CLERK:

13 Defense?

14 MR. VON HERRMANN:

15 Please present the juror.

16 CLERK:

17 Please be seated in the jury box.

18 (WHEREUPON: This juror, having
19 been accepted by the parties, was seated as a juror in
20 this case.)

21 CLERK:

22 223, William Leckie, Jr.

23 (WHEREUPON: The juror came
24 forward and turned and faced counsel table as
25 instructed.)

1 CLERK:

2 What say the State?

3 MR. BRYAN:

4 Please present Mr. Leckie.

5 CLERK:

6 Defense?

7 MR. VON HERRMANN:

8 Please present the juror.

9 CLERK:

10 Please be seated in the jury box.

11 (WHEREUPON: This juror, having
12 been accepted by the parties, was seated as a juror in
13 this case.)

14 CLERK:

15 369, Sharon Stamm.

16 (WHEREUPON: The juror came
17 forward and turned and faced counsel table as
18 instructed.)

19 CLERK:

20 What say the State?

21 MR. BRYAN:

22 Please present the juror.

23 CLERK:

24 Defense?

25 MR. VON HERRMANN:

1 Please present the juror.

2 CLERK:

3 Please be seated in the jury box.

4 (WHEREUPON: This juror, having
5 been accepted by the parties, was seated as a juror in
6 this case.)

7 CLERK:

8 156, Coco Hardwick.

9 (WHEREUPON: The juror came
10 forward and turned and faced counsel table as
11 instructed.)

12 CLERK:

13 What say the State?

14 MR. BRYAN:

15 Please present Ms. Hardwick.

16 CLERK:

17 Defense?

18 MR. VON HERRMANN:

19 Please excuse the juror from the
20 trial of this case.

21 CLERK:

22 You're excused from this
23 particular case.

24 (WHEREUPON: This jury panel
25 member, not being accepted by all parties, returned to

1 the panel and was not seated as a juror in this case.)

2 CLERK:

3 379, Richard Tesone.

4 (WHEREUPON: The juror came

5 forward and turned and faced counsel table as

6 instructed.)

7 CLERK:

8 What say the State?

9 MR. BRYAN:

10 Please present the juror.

11 CLERK:

12 Defense?

13 MR. VON HERRMANN:

14 Please present the juror.

15 CLERK:

16 Please be seated in the jury box.

17 (WHEREUPON: This juror, having

18 been accepted by the parties, was seated as a juror in

19 this case.)

20 CLERK:

21 333, Megan Roberts.

22 (WHEREUPON: The juror came

23 forward and turned and faced counsel table as

24 instructed.)

25 CLERK:

1 What say the State?

2 MR. BRYAN:

3 Please present Ms. Roberts.

4 CLERK:

5 Defense?

6 MR. VON HERRMANN:

7 Please present the juror.

8 CLERK:

9 Please be seated in the jury box.

10 (WHEREUPON: This juror, having
11 been accepted by the parties, was seated as a juror in
12 this case.)

13 CLERK:

14 Christopher Jordan.

15 (WHEREUPON: The juror came
16 forward and turned and faced counsel table as
17 instructed.)

18 CLERK:

19 Sir, were you given a number
20 downstairs?

21 JUROR JORDON:

22 203.

23 CLERK:

24 203? Thank you.

25 What say the State?

1 MR. BRYAN:

2 Please excuse Mr. Jordan.

3 CLERK:

4 You are excused from this
5 particular case.

6 (WHEREUPON: This jury panel
7 member, not being accepted by all parties, returned to
8 the panel and was not seated as a juror in this case.)

9 CLERK:

10 371, Andrew Steier.

11 (WHEREUPON: The juror came
12 forward and turned and faced counsel table as
13 instructed.)

14 CLERK:

15 What say the State?

16 MR. BRYAN:

17 Please excuse Mr. Steier.

18 CLERK:

19 You're excused from this
20 particular case.

21 (WHEREUPON: This jury panel
22 member, not being accepted by all parties, returned to
23 the panel and was not seated as a juror in this case.)

24 CLERK:

25 300, Louis Pimpare. (Pronounced

1 Pim-pear.)

2 JUROR PIMPARE:

3 Pimpare. (Pronounced Pim-par-rie)

4 CLERK:

5 Pimpare. (Pronounced Pim-par-rie)

6 (WHEREUPON: The juror came

7 forward and turned and faced counsel table as

8 instructed.)

9 CLERK:

10 What say the State?

11 MR. BRYAN:

12 Please present the juror.

13 CLERK:

14 Defense?

15 MR. VON HERRMANN:

16 Please present the juror.

17 Please be seated in the jury box.

18 (WHEREUPON: This juror, having

19 been accepted by the parties, was seated as a juror in

20 this case.)

21 CLERK:

22 167, Dennis Herring?

23 (WHEREUPON: The juror came

24 forward and turned and faced counsel table as

25 instructed.)

1 MR. VON HERRMANN:

2 Is he one of the alternates?

3 CLERK:

4 Yes sir.

5 MR. VON HERRMANN:

6 What was his number?

7 CLERK:

8 Uh -- 167.

9 MR. VON HERRMANN:

10 Okay.

11 CLERK:

12 What say the State?

13 MR. BRYAN:

14 Please excuse Mr. Herring.

15 CLERK:

16 You're excused from this
17 particular case.

18 (WHEREUPON: This jury panel
19 member, not being accepted by all parties, returned to
20 the panel and was not seated as a juror in this case.)

21 CLERK:

22 226, Richard Leslie.

23 (WHEREUPON: The juror came
24 forward and turned and faced counsel table as
25 instructed.)

1 CLERK:

2 What say the State?

3 MR. BRYAN:

4 Please present Mr. Leslie.

5 CLERK:

6 Defense?

7 MR. VON HERRMANN:

8 Please excuse the juror in the
9 trial of this case.

10 CLERK:

11 You're excused from this
12 particular case.

13 (WHEREUPON: This jury panel
14 member, not being accepted by all parties, returned to
15 the panel and was not seated as a juror in this case.)

16 CLERK:

17 59, Jennifer Cormack.

18 (WHEREUPON: The juror came
19 forward and turned and faced counsel table as
20 instructed.)

21 MR. BRYAN:

22 Your Honor, may I ask how the --

23 THE COURT:

24 Sure.

25 MR. BRYAN:

1 How stand the strikes.

2 THE COURT:

3 This is the alternate. Defense
4 has one strike and they've already used it. And you have
5 two.

6 MR. BRYAN:

7 What was the number?

8 CLERK:

9 Uh -- Juror Number 69.

10 MR. BRYAN:

11 Please present the juror.

12 CLERK:

13 Defense?

14 MR. VON HERRMANN:

15 Please excuse the juror in the
16 trial of this case.

17 CLERK:

18 You're excused from this
19 particular case.

20 (WHEREUPON: This jury panel
21 member, not being accepted by all parties, returned to
22 the panel and was not seated as a juror in this case.)

23 THE COURT:

24 Y'all hold on one second. If you
25 would you approach; both of you.

1 (WHEREUPON: Counsel for each party
2 conferred off the record with The Court at the bench at
3 2:27 PM, July 19, 2010.)

4 CLERK:

5 262, Delores Moss.

6 (WHEREUPON: The juror came
7 forward and turned and faced counsel table as
8 instructed.)

9 CLERK:

10 What say the State?

11 MR. BRYAN:

12 Please present Ms. Moss.

13 CLERK:

14 Defense?

15 MR. VON HERRMANN:

16 Please present the juror.

17 Please be seated in the jury box.

18 (WHEREUPON: This juror, having
19 been accepted by the parties, was seated as a juror in
20 this case.)

21 THE COURT:

22 All right.

23 Is there any objections to the
24 jury or the process by which they were drawn?

25 What says the State?

1 MR. BRYAN:

2 No, Your Honor.

3 THE COURT:

4 What says Defense?

5 MR. VON HERRMANN:

6 None from Defense, Your Honor.

7 THE COURT:

8 All right, thank you very much.

9 Members of the jury, I'm going to
10 excuse you until 10:30 in the morning.

11 We're going to start this case at
12 10:30 in the morning.

13 But I want to give you two
14 instructions.

15 One:

16 I know you know very little about
17 the case other than what you have just heard.

18 But I would ask that you not
19 discuss the case with anybody; that you not talk about
20 the case with anybody.

21 Even when you get home, if your
22 spouse or your family or your friends ask you:

23 What is the case about?

24 Just tell them you're instructed
25 not to talk about it at all at this time.

1 Also:

2 I would ask that you not undertake
3 any independent investigation into this case.

4 Don't try to look it up on the
5 Internet or find out anything about it.

6 What I want you to do is get a
7 clean, fair, trial in this courtroom.

8 And what I want you to receive, I
9 want it to come from this courtroom, because we want to
10 make sure that the Defense and the State gets a fair
11 trial in this case.

12 So if you would do those two
13 things and be back at 10:30 in the morning, I would
14 appreciate it.

15 Thank you.

16 (WHEREUPON: The jury empanelled
17 in the case withdrew from the courtroom at 2:29 PM, July
18 19th, 2010; and was no longer present during the
19 following proceedings.)

20 THE COURT:

21 All right.

22 Solicitor, anything further?

23 MR. BRYAN:

24 No, Your Honor.

25 THE COURT:

1 All right. Mr. Von Herrmann,
2 anything further?

3 MR. VON HERRMANN:

4 No, Your Honor.

5 THE COURT:

6 All right. You're excused.

7 MR. BRYAN:

8 Your Honor?

9 THE COURT:

10 Yes.

11 MR. BRYAN:

12 The custody status of the

13 Defendant at this point?

14 THE COURT:

15 I would like to house him here if
16 we could.

17 MR. VON HERRMANN:

18 Uh -- Your Honor, I mean, we would
19 obviously object because the jury hasn't been sworn yet,
20 and --

21 THE COURT:

22 That's fine. I have no problem
23 with that.

24 But when they're sworn, I want him
25 to remain in custody.

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1 MR. VON HERRMANN:

2 I understand, Your Honor.

3 THE COURT:

4 All right, thank you.

5 MR. BRYAN:

6 Thank Your Honor.

7 (WHEREUPON: The court was
8 declared in recess at 2:30 PM, July 19th, 2010.)

9 (WHEREUPON: The court began the
10 proceedings of this particular case again at 10:28 AM,
11 July 20th, 2010; and all pertinent parties, along with
12 their counsel, were back and present in the courtroom.)

13 THE COURT:

14 Is there anything we need to
15 take up before we start?

16 MR. VON HERRMANN:

17 Yes, sir, Your Honor. I have --

18 THE COURT:

19 Why don't we go ahead and do
20 that.

21 MR. VON HERRMANN:

22 Uh -- Your Honor, either one of
23 two things, Your Honor.

24 I would like to have that he
25 sets the record -- either one or two things.

1 Either the State would stipulate
2 that -- uh -- jeopardy is attached and/or -- uh -- we can
3 bring the jury out and swear them and send them back, one
4 of the two.

5 I just want jeopardy to attach.

6 THE COURT:

7 Right.

8 MR. VON HERRMANN:

9 And normally, I think the
10 prosecutor's fine with that.

11 THE COURT:

12 Any problems, Mr. Bo?

13 MR. VON HERRMANN:

14 I mean, I don't want to make a
15 bunch of motions, you rule, and he not like your ruling;
16 and then all of a sudden, he takes it to a different
17 judge.

18 MR. BRYAN:

19 As long as we're clear that it's
20 a -- uh -- post trial and not a pretrial motion, I'm fine
21 with it.

22 MR. VON HERRMANN:

23 How could it be a post trial
24 motion and not have the trial?

25 MR. BRYAN:

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1 I'm just saying as long as we're
2 clear that it's not a pretrial motion or a motion -- uh
3 -- that must be made prior to swearing the jury, I'm fine
4 with it.

5 THE COURT:

6 You want me to bring out the
7 jury and let's swear them in --

8 MR. BRYAN:

9 That'd be fine with me.

10 THE COURT:

11 -- and appoint a foreperson and
12 send them out and do motions?

13 MR. VON HERRMANN:

14 I mean, I hate to do it that
15 way.

16

17 THE COURT:

18 I don't mind.

19 MR. VON HERRMANN:

20 But it's certainly -- I mean, I
21 hate -- you know -- running juries in and out. But if
22 that makes the prosecutor feel comfortable?

23 THE COURT:

24 All right.

25 MR. VON HERRMANN:

1 And -- And -- And Judge, I'm --
2 I'm --
3 THE COURT:
4 Where's your client.
5 MR. VON HERRMANN:
6 -- you know -- I was talking to
7 the officer.
8 Uh -- You know, we might have
9 this case resolved. And -- uh --
10 THE COURT:
11 All right.
12 MR. VON HERRMANN:
13 -- you know -- we might not.
14 THE COURT:
15 Mr. Moore?
16 DEPUTY:
17 Yes sir.
18 THE COURT:
19 When they come out, would you
20 make sure that Mr. Jernigan sits in the Foreman's seat.
21 DEPUTY:
22 Jernigan?
23 THE COURT:
24 Jernigan. Just whenever they
25 come out.

1 DEPUTY:

2 Okay.

3 THE COURT:

4 All right. Y'all ready to
5 bring out the jury and swear them in?

6 MR. BRYAN:

7 Yes sir. We can bring the
8 lights up if you want to.

9 MR. VON HERRMANN:

10 Your Honor, as soon as they cut
11 this off, I'm ready.

12 THE COURT:

13 How do you turn the lights on.

14 CLERK:

15 I think you have to cut them all
16 the way off and then back on, Bobby.

17 THE COURT:

18 All right. You can go ahead
19 and bring the jury out.

20 DEPUTY:

21 Okay.

22 (WHEREUPON: The jury empanelled
23 in the case was escorted back into the courtroom at 10:33
24 AM, July 20th, 2010; and was in fact present during the
25 following proceedings.)

1 THE COURT:

2 Good morning

3 JUROR JERNIGAN:

4 Good morning, sir.

5 THE COURT:

6 All right. Ms. Clerk, would you
7 swear the jury in?

8 CLERK:

9 Yes sir.

10 WHEREUPON: The jury was sworn in
11 this case at 10:34 AM, July 20th, 2010.

12 THE COURT:

13 Thank you, Heather.

14 Mr. Jernigan, I'm going to appoint
15 you the Foreperson of the Jury. You will be the
16 spokesperson for the jury.

17 FOREPERSON:

18 Yes sir.

19 THE COURT:

20 All right. Members of the jury, I
21 had to bring you out, just for a minute, to swear you in
22 so that we could officially begin this case.

23 But -- and you can leave
24 everything in your seats -- But I'm going to have to ask
25 send you out for just a few minutes while we take up

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1 motions, now that the case has officially begun.

2 So if you don't mind, just step
3 out for a few minutes and we'll bring you back.

4 And again, do not discuss the
5 case.

6 (WHEREUPON: The jury empanelled
7 in the case withdrew from the courtroom at 10:35 AM, July
8 20th, 2010; and was no longer present during the
9 following proceedings.)

10 THE COURT:

11 All right, Mr. Von Herrmann, be
12 glad to hear from you.

13 MR. VON HERRMANN:

14 Thank Your Honor.

15 -- Uh -- Your Honor, we have a
16 number of pretrial motions.

17 Uh -- First of all, there's -- uh
18 -- our -- we have a motion in limine to eliminate any
19 mention of any blood bourn pathogens or diseases that the
20 client might have.

21 There's no indication there's
22 going to be anybody here to testify as to whether he does
23 or does not have them.

24 And we would -- uh -- specifically
25 request that all the witnesses -- uh -- not mention any

1 information that they might because it would be hearsay.

2 THE COURT:

3 Mr. Bryan --

4 MR. BRYAN:

5 No --

6 THE COURT:

7 -- any objections?

8 MR. BRYAN:

9 No sir. We don't intend to
10 introduce that. And I'll make sure if we get into --

11 THE COURT:

12 Then make sure they all understand
13 that.

14 MR. BRYAN:

15 I will make sure with Officer
16 Brantly that there's no mention of that.

17 MR. BRANTLY:

18 That's fine.

19 THE COURT:

20 All right. We'll grant that one.

21 Second one?

22 MR. VON HERRMANN:

23 Your Honor, the second motion is
24 absolutely no mentioning of any exact speed of what the
25 Defendant was doing.

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1 At the time, it was just a matter
2 of -- you know -- certainty they can mention whatever
3 speed they were going if they were driving.

4 But there's no indication or
5 report or anywhere else that there's a radar and how fast
6 he was going.

7 We just would want to move to
8 exclude that.

9 THE COURT:

10 Mr. Bryan?

11 MR. BRYAN:

12 Uh -- Let me make sure that don't
13 intend to testify that way (trails off to inaudible).

14 COURT REPORTER:

15 I'm sorry. I'm losing you. Would
16 you turn that mike toward him?

17 DEPUTY:

18 Turn it on?

19 THE COURT:

20 Turn it toward him.

21 MR. BRYAN:

22 That's -- uh -- That's fine, Your
23 Honor.

24 I think what the -- uh --
25 testimony will be, will be how fast the officers were

1 going --

2 THE COURT:

3 That's fine.

4 MR. BRYAN:

5 -- and whether they were gaining
6 or not on the Defendant.

7 THE COURT:

8 That's fine.

9 All right?

10 MR. VON HERRMANN:

11 Uh -- The third one, Your Honor,
12 is no mention of spitting towards the staff of the
13 hospital, or any conduct at the hospital with regards to
14 any kind of attempted violation of any of their rights.

15 As he's not charged with that,
16 that would be irrelevant, and it would not certainly be
17 relevant and -- uh -- applicable in this case.

18 MR. BRYAN:

19 Well, I don't think we intend to
20 testify to that, Your Honor.

21 THE COURT:

22 All right. I'll grant the
23 motions.

24 MR. VON HERRMANN:

25 No mentioning of threatening the

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1 hospital staff in any way, or any other public official
2 other than Mr. Brantly, who was the only one who is
3 mentioned within the indictment.

4 THE COURT:

5 Mr. Bryan?

6 MR. BRYAN:

7 And I don't agree with that, Your
8 Honor. It's res gestae. It's a part of what we're going
9 to have to prove.

10 And basically the threats were:
11 He was threatening everybody at
12 the scene.

13 We'll have a video where -- just
14 so you kind of understand what is going to happen.

15 The threatened officer is the
16 first one in pursuit.

17 His video didn't work.

18 The other officer shows up behind
19 him.

20 There's going to be a video That's
21 going to be slightly off-camera. And while it's -- of
22 what's going on with the arrest and all that -- And while
23 that's going on -- uh -- he was threatening everybody.

24 He comes back in. And Brantly's
25 got him. And you can actually see on the video where

1 he's trying to pull away from Brantley to go -- uh -- I
2 would assume -- jump on somebody else.

3 So he was making all kind of
4 threats about shooting this one, that one, and the other
5 one.

6 And -- uh -- even though it's not
7 charged conduct, I would say it would be impossible to
8 separate.

9 It's actually happening at the --
10 THE COURT:

11 Right.

12 MR. BRYAN:

13 -- scene while he's threatening
14 Brantly.

15 THE COURT:

16 I agree.

17 MR. VON HERRMANN:

18 However, Your Honor, it's
19 mentioned in the indictment specifically where they could
20 have listed any and all people, or any and all
21 enforcement, they specifically mention John Brantly as
22 being the one that's threatened.

23 And therefore, they have elected
24 to choose that element of the crime, which they must
25 prove.

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1 THE COURT:

2 Right.

3 MR. VON HERRMANN:

4 And therefore, anything else is
5 irrelevant as to whether or not he threatened anybody
6 else.

7 They -- They optioned for that
8 element.

9 They optioned to put his name in
10 the indictment.

11 They ought to be held to -- to
12 make sure that that is the person that he threatened.

13 THE COURT:

14 Your response?

15 MR. VON HERRMANN:

16 We intend to prove that, Your
17 Honor. That's what we intend to prove. And that's the
18 element that we've charged.

19 We also think that we should be
20 allowed to testify under res gestae to what actually
21 happened at the event.

22 I don't think it's unfairly
23 prejudicial to give the jury the full picture of what was
24 going on at the scene.

25 We've agreed not to mention

1 anything that happened afterwards.

2 But I think that would be unfairly
3 prejudicial and not before the -- the jury.

4 But what's actually happening at
5 the time he's being threatened, I think is important for
6 the jury to understand what happened in --

7 THE COURT:

8 I'm going to overrule that motion.

9 MR. VON HERRMANN:

10 I was going to say, Your Honor, if
11 I could, just -- you know -- with regards to testimony is
12 all I'm concerned about there.

13 They are going to put their entire
14 video in. I'm not --

15 THE COURT:

16 Okay. I got you. Well, that's
17 fine. I mean --

18 MR. VON HERRMANN:

19 I mean, I don't care about --

20 THE COURT:

21 The video will show what happened.

22 MR. VON HERRMANN:

23 I just don't want either one of
24 these officers standing up there saying:

25 Well, he threatened me too.

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1 Because it's clearly prejudicial
2 way beyond -- I mean -- you know -- more prejudicial than
3 probative if he -- if they start saying:

4 Well, he threatened this officer,
5 this officer, this officer, this officer.

6 The video stands alone.

7 I have no objection to the video.

8 But they have -- they have listed
9 John -- John Brantly.

10 And quite frankly -- uh -- the
11 video actually cuts off in the audio to where we don't
12 really know what he's saying.

13 Uh -- And -- you know -- if we
14 need to -- uh -- proffer the -- the video, that's fine.

15 THE COURT:

16 Well, who's going to testify, John
17 Brantly?

18 MR. BRYAN:

19 To be fair, Your Honor, John --

20 THE COURT:

21 He can --

22 MR. BRYAN:

23 John Brantly, and Crews -- and
24 just to be fair -- so that we flesh it all out.

25 THE COURT:

1 Right.

2 MR. BRYAN:

3 I just spoke to Officer Crews, who
4 will say that:

5 Although he didn't threaten me
6 directly -- So no one's going to come in and say -- other
7 than Brantly -- that:

8 He threatened me directly.

9 They will probably both say:

10 He was threatening to kill us all.

11 Because he did say that.

12 He was basically saying:

13 I'm going to shoot everybody.

14 Something to that effect. So --

15 THE COURT:

16 And that's on the video?

17 MR. VON HERRMANN:

18 -- he didn't say:

19 I'm going to shoot you.

20 Well, the problem is with the
21 audio.

22 You can hear -- I'm able to pick
23 up, one time, where he says something -- uh -- about
24 shooting.

25 Uh --

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1 MR. VON HERRMANN:

2 Your Honor --

3 THE COURT:

4 Well, they're both on the video --

5 MR. BRYAN:

6 The issue is that -- that

7 basically -- you know -- the Defendant's not miked up.

8 Uh -- Crews is.

9 And the guy getting threatened is
10 not Crews.

11 So he's not necessarily the
12 closest on to him.

13 So you can hear some stuff. And
14 what some people can hear, I'm not going to presume to
15 say.

16 I'm going to say what I can hear,
17 and -- and ask them to listen to it.

18 MR. VON HERRMANN:

19 Your Honor, if I can?

20 If we -- We can watch the video if
21 we need to.

22 The -- The problem with the video
23 -- or the audio -- is not the fact that you can't hear
24 it.

25 The problem with the audio is:

1 The last word you hear before he
2 remotely cuts it off is the F-word.

3 And he doesn't want to have
4 anybody else hear the rest of the conversation. And he
5 cuts it off.

6 So it's not a matter, or an issue,
7 of whether or not you can hear it. It's a matter of:

8 They intentionally caused it not
9 to be heard.

10 THE COURT:

11 Right.

12 MR. VON HERRMANN:

13 And again, can Your Honor, we --
14 we will not object to the video coming in at all with
15 whatever audio and video there is.

16 THE COURT:

17 Mr. Bryan?

18 MR. BRYAN:

19 I'm sorry, Your Honor.

20 What was the -- the -- I mean --
21 uh -- I think that that's -- uh -- argument before the
22 jury.

23 I -- I don't think there's --

24 THE COURT:

25 Yeah.

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1 MR. BRYAN:

2 -- like -- If none of it was on
3 video --

4 THE COURT:

5 And you have --

6 MR. BRYAN:

7 -- it wouldn't be precluded.

8 THE COURT:

9 -- two public officials that were
10 at the scene.

11 They saw what happened. And
12 they're going to testify as to what happened.

13 MR. BRYAN:

14 Yes, sir, Your Honor.

15 THE COURT:

16 He's charged with resisting arrest
17 and threatening a public official. They're both public
18 officials.

19 I'm going to allow those two to
20 testify.

21 MR. BRYAN:

22 The officer who's this video is
23 will testify. He can be cross examined about it. The
24 argument can be made.

25 Obviously, if we didn't have any

1 video, we wouldn't be precluded from going forward.

2 THE COURT:

3 Right.

4 MR. BRYAN:

5 The fact that we've got some,
6 shouldn't preclude us.

7 THE COURT:

8 Right. Right. I'm going to
9 overrule that one.

10 MR. VON HERRMANN:

11 Thank Your Honor.

12 And, of course, please note my
13 exception.

14 THE COURT:

15 Right. Anything further?

16 MR. VON HERRMANN:

17 Yes, sir, Your Honor.

18 There's a firearm that was
19 allegedly found in the truck later on by somebody. I am
20 not even sure who it is.

21 We would -- uh -- mention that
22 that be precluded from testimony, as there is no firearm
23 here. There's no testimony that -- There's nobody that
24 found it.

25 These officers didn't find it.

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1 MR. BRYAN:

2 Don't intend to -- uh -- elicit
3 that testimony.

4 THE COURT:

5 All right. We'll do that one.

6 MR. VON HERRMANN:

7 Motion to sequester the witnesses,
8 Your Honor.

9 THE COURT:

10 No problem there. Any problem for
11 you, Mr. Bryan?

12 MR. BRYAN:

13 We just ask you allow us, from the
14 statute, that -- uh -- Officer Brantly, the lead officer,
15 be allowed to stay.

16 THE COURT:

17 That'll be fine. All right.

18 MR. VON HERRMANN:

19 And no -- No objection from the
20 State -- from the Defense.

21 MR. BRYAN:

22 Get use to it over there.

23 MR. VON HERRMANN:

24 I'm telling you. I'm having --
25 struggling.

1 That's the only motions I have,
2 Your Honor.

3 THE COURT:

4 All right.

5 Anything from the State?

6 MR. BRYAN:

7 Uh -- Your Honor, I just want to
8 clarify one thing.

9 On the -- uh -- indictment, there
10 is -- uh -- let me get that indictment.

11 Indictment 2010-GS-26-682 is for
12 threatening the life of a public official. And there is
13 a scribner's error on it.

14 Uh -- What happened is, it says --
15 Do you have a copy of the indictment? You got that --

16 THE COURT:

17 682 is throwing bodily fluids.

18 MR. BRYAN:

19 That's the one I'm referring to.

20 I'm sorry, Your Honor.

21 THE COURT:

22 Okay.

23 MR. BRYAN:

24 Throwing bodily fluids on a
25 correctional facility employee or a local law enforcement

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1 officer.

2 Uh -- In the body of the
3 indictment, it contains all the elements of the offense.

4 It names -- uh -- John Brantly as
5 the officer.

6 But then, it incorrectly
7 identifies him as a local correctional facility employee
8 as supposed to local law-enforcement officer, which he
9 obviously is.

10 Uh -- And I would just -- uh -- to
11 that end, just make the quick argument:

12 Uh -- The indictment has it -- or
13 excuse me -- The warrant has it correctly in the -- uh --
14 body of it.

15 The police report, which he's got,
16 lists him as the one who was spit upon.

17 Uh -- We came here to try the case
18 last time. He's the only officer here.

19 Everybody knows -- Mr. Von
20 Herrmann and this Defendant -- everybody knows he's an
21 Horry County Officer.

22 And I would just cite -- uh --
23 State versus -- which I have a copy of -- State versus
24 Wilkins, which states -- It's very similar Your Honor,
25 but -- uh -- where they actually, I think, named the

1 wrong victim.

2 Here you've got the right victim.

3 Uh -- And we're just asking you to
4 take the -- all the surrounding circumstances into
5 account -- uh -- to make an accurate determination of
6 whether he was prejudiced by a lack of notice and
7 insufficient indictment.

8 And I would also note:

9 It should probably be -- the word
10 is "sufficient -- uh -- indictment."

11 Uh -- Case law requires that the
12 motion be made prior to swearing of the jury by the
13 Defendant.

14 So -- uh -- basically Mund (?
15 phonetic) says that:

16 You have to pick a choice.

17 Either you make your motion based
18 on the insufficiency of the indictment, or you take the
19 choice, cancel the jury.

20 And State v Means (? phonetic),
21 says:

22 All surrounding circumstances must
23 be weighed to make an accurate determination of whether
24 the Defendant was prejudiced by lack of notice.

25 While The Court should focus

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1 primarily on the charging language in the body of the
2 indictment, a caption or title which is consistent with
3 the language in the body may be considered a conjunction.

4 And you'll note just from -- uh --
5 looking right on the indictment, it says:

6 Or local law-enforcement officer
7 -- uh -- one inch above the body of the indictment.

8 THE COURT:

9 All right. Any objections, Mr.
10 Von Herrmann?

11 MR. VON HERRMANN:

12 Yes, Your Honor, I have an
13 objection; in that:

14 That we prepared for this case
15 based on the fact that there was a election by the
16 prosecutor to send this case to the grand jury with that
17 information as a correctional employee.

18 We knew that not to be -- uh --
19 you know -- obviously, the -- the truth -- uh -- or at
20 least we believed it not to be the truth.

21 I mean, a lot of times, they move
22 from jail to -- you know -- Sheriff's Department to the
23 Police Department and things like that.

24 However, Your Honor, that is
25 highly prejudicial.

1 The Solicitor had the opportunity
2 to have presented the correct indictment. He made an
3 option to select, out of an entire statute, one
4 particular -- you know -- and named in the statute, a
5 particular position.

6 Uh -- You know, while notice might
7 be -- We're not objecting or asking to have the
8 indictment quashed. We just want the element proved.

9 He set forth the element. We want
10 him to prove it.

11 If he can prove it to the jury's
12 satisfaction --

13 THE COURT:

14 Right now, he just wants to amend
15 the indictment.

16 MR. VON HERRMANN:

17 Yes, sir, Your Honor. We would
18 object to amending the indictment, as it -- you know --
19 he is changing an element of the crime.

20 THE COURT:

21 All right. I'm going to overrule
22 that objection.

23 I'm going to -- to look at the
24 totality of the circumstances.

25 The warrant has the proper reading

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1 to it.

2 The statute refers to both of
3 them.

4 It doesn't change anything as far
5 as notice goes.

6 MR. BRYAN:

7 And --

8 THE COURT:

9 And this is two different
10 employees --

11 MR. BRYAN:

12 -- uh -- Just to --

13 THE COURT:

14 -- which they are basically both
15 law enforcement.

16 MR. BRYAN:

17 -- create a -- a good -- a good
18 record for us, Your Honor, I'll -- uh -- ask to make this
19 warrant a copy and a --

20 THE COURT:

21 Right.

22 MR. BRYAN:

23 -- Court's Exhibit.

24 MR. VON HERRMANN:

25 And of course, Your Honor, I've

1 asked The -- uh -- The Court to note my objection to --

2 THE COURT:

3 Sure.

4 MR. VON HERRMANN:

5 -- the fact that -- you know -- I
6 don't believe it's sufficient.

7 Thank Your Honor.

8 MR. BRYAN:

9 The warrant will be Court's 2.

10 And I've already had the police
11 report marked as Court's 1, Your Honor. And I'd ask to
12 make that a Court's Exhibit 2.

13 THE COURT:

14 The record will reflect the
15 amendment to the indictment.

16 Anything further?

17 MR. BRYAN:

18 Nothing from the State, Your
19 Honor.

20 MR. VON HERRMANN:

21 Your Honor -- uh --

22 COURT REPORTER:

23 Just a minute. Give me a chance
24 to mark this.

25 WHEREUPON: THE ARREST WARRANT WAS

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1 MARKED BY THE COURT REPORTER AS COURT'S EXHIBIT NUMBER 2
2 FOR THE RECORD.

3 THE COURT:

4 Go ahead.

5 MR. VON HERRMANN:

6 Your Honor, we might be able to
7 resolve this case if we can step back and talk with The
8 Court in the -- uh -- chambers with regards to a
9 particular ruling that -- uh -- I don't want to present
10 right here, but maybe I could allow The Court to
11 understand and hear, and figure out, in -- in a -- in a
12 -- maybe it's a presump -- presumption.

13 THE COURT:

14 Why don't we do it up here with
15 the mike on?

16 MR. VON HERRMANN:

17 Uh -- It's pretty complicated,
18 Your Honor.

19 I don't know that you -- I mean
20 I'm a we can; but -- uh -- I mean -- it -- it's --

21 MR. BRYAN:

22 You and I both?

23 MR. VON HERRMANN:

24 No. I mean, it -- it's not --
25 It's just one of those things that probably -- But, I

1 mean, we can -- I'll certainly be happy to come up there
2 and --

3 THE COURT:

4 Why don't we do that.

5 MR. VON HERRMANN:

6 Your Honor, if you'd just give me
7 one second.

8 THE COURT:

9 Sure.

10 MR. VON HERRMANN:

11 I actually had it open, and shut
12 my book.

13 (WHEREUPON: Counsel for each party
14 conferred off the record with The Court at the bench at
15 10:50 AM, July 20th, 2010.)

16 THE COURT:

17 Are y'all want to put that on the
18 record?

19 MR. VON HERRMANN:

20 Your Honor, we were just doing --
21 We were just saying that there's a motion to dismiss
22 based on the fact that the statute requires "throw" or
23 "throwing."

24 And in this particular case, there
25 is no allegation of anything other than -- uh -- some

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1 type of spitting.

2 Uh -- And we would say that the
3 motion -- or -- or that there would be insufficient
4 evidence at any point.

5 We'll renew that, of course, if --
6 at directed verdict motion.

7 THE COURT:

8 All right.

9 MR. VON HERRMANN:

10 But that -- That'll be the motion.

11 THE COURT:

12 Thank you. Any response,

13 Solicitor?

14 MR. BRYAN:

15 Uh -- Just briefly, Your Honor.

16 I'm looking at this -- uh -- the
17 American Heritage Dictionary. And in its language, which
18 we got from the -- uh -- from the chambers, the second
19 definition of "throw" -- which is what's required -- is
20 "to discharge into the air by any means."

21 Uh -- The third definition is "to
22 hurl with great force, as in anger."

23 Uh -- I'd say that under either of
24 those -- uh -- definitions that that's what -- the
25 conduct that's charged here.

1 But certainly, it's a jury
2 question.

3 THE COURT:

4 I agree. I'm going to overrule
5 the objection.

6 MR. VON HERRMANN:

7 Thank Your Honor.

8 THE COURT:

9 Still, it's well stated and well
10 thought out.

11 MR. VON HERRMANN:

12 Please note my objection, Your
13 Honor.

14 THE COURT:

15 So noted. Anything further?

16 MR. VON HERRMANN:

17 Uh -- Yes, Your Honor.

18 I'm not really sure what they're
19 going to play.

20 I think they're going to use in
21 their opening -- Are you --

22 MR. BRYAN:

23 No. I'm just ready to play the
24 video when we get to the testimony.

25 MR. VON HERRMANN:

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1 Oh, that's fine.

2 Your Honor, if I could about five
3 minutes with my client.

4 THE COURT:

5 Sure.

6 MR. VON HERRMANN:

7 Okay.

8 WHEREUPON: Defense Counsel leaves
9 with his client to confer in the adjoining conference
10 room at 10:59 AM, July 20th, 2010.

11 WHEREUPON: Defense Counsel and
12 his client return to the courtroom at 11:05 AM, July
13 20th, 2010.

14 MR. VON HERRMANN:

15 I've got one thing to put on the
16 record.

17 MR. BRYAN:

18 All right.

19 THE COURT:

20 All right. Is everybody ready?

21 MR. BRYAN:

22 Yes sir.

23 MR. VON HERRMANN:

24 Your Honor, if I just on the
25 record -- you know -- one thing.

1 I've explained our potential
2 defenses.

3 Uh -- I've explained the potential
4 penalty for each and every crime he's accused of.

5 I've -- We've go over ad nauseam
6 the -- uh -- the information and evidence against him.

7 Uh -- I have explained to him,
8 even with my advice as to whether or not he should
9 proceed to trial, the potential of what the sentence
10 could be.

11 Uh -- He has discussed it with his
12 family, albeit -- you know -- it's probably not as much
13 as he has with me. And his family has advised
14 accordingly as to how they felt.

15 Uh -- But I just want to put on
16 the record that -- uh -- he is making his choice to go to
17 trial on his own. And he's indicated that to me.

18 And I would appreciate it if The
19 Court would -- you know -- inquire as to him -- uh --
20 THE COURT:

21 Sure.

22 MR. VON HERRMANN:

23 -- you know -- whether that is
24 true and accurate; whether or not I -- he believes that I
25 need to do anything else.

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1 THE COURT:

2 All right.

3 Mr. Smart?

4 DEFENDANT SMART:

5 Yes sir.

6 THE COURT:

7 Would you please stand up.

8 DEFENDANT SMART:

9 Yes sir.

10 THE COURT:

11 You understand that of course you
12 have the right to go to a trial just like you're doing.

13 There's no problem with that at
14 all.

15 However, if you choose to go to
16 trial, you know it may not go the way you want it to go.

17 Uh -- It -- It's really up to you.

18 I just want to make sure that
19 nobody is pushing you to go to trial; nobody's forcing
20 you to go to trial; you're doing it because you want to.

21 Is that correct?

22 DEFENDANT SMART:

23 Yes sir. (Whispering low.)

24 THE COURT:

25 Has anybody promised you any type

1 of reward, or gift, or inducement, or anything like that;
2 or made any promises to you to make you go to trial?

3 DEFENDANT SMART:

4 No sir. (Whispering low.)

5 THE COURT:

6 Are you going to trial solely
7 because you want to?

8 DEFENDANT SMART:

9 Yes sir. (Whispering low.)

10 THE COURT:

11 Have you had enough time to talk
12 with your lawyer?

13 DEFENDANT SMART:

14 Yes sir. (Whispering low.)

15 THE COURT:

16 Has your lawyer answered all of
17 your questions.

18 DEFENDANT SMART:

19 Yes sir. (Whispering low.)

20 THE COURT:

21 Do you need more time with your
22 lawyer?

23 DEFENDANT SMART:

24 No sir. (Whispering low.)

25 THE COURT:

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1 Do you have any questions for your
2 lawyer at this time.

3 DEFENDANT SMART:

4 No sir. (Whispering low.)

5 THE COURT:

6 All right.

7 Have you also had an opportunity
8 to talk with your family?

9 DEFENDANT SMART:

10 Yes sir. (Whispering low.)

11 THE COURT:

12 All right.

13 COURT REPORTER:

14 Your Honor, I'm not getting any
15 answer on the record.

16 THE COURT:

17 All right. Can you just speak
18 up.

19 DEFENDANT SMART:

20 Okay.

21 THE COURT:

22 This man has to hear you.

23 DEFENDANT SMART:

24 (Nods in the affirmative.)

25 THE COURT:

1 All right.

2 You've had an opportunity to speak
3 with your family. Is that correct?

4 DEFENDANT SMART:

5 (Nods in the affirmative.)

6 THE COURT:

7 All right.

8 After talking with your family;
9 after talking to your lawyer and thinking it through, are
10 you going to trial freely and voluntarily?

11 DEFENDANT SMART:

12 Yes sir.

13 THE COURT:

14 Is that something you want to do?

15 DEFENDANT SMART:

16 Yes sir.

17 THE COURT:

18 And you have no one questions for
19 your lawyer or The Court at this time.

20 DEFENDANT SMART:

21 No sir.

22 THE COURT:

23 All right.

24 Seems to me, he's doing it because
25 he wants to.

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1 MR. VON HERRMANN:

2 I appreciate it.

3 THE COURT:

4 And intelligently. And -- And
5 obviously, has a good lawyer. And that's his choice.

6 MR. VON HERRMANN:

7 Your Honor, that was my opinion as
8 well. I just wanted the record to be clear --

9 THE COURT:

10 Sure.

11 MR. VON HERRMANN:

12 -- for -- you know -- for any
13 future purposes we might have.

14 THE COURT:

15 All right. Let's bring out the
16 jury.

17 (WHEREUPON: The jury empanelled
18 in the case was escorted back into the courtroom at 11:09
19 AM, July 20, 2010; and was in fact present during the
20 following proceedings.)

21 THE COURT:

22 All right.

23 Welcome back; and -- and thank you
24 for being patient.

25 We -- We had a lot of issues we

1 had to take up.

2 We had to discuss them We had to
3 look them up. And we had to rule on them before we could
4 actually begin.

5 So we were actually working that
6 whole time. I don't want you to think we're out here
7 being slack wasting your time.

8 All right.

9 We're getting ready to start this
10 trial. But before we start the trial I want to just give
11 you some tidbits of information, so that you can tuck
12 them into your pocket and just kind of have a little bit
13 of working knowledge about what is taking place as the
14 trial progresses.

15 The first thing I want to tell you
16 as that -- is that:

17 The State has the burden of
18 proof.

19 The State of South Carolina has to
20 prove the Defendant guilty of these alleged crimes beyond
21 a reasonable doubt.

22 I will explain that to you in more
23 detail at the end of this trial.

24 The second thing I want to tell
25 you is that:

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1 You are the finders of fact. You,
2 the jury, and nobody else, determine what the facts of
3 this case are.

4 And you ask yourself:

5 Well, how do I do that?

6 It's very simple.

7 You just sit back and you listen
8 to the witnesses that come down and sit in this chair,
9 that are sworn in. And you decide who you believe is
10 telling the truth.

11 You decide what the facts of this
12 case are from those witnesses.

13 And I want you to clearly
14 understand:

15 That's not a job for me.

16 That's not a job for my court
17 staff, or anybody else in This courtroom.

18 That is strictly a job for you.

19 And I want you to understand that:

20 You can believe all of what a
21 witness says, or none of what a witness says.

22 You can believe half -- part of
23 what they say, or -- or disregard it.

24 You can do whatever you want to
25 do.

1 You can believe one witness
2 against many, and many against one.

3 You can treat it kind of like your
4 children.

5 Your child comes up to you and
6 says they did something. You listen to them. You look
7 at them. And you make the decision as to whether or not
8 you think they're telling the truth or not.

9 That's your job.

10 That's very, very simple.

11 And that's how you will decide
12 this case.

13 You will decide it based on:

14 What the witnesses tell you; how
15 you accept it, along with any exhibits that go get back
16 into the jury room with you.

17 Well, you ask yourself:

18 Well, then, whets my job as a
19 judge?

20 I am the judge of the law.

21 At the end of this case, I will
22 instruct you as to what the law is.

23 I will give you all of the
24 elements of these alleged crimes.

25 I'll explain them to you in

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1 detail.

2 I'll explain what your process --
3 what your role is in detail. And, under your oath,
4 you're sworn to accept the law as I give it to you.

5 In other words, if you have any
6 preconceived ideas as to what you think the law is, or
7 what you think the law ought to be, you have to disregard
8 that. You have to accept the law as I give it to you,
9 and only when I tell you to begin your deliberations.

10 It's very, very, easy. It's very
11 common sense.

12 You just take the facts as you
13 find them, and take the law as I give it to you; you put
14 them together; you discuss it; and you make a decision
15 therefrom.

16 There is not a whole lot to that.

17 Somebody had written me a note
18 about note taking. In a case like this, it's -- it's
19 relatively simple. The facts are relatively simple.

20 There's a lot of high, technical
21 terms, or scientist that are going to come in. So, I
22 would just suggest that you do not take notes.

23 Just sit back. Just pay
24 attention. Just listen and look at body language. Look
25 at each witnesses' demeanor; and -- and just go from

1 there.

2 Also, I want to let you know that
3 what the lawyers tell you is not evidence.

4 I want you to understand their
5 role.

6 Their role is to be a spokesperson
7 for their client.

8 Their role is to be an advocate
9 for their client.

10 Evidence comes from where?

11 That witness chair right there.

12 It's very, very simple.

13 Right now, I just want you to sit
14 back. Don't take any notes. Just relax and soak it all
15 in. All right.

16 Solicitor --

17 MR. BRYAN:

18 Thank Your Honor.

19 THE COURT:

20 -- you're recognized.

21 MR. BRYAN:

22 If it please The Court

23 Good morning.

24 Uh -- I think as jurors go, you --
25 y'all might be fairly fortunate. This case is going to

1 be pretty quick. It's going to be two witnesses -- uh --
2 on behalf of the State.

3 Uh -- They may put all the
4 testimony that they would like.

5 But certainly, we'll be finished
6 today, so you'll know kind of what you looking forward
7 to.

8 But does not mean that it's not an
9 important case --

10 THE COURT:

11 Speak up, Mr. Bryan, if you would.

12 MR. BRYAN:

13 Yes sir.

14 THE COURT:

15 He's having trouble hearing you.

16 MR. BRYAN:

17 -- both for that Defendant and
18 also to the State and Officer Brantly.

19 I'm going to tell you what
20 happened. We're going to call two officers.

21 Uh -- This is John Brantly. He's
22 an Horry County officer. Raise your hand, John.

23 Uh -- He was on patrol on
24 Christmas day -- uh -- into the evening and the morning
25 of December 26 of last year.

1 The evidence will show that at 501
2 and 544 near Conway, at that intersection -- uh -- this
3 Defendant came through the red light at a kind of high
4 rate of speed and slammed on breaks, and ended up pretty
5 much in the intersection, having run the red light; and
6 then looked at the officer; took off.

7 At that point, he -- he attempted
8 to initiate a traffic -- traffic stop. Uh -- And he had
9 to chase him all the way to Myrtle Beach before the
10 Defendant ultimately wrecked his car running over -- uh
11 -- uh -- another lane of travel; and actually running
12 into the railroad tracks right there in Myrtle Beach.

13 Uh -- His video -- And he'll tell
14 you that his video actually was erased when he took the
15 Defendant to the hospital.

16 Uh -- They -- They erased the
17 video. Well, I guess he didn't know at the time. But
18 he'll testify as to what happened there.

19 Fortunately, there's another
20 officer who got in behind him, who is Jeremy Crews.
21 He'll be the other officer testifying; and you'll be able
22 to see his video at least of the chase itself -- uh --
23 where they're -- they're traveling around 90 or 100 miles
24 an hour and -- uh -- Crews never does catch up to him
25 until the Defendant turns around and shortly thereafter

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1 he wrecks.

2 Uh -- So he's charged with failure
3 to stop for a blue light. Uh -- I think that's going to
4 be pretty clear on the video.

5 You're -- You're going to actually
6 get to see that.

7 Uh -- What's going to happen is:

8 Uh -- Brantly is behind the
9 Defendant heading towards Myrtle Beach. Crews is coming
10 the other direction.

11 About two minutes in, you'll see
12 them cross. You'll see the blue lights kind of in behind
13 the car, at which point, the other officer turns around
14 and you'll see the blue lights up ahead. And they'll
15 testify as to what was going on at that point.

16 Uh -- The chase ends when the
17 Defendant. As I said, he never give up till -- uh -- he
18 had a pretty -- uh -- significant collision.

19 Uh -- Then they go to arrest him.
20 And when they do, he gives them some resistance. He
21 tried to pull his arms back and -- and roll over -- and
22 they have to basically wrestle him to get him under
23 control because of the resisting arrest.

24 Uh -- And then, there's things
25 that happened off camera.

1 Because what happened:

2 As Crews pulls in. And when he
3 pulls in, he's obviously trying to go apprehend the
4 suspect. And the car's just pointing the direction it
5 is. The camera is pointing the direction it is.

6 So he's miked up. And you'll some
7 of the -- what goes on off camera.

8 But basically, all the resisting
9 arrest -- uh -- the failure to -- uh -- threatening the
10 life of a public official and the -- uh -- throwing of
11 bodily fluids upon an officer takes place off camera.

12 So, what I am asking you to do at
13 the end of the trial is:

14 To hold him accountable, not only
15 for what you can actually see from watching TV, but
16 actually what he did.

17 And to do that, what you need to
18 do is listen to the officers' testimony and whatever
19 evidence comes out, and use your common sense.

20 And I just want to point out -- uh
21 -- a couple of things that you're going to see on the
22 video; because you're going to have about 10 minutes
23 where really nothing's happening; where they're trying to
24 get him under control; and waiting for the EMS to help
25 him.

25 | They're -- They're being as mild,

1 and as -- uh -- gentle as they can with him.

2 I mean, when he goes to try to
3 fight somebody else, they don't slam him to the ground.
4 They don't rough him up any.

5 They're just basically, like a --
6 like a dog that's trying to get another dog. They're
7 just kind of holding onto him. And they put him in the
8 car.

9 Uh -- At 2:18, if you listen real
10 close -- and you guys are the judge of the facts. If you
11 don't hear it, that's up to you to determine. But I
12 suggest that -- uh -- about 2:18 -- right at 2:18:00, you
13 can hear him say:

14 I promise you one day I will sit
15 up in a tree. And you just use that in con -- uh --
16 conjunction with the officer's testimony.

17 He's going to say that he's saying
18 he's going to go up in a tree and shoot him.

19 Uh -- And he threatened to kill
20 him. He -- At some point, you can hear him talking
21 about his family -- his wife and kids. He's threatening
22 to kill him; kill all the officers; kill their families;
23 et cetera.

24 And he'll testify to that. But
25 you can't hear it all; because the Defendant's not miked.

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1 The other officer is miked.

2 And so you're not able to hear it.

3 You just have to listen and decide whether you're going
4 to believe the officer or not.

5 And then finally:

6 As far as the spitting on the
7 officer -- or the throwing of bodily fluids on an officer
8 -- and the officer will testify that he was bloody. He
9 had the ac -- uh -- an accident and he was bloody.

10 And -- uh -- at 2:18 and 20
11 seconds -- so all this happens between 2:17 and 2:18 and
12 20 seconds -- you'll see him actually on camera doing
13 this. (Gestures.)

14 And -- And the officer will
15 testify here. What he's saying is -- He's telling them
16 like -- uh -- like the hockey players do, pull the shirt
17 up over his head.

18 And -- And that's some evidence
19 that you can use as -- uh -- circumstantial evidence that
20 he did actually spit on him.

21 Because what -- what he's trying
22 to do is get him to put the shirt over his head --

23 MR. VON HERRMANN:

24 Objection, Your Honor.

25 MR. BRYAN:

25 But I suggest when you put that

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1 together with the testimony, it's obvious that the
2 Defendant was spitting on the -- the officer.

3 So we just ask you to -- uh --
4 just give him a fair -- a fair trial.

5 Uh -- Do what is right in this
6 case. And -- And hold him accountable, not only for what
7 you can actually see, what he clearly did.

8 Thank you.

9 THE COURT:

10 Mr. Von Herrmann?

11 MR. VON HERRMANN:

12 Thank you, Your Honor.

13 You know, I don't know why we're
14 here.

15 Now he just told you everything
16 that they think they're going to prove.

17 The problem with that is, is --
18 unless they start off with the most offensive thing --
19 is:

20 He wants you to interpret this
21 (gestures) as saying:

22 Cover him up because he's
23 spitting.

24 The truth of the matter is:

25 When you see the video, you going

1 to see that there is no crime; and that the guy doing
2 this (gestures), actually has a full-head toboggan on.

3 And, if that's what he was trying
4 to do, he could've simply taken that toboggan off and
5 covered the face of the Defendant.

6 What they want you to believe is:

7 Everything that was not on video,
8 not on audio.

9 And you're going to find out that
10 the audio was cut-off by the police officer right after
11 he dropped F-bomb. Because he didn't want everybody to
12 hear his discussion.

13 My client, Mr. Smart, was
14 absolutely in a horrible accident.

15 He is going to be found guilty of
16 failure to stop for a blue light. I am confident of
17 that.

18 Everything that occurred after
19 that -- and the Judge is ultimately going to charge you
20 that:

21 He has to have a criminal intent;
22 the intent to commit these crimes.

23 What you're going to find out is:

24 There's not two officers there.

25 There's more like 15 to 20

1 officers there.

2 And every one of them drove their
3 own car.

4 And every one of them had a video
5 camera.

6 And we don't have any of those
7 videos.

8 Then they called EMS; because my
9 client, Mr. Smart, had actually suffered a concussion.

10 And it took them 30 seconds to cut
11 the siren off of the car. It took them two and a half
12 minutes to get my client to where he could actually talk,
13 or focus, or do anything else.

14 He wasn't even -- They -- They're
15 poking at him, Your Honor:

16 Hey sport, wake up. Come on
17 Sport.

18 They called EMS.

19 Instead of what they typically do
20 in protocol in -- with every wreck -- Instead of taking
21 him and putting him on a backboard, putting him down,
22 putting the neck brace, the collar; everything that we
23 normally see in a -- the car accident, they don't do any
24 of that.

25 They take him. They poke at him.

1 You can see the officers in the background laughing at
2 him.

3 He's not threatening John Brantly.

4 But if you take a bear, and you
5 poke him hard enough, he's going to start saying
6 something back, I promise you.

7 That doesn't mean he had the
8 criminal intent to do it, or carry it out, or anything
9 else.

10 What it means is:

11 Law enforcement, in this case,
12 conducted themselves unprofessionally. And it's because
13 they had 10 or 15 people milling around.

14 You'll see five or six Highway
15 Patrolmen. You'll see a half dozen Myrtle Beach. You'll
16 see a half dozen or so Horry County Police Officers.

17 That's not excusing what he did.

18 I don't offer an excuse.

19 He's willing to accept
20 responsibility for failure to stop for a blue light.

21 But when you're unconscious for
22 almost two minutes -- and you're going to see the
23 videotape.

24 When you're unconscious and you're
25 woken up -- And obviously it wasn't a big threat to them

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1 at the time because one officer leaves. One officer's
2 there with him trying to handcuff him.

3 And then, when he comes out, you
4 can see all the officers ganging around and poking at
5 him. And you see five or six of them grouped-up,
6 laughing.

7 That doesn't excuse the failure to
8 stop a blue light.

9 That doesn't excuse the fact that
10 he was drinking that night and he made bad decisions.

11 And he's going to go to jail for
12 that. And we all know that.

13 But that's what he needs to go to
14 jail for; not for everything else that they piled on
15 afterwards that they helped cause.

16 You can't participate. You can't
17 start trying to poke at people, and prod at people, and
18 antagonize them; and then turn around and blame them for
19 getting upset; especially when you know -- and you do
20 know -- that they've been drinking; that they have had a
21 concussion.

22 And their first and foremost
23 responsibility is to -- No matter how bad that guy is --
24 and unfortunately -- you know -- the way it is, is:

25 If he was a murderer -- which he

1 certainly wasn't -- certainly isn't -- is to make sure
2 that that man is taking care of medically, and let the
3 court system take care of the rest.

4 They didn't do it.

5 EMS was called.

6 EMS was sent away.

7 And they drag him out.

8 Now I know that, I don't think you
9 heard from the prosecutor. He just neglected to mention
10 it.

11 They neglected to mention the
12 microphone and the siren. The siren's cut off at one
13 point.

14 But when the officer starts
15 talking to his buddies, and starts palling around and
16 joking around about it, and dropped the F-bomb, he cuts
17 it off of on his belt.

18 So if you think about it this way:

19 If you've got 15 police officers
20 out there. You've got two cars. One of them magically
21 erased the videotape -- the best videotape you would have
22 -- the best evidence y'all would have to -- to convict
23 him or to find him not guilty.

24 But it's magically gone.

25 But you've still got 11 or 12

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1 other ones.

2 And he's got 15 -- 16 -- hem
3 however many witnesses. You'll watch the video. You'll
4 get the chance to look at it and see.

5 Why aren't those people here?

6 If all this blood is running
7 everywhere, and it was -- you know -- or spitting it
8 everywhere and all that.

9 And I'll submit to you:

10 The statute doesn't even apply
11 here.

12 The statute says that:

13 You have to throw blood, or -- you
14 know -- some bodily fluid.

15 Well, first of all:

16 The only thing my -- my client was
17 doing was trying to get -- do something that they
18 should've done themselves; and that is:

19 Get the blood out his mouth so he
20 could breathe.

21 But instead of letting EMS do it,
22 and handle it -- because it was a medical condition --
23 they chose to handle it themselves.

24 My client didn't spit blood on
25 anybody for any purposes other than to clear fact that he

1 was not being manhandled, and the fact that he was --
2 quite frankly, had too much to drink -- and was trying to
3 get his airway cleared out.

4 He wasn't trying to spit on
5 anybody.

6 And this whole thing could have
7 been cured if they had even remotely believed it, by
8 taking that toboggan off and sticking it over him.

9 But they didn't do it.

10 Everybody was too busy out there
11 grab-fannyng around, laughing at it, because my client
12 hit a -- a -- a -- uh -- railroad so hard that they -- he
13 broke it.

14 It was a bad accident, folks. And
15 nobody here is going to deny that. And if they do, then
16 I think the video will show something different.

17 Folks, he is guilty of failure to
18 stop a blue light. I'm convinced you will -- you will
19 find him guilty of that.

20 But what happened after that, you
21 can't hold him responsible, because you have -- he has to
22 have the criminal intent to do that.

23 And if he doesn't have the
24 criminal intent, your duty -- your sworn oath -- is to
25 find him not guilty; not because he power-point you like

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1 -- It's not saying you like what he did. It's not that
2 the -- that there was anything else that -- uh -- you
3 know -- was good about the situation. It was all bad.

4 But it should have been held
5 differently and handled differently by law-enforcement
6 and EMS.

7 He should've been strapped to a
8 board like everybody that's ever been in a fender-bender
9 in their life; taken in; make sure his airway was clear;
10 make sure he was safe; and then arrest him and take him
11 in for the failure to stop for a blue light.

12 If they had done that, we wouldn't
13 be here today.

14 If you listen the prosecutor, and
15 you listen to what he says all this evidence is, and you
16 don't listen to the evidence he left out, like:

17 Oh -- you know -- the -- the -- uh
18 -- officer was miked up.

19 Yeah, he was miked up. He just
20 chose to cut it off.

21 Well, if you listen to that, we
22 all might as well go home.

23 We'll just let the prosecutor go
24 ahead and figure out what his sentence is; and we'll go
25 down the road.

1 But that's not the way it is.

2 That's not the way our system of justice works.

3 There has to be criminal intent.

4 He has to prove beyond a
5 reasonable doubt.

6 And if not, our constitution does
7 not provide the safety or the dignity for our country and
8 our citizens. And that's not fair.

9 You are sworn to do your duty.

10 I believe you will.

11 We chose y'all all, and you were
12 aware, as independent and fair witnesses.

13 Look at this video close.

14 Listen, not only to what he says;
15 because he's talking out of his mind.

16 I mean, what person in their right
17 mind would threaten a public official by saying:

18 I'm going to climb up a tree
19 stand.

20 That's ludicrous.

21 Now I understand that these guys
22 have a tough job to do. And I don't want to take away
23 from that.

24 But they also have to do it with
25 professionalism, with reasonability, and with the ability

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1 to understand what is real and what is perceived.

2 And what we have in this situation
3 is a total misconception; a total lack of
4 professionalism, not just -- I'm not saying this officer;
5 but all the officers.

6 They obviously weren't concerned
7 about the safety of this guy. And they were obviously
8 not concerned about the safety of any -- or -- or the --
9 the threats. Because they're all out there joking and
10 laughing.

11 Watch the video.

12 The video will tell the story.

13 And I'm going to tell you this:

14 This video; we're going to point
15 out specific things. Obviously, both sides are going to
16 do that.

17 But the bottom line is:

18 Watch the video from the first
19 time that you will for all the things I mentioned; and
20 all the things that really are important.

21 Because if he didn't have a
22 criminal intent to commit those crimes, you're going to
23 find them not guilty.

24 And I'm telling you right now,
25 folks:

1 The overwhelming evidence is going
2 to be that:

3 Not only did he not have the
4 criminal intent, he was so messed up, he couldn't have
5 formed a criminal intent.

6 If you have a concussion, you
7 don't know what you're doing. If you're talking out of
8 your mind, then that's the way it is. You can't help
9 that.

10 I'm not saying what he did was
11 right.

12 I'm not defending the failure to
13 stop for a blue light.

14 I've explained that to him. And
15 he is willing, ready, and able, to accept your guilty
16 verdict for a failure to stop for a blue light.

17 Unfortunately for our system,
18 there are sometimes in life where you can't stand before
19 a judge and accept responsibility for part of what you're
20 accused of, and then go forward on everything else.

21 That's just the way life is.

22 That's the way the system works.

23 Don't hold that against him. Don't hold it against him.

24 Don't hold it against him --

25 because the law is very clear -- that he's not going to

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1 testify. My decision. I'm his lawyer. I've advised him
2 not to.

3 What good -- What is it he can
4 tell you that would make things better for him?

5 He ran from the police. No
6 question about it.

7 He was intoxicated.

8 He had a concussion.

9 And after that, what else can he
10 tell you?

11 Because, if you can't remember it,
12 you can't tell it.

13 So you can't hold that -- not only
14 legally -- against him. You just really can't hold it
15 against the guy.

16 It ain't that he ain't going to
17 jail. He knows that.

18 But what I'm telling you ladies
19 and gentlemen, is:

20 I am confident that at the end of
21 this trial you will find guilty of failure to stop for a
22 blue light, and you'll find him not guilty of every other
23 charge.

24 Thank you.

25 THE COURT:

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1 Thank you.

2 Mr. Bryan?

3 MR. BRYAN:

4 Thank Your Honor.

5 The State calls Officer John Brant

6 -- Brantly.

7 WHEREUPON: OFFICER JOHN M.

8 BRANTLY, JR., WAS DULY SWORN AND TESTIFIED UNDER OATH AS

9 FOLLOWS:

10 CLERK:

11 Thank you. Please be seated.

12 State your full name; and spell

13 your last name.

14 WITNESS:

15 All right. John M. Brantly, Jr.;

16 B-r-a-n-t-l-y.

17 DIRECT EXAMINATION BY MR. BRYAN:

18 Q. Who are you employed by?

19 A. Horry County Police Department

20 Q. And -- uh -- how long have you worked for Horry
21 County?

22 A. Uh -- This month will be three years.

23 Q. And -- uh -- were you on patrol Christmas day of
24 last year?

25 A. I was.

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1 Q. Uh -- Did you have -- Well tell the jury first -- uh
2 -- what do you -- What are your general duties and
3 responsibilities? What do you do?

4 A. Generally --

5 Q. What kind of officer are you?

6 A. I'm a -- I'm a road patrol officer. I respond to
7 household calls -- uh -- any calls that are called in by
8 any resident of Horry County -- uh -- as well as any
9 proactive patrolling of neighborhoods, businesses -- uh
10 -- as well as conducting -- uh -- traffic enforcement.

11 Q. Okay. Do you do a lot of -- Do you write a lot of
12 spitting tickets?

13 A. I wouldn't say a lot.

14 Q. Okay. (Laughs.) But you sometimes write speeding
15 tickets?

16 A. I do, yeah.

17 Q. And -- uh -- so you -- you're traffic enforcement,
18 as well?

19 A. Yes.

20 Q. All right. So you were on duty December 25th of
21 last year?

22 A. Yes, I was.

23 Q. And -- uh -- did you come in contact with Thomas
24 Smart that night?

25 A. I did.

1 Q. Tell the jury how you came in contact with Mr.
2 Smart?

3 A. I was in the area of Highway 544 and Highway 501.
4 There's an intersection -- a traffic light there.

5 Uh -- I was actually on Old
6 Highway 544 getting ready to turn on to Highway 501 -- uh
7 -- sitting at a red light.

8 The light turns green.

9 I'm getting ready to proceed
10 through the intersection.

11 Uh -- I could observe and see a
12 black Ford truck -- uh -- traveling at a high rate of
13 speed, getting ready to approach their red light.

14 Not looking like it was going to
15 stop or whatnot, I have to stop from entering the
16 intersection.

17 Uh -- The vehicle begins to stop
18 abruptly. The back tire start to skid a little bit.

19 Once I believe he realizes that
20 he's not able to stop -- uh -- proceeds through the
21 intersection. Actually looks directly at me and
22 continues -- continues to go.

23 At that point, I turned beach-
24 bound onto Highway 501. Uh -- Was able to close distance
25 to him. Initiate a traffic stop with blue lights and

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1 siren.

2 Uh -- At that point, the Defendant
3 gained speed.

4 Q. Let me ask you to -- I'm going to stop you right
5 there.

6 A. Okay.

7 Q. Just to make sure we understand where we're at,
8 you're at -- uh -- what intersection?

9 A. We were at -- We were at Highway 501 and Highway
10 544.

11 Q. In what part of the County?

12 A. In -- In Conway area. There is -- There's two gas
13 stations next to each other -- uh -- that are right
14 across the street from each other, as well -- as well as
15 a Conway National Bank on the corner.

16 Q. So where 544 and 501 come together right outside of
17 Conway.

18 A. Yes sir.

19 Q. And -- uh -- were you traveling the same way as he
20 was; or a different direction?

21 A. He was almost perpendicular.

22 Q. And -- uh -- Did you have a green light or a red
23 light?

24 A. I initially had a red -- was sitting at a red light.
25 The light turned green. I went to proceed through the

1 intersection.

2 That's when he was coming down

3 501.

4 Q. And could you see his light?

5 A. Yeah.

6 Q. He had a red light?

7 A. He was sitting directly -- perfectly -- At that
8 intersection, especially at night, you can see a -- a red
9 glow coming from the -- the side of the light.

10 Q. Okay. And -- And so -- I interrupted you just to
11 make sure we knew where we're at.

12 And then, tell -- tell the jury
13 what happened after he looked at -- at you?

14 A. After he looked at me, he proceeded on through the
15 intersection.

16 Uh -- I turned onto Highway 501
17 going towards Myrtle Beach. Uh -- Was able to close
18 distance -- distance a little bit.

19 Initiated my blue lights and siren
20 to initiate a traffic stop.

21 Uh -- Defendant didn't stop;
22 didn't slow down. In fact, he gained speed.

23 Uh -- I notified my dispatch I was
24 in pursuit of a vehicle.

25 Uh -- They in turn -- you know --

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1 uh -- notified other -- uh -- motor officers.

2 We began pursuit Highway 501
3 beach-bound.

4 Uh -- My speed got up to -- uh --
5 approximately 110 -- in excess of that.

6 Uh -- At that point, I was -- I
7 was no longer gaining any distance or -- uh -- having a
8 distance gained on me.

9 We were both traveling at the same
10 distance from each other.

11 Q. How fast were you going?

12 A. About a hun -- uh -- At least 110 miles an hour.

13 Q. And -- uh -- Did you have your blue lights on?

14 A. Yes.

15 Q. Did you have your siren on?

16 A. Yes.

17 Q. How far behind were -- uh -- the Defendant -- were
18 you?

19 A. I was approximately 25 yards behind the Defendant.

20 A. And -- uh -- what were the conditions like that
21 night?

22 A. Uh --

23 Q. And what time was it?

24 A. It was just before -- uh -- one second, let me
25 double-check.

1 Right after 1:30 in the morning,
2 the 26th of December.

3 Q. Okay. And -- uh -- what were the conditions like?

4 A. The road conditions were -- were normal. There was
5 very few people on the road -- uh -- being the fact that
6 it was the night after Christmas.

7 Q. Okay. And so -- uh -- really the morning after
8 Christmas -- uh -- the night of Christmas; right?

9 A. Yes.

10 Q. So you're going about 110 miles an hour. You're not
11 gaining on him? How far did y'all travel?

12 A. We traveled -- uh -- from the point of where -- uh
13 -- Coastal Carolina University is, to -- uh -- traveling
14 into the Myrtle -- city limits of Myrtle Beach.

15 Uh -- Crossed into the city limits
16 of Myrtle Beach past Seaboard -- Seaboard Street.

17 Uh -- Approached the intersection
18 of Robert Grissom Parkway right there.

19 Uh -- Defendant went to make a
20 right turn onto Robert Grissom Parkway. And when he did
21 -- uh -- at -- at the rate of speed that he was
22 traveling, began to start -- uh -- the back end of his
23 vehicle began to start coming around on him.

24 Uh -- When I made a term onto
25 Robert Grissom -- uh -- Defendant's vehicle -- uh -- did

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1 three complete 360s and begin rolling backwards on the
2 sidewalk where Ralph Simms -- uh -- auto dealership is
3 right there on Robert Grissom Parkway.

4 Q. Is that when he stopped and got out?

5 A. No.

6 Q. What happened then?

7 A. At that point -- uh -- I notified our dispatch that
8 -- uh -- that he had wrecked.

9 Uh -- he began traveling again.

10 Drove past me.

11 Uh -- Was drive -- Was traveling
12 in the oncoming lane on Robert Grissom. Crossed the
13 beach-bound lane of Highway 501.

14 Uh -- Struck the medium right
15 there.

16 Crossed the Conway bound lane of
17 501.

18 Uh -- Hit -- Right there at that
19 -- that intersection, there's -- there's two ditches and
20 a railroad track.

21 He hit the first ditch. Uh --
22 Went airborne. Cleared the second ditch. And struck the
23 railroad track, going over the railroad track and landing
24 in the ditch.

25 Q. What kind of vehicle was he in?

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1 A. It was a -- uh -- black V71.

2 Q. A pickup truck?

3 A. Chevy -- Chevrolet truck. Yes sir.

4 Q. And -- uh -- so he crossed over. Was there a -- a
5 median dividing the -- the two lanes of travel?

6 A. Yes, there's -- there is a median. On -- On Highway
7 501, there's a median that divides -- uh -- It's almost
8 like a median -- a median barrier, almost.

9 Uh -- It almost looks kind of
10 looks like kind of like a post or a hold, if -- if you
11 could say.

12 Q. So he went across the median -- the oncoming lane of
13 traffic?

14 A. In the oncoming lane of traffic; yes.

15 Q. And -- And then, crossed over that.

16 A. Crossed over that.

17 Q. Into -- uh -- the railroad track and on --

18 MR. VON HERRMANN:

19 Object, Your Honor. Leading the
20 witness.

21 THE COURT:

22 Sustained.

23 MR. BRYAN:

24 Is that --

25 WITNESS:

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1 Once he was going to begin driving
2 again, he was driving in the oncoming lanes of Robert
3 Grissom Parkway.

4 He drove over the beach bound
5 lanes of Highway 501.

6 He crossed over the median,
7 actually striking the median.

8 He crossed over the Conway-bound
9 lanes of Highway 501 again.

10 And that's when he struck the
11 ditch -- uh -- clearing air to do it; and struck the
12 railroad track, and landed in the ditch.

13 DIRECT EXAMINATION BY SOLICITOR CONTINUED:

14 Q. Let me just make sure I got this straight. He was
15 actually traveling oncoming -- against oncoming --

16 A. Against oncoming traffic.

17 MR. VON HERRMANN:

18 Object, Your Honor. That's asked
19 and answered.

20 THE COURT:

21 Sustained.

22 DIRECT EXAMINATION BY SOLICITOR CONTINUED:

23 Q. All right. What happened next when -- uh -- After
24 he ran over the -- uh -- railroad track, what happened
25 next?

1 A. Once -- Once the vehicle came to a stop the second
2 time -- uh -- I exited my patrol vehicle -- uh -- with my
3 -- with my weapon drawn. Approached the -- the vehicle.

4 At the time the door -- the door
5 opened. Uh -- Defendant began to somewhat stumble out of
6 the vehicle.

7 Uh -- Once it was clear that he
8 had no weapons on him actually in -- in his -- in his
9 possession -- his hands -- uh -- holstered my weapon.

10 Uh -- Made contact with him.

11 Placed him on the ground -- uh --
12 to place him into handcuffs.

13 At that point, it is -- the
14 Defendant began to try and start to roll over on top of
15 me -- uh -- resisting us from -- from placing him under
16 arrest.

17 Uh -- Able to get handcuffs on
18 him.

19 Uh -- The -- The noise from where
20 the vehicles were -- uh -- the sirens or whatnot was
21 extremely deafening -- uh -- being the fact that where
22 our -- the vehicles were in proximity to how close we
23 were.

24 Uh -- Asked the -- uh -- the other
25 officer that was there behind me to -- uh -- turn the

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1 sirens off of the -- of the vehicle.

2 Uh -- Was able to get a second
3 handcuff on the Defendant.

4 Uh -- While we holding the
5 Defendant -- Defendant there or whatnot -- uh --
6 continues to try to roll over on us.

7 He's laying on the ground -- uh --
8 trying to roll over on us.

9 When -- The entire time -- uh --
10 from the accident -- He has -- uh -- He has struck the --
11 either the steering wheel or the dashboard.

12 I'm -- He struck some in the
13 vehicle.

14 He's got a bloody mouth; a bloody
15 face.

16 Uh -- The entire time that we're
17 trying to place him under arrest that he's trying to roll
18 over on us -- uh -- he's trying to spit in -- in our
19 direction -- at that point, was trying to spit in our
20 direction.

21 Q. Did he appear to be having trouble breathing?

22 A. Not at all.

23 Q. Uh -- And when you say -- I just want to make sure
24 you clarify to the jury very clearly whether he was
25 spitting on the ground; or in what direction?

1 A. We -- As we're -- we're trying to restrain him from
2 rolling off on us -- When he's attempting to roll over,
3 he's attempting to roll over to his left.

4 And at the entire time that he is
5 doing that, he is spitting blood the entire time, as he's
6 trying to roll over on -- onto his left, which would be
7 towards me.

8 Q. All right. What happened next?

9 A. Uh -- At that point, we -- uh -- we had requested
10 EMS respond.

11 Uh -- We were holding -- uh -- the
12 Defendant there.

13 He's still trying to fight with
14 us; still trying to get up.

15 Right as -- uh -- At that point,
16 other officers have arrived.

17 Uh -- The other officers that have
18 arrived are actually keeping their distance from where
19 we're at due to the simple fact that he's attempting to
20 split blood on -- on everybody.

21 Q. All right. What happened next?

22 A. Uh --

23 Q. Did he appear to -- You called the EMS?

24 A. We called the EMS; yes.

25 Q. And did he appear to -- uh -- have any life-

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1 threatening injuries? Or --

2 A. No. I -- I'm -- Not to -- Not to my knowledge, I
3 guess you could say.

4 Q. Okay. So after you called EMS, what happened next?

5 A. Uh -- Had -- EMS responded out. Uh -- EMS was
6 speaking with him or attempting to try and treat him.

7 Uh -- Defendant was being
8 extremely disorderly.

9 Uh -- Was -- Had no interest
10 whatsoever in having anything to do with any medical help
11 being given to him.

12 Uh --

13 Q. When you say that, how do you know that?

14 A. Uh -- From -- EMS was asking him --

15 MR. VON HERRMANN:

16 Objection, Your Honor; hearsay.

17 THE COURT:

18 Sustained.

19 DIRECT EXAMINATION BY SOLICITOR CONTINUED:

20 Q. Not what they said; but when -- when EMS came to
21 transport him, did the Defendant say anything?

22 A. He -- He refused treatment by Excuse me, sir.

23 Q. And how did he refuse treatment?

24 A. He said that he wasn't -- he wasn't going anywhere.
25 He didn't want anybody to touch him. Everybody leave me

1 alone.

2 Q. And he said that to you; or to who? Who did he say
3 that to?

4 A. He was -- was referring to a -- to -- to EMS as they
5 were asking him what was going on.

6 Q. Okay. So what did they do?

7 A. Uh -- I asked EMS -- I said:

8 You know, we're not going to be
9 out here all night deciding this. Are you all going to
10 -- Is -- Is he going to seek treatment through EMS?

11 Is he going to be transported by
12 EMS?

13 My response -- Their response to
14 me was --

15 MR. VON HERRMANN:

16 Uh -- Objection, Your Honor;
17 hearsay.

18 THE COURT:

19 Sustained.

20 DIRECT EXAMINATION BY SOLICITOR CONTINUED:

21 Q. Not what they said; but what happened next?

22 A. Uh -- He did not -- uh -- did not receive treatment
23 by EMS and was not -- received transport by EMS.

24 Q. And was anybody else injured?

25 A. No, he was the only -- only individual.

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1 Q. And EMS came?

2 A. EMS came.

3 Q. Did you send them away?

4 A. (No response.)

5 Q. Who sent -- Who sent EMS away?

6 A. They left after refusal of treatment.

7 Q. Okay. All right. What happened next?

8 A. Uh -- At that point -- uh -- it -- it's my knowledge
9 that with that -- an individual has any type --

10 MR. VON HERRMANN:

11 Objection, Your Honor. Either he
12 knows or he doesn't know.

13 THE COURT:

14 Sustained.

15 WITNESS:

16 Okay. Uh --

17 DIRECT EXAMINATION BY MR. CONTINUED:

18 Q. What happened after EMS left?

19 A. After EMS left, we picked the Defendant up. Took
20 him over to where the patrol cars were to transport him
21 to -- uh -- to actually to transport him to the hospital.

22 And -- uh -- at that time t--

23 Q. Why -- Why were you transporting him to the
24 hospital?

25 A. The jail will not accept an individual that has

1 blood on their face.

2 Q. Okay. So you took him to the hospital -- or went
3 to transport him to the hospital. What happened next? A.

4 Went to transport him to the hospital.

5 Q. Okay.

6 A. When we were walking to the car or whatnot -- uh --
7 the -- there was a second -- a secondary officer -- uh --
8 couldn't tell you he was -- who he was with or whatnot
9 -- was -- uh -- the Defendant -- uh -- attempted to try
10 and -- and lunge at him or whatnot.

11 Q. Was the Defendant saying anything at that point?

12 A. He was -- He was screaming that he was -- uh -- he
13 was going to kill every one of us.

14 Uh -- Specifically -- uh -- he was
15 stating it to me. Uh -- And specifically was stating
16 that -- uh -- he had a mobile dear stand -- a portable
17 dear stand.

18 Was going to -- uh -- take a rifle
19 and shoot myself in the forehead, as well as my wife.
20 And if I had kids, he would kill all my kids as well.

21 Q. Okay. What happened next?

22 A. Uh -- At that point -- uh -- after repeating this
23 numerous times to myself and -- uh -- other individuals
24 there -- attempted to try and -- and take them over to
25 the car.

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1 Uh -- That's when he began to try
2 and start lunging at another officer.

3 Uh -- Were able to take control of
4 him again. Get him to the car.

5 Uh -- The officer that was
6 assisting me in carry -- in carrying him to the car went
7 to unlock my patrol car.

8 I went to place the Defendant
9 inside the vehicle.

10 At the time that I took one hand
11 off of him to unlock -- to open the door, is when the
12 Defendant turned around; spun around on me; made a
13 forward motion; spit blood directly in my face.

14 Q. Uh -- Could he have just been clearing his airway
15 there?

16 A. No.

17 MR. VON HERRMANN:

18 Objection, Your Honor. That calls
19 for speculation.

20 THE COURT:

21 Sustained.

22 MR. VON HERRMANN:

23 Move to strike, Your Honor. And
24 instruct the jury, if you would, that that's -- that's --
25 that question was inappropriate and the answer should be

1 disregarded.

2 THE COURT:

3 Correct. And members of the jury,
4 that was an inappropriate question and answer. And I
5 would ask that you would completely disregard that from
6 your minds and from your thought process; and do not
7 discuss it in the juryroom at a later date.

8 Do not let it enter into your
9 decision whatsoever.

10 Continue.

11 DIRECT EXAMINATION BY SOLICITOR CONTINUED:

12 Q. Directly -- uh -- in the seconds before you said
13 that he turned to spit on you, did he seem to be having
14 having trouble breathing?

15 A. No. With -- With the way that he was yelling at
16 everyone that was there and yelling at other officers;
17 the continued threats that he was going to kill myself
18 and my wife and whatnot, there was no -- He had no
19 trouble breathing.

20 Q. And immediately prior to spitting in your face,
21 which direction was he facing?

22 A. He was facing away from me.

23 Q. Did you turn him towards you?

24 A. No, I did not.

25 Q. Did somebody else turn him towards you?

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1 A. No, they did not.

2 Q. All right. What happened after you put him in the
3 car? What happened after he spit?

4 A. After he spit blood in my face, we attempted to try
5 and -- uh -- pull the shirt up over his head.

6 Uh -- In --

7 Q. Why -- Why did you do that?

8 A. In doing so, that -- that contains him from trying
9 to spit on anybody else or trying to -- uh -- trying to
10 keep anything -- anybody else from being exposed to any
11 blood or bodily fluids are hazardous materials.

12 Q. Okay. What happened next?

13 A. Uh -- At that point we were able to -- uh -- finally
14 get him in the patrol car.

15 Uh -- I had asked my supervisor --
16 other officer if -- uh -- there was any blood on my face?

17 Uh -- They did say: "yes."

18 I notified -- uh -- I notified to
19 my Sergeant that -- uh -- I needed -- uh -- that there is
20 a --

21 MR. VON HERRMANN:

22 Your Honor, at this time, we need
23 to have a motion, I believe, in limine.

24 THE COURT:

25 All right. If you will just

1 approach.

2 (WHEREUPON: Counsel for each party
3 very briefly conferred off the record with The Court at
4 the bench.)

5 DIRECT EXAMINATION BY SOLICITOR CONTINUED:

6 Q. Let me just stop you right there. What did you do
7 with the Defendant next? What happened next with the
8 Defendant?

9 A. He was transported to the hospital.

10 Q. Who transported him?

11 A. I did.

12 Q. And -- uh -- how long did it take you to get to the
13 hospital?

14 A. Uh -- Under -- I would -- Under 10 minutes. I mean,
15 it was no traffic on the road. It was from Grissom to
16 Conway Hospital.

17 Q. Did he make any -- Did the Defendant make any
18 statements towards you while -- uh -- there?

19 A. (No response.)

20 Q. Or while being transported?

21 A. While being transported, he continued that -- the
22 same statements of -- that he was going to kill all of
23 us.

24 Q. Okay. And when you got him to the hospital, what
25 happened?

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- 1 A. When we got to the hospital?
- 2 Q. Well --
- 3 A. I'm sorry.
- 4 Q. What happened when you took him to the hospital --
- 5 keeping in mind --
- 6 A. Yes.
- 7 Q. Okay.
- 8 A. Uh -- We arrived at the hospital. Uh -- I -- When
- 9 we got to the ambulance entrance to the hospital -- uh --
- 10 brought him inside where he was treated for his injuries.
- 11 Uh -- And at the point of when he
- 12 was being discharged, he was placed back in my vehicle
- 13 and was transported to J. Reuben Long.
- 14 Q. The hospital keep him overnight?
- 15 A. No.
- 16 Q. So they released him to go to the jail that same
- 17 morning -- early morning?
- 18 A. Yes.
- 19 Q. All right. Do you know about how long they kept
- 20 him?
- 21 A. Uh -- I -- I couldn't -- couldn't tell you.
- 22 Q. Okay. Uh -- Now your car; is it equipped with a
- 23 video?
- 24 A. It is.
- 25 Q. And -- uh -- did this -- To the best of your

1 knowledge, did the video come on when the pursuit
2 happened?

3 A. Yes, it did.

4 Q. All right. And what -- Do you have the video now?

5 A. I do not have the video now.

6 Q. Tell the jury why not.

7 A. Uh -- The video is actually initiated -- uh -- when
8 I activate my blue lights. It's automatic.

9 I have no control over whether it
10 comes on. Uh -- It comes on the entire time.

11 The only time would be -- When we
12 went to the hospital -- uh -- being that I knew that I
13 was going to -- not going in and coming right back out --
14 shut my car off.

15 Our video systems are -- As much
16 energy -- I mean, as much power as they -- they drain,
17 there is something to do with the video where after about
18 an hour -- between the hour and 10 minutes -- an hour and
19 20 minutes -- uh -- the system itself will shut off to
20 save the battery life of the car.

21 Uh -- At that point, when the --
22 and the video is continuously running -- then any video
23 that is still going when -- when its powered off, is not
24 there.

25 Because once we power the -- the

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1 camera back on, that's when it -- it initiates from
2 startup.

3 Q. So what happened to the video?

4 A. I could not tell you. It -- It -- It's -- We're not
5 -- We don't use VHS tapes. We don't have DVDs.

6 It's a hard drive. And it's not
7 on the hard drive.

8 MR. BRYAN:

9 I don't have any other questions.

10 Please answer any questions Mr. Von Herrmann has.

11 THE COURT:

12 Cross?

13 MR. VON HERRMANN:

14 Thank you.

15 CROSS-EXAMINATION BY MR. VON HERRMANN:

16 Q. Officer Brantly -- uh -- first of all, you were
17 equipped with a Taser that night, weren't you?

18 A. Yes sir, I was.

19 Q. So any real resisting arrest, y'all aren't very
20 hesitant to use those tasers; are you?

21 A. When the need arises.

22 Q. And the need would arise pretty good if you thought
23 your -- uh -- safety was in jeopardy; or maybe somebody
24 was continuing to struggle by a car for over 15 minutes?

25 That seems like a pretty good time

1 to be -- uh -- using it; doesn't it?

2 A. Depending upon the circumstances.

3 Q. In fact, when you walked up to the car, it was a
4 stressful situation; no question about it?

5 I mean, you had just been in a
6 high speed chase.

7 No question that he failed to stop
8 for a blue light; right?

9 A. Yes sir.

10 Q. And -- And in all honesty, that's probably law
11 enforcement's worst nightmare?

12 A. Yes sir.

13 Q. It -- You don't know what you're doing?

14 A. Yes sir.

15 Q. When your approach the car, you've got your firearm
16 out? And you realize he doesn't have a weapon. And he's
17 laying there.

18 And you've got to spend probably
19 close to -- and the video will show it later on -- about
20 two minutes trying to get him waken (sic) up to where
21 he's even talking?

22 A. (No response.)

23 Q. Is that true?

24 A. Yes.

25 Q. So he's not trying to get out and fight you at that

1 point?

2 A. I don't -- Was that -- I don't know if that was a
3 question or --

4 Q. He wasn't trying to fight with you that point. He
5 was as -- He was at the wheel unconscious.

6 MR. BRYAN:

7 That's -- That's a statement, Your
8 Honor. I think he -- he needs to ask a question.

9 THE COURT:

10 Sustained.

11 CROSS-EXAMINATION BY MR. VON HERRMANN CONTINUED

12 Q. Was he at the wheel unconscious for two minutes
13 while you were trying to wake him up, or -- and your
14 partner?

15 A. No; he was not at the wheel unconscious.

16 Q. Where was he unconscious at?

17 A. He was -- had stepped out of the vehicle.

18 Q. And he's unconscious outside of the car?

19 A. Not -- You can't be unconscious fighting with us.

20 Q. So you would agree with me that if this video that
21 they're about to play shows and indicates that y'all --
22 that somebody was saying:

23 Wake-up, Hoss. Wake up there,
24 Slick.

25 You would agree with me that your

1 testimony today would be wrong.

2 A. I would agree that he was not responsive once the
3 handcuffs were placed on him.

4 Q. In other words, he was unconscious?

5 A. He was not responsive once the handcuffs had been
6 placed on him.

7 Q. Well how can he fight you and -- being unconscious.
8 Explain that to me, please.

9 A. Once the handcuffs are placed on him --

10 Q. Once the handcuffs were placed on him, he then was
11 unconscious?

12 A. That's when he was unresponsive --

13 Q. Okay.

14 A. -- to us.

15 Q. But then, a little while ago, you testified that he
16 we tend to and spit.

17 A. There was a moment where he was responsive. And
18 there was a moment when he was unresponsive.

19 Q. Isn't it true that his teeth had actually come
20 through the upper part -- or the lower part of his lip
21 and his mouth was full of blood?

22 A. I -- I would agree that his mouth was full of blood.
23 I would not know the injuries sustained to his lip.

24 Q. You didn't check?

25 A. No sir.

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1 Q. And you -- you just said:

2 You're totally a mess. We ain't
3 going to be out here all night. Make a decision.
4 Whatever y'all going to do, make a decision. We're not
5 going to be here all night.

6 A. After he was refuse treatment with EMS; yes.

7 Q. And you would agree with me that the standard
8 protocol in a wreck that you respond to on the average
9 day would be:

10 To have EMS put him on the board
11 with a neck brace and all of that to have him
12 transported.

13 You would agree that's standard
14 protocol for a traffic accident?

15 A. No sir.

16 Q. That's not standard pro --

17 A. I -- I have nothing to do with traffic accidents.
18 We don't respond to traffic accidents.

19 Q. If you, in your department, were to respond to a
20 traffic accident -- Certainly you've backed up the
21 Highway Patrol haven't you?

22 A. Yes sir. Yes.

23 Q. And you've seen the standard response. The EMS
24 shows up. They put him on a backboard.

25 Isn't that true?

1 A. If -- If they deem necessary.

2 Q. And -- And they put him in a neck brace?

3 A. (No response.)

4 Q. And they don't worry about whether or not they're
5 going to be there all night?

6 A. That's a -- That's a call for EMS to make. That's
7 their -- That's their decision.

8 Q. And EMS isn't here?

9 A. No. No. You're right. They're not.

10 Q. And the guy that supposedly told you to cover his
11 head up, he's not here to testify today either; is he?

12 A. To my knowledge.

13 Q. As a matter of fact, there's nobody here to testify
14 and there's no evidence on the video of -- of having an
15 blood split on you.

16 MR. BRYAN:

17 Objection, Your Honor. That's
18 argument, Your Honor.

19 MR. VON HERRMANN:

20 It's a question.

21 THE COURT:

22 Overruled.

23 CROSS-EXAMINATION BY MR. VON HERRMANN CONTINUED

24 Q. Is there or is there not?

25 THE COURT:

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1 Go ahead and answer.

2 MR. BRYAN:

3 He's asking him to go ahead and testify,
4 Your Honor.

5 MR. VON HERRMANN:

6 I'm asking him the question.

7 CROSS-EXAMINATION BY MR. VON HERRMANN CONTINUED

8 Q. Is there or is there not anybody out of the hundred
9 officers out there and EMS and everybody else to testify,
10 other than you and another officer?

11 A. To testify where he spun around he split blood
12 direct in my face?

13 Q. Right.

14 A. No.

15 Q. And this miraculous video that keeps disappearing,
16 your partner, who's going to testify here in a few
17 minutes, has the same type video you have.

18 Isn't that correct?

19 A. Yes.

20 Q. But we have his video and we're going to watch that
21 here in a little while; right?

22 A. Yes.

23 Q. So yours would've had more information and more
24 stuff for this jury to make a decision on than his would
25 have?

1 A. Probably; yes.

2 Q. But we don't have his.

3 A. He was fortunate enough not to have to turn his car
4 off.

5 Q. That you know of.

6 A. That I know of.

7 Q. But you said:

8 Even if you turn the car off, it goes to
9 hard drive.

10 And you don't have the hard drive?

11 A. If the video is processing.

12 Q. So everything seems to be working out just perfect
13 for y'all.

14 A. (No response.)

15 Q. You have a video camera or a digital camera or
16 anything? You got a cell phone camera.

17 A. Yes.

18 Q. Did you take any pictures of the blood that was on
19 you?

20 A. No.

21 Q. You know, there are cameras in the hospital?

22 A. I -- I wouldn't know that.

23 Q. Did you ask. Did you go back and try to find it?

24 A. No.

25 Q. You're the lead investigator in this case; aren't

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1 you?

2 A. I'm the arresting officer.

3 Q. And you're lead investigator.

4 A. I'm the arresting officer.

5 Q. And you list in your report that you're the lead
6 investigator; correct?

7 A. The responding officer; yes.

8 Q. No; you go one step further. You are, according to
9 your report, the leading investigator.

10 A. I'd have to see where "leading investigator" is
11 actually being shown.

12 My name shows I'm the reporting officer.

13 Q. Well, you didn't sign the warrant; did you?

14 A. I'd have to look at the warrant to re -- refresh my
15 memory.

16 Q. You don't -- As important a case this is, you
17 haven't reviewed the warrants already?

18 A. Six months.

19 Q. Six months that you --

20 A. Seven months.

21 Q. -- have met with the prosecutor and read the
22 warrants and gone through your file?

23 A. I have. I -- I've refreshed my memory of the events
24 that took place that night.

25 Q. Well, let's just say -- See if this helps you out.

1 A. Your answer would be no, then. Yes. I'm sorry. No
2 I did not.

3 Q. Okay. So you didn't sign the warrant?

4 A. No I did not.

5 Q. You didn't check the hospital. Now you're claiming
6 not to be the lead investigator.

7 But this is an important case to
8 you?

9 A. It is.

10 Q. And there's no doubt that -- no doubt that my client
11 stop -- did not stop for your blue lights; none.

12 We all agree about that; right?

13 A. Yes.

14 Q. Okay. Other cars had video; didn't they?

15 A. Other cars were --

16 Q. Other patrol cars?

17 A. Other cars were equipped with vehicle video. I'm
18 not positive that other --

19 Q. As an investigator, or as a lead person, or as
20 arresting agent or anything, wouldn't that have been
21 important to you to go around and collect that and bring
22 -- or interview those people to see what they saw?

23 A. Yes.

24 Q. But you didn't do it?

25 A. No.

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1 Q. In fact, my client was talking about how he was John
2 Gotti at one point; didn't he?

3 A. Yes.

4 Q. He's clearly is not John Gotti; right?

5 A. No.

6 Q. Did it stop anybody from poking fun at him about
7 being John Gotti?

8 A. (No response.)

9 Q. Do you remember people saying:

10 Oh, you're John Gotti. We've
11 been looking for you for years.

12 A. I don't remember that.

13 Q. You don't remember that?

14 A. No sir.

15 Q. If the video shows it, you wouldn't disagree with
16 it; would you?

17 A. If -- I'd have to listen to the video.

18 Q. Okay. And -- And -- But we will. We'll --

19 A. Yes sir.

20 Q. -- listen to all that.

21 Isn't it true, my -- my client,
22 Mr. Smart, was really struggling with his faculties?

23 A. (No response.)

24 Q. Struggling with this mental process?

25 A. (No response.)

1 Q. He had just jumped -- Well, let me just stop there.

2 And I'll ask you another question.

3 A. Are -- Are you asking whether he was drunk or not?

4 Q. Not drunk; just struggling.

5 I mean, we don't know whether he
6 had a concussion; whether he was drunk; whether he was
7 just -- I mean, we don't know.

8 But he was struggling with his
9 mental faculties?

10 You'd agree with that?

11 MR. BRYAN:

12 Objection; that calls for --

13 MR. VON HERRMANN:

14 An observation.

15 MR. BRYAN:

16 -- uh -- an impression of
17 another person's state of mind.

18 MR. VON HERRMANN:

19 It calls for an observation,

20 Your Honor.

21 THE COURT:

22 Overruled.

23 WITNESS:

24 Yes; whether it was intentional
25 or unintentional.

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1 MR. VON HERRMANN:

2 Okay. That -- That's fair.

3 CROSS-EXAMINATION BY MR. VON HERRMANN CONTINUED

4 Q. And tell me again, because I'm not real sure exactly
5 how far all of this jumping and crossing and taking place
6 -- He ended up crashing into a -- a -- a railroad track?

7 A. Yes.

8 Q. Where he broke it.

9 A. Yes.

10 Q. And he cleared at least two ditches?

11 A. Cleared -- He cleared -- cleared one ditch.

12 Q. One ditch --

13 Q. And struck the railroad track and landed in that
14 second ditch.

15 Q. And you would agree with me, even though you don't
16 work accidents, that's a bad accident?

17 That's -- you know -- That's
18 going to be a bad scene.

19 A. That's not what somebody wants to do; no.

20 Q. No. And that can certainly -- you know -- impact
21 your health and things of that nature?

22 You agree with me?

23 I mean, you've worked -- you've
24 backed up the Highway Patrol enough to know that?

25 A. You could -- you could sustain some type of physical

1 injury with that; yes.

2 MR. VON HERRMANN:

3 And -- Well, I'll withdraw that.

4 I have no further questions,

5 Your Honor.

6 THE COURT:

7 Redirect?

8 MR. BRYAN:

9 Thank Your Honor.

10 REDIRECT EXAMINATION BY MR. BRYAN:

11 Q. Uh -- Mr. Von Herrmann asked you about -- uh -- 15
12 minutes of struggling.

13 Was he struggling for the whole
14 15 minutes?

15 A. At -- At what -- I mean, at what point?

16 Q. Well he asked you -- He said -- He was asking you
17 about tasing him. And you had a taser. Do you remember
18 that?

19 A. Yes.

20 Q. And he said:

21 Uh -- Couldn't you just tase him
22 if he was struggling for 15 minutes?

23 Do you remember those questions?

24 A. Yes.

25 Q. Uh -- How long did it take you to get the handcuffs

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1 on him?

2 A. Uh -- Not long. Very -- Very short. Very short
3 timeframe.

4 Q. Uh -- Less than five minutes?

5 A. Oh, yes.

6 Q. And so, would you tase somebody with handcuffs on
7 them?

8 A. No.

9 Q. Uh -- As far as him being conscious or unconscious
10 -- uh -- you said that he was unresponsive; is that
11 right?

12 A. Unresponsive to verbal -- verbal questions or --or
13 verbal statements.

14 Q. And was that before or after he had struggled
15 initially?

16 A. He --

17 Q. When he got out of car, was he conscious when he got
18 out of the car.

19 A. Yes.

20 Q. Was he conscious when you tried to put the handcuffs
21 on him?

22 A. Yes.

23 Q. Was he then unresponsive after you got the handcuffs
24 on him?

25 A. Yes.

1 Q. And then, did he -- What happened after that?

2 A. It was a -- a mix-up between a struggle and an
3 unresponsiveness.

4 Q. And -- uh -- according to your observations, did you
5 believe that he was unconscious or just not answering the
6 questions?

7 A. Believe he was not answering questions -- quite
8 possible.

9 Q. Do you think he was unconscious?

10 A. No.

11 Q. Now -- And I think there was some question about the
12 -- the board and all that.

13 You -- You've been to a few
14 accidents, although you don't technically work them; the
15 Highway Patrol does; is that right?

16 A. Yes.

17 Q. And -- uh -- every accident you go to, they put
18 somebody on a board and carry them to the hospital?

19 A. No.

20 Q. Okay. And did this Defendant get the opportunity
21 to go with EMS?

22 A. Yes; a --

23 Q. Who called EMS?

24 A. -- few times. I -- Well, I requested EMS. It was
25 sent to dispatch.

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1 Q. For him?

2 A. Yes.

3 Q. And they came?

4 A. Yes.

5 Q. And -- uh -- there was a question about whether you
6 took a picture of the blood he spit on your face?

7 Uh -- When you got spit in your
8 face -- uh -- is that -- what -- what did you think
9 about?

10 Did you think about taking a
11 picture of it?

12 A. No, I didn't want to -- I actually didn't want to
13 contaminate anything else.

14 Q. Did you wipe it off?

15 A. (No response.)

16 Q. Did you wipe the blood off your face after you got
17 spit on?

18 A. Oh, Yes.

19 MR. BRYAN:

20 I don't have any other
21 questions.

22 THE COURT:

23 Recross?

24 MR. VON HERRMANN:

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1 I have no questions, Your Honor.

2 THE COURT:

3 All right. Thank you. You
4 may step down.

5 All right. Call your next
6 witness.

7 MR. BRYAN:

8 The State calls Jeremy Crews.

9 WHEREUPON: OFFICER JEREMY CREWS

10 WAS DULY SWORN AND TESTIFIED UNDER OATH AS FOLLOWS:

11 CLERK:

12 Thank you. Please be seated.
13 State your full name; and spell
14 your last name

15 WITNESS:

16 Jeremy Alan Crews; it's C-r-e-w-s.

17 DIRECT EXAMINATION BY MR. BRYAN:

18 Q. Who do you work for?

19 A. Horry County Police Department.

20 Q. Uh -- And what are your duties and responsibilities?

21 A. Uh -- Patrol Officer.

22 Q. And were you working on -- uh -- Christmas night,
23 last year?

24 A. Yes.

25 Q. And you got -- How did you get involved in this

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1 case?

2 A. I was sitting on 501 on top of the 44 coverpass. I
3 was Conway bound. And I was sitting on top of the
4 bridge.

5 And the central-side dispatch had
6 dispatched me a call; and said that -- uh -- Officer
7 Brantly was in a pursuit heading beach-bound on 501.

8 Q. What did you do?

9 A. I started heading down 501 Conway-bound. I got to
10 the light at Waccamaw Pines on Highway 501.

11 At that time, I saw them approach
12 at a high rate of speed.

13 Uh -- As they passed me, I turned
14 around in the median and began trying to catch up.

15 Q. Okay. And -- uh -- tell the jury what you did
16 after you turned around?

17 A. I turned around to try to catch up. They was moving
18 at a high rate of speed.

19 I had initially went approximately
20 about 105, maybe 110 miles an hour. Realized I was not
21 catching up. Uh -- Ended up getting up to 129.

22 Uh -- We went over the Waccamaw
23 bridge. Uh -- Went under the 17 bypass.

24 And -- uh -- I initially started
25 there gaining on them as they passed Seaboard Street.

1 And initially actually caught up to them at Robert
2 Grissom and 501.

3 Q. Okay. And where did you -- where did you start the
4 pursuit?

5 A. It started at Waccamaw Pines and -- and -- uh --
6 Highway 501 where the factory stores is at.

7 Q. Is that Tangier Outlets?

8 A. Yes.

9 Q. Okay. And -- uh -- when you caught up to him, what
10 was he doing? What was the Defendant's vehicle doing
11 when you caught up to him?

12 A. When I made the right-hand turn on Robert Grissom --
13 that would be southbound -- uh -- I followed John Brantly
14 -- uh -- Officer Brantly's car.

15 He had slowed down because the
16 suspect had spun out and actually went backwards over to
17 the curb.

18 And then, after he stopped, he
19 went forward; went back northbound, passed me.

20 And Officer Brantly had turned
21 around.

22 I waited for him to turn around.
23 And he passed me. And I had turned around. And the
24 suspect had went over the median and went across 501 on
25 -- uh -- went down Robert Grissom the wrong way. Went

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1 over the 501 median and across the lane; and ended up
2 crashing into a ditch.

3 Q. Okay. And -- uh -- what did you do after that?

4 A. Uh -- We -- Both of us had pulled our cars -- cars
5 upon on the road. Blocked the road. Got out. Ran
6 toward the vehicle.

7 At that time the suspect had
8 opened the door. He got out of the car. Seemed a little
9 confused. We then put him down to the ground.

10 And when we started to put him
11 into custody, he kind of pulled away a little bit. And
12 as we got him into custody, I turned around; went back to
13 the cars; and shut off the siren on the vehicle.

14 Q. Okay. Uh -- Describe -- uh -- as fully as you can
15 -- Well first of all, were you -- uh -- in front or
16 behind Brantly?

17 A. Behind Brantly.

18 Q. Okay. And got out of the car first?

19 A. Brantly. Officer Brantly did.

20 Q. Who got to the Defendant first?

21 A. Officer Brantly.

22 Q. And -- uh -- what happened -- describe the -- uh --
23 you said he struggled a little bit. Tell the jury what
24 happened.

25 A. He was pulling his arm away as we tried to get one

1 handcuff on him and just kind of basically trying to roll
2 over, as he was on his stomach.

3 Q. Did he seem unconscious while he was doing that?

4 A. No.

5 Q. Uh -- Okay. And what happened after you -- uh --
6 got the cuffs on him?

7 A. I had walked back to the car. Uh -- Turned the
8 siren off on my car. Went over to Officer Brantly's car
9 and turned the sirens off.

10 And then went back; and at that
11 point he was laying there, acting as if he wasn't moving,
12 kind of basically not making any movement.

13 Q. How long did he do that?

14 A. I'd say maybe approximately maybe a couple of --
15 maybe a minute or two. And we were waiting on -- because
16 we had called for -- uh -- EMS to come.

17 Q. Okay. And then, did he ultimately become
18 responsive again?

19 A. Yes sir.

20 Q. What -- Tell the jury about that.

21 A. Uh -- He became responsive; started turning his head
22 and spitting towards the ground. And walked to right of
23 him, because we had him laid down beside where the door
24 opened up.

25 And he began -- While he was in

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1 handcuffs, he was trying to rollover and things like
2 that.

3 And we were waiting on EMS
4 personnel. And then, he had -- I mean, started making --
5 At first, he started making comments about how he was
6 John Gotti and how he would, if he had a gun, he would
7 kill us all.

8 And other officers started to show
9 up. And we a stepped -- A couple of us had stepped off
10 while Officer Brantly had his foot on his back,
11 basically, so he wouldn't roll over and try to spit
12 towards him.

13 Q. Okay. And when you said that he was spitting, was
14 he spitting towards -- How close to the car was he?

15 A. Maybe --

16 Q. Or the truck, I guess.

17 A. Maybe 2 feet, maybe 3 feet.

18 Q. And -- uh -- was he spitting in the direction of the
19 truck or in the other direction.

20 A. Towards the right, away from the truck?

21 Q. And who was on the other -- Who was on that side of
22 him? Anybody?

23 A. I don't know. Officer Brantly was standing towards
24 -- maybe towards that side of him, but more towards --
25 like here is my thigh area -- and had his foot towards

1 his back.

2 Q. Okay. Uh -- Okay. So what happened after -- You
3 called EMS?

4 A. (No response.)

5 Q. Is that right?

6 A. Yes sir.

7 Q. And then -- uh -- what happened when EMS got there?

8 A. EMS got there. He was still disorderly; cussing at
9 us; telling us -- you know -- he was going to -- he was
10 making comments about how he was going snipe us out of
11 the field like deers (sic) from a tree.

12 Uh -- EMS got there.

13 He was very disorderly with him.

14 They -- They didn't -- They tried
15 to seek attention to him. And he kind of denied
16 attention, basically.

17 So they ended up clearing him;
18 going back. And he ended up having to transport him to
19 the hospital.

20 Q. And -- uh -- who transported him to the hospital?

21 A. Officer Brantly.

22 Q. And did you -- uh -- You got a video in your car?

23 A. Yes sir.

24 Q. Uh -- I'm going to hand you --

25 MR. VON HERRMANN:

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1 With -- Without objection, Your
2 Honor.

3 THE COURT:

4 All right.

5 MR. BRYAN:

6 This is State's 1.

7 THE COURT:

8 State's 1 in evidence?

9 MR. BRYAN:

10 Yes, sir, Your Honor.

11 Well --

12 THE COURT:

13 Is that correct, Mr. Von Herrmann?

14 MR. BRYAN:

15 I'm going to --

16 MR. VON HERRMANN:

17 Without objection, Your Honor. He
18 can play it.

19 THE COURT:

20 Into evidence?

21 MR. VON HERRMANN:

22 Yes sir.

23 THE COURT:

24 All right. State's Number 1 into
25 evidence.

1 WHEREUPON: THE VIDEO TAPE (WITH
2 NO ACCOMPANYING TRANSCRIPT) THAT WAS EARLIER MARKED BY
3 THE COURT REPORTER AS STATE'S EXHIBIT NUMBER 1, WAS
4 ENTERED INTO EVIDENCE WITHOUT OBJECTION.

5 MR. BRYAN:

6 Thank Your Honor.

7 DIRECT EXAMINATION BY SOLICITOR CONTINUED:

8 Q. Now -- uh -- what -- what you're going to see on the
9 -- uh -- I think we've probably covered it.

10 But this is out of your car; is
11 that right?

12 A. Yes sir.

13 Q. And you will where in relationship to the Defendant
14 and Brantly?

15 A. Where my car was pointing at?

16 Q. Yeah.

17 A. It was pointing --

18 Q. First of all, when -- when we first pick it up,
19 where are you -- where are you pointing?

20 Are you traveling the same way; or
21 the other way?

22 A. (No response.)

23 Q. When you first cut your video on? Are you --

24 A. I'm traveling towards them. They're heading towards
25 me.

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1 Q. Opposite direction.

2 A. Opposite direction.

3 Q. And then -- uh -- ultimately you turned around on
4 them?

5 A. Yes. I turned around.

6 Q. And then -- uh -- you obviously got in behind them?

7 A. Uh-huh.

8 MR. BRYAN:

9 Uh -- We'd request to publish it
10 now, Your Honor.

11 THE COURT:

12 Sure. Any objection?

13 MR. VON HERRMANN:

14 No objection, Your Honor.

15 THE COURT:

16 It's into evidence.

17 MR. VON HERRMANN:

18 Absolutely.

19 WHEREUPON: State's Exhibit Number

20 1 was played in the courtroom for the jury beginning at
21 12:16 PM and continuing until 12:41 PM, July 20, 2010.

22 DIRECT EXAMINATION BY SOLICITOR CONTINUED:

23 Q: Uh -- After all this chase happens and everything,
24 there's a --

25 After the case happens and -- uh -- the car stops -- the

1 truck the Defendant was driving stops -- uh -- you get
2 out of your car.

3 Is that you, when we see you
4 running --

5 MR. VON HERRMANN:

6 Objection, Your Honor, leading the
7 witness.

8 THE COURT:

9 Sustained.

10 MR. BRYAN:

11 I'm asking him -- uh -- at a
12 particular point in time. I'm just trying to have him
13 clarify who was on the video.

14 DIRECT EXAMINATION BY SOLICITOR CONTINUED:

15 Q. Can you see yourself running across the -- uh -- Did
16 you watch the video here?

17 A. Yes sir.

18 Q. Did you see yourself run across the side of the --

19 A. Yes, I ran across the video towards the left.

20 Q. All right. Did you ever see the Defendant or -- uh
21 -- Brantly on there?

22 A. On the video; no sir.

23 Q. Uh -- At that point?

24 A. At that point; no.

25 Q. Okay. And then when you came -- Did you come back

1 onto the camera? Or the cam -- view of the camera?

2 Did you see yourself come back
3 into the picture?

4 A. When I came back to turn the sirens off the car.

5 Q. And at that point -- uh -- about how long was that
6 after you had initially run passed off the camera?

7 A. I'd say maybe a minute maybe.

8 Q. Okay. And at that point was the Defendant in
9 custody?

10 A. Yes.

11 Q. In other words, was he handcuffed?

12 A. I -- Yes. Yes. Did I -- We had put him in cuffs
13 and then I had walked back to turn the sirens off in the
14 cars.

15 Q. So just so that's clear, he was handcuffed when you
16 came back across the --

17 MR. VON HERRMANN:

18 Objection, Your Honor; leading the
19 witness.

20 THE COURT:

21 Sustained.

22 DIRECT EXAMINATION BY SOLICITOR CONTINUED:

23 Q. When you walked back across the screen, was the
24 Defendant --

25 MR. VON HERRMANN:

1 Again Your Honor, objection;
2 leading the witness.

3 MR. BRYAN:

4 I'm asking at a particular point
5 in time on the video, was he or was he not handcuffed.

6 THE COURT:

7 Overruled.

8 MR. BRYAN:

9 He can answer either way.

10 THE COURT:

11 Continue.

12 DIRECT EXAMINATION BY MR. CONTINUED:

13 Q. Was he or was he not handcuffed when you walked back
14 across the screen?

15 A. Yes.

16 MR. BRYAN:

17 I don't have any other questions.

18 THE COURT:

19 Cross.

20 MR. VON HERRMANN:

21 Thank Your Honor.

22 CROSS-EXAMINATION BY MR. VON HERRMANN:

23 Q. At some point the Defendant wasn't make any movement
24 on the ground at all, was he?

25 A. No sir.

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1 Q. And y'all were concerned about him, because you kept
2 going -- you know:

3 Are you okay buddy? Are you okay?

4 And that lasted several minutes?

5 A. Not several minutes.

6 Q. So if I told you that I taped this and it was about
7 two minutes, you would disagree with that?

8 A. It -- It was about two minutes, yeah, that he wasn't
9 moving.

10 Q. Okay. So you were concerned?

11 A. (No response.)

12 Q. And you in -- Is that right?

13 A. Yes.

14 Q. Okay. And you indicated that he was spitting
15 towards the ground.

16 A. Towards the -- He turned his head towards the right
17 spitting.

18 Q. Towards the ground.

19 A. (No response.)

20 Q. And he --

21 MR. BRYAN:

22 Objection, Your Honor. He's
23 making a comment after the question was answered, which
24 was different than the answer.

25 MR. VON HERRMANN:

1 His answer was exactly the same.

2 THE COURT:

3 Continue.

4 MR. BRYAN:

5 He said --

6 MR. VON HERRMANN:

7 So he had --

8 MR. BRYAN:

9 The witness said to the right; and
10 he said to the ground, Your Honor.

11 THE COURT:

12 Continue.

13 CROSS-EXAMINATION BY MR. VON HERRMANN CONTINUED:

14 Q. So we had a foot on his back?

15 A. (No response.)

16 Q. And you would agree with me there was officers out
17 there poking fun at the guy?

18 A. No. No sir.

19 Q. Not calling him John Gotti? Saying: You're John
20 Gotti. We been looking for you forever.

21 A. Well, we --

22 Q. Do you not consider that poking at him?

23 A. He -- He kept telling us he was John Gotti. We kept
24 -- He didn't have any I.D. on him. And the next thing,
25 he -- At first he wasn't responsive kind of.

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1 So what you would do is probably
2 get somebody to actually talk to him to keep responses
3 while EMS is coming.

4 Q. So you're telling that you believed he was John
5 Gotti now?

6 A. No. Not that I would.

7 Q. Okay. So you were poking at him?

8 A. That wasn't me.

9 Q. Well, other officers were poking at him.

10 A. I wouldn't say they was poking at him. They was
11 talking to him.

12 Q. You don't think that making comments like:

13 So you're John Gotti. We been
14 looking for you for years.

15 You don't think that's poking to
16 the guy?

17 A. (No response.)

18 Q. How about the -- uh -- comments you made about:

19 Missed a good one there; didn't
20 you?

21 To the other officers.

22 What did you mean by that?

23 A. Good chase.

24 Q. So it was a good chase.

25 Q. It -- It was car chase, yeah.

1 COURT REPORTER:

2 It was a what? I'm sorry?

3 WITNESS:

4 Car chase. Car chase.

5 CROSS-EXAMINATION BY MR. VON HERRMANN CONTINUED:

6 Q. And you could have left the sound on the whole time,
7 couldn't you?

8 A. Well, John -- Officer Brantly had a mike. And for
9 himself, he had the same camera system I did.

10 And when you got the camera system
11 on, the green light is on, on your body mike. His was
12 on.

13 And he was standing by the
14 suspect.

15 Q. You could have left your cam -- your video on. We
16 don't have his video; right? We all know that.

17 A. Uh --

18 Q. You could've left your video or your audio on?

19 A. Yes sir.

20 Q. And we'd know what everybody out there was saying if
21 you left it on; wouldn't we?

22 A. Well -- From the video -- I -- I wasn't standing
23 that close to him. So you -- you could hear Brantly more
24 because he was more vocal than him.

25 Q. We would have known everything that you would have

1 heard on your microphone? That's the reason y'all have
2 them; isn't it?

3 A. Uh --

4 Q. And yet you chose, right after you said the F-word
5 -- and not that we're not all over 21 -- but I believe we
6 know. There's no sense in --

7 A. Yes.

8 Q. Right after you said that, you cut it off.

9 A. I -- I had -- I had -- was speaking with my direct
10 supervisor and -- and the other officers that are
11 actually on my shift; because I have a different
12 supervisor than Brantly does. And he chased him down
13 towards out precinct.

14 And I explained to him how I got
15 involved and what exactly happened.

16 Q. But you had cut your microphone off during your
17 explanation; didn't you?

18 A. Yes sir.

19 Q. And during the time that, for instance, when we
20 might've heard something when he was coming up from -- uh
21 -- of what he said?

22 A. That's possible.

23 Q. Did you have a cell phone with you?

24 A. It was in my car.

25 Q. That night?

1 A. Yes sir.

2 Q. You could've taken pictures; couldn't you?

3 A. I don't take pictures with my cell phone; no.

4 Q. You've got capabilities with your --

5 A. I've got capabilities; yes.

6 Q. And you could have turned your camera on your video
7 to take pictures of what was going on; couldn't you?

8 A. At the angle of that, possibly.

9 Q. And if we had all those police officers -- How many
10 do you estimate there were?

11 A. There was Highway Patrol. There was Myrtle Beach.
12 There was Horry County.

13 Q. A bunch of cameras; right?

14 A. Yes.

15 Q. And a bunch of ways to collect evidence; right?

16 A. Well, not -- Not everybody had their cameras on.
17 Unless they've actually initiated or would turn their
18 lights on.

19 Q. But there's a bunch of ways to collect evidence.

20 A. Yes.

21 Q. And Horry County, in fact, has a evidence unit that
22 goes out and will collect and process the crime scene?

23 Is that true?

24 A. Yes sir.

25 Q. And you can call them pretty much at will and

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1 they'll come out and process a crime scene?

2 A. That was -- They wouldn't respond to a chase.

3 Q. But if you had said there was a crime scene and we
4 need a process, they would've come out there; right?

5 A. That's actually not like -- like a crime scene that
6 they would come out to.

7 A -- A car chase; unless there was
8 bodily injury, they -- they would not have responded.

9 Q. But there was bodily injury. We've got a guy that's
10 passed out. So they would've responded to that one.

11 A. I'm referring to like great bodily injury; something
12 where it was life-threatening.

13 Q. Did you know it wasn't great bodily injury?

14 A. No sir. EMS came and checked him out.

15 Q. But you didn't know -- EMS -- They took him to the
16 hospital; didn't they?

17 A. Yeah, they took him to the hospital; yes.

18 Q. So you didn't know there wasn't great bodily injury.
19 Did you bother calling the crime scene people and ask
20 them to come out and process the crime scene?

21 A. No sir.

22 MR. VON HERRMANN:

23 No further questions.

24 THE COURT:

25 Redirect?

1 MR. BRYAN:

2 No, Your Honor.

3 THE COURT:

4 All right. You may step down.

5 Thank you.

6 Anything further from the State?

7 MR. BRYAN:

8 No, Your Honor. That's the

9 State's case.

10 THE COURT:

11 All right.

12 Members of the jury, we're going
13 to take a lunch break. We have to take up some matters
14 of law here in the courtroom. So we need a little bit
15 longer for lunch than you do.

16 So we're going to take a break
17 until three o'clock. If you would be back in the
18 juryroom at three o'clock.

19 But again, let me instruct you:

20 Do not talk about the case among
21 yourselves at all.

22 You have not heard everything that
23 you need to hear.

24 If you go home, don't talk about
25 with your family members. Just don't talk about it with

1 anything (sic).

2 You can talk about anything else
3 you want, but not the case itself.

4 Thank you very much. And we'll
5 see you at three o'clock.

6 (WHEREUPON: The jury empanelled
7 in the case withdrew from the courtroom at 12:49 PM, July
8 20, 2010; and was no longer present during the following
9 proceedings.)

10 THE COURT:

11 All right; motions from Defense?

12 MR. VON HERRMANN:

13 Yes, Your Honor.

14 Your Honor, we have no motion with
15 regards to failure to stop for a blue light as we find,
16 we believe, that there is evidence to go to the jury, and
17 without a doubt.

18 We've admitted that and confessed
19 the fact that there is probably -- and -- and my client
20 understands that there is the likelihood that -- and --
21 and almost the impossibility that the jury will find
22 anything other than not guilty in that particular case.

23 However, with regards to the other
24 ones -- uh -- we do have a motion for a directed verdict,
25 specifically with the threatening the life of a public

1 official.

2 They have not proved -- uh -- at
3 this point that there's any public official whose life
4 has been actually threatened -- uh -- in any way, shape,
5 or form, not to mention that there is no adequate -- uh
6 -- really an adequate way to say -- to determine the
7 intent.

8 Uh -- This Defendant was rambling.
9 He obviously was in a state, according to the police
10 officer's testimony -- uh -- in a state where he was --
11 you know -- essentially unconscious at times -- uh --
12 fading in and out.

13 There is no indication -- and --
14 and quite frankly the evidence is -- is exactly opposite,
15 in that:

16 If we had the video; if we had the
17 audio that was available to the Police Department -- uh
18 -- it might have showed something different.

19 Uh -- And that's certainly -- uh
20 -- we're going to request a charge if the -- if the -- uh
21 -- this motion is denied.

22 Your Honor, for that reason, we
23 would request a directed on that particular charge.

24 THE COURT:

25 Any response, Mr. Bryan?

1 MR. BRYAN:

2 Uh -- Well I think the evidence is
3 clear that he made some threats to kill the officer who
4 is a public officials.

5 THE COURT:

6 I find it's a question of fact. I
7 deny the motion.

8 MR. VON HERRMANN:

9 Your Honor, we would also -- uh --
10 with regards to resisting arrest -- uh -- we believe
11 there's insufficient evidence to send that to the jury
12 for -- uh -- there consideration on resisting arrest, as
13 we believe there's not sufficient evidence.

14 THE COURT:

15 Any response.

16 MR. BRYAN:

17 No argument, Your Honor.

18 THE COURT:

19 All right.

20 MR. BRYAN:

21 Judge, when I say no argument, I'm
22 -- I'm not agreeing.

23 THE COURT:

24 All right.

25 MR. BRYAN:

1 I just think the record is clear
2 on all the issues.

3 THE COURT:

4 I'm glad you bring that up.
5 Motion denied.

6 MR. VON HERRMANN:

7 I'm with on the burglary --

8 THE COURT:

9 All right. Continue.

10 MR. VON HERRMANN:

11 -- if he wants to do that one?

12 The last one, throwing the bodily
13 fluids, Your Honor, I believe the statute is -- is clear
14 that you have to throw.

15 I understand we'd had some
16 pretrial motions with regard to it. We would simply
17 renew our motion on that -- uh -- to stand on the same
18 grounds that we believe that throwing, or to be thrown,
19 would actually not -- uh -- be under the statute; that
20 the statute should have been at a simple assault, assault
21 and battery, or things of that nature.

22 I understand The Court's ruling on
23 that; and I just wanted to put that on the record and --

24 THE COURT:

25 Sure.

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1 MR. VON HERRMANN:

2 -- and please note my exception to

3 -- I guess I ought to let you rule. You might --

4 THE COURT:

5 Again, motion denied.

6 MR. VON HERRMANN:

7 And --

8 THE COURT:

9 Anything further?

10 MR. VON HERRMANN:

11 And I would ask The Court to --

12 you know -- note my exception.

13 THE COURT:

14 Sure. Anything further --

15 MR. BRYAN:

16 No, Your Honor.

17 THE COURT:

18 -- from the State?

19 MR. BRYAN:

20 No, Your Honor.

21 THE COURT:

22 Defense?

23 MR. VON HERRMANN:

24 No Your Honor.

25 THE COURT:

1 Let's go over the charge with them
2 real quick and see if we've got this right.

3 LAW CLERK:

4 Okay.

5 Mr. Court Reporter, this is Jack
6 Hofler, the law clerk, for the record.

7 Uh -- This is a pretty standard
8 charge. But we're going to charge reasonable doubt. And
9 that's Victor v Nebraska.

10 Uh -- Direct and circumstantial
11 evidence. Uh -- And this is depending on -- uh -- some
12 further conversations that the judge will have with the
13 Defendant. But, if the Defendant chooses not to testify,
14 we'll charge that specifically.

15 Uh -- Uh -- Duties of judge and
16 jury. Uh -- Credibility of witnesses. We're going to do
17 a police officer charge.

18 Uh --

19 MR. VON HERRMANN:

20 I -- I'm sorry, Your Honor. I'm
21 not familiar with a police officer charge.

22 LAW CLERK:

23 Basically, the police officer
24 charge is just that the jury should not consider the
25 testimony of a police officer charge --

1 MR. VON HERRMANN:

2 Okay.

3 LAW CLERK:

4 -- should not weigh it any more
5 heavily than any other witness.

6 MR. VON HERRMANN:

7 Okay.

8 LAW CLERK:

9 And then we're --

10 MR. VON HERRMANN:

11 No objection, Your Honor.

12 LAW CLERK:

13 going to charge specifically that
14 -- uh -- while the Defendant is charged with four
15 indictments, that each indictment's charging separate and
16 distinct offenses; and that each must be considered
17 separately and -- uh -- the jury must decide each
18 separately.

19 And then, we're just going to
20 charge each of the four offenses -- uh -- per the stature
21 and the -- uh -- uh -- criminal bench book.

22 I believe that's -- that's
23 everything we've got.

24 MR. VON HERRMANN:

25 We would request that they -- you

1 charge the general criminal intent -- uh -- statute.

2 THE COURT:

3 Any objections?

4 MR. BRYAN:

5 No, Your Honor.

6 THE COURT:

7 All right. Anything further?

8 (No response.)

9 THE COURT:

10 From the Defense?

11 MR. VON HERRMANN:

12 No sir; not that I can think of

13 right this second.

14 THE COURT:

15 How about the Solicitor?

16 MR. BRYAN:

17 Your Honor, is it possible to find

18 out what your charge on intent would be?

19 THE COURT:

20 I just asked him the same. We'll

21 find it and see what we can do.

22 MR. BRYAN:

23 Thank Your Honor.

24 THE COURT:

25 All right.

1 MR. BRYAN:

2 That's all I have.

3 THE COURT:

4 And remind me when we come back.

5 All right. Thank you very much.

6 We'll be at ease until three o'clock.

7 MR. BRYAN:

8 Thank Your Honor.

9 MR. VON HERRMANN:

10 Your Honor, when do you want to go
11 over with my client --

12 THE COURT:

13 I'll tell you what. Why don't we
14 go ahead and swear-in the Defendant and let me give him
15 his rights. And then we'll take a break after that.

16 Come on up here, Mr. Smart, if you
17 would.

18 CLERK:

19 You want to take the stand?

20 THE COURT:

21 He can just stand right here and
22 you can swear him in, if you want to.

23 WHEREUPON: The Defendant was
24 sworn in open court by the Clerk at 12:54 PM, July 20,
25 2010.

1 THE COURT:

2 All right.

3 Mr. Smart, you have the right to
4 claim the protections given to you by the Fifth Amendment
5 of the Constitution of the United States.

6 This amendment in part, states
7 that:

8 No person shall be compelled in
9 any criminal case to be a witness against himself.

10 This means that you cannot be
11 required to testify this case.

12 However, you do have the right to
13 testify on your behalf if you so choose.

14 However, no one can make you
15 testify. This is a personal right; and no one can waive
16 this right except for you.

17 If you decide to testify, please
18 understand that you will be subject to the same rules
19 that govern other witnesses. And you may be examined and
20 cross-examined on any irrelevant issue in this case.

21 Furthermore, if you have any
22 convictions involving dishonesty or false statements, or
23 for crimes punishable by imprisonment for more than one
24 year, and This Court determines that the probative value
25 of admitting the evidence outweighs its prejudicial

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1 effect to you, the Solicitor will be able to introduce
2 your record to attack your credibility.

3 Do you understand?

4 DEFENDANT SMART:

5 Yes sir.

6 THE COURT:

7 Furthermore, it's important to
8 understand that if you decide not to testify, I will
9 instruct the jurors that they cannot give that fact any
10 consideration whatsoever; and that there is to be
11 absolutely no prejudice to you.

12 Do you understand this?

13 DEFENDANT SMART:

14 Yes sir.

15 THE COURT:

16 Furthermore, because you did not
17 testify, it is left entirely up to you as to whether or
18 not you testify.

19 You may talk with your lawyer.

20 You may talk with your family. You may talk to your
21 friends. That decision needs to be yours.

22 Do you understand that?

23 DEFENDANT SMART:

24 Yes sir.

25 THE COURT:

1 All right. Understanding that,
2 do you wish to testify?

3 DEFENDANT SMART:

4 No.

5 THE COURT:

6 Have you talked with your lawyer?

7 DEFENDANT SMART:

8 Yes sir.

9 THE COURT:

10 Have you talked with your family?

11 DEFENDANT SMART:

12 Yes sir.

13 THE COURT:

14 Do you have any questions about
15 this whatsoever?

16 DEFENDANT SMART:

17 No sir.

18 THE COURT:

19 All right. Anything further?

20 MR. VON HERRMANN:

21 No, Your Honor.

22 THE COURT:

23 All right. Thank you very much.

24 Please be back at three o'clock.

25 (WHEREUPON: The court was

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1 declared in recess at 12:56 PM, July 20, 2010.)

2 (WHEREUPON: The court was called
3 to order by the Bailiff at 3:01 PM, July 20, 2010; and
4 all pertinent parties, along with their counsel, were
5 back and present in the courtroom.)

6 DEPUTY:

7 Order in the court. All Rise.

8 THE COURT:

9 Thank you. Everybody be seated.

10 Okay. Solicitor and Mr. Von
11 Herrmann, I have copies of the charge.

12 If each of you would like to take
13 it and briefly review it and let me know that's suitable.

14 MR. VON HERRMANN:

15 Thank Your Honor.

16 MR. BRYAN:

17 Thank you, Your Honor.

18 MR. VON HERRMANN:

19 Wow. Are we going to read all
20 this?

21 THE COURT:

22 It's up to you. You can skim it,
23 I'm sure, and figure it out.

24 MR. VON HERRMANN:

25 No. I'm talking about for them.

1 THE COURT:

2 Unless he wants to do it.

3 MR. VON HERRMANN:

4 No objection from the Defense,

5 Your Honor.

6 THE COURT:

7 All right. How about you,

8 Solicitor?

9 MR. BRYAN:

10 Uh -- I just need one more second,

11 Your Honor.

12 No exceptions or additions, Your

13 Honor.

14 THE COURT:

15 All right. Thank you very much.

16 MR. BRYAN:

17 I have one quick thing. Before
18 the jury comes out, I just wanted to -- so that -- uh --
19 go ahead and mark it as Court's Exhibit Number 1.

20 I don't want to object, at least,
21 during his closing; but I just wanted to clarify:

22 I would object to anything -- uh
23 -- with respect to sentencing; like:

24 He's going to go to jail.

25 We know he's going to go to jail.

1 THE COURT:

2 All right.

3 MR. BRYAN:

4 I don't think that's proper
5 province of the jury; and -- uh -- also to testify for
6 the Defendant, i.e.

7 I told him not to testify. It's
8 my decision.

9 I think that's a misstatement of
10 the law. The Defendant has to decide not to testify,
11 himself.

12 I certainly don't want to object
13 to that; but it's fair to say:

14 He can testify or not testify and
15 you can't hold it against him.

16 But I don't think it's fair to say
17 that:

18 I, the lawyer, made that decision;
19 because that's the Defendant's decision. And I -- just
20 clearly don't want to object to that.

21 MR. VON HERRMANN:

22 Your Honor, with regard to the
23 second issue first because I won't to that.

24 Uh -- But with regard to the
25 first, I believe our Supreme Court has held that making

1 comment on the fact that the client is going to -- you
2 know -- at least face the potential of going to jail;
3 because we really don't know whether he's going to or
4 not.

5 The Court -- That's within The
6 Court's province.

7 But to comment on the fact that he
8 faces jail is absolutely okay.

9 You can't get into how many year
10 or anything like that; but you --

11 THE COURT:

12 I don't have any probably with
13 that.

14 Do you, Solicitor?

15 MR. BRYAN:

16 No. He just said -- In opening,
17 he said:

18 My client's going to jail.

19 And I -- I think that's not
20 knowable; and is misleading.

21 MR. VON HERRMANN:

22 If -- If -- you know --
23 everybody's okay -- you know:

24 My client has the potential to go
25 to jail on this.

1 I think we'll limit it to that.

2 THE COURT:

3 Sure.

4 MR. VON HERRMANN:

5 It may not -- I think our Supreme
6 Court has held that that's admissible.

7 THE COURT:

8 Sure. Any objection?

9 MR. BRYAN:

10 I'm not familiar with the -- that
11 case, Your Honor. I thought that the penalty was -- you
12 know -- was up to the judge; and that --

13 THE COURT:

14 Well, yeah --

15 MR. BRYAN:

16 -- the facts of whether guilty or
17 not guilty --

18 THE COURT:

19 -- the penalty is. And you're not
20 going to mention the number of years or anything like
21 that?

22 MR. VON HERRMANN:

23 No sir.

24 THE COURT:

25 You --

1 MR. BRYAN:

2 Whether he's going to jail or not,
3 I don't think it's anything relevant to the jury.

4 I don't know what case you're
5 referring to.

6 MR. VON HERRMANN:

7 Yeah. I mean, The Supreme Court
8 came down and essentially said that it was harmless error
9 for a defense lawyer or a prosecutor to mention going to
10 jail -- going away to jail. I think it's misleading to
11 the jury.

12 I mean, we all know that we're not
13 here so we can go to Sunday school.

14 I mean, I think it's misleading to
15 the jury if we try to avoid that topic.

16 I mean --

17 MR. BRYAN:

18 Harmless error is error. It's
19 just not -- It's just not dispositive.

20 THE COURT:

21 I think the jury can figure it out
22 whether you mention it or not.

23 MR. BRYAN:

24 Yeah.

25 THE COURT:

1 So why don't we just not mention
2 it; and --

3 MR. BRYAN:

4 All right. Thank Your Honor.

5 THE COURT:

6 They know what's going on. They
7 know what --

8 MR. VON HERRMANN:

9 I promise you I will do my best.
10 The problem is, of course, I've been doing it for so
11 long, just saying that, that -- but I promise I won't do
12 it intentionally.

13 THE COURT:

14 That's fine.

15 MR. VON HERRMANN:

16 And -- And please object or
17 whatever is appropriate.

18 I -- I will promise I will not do
19 it intentionally.

20 THE COURT:

21 All right. Bring them on out.

22 MR. VON HERRMANN:

23 Oh; you know what, Your Honor, I
24 do have to rest.

25 MR. BRYAN:

1 (? Inaudible -- Spoken directly
2 toward the Defense Counsel in a low tone.)

3 MR. VON HERRMANN:

4 No; he's -- Well, he's already
5 done that.

6 THE COURT:

7 You want to rest on the record.

8 MR. VON HERRMANN:

9 I'll just rest on the record and
10 it's fine.

11 MR. BRYAN:

12 Okay.

13 MR. VON HERRMANN:

14 But for the purpose of the -- We
15 would state though, the defense is not going to put any
16 evidence up.

17 MR. BRYAN:

18 I know you advised him of -- of
19 his rights. I didn't know if you --

20 MR. VON HERRMANN:

21 Yes, we have --

22 MR. BRYAN:

23 -- in his colloquy that he said he
24 was not going to testify.

25 THE COURT:

DEFENSE RESTS -- MOTIONS, ETC.

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1 He said he was not.

2 MR. BRYAN:

3 Thank Your Honor. I'm sorry.

4 THE COURT:

5 Do you want to rest in front of
6 the jury; or have you rested?

7 MR. VON HERRMANN:

8 Uh -- I've rested. But I'd like
9 to rest in front of the jury.

10 THE COURT:

11 Okay.

12 (WHEREUPON: The jury empanelled
13 in the case was escorted back into the courtroom at 3:10
14 PM, July 20, 2010; and was in fact present during the
15 following proceedings.)

16 THE COURT:

17 Mr. Von Herrmann, call your next
18 witness.

19 MR. VON HERRMANN:

20 Your Honor, we see no need to call
21 any witnesses. So Defense rests at this time.

22 THE COURT:

23 All right.

24 Members of the jury, just for a
25 brief moment, I'm going to send you back out. I have to

1 take up motions at this time. And we'll bring you right
2 back in real quick.

3 Thank you.

4 (WHEREUPON: The jury empanelled
5 in the case withdrew from the courtroom at 3:11 PM, July
6 20, 2010; and was no longer present during the following
7 proceedings.)

8 THE COURT:

9 Any motions?

10 MR. VON HERRMANN:

11 Your Honor, Defendant renew all
12 the motions in pretrial -- uh -- uh -- previously made
13 before on -- under the directed verdict for all four
14 cases -- or all four charges, with the same reasons.

15 THE COURT:

16 Okay. The motions are denied
17 again.

18 Solicitor, anything from you?

19 MR. BRYAN:

20 (No response.)

21 THE COURT:

22 Any motions?

23 MR. BRYAN:

24 No sir, Your Honor.

25 THE COURT:

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1 All right.

2 Let's go ahead and bring the jury
3 back in.

4 (WHEREUPON: The jury empanelled
5 in the case was escorted back into the courtroom at 3:14
6 PM, July 20, 2010; and was in fact present during the
7 following proceedings.)

8 THE COURT:

9 All right. Thank you very much.

10 I just wanted to make sure you get
11 your exercise after lunch.

12 (Laughter erupts in the
13 courtroom.)

14 THE COURT:

15 All right.

16 Solicitor, you're recognized.

17 MR. BRYAN:

18 If it please The Court?

19 I appreciate your patience and --
20 uh -- your abilities to pay attention.

21 I think everybody on the jury --
22 It looked to me like you were paying attention and taking
23 the job serious.

24 And even though it's -- uh -- like
25 I said, a pretty quick case -- uh -- it's important to

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1 everybody in the courtroom too.

2 And -- uh -- all we want you to do
3 is to do justice in the case.

4 And -- uh -- we want you to just
5 simply use common sense.

6 And the judge is going to charge
7 you on reasonable doubt that it's a -- a verdict that you
8 -- leaves you firmly convinced -- that the evidence in
9 the case leaves you firmly convinced, either way -- uh --
10 that's when you come -- that's when you come back in the
11 courtroom.

12 And if you are firmly convinced of
13 the Defendant's guilt on each of these charges, then your
14 responsibility is to come back: guilty.

15 Let me talk just quickly about the
16 evidence.

17 Uh -- It's basically from the
18 officers -- those two officers who testified and the
19 video.

20 That's all the evidence there is
21 in the case.

22 And -- uh -- the judge is going to
23 charge you on credibility. And I suggest to you that
24 both officers -- uh -- looked forthright.

25 He's going to talk about their

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1 demeanor.

2 Uh -- Did they look like they were
3 telling the truth?

4 Did they act like they had
5 something to hide?

6 Did they seem like they were
7 extremely bias.

8 Uh -- But I would suggest to you
9 that:

10 Officer Brantly came in and just
11 told you what happened factually.

12 And what happened is:

13 He was on patrol on Christmas Day.

14 So he's got the -- uh -- He drew
15 the short stick. And he's working Christmas Day into the
16 midnight and beyond of the 26th.

17 And he's just on routine patrol,
18 when he sees the -- the Defendant come by in his car.

19 He's going too fast.

20 He goes right through the
21 intersection and stops in the middle of it.

22 And he looks over and he sees the
23 officer, at which point he takes off.

24 And the failure to stop is later
25 caught on video but the officer said that he was going --

1 uh -- Crews testified that he was going 120 miles an hour
2 and not catching up to the Defendant.

3 So he's putting his -- his life in
4 jeopardy; the lives of the officers; the life of anybody
5 unfortunate enough to be on the road at -- uh -- one or
6 two o'clock in the morning on Christmas Night.

7 And he goes all the way in to
8 Myrtle Beach, at which point he never stops.

9 At some point he takes a right.
10 He does a couple of spins.

11 You see him go back in reverse.

12 He steps on it again.

13 And he doesn't stop, ever.

14 And that's what I want you to --
15 to keep in mind in this case.

16 Uh -- Mr. Von Herrmann is probably
17 going to say a lot of things that -- that I won't
18 address.

19 But I hope you just use your
20 common sense. And -- And think about what's on the video
21 and what the testimony was.

22 If there's one thing we know is,
23 that:

24 That Defendant never stopped, ever
25 voluntarily.

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1 He didn't stop when he ran his car
2 into oncoming traffic, across median, across the road he
3 was supposed to be on, across the grass there, and
4 ultimately into the -- uh -- railroad track.

5 And once he crashed his vehicle
6 and he couldn't drive anymore, they got him.

7 When they got him, he tried to
8 pull away. That's the resisting arrest.

9 The two of them were able to take
10 him down and arrest him and put his hands behind his
11 back, at which point he starts playing possum.

12 And now he's gone from -- uh --
13 resisting and struggling, to spitting all over the place.
14 And now he's just unconscious.

15 And you hear the officer say:

16 Hey, you all right buddy.

17 He says:

18 Uh -- EM -- EMS is on the way
19 Hoss; right.

20 And if he was condescending -- uh
21 -- then you are the judge of that.

22 I suggest to you that nothing that
23 Brantly ever did was condescending or in any way -- uh --
24 is he responsible for what happened.

25 So they -- they arrest -- they --

1 they place him in cuffs.

2 He calls EMS.

3 When he calls EMS, it takes about
4 10 minutes to get there.

5 When they get there, the Defendant
6 refuses EMS treatment.

7 EMS came. EMS left. They didn't
8 take the Defendant with them.

9 That wasn't his fault.

10 That was EMS's decision based on
11 what they heard from this Defendant.

12 Now, at the end, and this tape is
13 in evidence.

14 So the video's in evidence.

15 Uh -- I want to use your common
16 sense. And if you need to go back and look at this, I --
17 I urge you to do so.

18 But with about 17 -- at 2:17:35 in
19 the morning, you see this -- uh -- that Mr. Von Herrmann
20 characterized -- uh -- half-consciously Defendant coming
21 across the screen.

22 And he is pulling two officers
23 with him, as he is barking in the other direction,
24 obviously screaming at somebody and trying to attack
25 somebody while he's got his handcuffs still on.

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1 Now, I'm not making that up.
2 That's on the video. And that's what the evidence will
3 show. And that's consistent with what the officers
4 testified to.

5 So he wouldn't quit, even when
6 they got him in handcuffs.

7 Now a lot has been made about the
8 other video. Uh -- There is one video. You have what
9 you have. It's the evidence that's in front of you.

10 But I suggest that:

11 Even if there was another video,
12 it wouldn't capture the Defendant spitting on the victim,
13 because it would be heading straight ahead anyway and
14 they're in there next to the door."

15 So that's just a bunch of -- uh --
16 making a big deal about nothing. Because it wouldn't be
17 on there anyway.

18 The point is:

19 He's handcuffed. And when he --
20 uh -- when he -- uh -- goes to put him in the car, he
21 turns, according to the testimony, and spits directly in
22 his face.

23 Now a lot's been made on cross-
24 examination about professionalism, and whether these
25 officers were professional or not.

1 And -- uh -- I would suggest to
2 you that the fact that the Defendant made it to the
3 hospital in the same condition he was in prior to
4 spitting in the officer's face, is about as professional
5 as a man can be expected to behave.

6 If someone spits in another
7 person's face -- uh -- it's not sending them a birthday
8 card.

9 It's pretty clear -- uh -- what
10 your intention is.

11 And I can't think of anything more
12 insulting than you can do from one person to another than
13 spit in their face.

14 Now when the matter can clear and
15 the blood -- Again, when you see him come across the
16 screen, if you'll take a look at that on the video -- or
17 if you saw it the first time:

18 Did he look like somebody who was
19 having trouble breathing; that he was half-unconscious;
20 that he was -- uh -- in dire need of medical care.

21 He was pulling two officers trying
22 to get to somebody else, even though he was handcuffs.

23 Then, he spit in that officer's
24 face.

25 And the question comes:

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1 Well did you take a picture of it?

2 So, if you've ever heard of a
3 Monday-morning-quarterback, it's easy to -- uh -- ask
4 questions six months or a year later on a Tuesday
5 afternoon in the courtroom when you got a law degree.

6 When you get spit in your face, a
7 bunch of spit and blood, I suggest to you the first thing
8 you -- you're thinking is probably not:

9 Where's my camera?

10 Probably you're going to wipe the
11 spit off, and the blood off of your face.

12 The other thing that -- uh -- is
13 in evidence that I think is very telling about it, is:

14 And we didn't make 25 officers --
15 uh -- come off duty, or -- or come here while they were
16 off duty to testify to this; because you can see clearly
17 on that video.

18 You see that officer doing that
19 (gestures by pulling his hand up over his head).

20 And the testimony is -- and it
21 seems just really clear and obvious if you use your
22 common sense -- what they're saying is:

23 Put the shirt over his face so you
24 don't have to get blood -- any more blood spit in your
25 face.

1 And that's another piece of
2 evidence that you can put along with the testimony in
3 evidence to make it clear that's what's been alleged is
4 what happened.

5 Mr. Von Herrmann is also going to
6 say or he's referred to -- uh -- the fact that it's not
7 "throwing."

8 And -- uh -- because he didn't
9 spit blood into his hand and try to hurl it at him, which
10 I suggest would be impossible, and really eviscerate the
11 statute.

12 I want to read the definition of
13 "throw" to you from the dictionary. It's pretty clear:
14 To discharge into the air by any
15 means.

16 I would take "any means" to be
17 spitting.

18 To hurl straightforth as in anger.
19 That's another definition.

20 So, I don't think they get out of
21 -- uh -- spitting on the officer's face by saying that he
22 didn't throw the spit at him.

23 When the judge charges you the
24 law, he'll tell you what -- uh -- throwing bodily fluids
25 on an officer is, according to statute.

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1 And it will say:

2 Throwing blood, urine, spit,
3 feces.

4 I suggest to you that the statute
5 would be meaningless with respect to "spit," if it was
6 talking about throwing it with your hand.

7 So I don't think that should be an
8 issue if you use your common sense and think about it.

9 The question here -- you know --
10 it's not a question of what don't you have. It's a
11 question of what do you have and what do you know.

12 And if you don't believe that the
13 officer testified credibly?

14 If you think that he made that up
15 about being spit on?

16 If you think that he just made up
17 the fact that he said he was sitting in a deer stand,
18 which I suggest to you, you can actually hear about two
19 hours -- uh -- two o'clock -- maybe 2:18 in the morning,
20 you hear -- the officer says what?

21 I've got a portable -- He says
22 he's got a portable deer stand. He's going to come shoot
23 you.

24 And you can actually hear him at
25 2:18, he says:

1 I promise one day I will sit in a
2 tree.

3 And about 13 seconds later, you
4 hear something about "shot."

5 There's some mumbling. You can't
6 quite hear between there. But clearly that corroborates
7 what the officer testified to.

8 There's no question that he was
9 threatening in his demeanor and his manner.

10 He was actually trying to get at
11 the officers while he was cuffed.

12 While he was still cuffed and he
13 couldn't fight anybody anymore, he spit on them.

14 And I would suggest to you that:

15 Rather than bending over backwards
16 to exonerate the Defendant, when it's clear to everybody
17 that he was not going to quit.

18 He was running -- Nobody made him
19 -- you know -- Mr. Von Herrmann said that -- uh -- that
20 he caused it; that the officers, I think he said, caused
21 it -- and those other things.

22 If he suggest to you that -- that
23 the officers caused this, or that they were somehow at
24 fault -- let's think about it with a realistic point of
25 view -- caused it.

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1 The officer didn't make him go a
2 120 miles an hour.

3 The officer didn't make him fight
4 him.

5 The officer didn't make him
6 scream:

7 I'm going to kill you. I'm going
8 to kill your wife and kids.

9 And -- And if we had this point
10 about:

11 Oh, well he didn't really do
12 anything. It was all just a harmless threat.

13 He was just spouting off. He's
14 not really John Gotti.

15 I suggest to you:

16 It's not up to us to determine
17 whether he actually killed somebody.

18 If he had killed him, we (sic)
19 wouldn't be sitting here charged with threatening the
20 life of a public official.

21 It would be much different charge.

22 He doesn't have to carry out the
23 threat.

24 There is nothing in law that
25 requires him to carry out the threat to make it a threat.

1 The point is:

2 It is illegal to tell an officer
3 that you're going to kill him; that you're going to kill
4 their wife; that you're going to kill their children.

5 He shouldn't have to hear that.

6 He should have to deal with it.

7 And he certainly shouldn't have to deal with it on
8 Christmas Day -- or Christmas Night.

9 All we're asking you to do is to
10 do justice in this case.

11 I suggest to you that whether
12 there were other officers who were laughing and joking
13 around, it wasn't funny to Officer Brantly when he got
14 spit in his face.

15 He didn't try to do any justice
16 himself that night. He left it in your hands.

17 And I'd suggest to you that the
18 only just verdict that you can bring back is guilty on
19 all these.

20 Thank you.

21 THE COURT:

22 All right. Thank you.

23 Mr. Von Herrmann?

24 MR. VON HERRMANN:

25 Folks, the only thing that Bo and

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1 I agreed about the entire time is -- well, not the only
2 thing -- but is this:

3 They didn't provide a whole lot of
4 much of anything at all.

5 They could have provided pictures.

6 They could have provided video.

7 They could have brought videos in.

8 They chose not to.

9 They had all those EMS operators.

10 They were available. They could've brought them in to
11 tell you that he refused medical attention.

12 They could have brought in
13 independent police officers. There was enough out there.

14 They could have shown video from
15 at least, I counted, 12 or 13 cars. It's up to y'all to
16 count them and figure out -- you know -- how many
17 officers were on the scene and the credibility.

18 But the truth of the matter is:

19 What we're really talking about
20 here, when we talk about all the lack of evidence, it's
21 not necessarily any one detail that -- that they didn't
22 bring in, as much as that is.

23 No pictures.

24 No blood.

25 Look at the video.

1 They talk about he's concerned
2 about the -- uh -- blood.

3 Well, let me tell you this:

4 When you watch the video, he comes
5 up, he didn't have any blood on his face at all.

6 The officers are not concerned at
7 that point at all, apparently. Because when they had him
8 down on the ground and they had his foot on his back so
9 he couldn't roll over and spit on them, they act like
10 they had a big concern.

11 They could have taken care of it
12 right then. (Snaps fingers loudly.) Done. No problem.

13 So that tells me a lot.

14 And what that tells me is:

15 Not only were they not concerned,
16 it didn't happen.

17 That there wasn't a spitting
18 intentionally of anybody's face. Because it could have
19 been rectified right there.

20 They had already identified,
21 according to the testimony, if you believe the police
22 officer -- and I have no reason to believe it's -- I
23 mean, the officer said:

24 He was turning to the right and
25 spits in the grass.

1 I want to watch that video.

2 Because the interesting thing about that video is:

3 There are at least three police
4 officers that spit that night that are uninvolved in this
5 case.

6 And none of them had been in a
7 horrible car wreck where their teeth came through the
8 roof in their mouths -- or the front of their mouths.

9 And I think that's telling.

10 This is a pile-on case.

11 He -- He failed to stop for a blue
12 light. No question about it. No question about it.

13 I expect that that verdict will be
14 one of the quickest things that's ever come back in the
15 history of Horry County law, is the fact that he ran.

16 And he did some bad things that
17 night. No question about it.

18 But the rest of it, when you get
19 in an accident and you are facing and you have had the
20 amount of injuries that this man has had, and you are not
21 treated by EMS.

22 And we don't have any indication
23 other than police officer saying:

24 Yeah, he -- he rejected EMS help.

25 We don't have any EMS officers

1 just a little bit. They have failed that miserably, by
2 not providing you the information that you need to make
3 that determination and decision; by not providing a
4 picture.

5 If we had a picture, or if we had
6 the hospital information?

7 If we had one of a hundred video
8 cameras?

9 If we had the audio tape that the
10 officer cut off; because he had to say the F-word and run
11 to the scene.

12 Well, he didn't run to the scene.
13 He ran 'cause he was bloody.

14 And the man's surrounded by ten or
15 twelve, fourteen cops. And they're all doing what?

16 Poking and laughing at him.

17 Look at the videotape.

18 When he's drug out, even after
19 they didn't put him on the backboard and do the neck
20 brace and everything else, they're still laughing at him.

21 You poke a bear long enough, I
22 mean, of course he's going to react.

23 I'm not saying as that's fair.

24 I'm not saying that that's the way that -- that police
25 officers, really in life, should be treated.

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1 I'm saying that is life. And I'm
2 saying that's how people react.

3 And if we have gotten to point in
4 our lives and in law-enforcement lives where you can
5 arrest, and poke fun, and joke, and laugh, when a man's
6 in handcuffs, and yet, you don't expect them to say
7 anything bad to you, I subject to you -- suggest to you
8 that:

9 We're in a bad state of affairs.

10 We're in trouble.

11 We're in a bad state of affairs,
12 if I -- if a professional law enforcement officer can
13 continue to act that way, poke and prod at somebody,
14 allow his buddies to laugh at him.

15 The guy's in handcuffs. Clearly
16 they weren't concerned about the blood; clearly. Because
17 they would have already taken care of it.

18 There was -- You saw the guy with
19 a baseball bat -- I mean, baseball hat. He could put it
20 on him and it would've been done, if that was really the
21 concern.

22 Yeah. Mr. Bryan's right.

23 There's a lot of stuff that I'm bringing up that he don't
24 want to talk about.

25 He don't want to talk about it,

1 because the other thing is: beyond a reasonable doubt.

2 You have to be firmly convinced
3 that these offenses occurred.

4 And we've already said:

5 He failed to stop for a blue
6 light. And I've already explained to you that:

7 The -- The law just doesn't allow
8 certain things.

9 And that all can be discussed
10 later after the trial. And -- And maybe we're able to --
11 you know -- sit down and -- and talk.

12 But right now is not the time for
13 that and is not the place for that.

14 But we know that he didn't stop
15 for the blue light.

16 We know that there was obviously
17 blue lights.

18 We know that what he did was mess
19 up real bad that night.

20 But don't let them do what they
21 did on the night of that day -- or excuse me -- the 26th
22 of December -- and pile-on for the sole purpose of making
23 it worse and worse and worse and worse on him.

24 That's not fair. And justice is
25 fair; fundamental fairness.

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1 And you folks are the ones that
2 has the absolute power and control to control that
3 activity, and to allow people the opportunity to make a
4 mistake, even if it is our -- horrendous mistake -- that
5 -- that -- that, thank goodness, like he indicated, going
6 that fast.

7 Sure, it could have killed
8 somebody. It could have hurt somebody. It almost did;
9 him.

10 But we punish people, not for what
11 could have happened. Because if we did that, everybody
12 would be in trouble.

13 We punish people for what they've
14 done.

15 And what he did was:

16 He failed to stop for the blue
17 light.

18 It had horrendous effects.

19 It had the effect physically,
20 mentally, emotionally, on him. And now he's at trial for
21 it.

22 I mean, he's in a fight. He's in
23 a fight for his life.

24 The prosecutors are just doing --
25 and the police -- are piling on.

1 They're -- They're over -- I won't
2 say "exaggerate," that's probably not fair.

3 But they didn't bring you the
4 evidence to overcome the burden of proof that they carry
5 squarely on their shoulders.

6 You see, as my client sits there
7 today, it's been described by people a heck of a lot
8 smarter than I am, as:

9 He wears a cloak of innocence.
10 And that cloak is absolute. And until it's removed by
11 you folks, he is an absolute innocent man.

12 Now, while that cloak has some
13 tethering -- because there's no question that he did
14 violate the law in speeding and failing to stop for the
15 blue light and all that -- there are tethering.

16 And with that tethering comes
17 responsibility.

18 But there's no sense in it being
19 taken completely off of him just because police officers
20 were mad.

21 Folks, y'all are sworn to -- to
22 truly and try this case correctly. I submit to you:

23 There is no evidence of three of
24 the charges.

25 I submit to you that:

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1 There is absolutely -- him -- The
2 realistic view of him pulling away with two officers that
3 are a lot bigger than he is, in handcuffs, yelling and
4 barking at somebody else.

5 You know, you honestly would have
6 the evidence that you needed to know to whether he
7 threatened somebody or didn't threaten somebody; but he
8 cut his -- he cut his remote off.

9 So there's no audio of it; or
10 else, you know what?

11 I might have been up saying:

12 Yeah, he ran -- failed to ran a
13 red light -- or stop for a blue light, and he did what
14 they said he did with a public official.

15 But they didn't give you that.

16 And that's their responsibility.
17 He doesn't have to prove anything. Nothing.

18 And it's your responsibility to
19 uphold that, the law and the Constitution.

20 And for that reason, I understand
21 you're going to find him guilty of failure to stop for a
22 blue light.

23 But I submit to you folks, as I
24 did in the beginning, the rest of the charges should come
25 back: not guilty.

1 Thank you.

2 THE COURT:

3 All right. Thank you.

4 Members of the jury, it's now that
5 point in time with this trial when I have to charge you
6 on the law applicable to this case.

7 I want you to understand it's
8 eleven pages long, and it's 3390 words.

9 So before I do that, why don't we
10 just stand up, stretch our legs, catch a breath, and then
11 we'll go through that, and hopefully, complete this
12 trial.

13 So, if you would just stand up and
14 stretch your legs.

15 And you can to, if you would like.

16 All right.

17 Members of the jury, it is now my
18 duty as the trial judge to instruct you on the law
19 applicable to this case.

20 It is your duty as jurors to
21 accept and apply the law that I now state to you.

22 Furthermore, it is your exclusive
23 duty to decide all the issues of fact in this case, and
24 to determine the effect, value, weight, and truth of the
25 evidence.

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1 Both the State and Defendant have
2 the right to expect that you will carefully consider and
3 evaluate the evidence and apply the law of this case to
4 it; so that in the end, both the State of South Carolina
5 and this Defendant will receive a fair and impartial
6 trial.

7 I want you to understand that:

8 When I -- When I use the word
9 "Defendant," I refer to Mr. Tom on -- Thomas Allen Smart.

10 Furthermore, it is important to
11 understand that the State of South Carolina charges the
12 Defendant, Thomas Smart, with the offenses known as:

13 Hurling Bodily Fluids on a
14 Correctional Facility Employee or Local Law Enforcement
15 Officer;

16 Failing to Stop for a Blue Light
17 or Siren;

18 Threatening a Public Official; and
19 Resisting Arrest .

20 To these charges, the Defendant
21 has entered a plea of not guilty.

22 This plea of not guilty places the
23 burden of proof on the State to prove the guilt of the
24 Defendant to you, the jury, beyond a reasonable doubt.

25 It is vital to understand that the

1 Defendant is presumed under the law to be innocent of
2 these charges.

3 It is a fundamental rule of our
4 law that a Defendant, irrespective of the seriousness of
5 the charges against him, is always presumed innocent of
6 the crimes for which he is charged, unless and until his
7 guilt has been proven by evidence which satisfies you
8 beyond a reasonable doubt.

9 This presumption of innocence is
10 not a mere legal theory or a legal phrase.

11 This presumption of innocence is
12 very important. And you need to understand that this
13 presumption accompanies the Defendant from the time of
14 his arrest and appearance in this Court, and continues
15 with the Defendant, even after you retire to the jury
16 room to deliberate.

17 In other words, the Defendant
18 receives the burden (sic) of the presumption of innocence
19 until the very end of this trial, when you, the jury,
20 will deliberate upon the evidence and decide whether the
21 State has proved his guilt beyond a reasonable doubt.

22 Proof beyond a reasonable doubt is
23 proof that leaves you firmly convinced of the Defendant's
24 guilt.

25 There are very few things in this

CLOSING ARGUMENTS AND JUDGE'S CHARGE

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1 world that we know with absolute certainty. So even in
2 criminal cases, the law does not require proof that
3 overcomes every possible doubt.

4 However, if based on your
5 consideration of the evidence, you are firmly convinced
6 that the Defendant is guilty of the crime charged, you
7 must find him guilty.

8 If on the other hand, you think
9 there is a real possibility that he is not guilty, you
10 must give him the benefit of the doubt and find him not
11 guilty.

12 Please understand that:

13 Reasonable doubt may arise from
14 evidence which has been presented in the case, or from
15 the lack of evidence in the case.

16 It is your responsibility to
17 determine whether or not reasonable doubt exists as to
18 the guilt of this Defendant.

19 I charge you that Defendant is
20 entitled to every reasonable doubt arising in the whole
21 case, or arising in any defenses asserted by the
22 Defendant.

23 If upon any issues of fact
24 essential to a conviction and a verdict of guilty, you
25 have a reasonable doubt as to how that issue should be

1 resolved, it would be your duty to resolve that
2 reasonable doubt in favor of the Defendant.

3 Thus, in summary, it is important
4 to understand that a Defendant is not required to prove
5 his innocence.

6 Instead, the State is required by
7 law to prove every essential element of the offense
8 charged against the Defendant by evidence which satisfies
9 you of his guilt beyond a reasonable doubt.

10 Only then can you convict the
11 Defendant and find him guilty.

12 There are two types of evidence
13 which are generally presented during a trial: direct
14 evidence and circumstantial evidence.

15 Direct evidence is the testimony
16 of a person who claims to have actual knowledge of a
17 fact, such as an eyewitness. It is evidence which
18 immediately establishes the main fact to be proved.

19 Circumstantial evidence is proof
20 of a chain of facts and circumstances indicating the
21 existence of a fact.

22 It is evidence which immediately
23 establishes collateral facts from which a main fact may
24 be inferred.

25 Circumstantial evidence is based

CLOSING ARGUMENTS AND JUDGE'S CHARGE

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1 on inference and not on personal knowledge or
2 observation.

3 The law makes absolutely no
4 distinction between the weight or value to be given to
5 either direct or circumstantial evidence. Nor is a
6 greater degree of certainty required of circumstantial
7 evidence than of direct evidence.

8 You should weigh all the evidence
9 in the case.

10 If, after weighing all the
11 evidence, you are not convinced of the guilt of the
12 Defendant beyond a reasonable doubt, you must find the
13 Defendant not guilty.

14 The Defendant in this case has not
15 testified.

16 This is his constitutional right,
17 and it is not a circumstance that you can take into your
18 consideration, or even allow to enter into your
19 discussions in your jury room.

20 Under the Constitution of South
21 Carolina, and under the United States Constitution, it is
22 his constitutional right not to testify.

23 The burden of proof is upon the
24 State of South Carolina to establish guilt by competent
25 evidence beyond a reasonable doubt.

1 The fact that the Defendant did
2 not take the witness stand and testify in his own behalf
3 does not create any inference against him.

4 The jury must not permit the --
5 that fact to weigh in the slightest degree against this
6 Defendant; nor should this fact enter into discussions or
7 deliberations of the jury in any manner whatsoever.

8 When you consider the whole case,
9 if you have a reasonable doubt as to the guilt or the
10 innocence of the Defendant, then he is entitled to that
11 reasonable doubt and would be entitled to a verdict of
12 not guilty.

13 However, if upon considering the
14 whole case you find that the State has proved by evidence
15 which satisfies you of the guilt of the Defendant beyond
16 a reasonable doubt, then in such circumstances, it would
17 equally be your duty to convict the Defendant and find
18 him guilty.

19 During this trial, you and I have
20 separate duties to perform.

21 As the trial judge, it is my
22 responsibility to preside over this trial. I also have
23 the duty to rule upon the admissibility of the evidence
24 offered during the trial.

25 In that regard, you are to

CLOSING ARGUMENTS AND JUDGE'S CHARGE

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1 consider only the evidence before you, And you are to
2 disregard from your mind any testimony ordered stricken
3 from the record of this case during the progress of this
4 trial, if there be any.

5 Thus you are to consider only the
6 testimony which has been presented from this witness
7 stand, together with any exhibits admitted into the
8 records of this case.

9 Furthermore, I have the additional
10 duty to charge you on applicable law of this case.

11 And in that regard, I am the sole
12 judge of the law of this case.

13 It is your duty to accept and
14 apply the law as I now state it to you.

15 If you have any preconceived ideas
16 as to what the law is, or what the law ought to be, and
17 it does not agree with what I tell you the law is; you
18 are obligated under your oath to abandon those
19 preconceptions, because you are sworn to accept the law
20 as I now state it to you.

21 In this trial, you are the sole
22 and exclusive judge of the facts.

23 I am the judge of the law.

24 Please do not infer that I have
25 any opinion about the facts in this case from anything I

1 intentionally, or not done by accident.

2 "Resisting" means: to oppose,
3 strive against, or struck -- obstruct.

4 "Obstruct" means: to impede,
5 hinder, or interfere with.

6 Even peaceful, nonviolent,
7 indirect obstruction of an arrest or the service or
8 execution of process is considered resisting arrest.

9 If the means used are sufficient
10 to prevent the officer from making an arrest, the
11 Defendant is guilty of resisting arrest.

12 Ladies and gentlemen, I'm now
13 drawing near the end of my charge, and I want you to
14 clearly understand that:

15 You are not partisans or advocates
16 for the State or this Defendant.

17 You do not serve as jurors to
18 reward your friends or punish your enemies.

19 In this regard, you have been
20 selected by both the State of South Carolina and this
21 Defendant to be fair and impartial jurors.

22 It is your duty by your joint
23 deliberations, to determine the truth in this case,
24 giving to this Defendant the benefit of every reasonable
25 doubt on each and every issue.

CLOSING ARGUMENTS AND JUDGE'S CHARGE

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1 Then, to the facts which you
2 determine to be true, you should take and apply the law
3 which has been given to you by This Court, and thus
4 arrive at a verdict which speaks the truth in this case.

5 In fact, the word "verdict," which
6 has a Latin derivative, means: "a true saying".

7 Thus, when you have accomplished
8 these responsibilities, you will have satisfied your oath
9 as jurors, and you will have discharged your duty to This
10 Court.

11 Now Mr. Foreman, I'm going to hand
12 you this verdict form.

13 Ms. Clerk, if you would hand that
14 to him, I would be appreciative.

15 WHEREUPON: The Clerk did as
16 instructed by The Court.

17 THE COURT:

18 Thank you.

19 Mr. Foreman, when you arrive at a
20 verdict in this case, you will write your verdict on the
21 verdict form.

22 If the State has failed to prove
23 the guilt of this Defendant beyond a reasonable doubt, of
24 course, your verdict would be two words:

25 Not Guilty.

JURY REQUEST

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1 You want to try my copy?

2 MR. BRYAN:

3 Yeah.

4 MR. VON HERRMANN:

5 I don't object, Your Honor. I
6 don't object as long as I have it.

7 WHEREUPON: A portion of State's
8 Exhibit Number 1 was played before the jury again
9 beginning at 4:49 PM and ending at 5:09 PM, July 20,
10 2014.

11 THE COURT:

12 Mr. Foreman, you may retire to the
13 juryroom and continue your deliberations.

14 FOREPERSON:

15 Thank you, sir.

16 (WHEREUPON: The jury empanelled
17 in the case withdrew from the courtroom at 5:09 PM, July
18 20, 2010; and was no longer present during the following
19 proceedings.)

20 THE COURT:

21 All right.

22 Anything else we need to do?

23 MR. VON HERRMANN:

24 No, Your Honor.

25 MR. BRYAN:

VERDICT, POST TRIAL MOTIONS, AND SENTENCING 241

1 No sir.

2 THE COURT:

3 We'll be at ease until they come
4 back.

5 (WHEREUPON: The court was
6 declared in recess at 5:10 PM, July 20, 2010.)

7 WHEREUPON; We were informed by
8 the Bailiff at 5:19 PM, July 20, 2010, that the jury had
9 reached a verdict.

10 (WHEREUPON: The court was called
11 to order by the Bailiff at 5:21 PM, July 20, 2010; and
12 all pertinent parties, along with their counsel, were
13 back and present in the courtroom.)

14 BAILIFF:

15 Order in the court. All Rise.

16 THE COURT:

17 All right. Thank you.

18 Everybody be seated.

19 All right. Do we have a verdict?

20 MR. VON HERRMANN:

21 My understanding, Your Honor.

22 THE COURT:

23 All right. Sounds good.

24 All right, folks; let me just tell
25 everybody in the courtroom before the jury comes in:

1 This jury has a hard job. They're
2 doing what they think is right. And when they come in
3 and the verdict is read, whatever it is, good or bad, I
4 don't want them to have to put up with any kind of
5 reaction from anybody.

6 I don't care that it's a good
7 verdict or a bad verdict, I don't want anybody clapping;
8 anybody saying "yea" or "good" or anybody getting upset
9 and causing any commotion. Because, if you do, I promise
10 you I'm going to lock you down today.

11 So if you don't think you can be
12 good and sit there like a church mouse, you need to go
13 now.

14 If you can responsible and sit
15 there and -- and show respect to the jury, you're welcome
16 to stay.

17 Anybody want to go?

18 (No response.)

19 THE COURT:

20 All right. Thank you very much.

21 If you would, bring them in.

22 (WHEREUPON: The jury empanelled
23 in the case was escorted back into the courtroom at 5:24
24 PM, July 20, 2010; and was in fact present during the
25 following proceedings.)

VERDICT, POST TRIAL MOTIONS, AND SENTENCING 243

1 THE COURT:

2 All right, Mr. Foreman, have you
3 reached a verdict?

4 FOREPERSON:

5 Yes, Your Honor, we have.

6 THE COURT:

7 All right.

8 Would you hand it to the Deputy,
9 please.

10 FOREPERSON:

11 Sure.

12 THE COURT:

13 All right.

14 I find the verdict form is in
15 order. And Ms. Clerk, if you would publish the verdict.

16 CLERK:

17 Yes sir.

18 Indictment Number 2010-GS-26-682,
19 2010-GS-26-683, 2010-GS-26-684, 2010-GS-26-685, State of
20 South Carolina County of Horry versus Thomas Allen Smart:

21 As to the charge of throwing
22 bodily fluids on a correctional facility employee or a
23 local enforcement officer, we the jury unanimously find
24 the Defendant Thomas and Alice Smart: Guilty.

25 As to the charge of failure to

1 stop for a blue light or siren, we the jury unanimously
2 find the Defendant Thomas Allen Smart: Guilty.

3 As to the charge of threatening a
4 public official, we the jury unanimously find the
5 Defendant: Guilty.

6 As to the charge of resisting
7 arrest, we the jury unanimously find the Defendant Thomas
8 Allen Smart: Guilty.

9 Dated July 20th, 2010. Signed by
10 Foreperson Glenn Dale Jernigan, Juror -- Juror Number
11 195.

12 Ladies and gentlemen of the jury,
13 if this is your verdict so signify by raising your right
14 hand.

15 WHEREUPON: All jurors signified
16 their agreement with the verdict by raising their right
17 hand.

18 CLERK:

19 Thank you.

20 THE COURT:

21 All right.

22 Is there need for further polling?

23 MR. VON HERRMANN:

24 No, Your Honor.

25 THE COURT:

VERDICT, POST TRIAL MOTIONS, AND SENTENCING 245

1 Solicitor?

2 MR. BRYAN:

3 No, Your Honor.

4 THE COURT:

5 All right.

6 Members of the jury, I want to
7 thank you very much. You've been attentive. You've been
8 responsible. And you have officially done your duty in
9 this case.

10 You are hereby excused.

11 However, if you would like to say
12 for sentencing, you may. That choice is yours.

13 Uh -- Also I need for you to call
14 in at 11:00 o'clock tomorrow, if you're not on the jury
15 that we have set for tomorrow.

16 Is anybody on that jury for
17 tomorrow?

18 FOREPERSON:

19 How do we find out, sir?

20 THE COURT:

21 Is anybody on that jury for
22 tomorrow?

23 FOREPERSON:

24 Huh?

25 THE COURT:

1 You don't have to worry it.. Just
2 call in at 11:00 o'clock --

3 FOREPERSON:

4 11:00 --

5 THE COURT:

6 -- tomorrow.

7 FOREPERSON:

8 11:00 AM tomorrow morning?

9 THE COURT:

10 Right. Thank you very much.

11 (WHEREUPON: The jury empanelled
12 in the case withdrew from the courtroom at 5:27 PM, July
13 20, 2010; and was no longer present during the following
14 proceedings.)

15 THE COURT:

16 All right.

17 Solicitor, if you would prepare
18 the paperwork?

19 MR. BRYAN:

20 I have it here somewhere, Your
21 Honor.

22

23 Does anybody need to sign, Your
24 Honor. I don't think anybody does, including me, do we?

25 THE COURT:

VERDICT, POST TRIAL MOTIONS, AND SENTENCING

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1 I don't think so.

2 MR. BRYAN:

3 And -- uh -- just for on the
4 record, I'm crossing out "pleads" and putting
5 "convicted." I -- (trails off to inaudible).

6 COURT REPORTER:

7 I'm sorry. I'm not picking that
8 up.

9 Crossing out what?

10 MR. BRYAN:

11 Crossing out "pleads" and putting
12 "convicted" -- checking that box.

13 I don't think there will be any
14 question about that; but I had already printed the
15 sentence sheets out.

16 THE COURT:

17 I'll take a look at it.

18 MR. VON HERRMANN:

19 Your Honor, if I could, I need to
20 go ahead and put my --

21 THE COURT:

22 Sure.

23 MR. VON HERRMANN:

24 -- put my post-trial motions on
25 the record.

1 THE COURT:

2 Be glad for you to.

3 MR. VON HERRMANN:

4 Your Honor, we believe that -- uh
5 -- We request a new trial based on the fact that there
6 was lack of evidence for the jury's decision.

7 Uh -- I understand its pro forma
8 motion; but I certainly need to make it to protect my
9 client's rights.

10 Uh -- We will be, obviously, be
11 filing a notice of intent to appeal.

12 THE COURT:

13 All right. Thank you very much.
14 I'll deny those motions.

15 All right. Solicitor, I'll be
16 glad to hear from you regarding any prior record.

17 MR. BRYAN:

18 If it please The Court, Your
19 Honor?

20 He's got -- uh -- 2000 -- excuse
21 me.

22 1990: Endangering safety with the
23 use of the deadly weapon.

24 Uh -- 2006: Possession of a
25 controlled substance.

1 2006: Battery.

2 Uh -- 2007: Resisting an officer
3 in some other jurisdiction..

4 I have him for bail jumping in
5 2000.

6 Got a 2004: Threatening the life
7 of a public official, which is one of the -- obviously
8 one of the -- uh -- same charges that he was just
9 convicted of.

10 2005: Simple assault and battery.

11 Uh -- He had a '99: Criminal
12 sexual conduct with a minor, which I was unsure about.

13 Uh -- He's denied that; but, of
14 course, he's got a nine -- a 2005: Also sex offendery
15 (sic) registry conviction.

16 So I'm assuming that's correct.

17 And -- uh -- in 2009, again:
18 Threatening the life of a public official, for 9/30 of
19 '09.

20 So he's got two priors threatening
21 the life of a public officials as well as another
22 resisting and various other convictions.

23 Uh -- I don't know if you want to
24 hear from the State with respect to sentencing. I'll be
25 real brief.

1 THE COURT:

2 Sure.

3 MR. BRYAN:

4 Uh -- I think you can take into
5 consideration all relevant factors, Your Honor.

6 As an Officer of The Court, I
7 would -- uh -- uh -- represent to Your Honor that:

8 This Defendant has Hepatitis C.

9 Uh -- That's been -- uh -- He was tested.

10 Whenever the officer gets -- uh --
11 something like this happens -- he gets spit on or gets
12 some blood on him -- uh -- they test the offender and --
13 to know whether they need to check the -- the -- uh --
14 officer as well.

15 They did that. He came positive
16 for Hepatitis C, which we know is incurable.

17 Uh -- And -- uh -- so he's had
18 also undergo a battery of tests. And he's probably still
19 -- (toward the officer) Are you doing -- He's still
20 having to get blood drawn and periodically get checked
21 for Hepatitis C, to make sure he didn't contract it, Your
22 Honor.

23 So obviously, he feels strong
24 about it.

25 I don't know if he wants to

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1 address The Court.

2 OFFICER BRANTLY:

3 No.

4 MR. BRYAN:

5 That's all we have, Your Honor.

6 THE COURT:

7 All right. Thank you.

8 Mr. Von Herrmann?

9 MR. VON HERRMANN:

10 Thank Your Honor.

11 Your Honor, my client's 46 years

12 of age.

13 Uh -- He is a veteran of various
14 wars.

15 He has done an awful lot with
16 regards to turning his life around.

17 He's made obviously a ton of
18 mistakes throughout time.

19 Uh -- He does work on his family's
20 farm, he takes care of when his family's out of town --
21 uh -- over a hundred head of sheep; and is actually a
22 very talented in -- in construction and that type of
23 thing.

24 Made a very -- you know --
25 sustainable life. But he has got an alcohol addiction

1 problem. And he's been battling that obviously for quite
2 some time.

3 None of these offenses that -- uh
4 -- the prosecutor has read -- uh -- have ever occurred
5 while he was not impaired under the influence of alcohol.

6 We just would respect -- uh --
7 respectfully ask The Court for as much mercy and lenience
8 here as possible; and -- and if at all, any the grace
9 that The Court deems necessary.

10 THE COURT:

11 All right. Thank you very much.

12 MR. VON HERRMANN:

13 Your Honor?

14 THE COURT:

15 Yes sir.

16 MR. VON HERRMANN:

17 Uh -- His family is present; has
18 been present throughout the court -- uh -- throughout the
19 trial in the court.

20 I don't know if they want to make
21 a statement; but if they -- if The Court would entertain
22 any sentence -- or excuse me -- any --

23 THE COURT:

24 If they would like to make a
25 statement, I'll be glad to hear from them?

1 MR. CLARENCE SMART:

2 We all have to pay for our
3 mistakes. And alcoholisation (sic) is a terrible thing.
4 Uh -- Thank God I don't have it.

5 But -- uh -- some people have it
6 and it's a lifetime thing for some people. And whether
7 he'll ever kick it or not, I don't know.

8 But when he's not on alcohol, I
9 never had no problem with him. It's only when he's on
10 alcohol.

11 He's never given me any problems,
12 even when he's on alcohol. When he's on alcohol, he's
13 away from me, his dad, and his momma, and family.

14 But he does have a battle for it.
15 He's fought it all his life.

16 MR. VON HERRMANN:

17 Will you please state your name
18 for the record?

19 MR. CLARENCE SMART:

20 Clarence Smart. I'm his father.

21 THE COURT:

22 All right. Thank you.

23 MR. VON HERRMANN:

24 And also his mother and sister and
25 other family members are here.

VERDICT, POST TRIAL MOTIONS, AND SENTENCING

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1 THE COURT:

2 Sure. All right. Thank you very
3 much.

4 MS. LINDA SMART:

5 Yes. May I speak?

6 THE COURT:

7 Sure.

8 MR. VON HERRMANN:

9 State your name --

10 MS. LINDA SMART:

11 I'm Linda Smart, his mother.

12 (Starts to weep.)

13 THE COURT:

14 Uh-huh.

15 MS. LINDA SMART:

16 I'll -- I'll be okay.

17 Uh -- I do have terminal cancer.

18 Tom has been my helpmate for the last two months that
19 he's been out of jail.

20 You couldn't ask for a better son
21 than he's been.

22 He takes care of all of us,
23 really.

24 And I'd appreciate it if you would
25 consider that, and help him -- that he would get help for

1 his alcohol, which he has not done anything in the three
2 months he's been out of jail, except stay home and work
3 and help us.

4 And I would appreciate it if you
5 would consider that.

6 THE COURT:

7 Thank you.

8 MS. MELANIE STANLEY:

9 May I say something?

10 THE COURT:

11 Sure. State your name.

12 MS. MELANIE STANLEY:

13 Melanie Stanley. I'm his sister.

14 And I know that he's got some charges where he's
15 threatened a lots of public officials; but he was on
16 alcohol. (Weeping profusely and hard to understand.)

17 He's the most humble, good
18 heartedess (sic) person you've ever met. He wouldn't
19 hurt a fly.

20 He's really got a two-month-old
21 grandbaby, an eighteen-month-old grandson; and he loves
22 them to death.

23 He -- As a matter of fact he has a
24 bird at home he's got in a cage because he can't even
25 fly. And he's been taking care of it, feeding it out of

1 his hands.

2 When he's not on anything, he's
3 the most loveliest person and hard-working. Anybody who
4 knows him loves him.

5 But today, he has a problem with
6 alcohol; but I promise you he wouldn't never threaten (?
7 Inaudible) people; because he does have a good heart.

8 THE COURT:

9 All right. Thank you.

10 All right. If you would stand.

11 All right.

12 The sentence of The Court on
13 Indictment Number 2010-GS-26-00682, throwing bodily
14 fluids, the sentence of The Court is that:

15 The Defendant is committed to the
16 State Department of Corrections for a term of 10 years.

17 In reference to 2010-GS-26-00683,
18 failure to solve a blue light:

19 The Defendant is committed to the
20 State Department of Corrections for a term of 3 years.

21 In reference to 2010-GS-26--00684:

22 The Defendant is committed to the
23 State Department of Corrections for a term of 3 years.

24 In reference to 2010-GS-26-00685:

25 The Defendant is committed to the

VERDICT, POST TRIAL MOTIONS, AND SENTENCING 257

1 State Department of Corrections for a term of 6 months.

2 And all of these will be
3 consecutive.

4 Thank you very much.

5 WHEREUPON: There being nothing
6 further in this matter, these proceedings were concluded
7 at 5:37 PM, July 20, 2010

8 MOTION TO RECONSIDER THE
9 SENTENCE WAS HEARD ON JULY 21, 2010. PLEASE SEE
10 FOLLOWING PAGES FOR TRANSCRIPT OF THAT HEARING.

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MOTION TO RECONSIDER SENTENCE

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1 (WHEREUPON: The court was called
2 to order in this particular matter at 12:05 PM, July 21,
3 2010; and all pertinent parties, along with their
4 counsel, were back and present in the courtroom.)

5 THE COURT:

6 Solicitor, I'm ready.

7 MR. BRYAN:

8 Thank Your Honor.

9 If it please The Court?

10 This is Thomas Allen Smart. He
11 was a jury trial earlier --

12 THE COURT:

13 Hold on one second.

14 COURT REPORTER:

15 Somebody's talking.

16 THE COURT:

17 Y'all go ahead and finish.

18 MR. BRYAN:

19 I'm sorry, Your Honor.

20 This is -- uh -- Anthony -- I'm
21 sorry (laughs).

22 This is Thomas Allen Smart. He
23 was a jury trial, which -- uh -- earlier this week in --
24 in front of This Court in which the jury came back guilty
25 on all the indictments; those being 2010-GS-26-681, six

MOTION TO RECONSIDER SENTENCE

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1 -- I'm sorry, 682, 683, 684, and 685, for throwing bodily
2 (sic) on a law-enforcement officer; failure to stop for a
3 blue light; threatening the life of a public official;
4 and resisting arrest under A Section, respectively.

5 He was -- uh -- found guilty on
6 all the charges. And -- uh -- The Court sentenced him to
7 10 years, 3 years, 3 years, 3 years, and 6 months on
8 those indictments, 682 through 685, respectively; and ran
9 the sentences consecutive.

10 We are here -- uh -- on a Defense
11 motion to -- uh -- ask The Court to reconsider the
12 sentence; my understanding.

13 THE COURT:

14 All right. I'll be glad to hear
15 from you.

16 MR. VON HERRMANN:

17 Thank Your Honor.

18 Your Honor, first I -- I -- I'd
19 like to ask The Court's indulgence and appreciate the
20 fact that I'm walking obviously a very thin line; because
21 I don't want to invade or in any way intimate that I'm
22 invading the province of The Court --

23 THE COURT:

24 That's fine.

25 MR. VON HERRMANN:

1 -- with -- with the remarks that
2 I'm about to make; because certainly -- uh -- we believe,
3 and I discussed with my client, that he received a fair
4 trial, both by The Court, as well by the jury.

5 And we respect, while we disagree
6 with the outcome of the jury verdict, they certainly are
7 the ones charged with that.

8 And you are certainly the one
9 charged with the sentencing.

10 And -- you know -- without a doubt
11 -- uh -- having sat beside you -- or beside another
12 Circuit Court Judge -- that:

13 It is a very difficult situation
14 for which a -- a judge finds himself in, especially in
15 light of the fact that you have to make a decision within
16 several minutes of returning a verdict.

17 Quite frankly, I don't think I did
18 a very good job -- uh -- setting forth -- you know --
19 some of my arguments and what I would like The Court to
20 have considered -- uh -- because I was somewhat taken
21 back, as you might imagine, by the verdict -- uh --
22 having been out some five hours -- uh -- and then -- you
23 know -- ultimately the client being addicted.

24 And I just felt like it was an
25 appropriate thing to come back and have the opportunity

MOTION TO RECONSIDER SENTENCE

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1 to -- uh -- you know -- re -- kind of re-visit with this.

2 THE COURT:

3 Sure.

4 MR. VON HERRMANN:

5 One of the things that I've
6 learned in my limited little 13 years of practice, which
7 is not a lot compared to a lot of lawyers around here --
8 uh -- is:

9 A reflection can sometimes lead to
10 the heart of justice.

11 And what I found here, and what
12 I've done, is:

13 I -- I've looked at some of the
14 other things.

15 And one of the things that I want
16 to -- to bring out is the consistency of -- of -- of
17 sentences, and the consistency and the -- the effect of
18 what a consecutive sentence is.

19 We rarely, here in Horry County,
20 see consecutive sentences.

21 And that is certainly of course --
22 you know -- a legal sentence;; certainly within the
23 purview of This Court.

24 Uh -- My concern is, is that:

25 A consecutive sentence is two

1 things.

2 First of all, it's very
3 uncontrollable.

4 Once it -- Once a consecutive
5 sentence leaves This Court -- uh -- This Court has
6 absolutely no -- uh -- jurisdiction over it.

7 And the Department of Corrections,
8 essentially, gets to decide what sentence -- what charge
9 he maxes out; how long he stays in jail; and things like
10 that.

11 And it's not a very swift way or a
12 very -- uh -- consistent way -- which I believe that The
13 Court is -- you know -- almost incumbent upon The Court
14 as well as the -- all Officers of The Court to make sure
15 that justice is not only swift, but that it is also
16 consistent and it is sure.

17 Uh -- And I don't believe that the
18 -- the use of consecutive sentence in a case where,
19 essentially, if The Court was trying to get to 16 and a
20 half years -- uh -- one of these sentences carries 15.

21 Uh -- If The Judge was trying to
22 get to 16 and a half years, there was a way to do it,
23 even with just con -- the -- consecutive sentences of one
24 of the offenses.

25 Uh -- Your Honor, I would also

MOTION TO RECONSIDER SENTENCE

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1 like to point out the overlapping -- uh -- elements of
2 the crimes.

3 Uh -- Resisting arrest -- uh --
4 obviously -- you know -- the throwing the bodily fluids
5 on a police officer -- and again, you -- you sat through,
6 and I know that you paid close attention to the facts.

7 But a lot of the facts and
8 elements of the crime overlapped. And they -- And so
9 what it essentially does is:

10 It can carry over, where if they
11 find one fact, the jury -- and in fact, the jury did find
12 elements of the crime they were consistent and carried
13 that one crime together naturally; and it's a natural
14 progression.

15 If they find crime or one element
16 -- uh -- that he was guilty of, that would carry
17 throughout the entire time.

18 Your Honor, my concern is -- and
19 -- and I understand you're not bound by this. But I
20 under -- also understand that -- that -- you know -- it's
21 important to note, if for no other reason, for
22 informational purposes of The Court.

23 This week we've had a child
24 homicide, and he received 20 years.

25 I understand this is not binding

1 on The Court or anything else. It's merely persuasive.

2 THE COURT:

3 Sure.

4 MR. VON HERRMANN:

5 And -- And I don't mean to offend
6 The Court or say that your sentence is too harsh because
7 they were too light. I'm not comparing Courts at all.

8 THE COURT:

9 Right.

10 MR. VON HERRMANN:

11 I just want you to be aware of
12 some of the other sentences that have been handed down.
13 And then I've got a few other arguments and then I'll
14 wrap it up --

15 THE COURT:

16 Sure.

17 MR. VON HERRMANN:

18 -- if that's okay with The Court?

19 We had a -- two counts of lewd
20 act. The guy received 10 years.

21 Uh -- We had a -- uh -- individual
22 that was associated with an armed robbery and a murder,
23 who did cooperate, at 19 years.

24 So we're are talking -- you know
25 -- right -- where one of them got -- you know -- slightly

MOTION TO RECONSIDER SENTENCE

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1 less, and the two of them got slightly more, and -- for
2 much more serious charges, and -- and at least in the
3 General Assembly's view; not necessarily in the view of
4 The Court.

5 Uh -- And I just -- you know -- I
6 recommend that The Court reflect on that, and -- and see
7 if that is exactly -- you know -- where we want to be.

8 Mr. Smart understands that he --
9 uh -- did not accept responsibility for except for one of
10 the charges.

11 And he understood when he went to
12 trial, that not accepting responsibility, he would be
13 punished for if the jury found him guilty.

14 But consecutive sentences to the
15 tune of 16 years, I feel, will have a chilling effect on
16 those that are willing to come forward and exercise their
17 right to a jury trial.

18 And in the effect that, if they
19 have more than one charge, there will be consecutive
20 sentences.

21 Also, it encourages the
22 prosecution to indict more cases that come before you;
23 because they know that if the jury -- if the Defendant
24 goes to trial, they have the potential of stacking on
25 these consecutive charges.

MOTION TO RECONSIDER SENTENCE

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1 That also, combined with the fact
2 that it's inconsistent, and -- you know -- a number of
3 seminars I've been to, have been encouraged by -- you
4 know -- the -- uh -- the Supreme Court and other members,
5 not to issue consecutive sentences; because quite
6 frankly, the lawyer can't tell the clients what that
7 means.

8 Judges are unable to determine
9 what it means. And it's really just a -- a way or a
10 method for which we send it to Department of Corrections
11 and day:

12 Figure that out.

13 And I think -- as you well know --
14 once you send something to the Department of Corrections,
15 they figure it out; you might as well pretty much hang up
16 trying to get it -- you know -- readjusted or changed.

17 I don't necessarily, Your Honor,
18 disagree -- you know -- if This Court is inclined to --
19 uh -- a severe sentence.

20 I think that -- you know -- what
21 the jury has found him guilty of is -- is absolutely --
22 you know -- horrible behavior.

23 We respect that.

24 If we -- And again, we disagree
25 with it.

MOTION TO RECONSIDER SENTENCE

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1 Uh -- But it's clearly -- you know
2 -- an issue that they were charged to decide and we
3 respect that.

4 But we would like The Court to do
5 is reflect.

6 Uh -- One of the things that I
7 have learned, as both a prosecutor and a defense lawyer,
8 is that:

9 Every black man -- uh -- every
10 Defendant, and -- and in fact, every probably person, at
11 some point in their life -- uh -- demands, or request, or
12 needs grace.

13 And I can't think of a time in
14 this man's life right here that he is begging The Court
15 for more grace than right now.

16 What a 16 and a half year sentence
17 means to him, we don't know; because we don't know how
18 much time that 16 and a half years.

19 It was reported in the newspapers
20 at 16 and a half years. In fact, it's not a 16 and a
21 half year sentence. We know that.

22 We just don't know how much it
23 really is.

24 And what I would ask The Court is:
25 Let's fashion -- Or I would

1 request of The Court to:

2 Fashion a sentence where we
3 somehow know with some degree of certainty how long he's
4 actually going to be doing; what his family -- he's got a
5 mother whose in remission for cancer. And not that this
6 would affect that; but at least she would have an idea of
7 how long her son was going to be in jail.

8 I think -- you know -- God hopes
9 that she's going to be in remission until he gets out,
10 but we just don't know.

11 And that might give her that
12 reason to fight for the extra year or two or whatever it
13 is.

14 He's going to max out his
15 sentence. He's got a bad record.

16 And what he did -- uh -- I can
17 tell you he has expressed remorse for, as far as -- you
18 know -- what occurred.

19 But the other thing The Court kind
20 of needs to understand is -- and by no means of excuse,
21 but by means of mitigation -- uh -- Mr. Smart's been in
22 trouble an awful lot. And there's no excuse for it.

23 But there is also, unfortunately
24 for him, an addiction level in his body that:

25 Whether you give him 16 and a half

MOTION TO RECONSIDER SENTENCE

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1 years or 10 years or five years, it doesn't matter.

2 Unless he wants to clean it up,
3 and he wants to take an advantage of the Alcohol
4 Addiction Treatment Unit in the Department of Corrections
5 and he wants to make sure that he stays clean, then it
6 doesn't really matter.

7 You know, it's often said by
8 lawyers a lot better than me:

9 It's not always the time, it's the
10 certainty.

11 And Your Honor, what we would
12 request, is at least concurrent sentencing.

13 Of, if The Court's not inclined to
14 do concurrent sentencing, some reduction in those
15 sentences to where we have some certainty; some degree of
16 continuity.

17 And we -- we have punished the
18 people that don't accept responsibility for their
19 actions, but we don't have a chilling effect on those
20 that go forward on incentives for the prosecutors to
21 indict more counts and bring them before The Court.

22 And Your Honor, I -- I appreciate
23 you entertaining this motion, especially on a Friday
24 afternoon. And -- uh -- I -- I -- I really do appreciate
25 you hearing the case.

1 THE COURT:

2 All right. I'm glad to.

3 Anything you'd like to add to
4 that, in brief?

5 MR. BRYAN:

6 Pretty brief, Your Honor.

7 THE COURT:

8 Thank you.

9 MR. BRYAN:

10 Uh -- I just think that it was a
11 well considered, and a sentence -- uh -- based on the
12 facts in the case and -- uh -- his prior record.

13 Uh -- You know, again I'll try to
14 be brief. But I just, since he made the motion, I don't
15 want to forget the fact that he had a '99 criminal sexual
16 conduct with a minor and then failed to register as a sex
17 offender.

18 He's jumped bail.

19 Uh -- He's got a threatening the
20 life of a public official, both in '04 and in '09, and
21 another simple assault and battery.

22 THE COURT:

23 Sure.

24 MR. BRYAN:

25 Uh -- Given the facts and the fact

MOTION TO RECONSIDER SENTENCE

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1 that -- It was said that this was some -- some overlap of
2 the offenses, you know.

3 It's just simply not true.

4 He -- He failed to stop for the
5 blue light. Then he resisted arrest. Then he threatened
6 the officer. And that wasn't good enough, so he spit in
7 his face.

8 Uh -- What he did when he spit in
9 his face -- was infused with Hepatitis C. Uh -- It was
10 on the video.

11 You can actually saying:

12 I'll be dead in a year.

13 It's not like it was an
14 unconscious act. It was something that he was well aware
15 of, his condition.

16 Uh -- I can only assume that's
17 what he was talking about when he said:

18 I'll be dead in a year.

19 And he decided to share that -- uh
20 -- with the officer.

21 Uh -- I just think that -- uh --

22 THE COURT:

23 Well, let me interrupt.

24 First of all:

25 As far as consecutive sentences

1 go, I don't always give consecutive sentences.

2 I listen to the trial itself. I
3 listen to the charges. And I listen to the record before
4 I do that. And I did take this one pretty carefully.

5 Uh -- It bothers me a lot that:

6 Not only did he spit in the
7 officer's face, he had a mouth full of blood and spit
8 into the officer's face. And he had a disease which is
9 contagious.

10 And the officer had to be tested;
11 and is going to have to continue to be tested.

12 So, often times as a judge, I do
13 weigh -- and I do it every time. I weigh not only his
14 rights, the Defendant's rights; and I try to be fair to
15 him.

16 But the public has rights.

17 Victims have rights.

18 Officers have rights.

19 And I try to balance those rights
20 carefully, and I try to think -- you know:

21 What if I were in the Defendant's'
22 shoes?

23 What if I were in the Officer's
24 shoes, and I had to go have blood drawn?

25 How does his wife feel?

MOTION TO RECONSIDER SENTENCE

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1 How does his family feel?

2 And they always have to worry
3 about whether he's going to have Hepatitis C, because of
4 this incident.

5 That bothered me a lot.

6 The second thing that bothered me
7 about the blue light is that:

8 The Defendant was traveling, if
9 I'm not mistaken, at a hundred, a hundred and ten, a
10 hundred and twenty.

11 You know, what if your wife was on
12 the road; or a child was on the road?

13 So many people could get hurt by
14 careless behavior like this. It was terrible.

15 He just got lucky he didn't kill
16 anybody.

17 You know, then he gets out there.
18 And he -- and I can understand, because I come from a
19 small little town.

20 I mean, people threaten the police
21 all the time. But he threatens not only this guy, the
22 officer in the courtroom right here, but he threatens his
23 family.

24 And he threatens all the officers
25 out there and all of their families.

1 Uh -- You know, sometimes people
2 follow through with that.

3 If he didn't have any kind of
4 violence in his background, then I would not take as
5 serious; but he has a horrendous record.

6 And he does have violence in his
7 background.

8 And it just seems to me that my
9 sentence was well thought out.

10 It was not the maximum by any
11 means. But something needed to be done, weighing not
12 only his rights, but also the public and victims and
13 other people. And weighing those is how I came up with
14 that sentence itself.

15 It's certainly no reflection on
16 you. You're just a great lawyer and did an outstanding
17 job. And he could not have not been more lucky.

18 I don't know if he hired you or
19 got -- you know -- if you were appointed or wasn't. But
20 if you were appointed, you had one of the best lawyers in
21 the State and you're lucky.

22 Uh -- But that had nothing to do
23 with my -- my decision.

24 I based my decision on everything.
25 Not only him, but everything else.

MOTION TO RECONSIDER SENTENCE

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1 So I'm going to leave it the same.

2 MR. VON HERRMANN:

3 Thank Your Honor.

4 THE COURT:

5 But I thank you for coming
6 forward.

7 MR. BRYAN:

8 Thank Your Honor.

9 MR. VON HERRMANN:

10 Thanks; I appreciate it.

11 WHEREUPON: There being nothing
12 further in this matter, these proceedings were concluded
13 at 12:21 PM, July 21, 2010.

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CERTIFICATE

I, the undersigned, H. Eugene Buckner, CVR, Official Court Reporter at Large in and for the State of South Carolina, do hereby certify that the foregoing proceedings were taken on the 19th, 20th, and 21st days of July, 2010;

That the within judicial proceedings are, to the best of my ability, an accurate and verbatim transcription of the hearing;

I further certify that I am neither Counsel nor Solicitor to any of the parties in said suit, nor interested in the event of the cause.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 17th day of October, 2010.

H. Eugene Buckner

H. EUGENE BUCKNER, CVR
OFFICIAL COURT REPORTER AT LARGE
15TH JUDICIAL DISTRICT
STATE OF SOUTH CAROLINA

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF)

IN THE COURT OF COMMON PLEAS

Full name and prison number (if any) of Applicant.)

Thomas Allen Smart
Thomas D. Smart 299433)20 13 CP26 2123
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 in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

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

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

1. Place of detention Evans Correctional Inst.
2. Name and location of Court which imposed sentence Horry County Court House Conway S.C.
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 (a) 1065-26-
00682
 (b) 00683
 (c) 00684
 (d) 00685
5. The date upon which sentence was imposed and the terms of the sentence:
 (a) July 20, 2010
 (b) _____

HORRY COUNTY
13 APR - 4 PM 3:45
MELANIE HUGGINS-WARD
CLERK OF COURT

Prosecutive
sentence → 10 years for Throwing body fluid
3 years for Threatening life of public official
3 years for failure to stop for blue light

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C. State appellate court.
- ii. S.C. Supreme Court
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. denied
- ii. withdrew
- iii. _____
- (c) the date of each such result:
- i. ~~8-21-2012~~ 6-21-2012
- ii. Feb. 13, 2013
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: Ineffective assistance of counsel

- (a) _____
- (b) _____
- (c) _____

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

- (a) My attorney told me I couldn't be legally
- (b) charged with throwing of bodily fluid because
- (c) the officer that was in question was a

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

- (a) any petition in a State Court under South Carolina Law? yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? yes
- (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. direct appeal in state court
- ii. Certiorari
- iii. _____
- iv. _____

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

- i. Horry County Court house, Conway, S.C.
- ii. ~~Withdrew certiorari~~ T.A.S. State Supreme Court
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. denied
- ii. Withdrew certiorari
- iii. _____

- iv. _____
- (d) the date of each such disposition:
- i. 6-21-12
- ii. 2-13-13
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____
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) This is my first opportunity.
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:

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

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

- (a) the name and address of each attorney who represented you:
 - i. trial (Burtrum Von Herman)
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. trial
 - ii. _____
 - iii. _____

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

A new trial or my original plea offer of

20. Are you now under sentence from any other court that you have not challenged? 5 years.
no

20 13 CP26 2123

STATE OF SOUTH CAROLINA)

VERIFICATION

County of)

I, _____, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Thomas A. Smith

SWORN to and subscribed before me this 22nd
day of March, 2013

Danica

(L.S.)

Notary Public

My Commission Expires: 2-7-2023

HORRY COUNTY
13 APR - 4 PM 3:45
MELANIE HUGGINS-WARD
CLERK OF COURT

cont from question #11

⑧ My attorney also had his wife whom is an attorney help him prepare my defense. He stated that she was an attorney also and that she agreed that I should not have been charged with Throwing of bodily fluids on a correctional officer because the said officer was in fact a police officer. Also my attorney stated that I should have been charged with assault on a police officer instead. I later found out that his wife worked for the prosecutors office. He was giving knowledge of my defense to the prosecutor. That's a conflict of interest. It's illegal for my lawyer to discuss my case with anyone but me. The prosecution knew my whole defense because my attorney Bert Von Hennen told his wife ~~the~~ my defense and she works for the prosecutions office.

Answers from Question #11

) Before trial I told my lawyer about the night I received the charges in which I'm incarcerated on. I told him I believed I was drugged. Also that when I woke up in jail that all my money was gone. He never told the jury my thoughts or opinions on what happened the night I was arrested. He told me to plea the 5th Amendment. Not to testify. He stated let him handle my trial. The jury should have heard my whole story.

Answers to Question #11

1) I believe I was convicted over a definition of the word throw. The court and myself picked 12 jurors to judge whether or not I was guilty of throwing bodily fluids. The 12 jurors were competent and knows what the word throw means. Because my attorney didn't object to the use of a dictionary I was found guilty of the Throwing of bodily fluid on a Correctional officer. The prosecution stated that any forward motion was throwing. (Not true.) But because the definition that the prosecutor found in a dictionary said any forward motion is throwing I was found guilty. The jury should have been aloud to use their own interpretation of throwing. The jury didn't find me guilty. A dictionary did. My lawyer should have objected to the use of a dictionary.

3-22-13

Dear Clerk of Court,

Inclosed is a dismissal of my
appeal. Please file this PCR.
Thankyou very much.

Sincerely,

Glenad Hunt

Answers to question #11.

I was charged with the Throwing of bodily fluid on a correctional officer. My attorney told me not to plead guilty because the officer in question was not a correctional officer but a police officer. Also because it was said that I spit on the officer. That's what I was accused of. My attorney said spitting does not constitute throwing. Therefore I'm not guilty of throwing anything. That the judge would have to throw out the charge.

Transcript - pg 60 - line #11 - pg 70 #13,

HARRY COUNTY
13 APR - 4 PM 3:45
MELANIE HUGGINS-WARD
CLERK OF COURT

20 13

2123

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

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

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

Thomas A. Smith
Applicant

SWORN or affirmed to and subscribed before me this
22nd day of March, 2013

Diane B
Notary Public

My Commission Expires: 2-7-2023

HORRY COUNTY
19 APR - 6 PM 3:45
MELANIE HUGGINS-WARD
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
Thomas Allen Smart,)
S.C.D.C. No. 299433,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
C.A. No. 2013-CP-26-0225

RETURN

In response to the post-conviction relief application filed April 4, 2013, the Respondent would show this Court:

I.

The Applicant is currently incarcerated in the South Carolina Department of Corrections pursuant to Order from the Horry County Clerk of Court. The Applicant was indicted at the January 2010 term of the Horry County Grand Jury for throwing bodily fluids on a correctional facility employee or local law enforcement officer (2010-GS-26-0682), threatening a public official (2010-GS-26-0684), and resisting arrest (2010-GS-26-0685). William Bertram Von Herrmann, Esquire represented the Applicant.

The State took the case to trial, and on July 20, 2010 the Applicant was found guilty. The Honorable William H. Seals, Jr. sentenced the Applicant to ten (10) years imprisonment for throwing bodily fluids, three (3) years imprisonment for threatening a public official, and six (6) months imprisonment resisting arrest, all sentences to run consecutively.

A notice of appeal was filed at the South Carolina Court of Appeals. The Applicant withdrew his Appeal. By Order dated February 22, 2013 the South Carolina Supreme Court

dismissed the appeal. The Remittitur was sent on February 26, 2013.

Attached herewith and incorporated herein by reference are the records of the Horry County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II.

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

1. Ineffective assistance of counsel.
 - a. Applicant contends that his attorney told him to plead not guilty because he spit on the officer, rather than throwing fluids on the officer. Applicant contends spitting is not the same as throwing.
 - b. Applicant alleges trial counsel's wife worked for the solicitor, and trial counsel shared his defense strategy with her, prejudicing the Applicant.
 - c. Applicant contends he was drugged the night he was arrested.

Any claims not specifically enumerated in the Application or amendments thereto will be opposed by the State at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRCP

III.

Respondent interprets Applicant's allegations as ineffective assistance of counsel. Respondent asserts the Applicant's allegations that his attorney was ineffective are without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a criminal defense attorney.

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 on as having produced a just result." Strickland v.

Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). 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 v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305

S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

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

V.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

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10/24, 2013

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

THOMAS ALLEN SMART, #299433

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2013-CP-26-0225

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 on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Tristan M. Shaffer, Esquire
 1928 Barnwell St.
 Columbia, SC 29201

DATED this 24TH day of October, 2013.


 Norma Bigbee, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

2013-CP-26-225

Thomas Allen Smart,)

Plaintiff,)

vs.)

The State,)

Defendant.)

Transcript of Record

June 18, 2014

B E F O R E :

Honorable Benjamin H. Culbertson
Horry County Courthouse
Conway, South Carolina

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

Tristan M. Shaffer, Esquire
Attorney for Plaintiff

Joshua L. Thomas, Esquire
Attorney for Defendant

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

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1 (On the record, June 18, 2014.)

2 THE COURT: All right. This is case number 2013-CP-26-
3 225, Thomas Allen Smart versus State of South Carolina. The
4 matter is before the Court pursuant to the Applicant's
5 application seeking post-conviction relief. Hold for one
6 second and let me take a look at this package.

7 All right, sir. If you would please stand, Mr. Smart.
8 Your name is Thomas Allen Smart?

9 MR. SMART: Yes, sir.

10 THE COURT: All right. Let's place Mr. Smart under oath,
11 please.

12 (Thomas Allen Smart sworn by clerk.)

13 THE COURT: Thank you. All right. Now, Mr. Smart, you
14 have filed an application seeking post-conviction relief from
15 your convictions for resisting arrest, throwing bodily fluids
16 on a corrections officer, threatening the life of a public
17 official and failure to stop for a blue light; is that
18 correct?

19 MR. SMART: Yes, sir.

20 THE COURT: Okay. Now, I understand that for resisting
21 arrest you received a six-month sentence. Throwing bodily
22 fluids you received a ten-year sentence. Threatening the life
23 of a public official you received a three-year sentence, and
24 failure to stop for a blue light you served -- you received a
25 three-year sentence; is that correct?

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1 MR. SMART: Yes, sir.

2 THE COURT: Okay. Now, do all of these run consecutive?

3 MR. SMART: Consecutive.

4 THE COURT: Okay. All right. All right. Now, before we
5 go forward in this case I'm going to have to go over some
6 questions with you to be sure that you understand what we're
7 doing here today and that you understand the consequences of
8 bringing an action seeking post-conviction relief; okay?

9 MR. SMART: Yes, sir.

10 THE COURT: Now, at this time are you under the influence
11 of alcohol, drugs or any other undue influence that might
12 affect --

13 MR. SMART: No, sir.

14 THE COURT: -- your ability to know why you're here?

15 MR. SMART: Yes, sir.

16 THE COURT: I mean, do you know -- are you under the
17 influence --

18 MR. SMART: No. No.

19 THE COURT: All right. Do you understand why you're
20 here?

21 MR. SMART: Yes, sir.

22 THE COURT: Is there anything about this hearing that you
23 want to ask your lawyer or ask me before we proceed?

24 MR. SMART: No, sir.

25 THE COURT: All right. Now, before we go forward in this

1 case I need to let you know that if you go forward with your
2 application for post-conviction relief then two things can
3 happen. Number one is if I deny your request for post-
4 conviction relief then you will simply return to the
5 Department of Corrections and finish, finish serving the
6 sentences that have been imposed on you. Do you understand
7 that?

8 MR. SMART: Yes, sir.

9 THE COURT: All right. Now, if I grant your request for
10 post-conviction relief, then the convictions against you would
11 be set aside. You would go back to square one, and any
12 charges that were pending against you will be brought against
13 you again and you would go through the process again. If
14 convicted, you could receive a more -- a longer sentence than
15 you now have. I need to tell you you received a six-month
16 sentence for resisting arrest, and resisting arrest carries up
17 to one year and a thousand dollar fine. You received a ten-
18 year sentence for throwing bodily fluids. That crime carries
19 up to 15 years in prison, and by state law it must run
20 consecutive to whatever sentence you're serving in prison at
21 that time. You received a three-year sentence for threatening
22 the life of a public official. The maximum sentence you could
23 receive for that crime is five years in prison and a \$5,000
24 fine, and failure to stop for a blue light you received three
25 years in prison and the maximum sentence for that is a ten-

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1 year sentence. So the best thing that could happen to you
2 would be for me to grant your request for post-conviction
3 relief, you go back for a trial again, you're found not guilty
4 and everything is disposed of. You'd be released. However, I
5 need to let you know that there is a possibility that even if
6 I grant your request for post-conviction relief here today you
7 could go back, you could be retried. If found guilty on all
8 of these charges, if you were to receive the maximum sentence
9 for each charge, and if it was ordered to run consecutive to
10 one another, then you would be looking at 31 years in jail and
11 a \$6,000 fine. Do you understand that?

12 MR. SMART: Yes, sir.

13 THE COURT: Okay. Knowing that, do you still wish to
14 proceed with your request for post-conviction relief?

15 MR. SMART: Yes, sir.

16 THE COURT: Excuse me?

17 MR. SMART: Yes, sir.

18 THE COURT: Okay. Anything further you want placed on
19 the record, Mr. Shaffer, in that regard?

20 MR. SHAFFER: No, Your Honor. The, the, the only thing I
21 had added was did the throwing bodily fluids change because I
22 think I might have told him the wrong thing. I was thinking
23 ten was the maximum on that at the time.

24 THE COURT: Well, I can tell you --

25 MR. SHAFFER: I apologize.

1 THE COURT: -- I just went straight from the Strickler
2 Handbook and I'm -- I won't say it's absolute but --

3 MR. SMART: It's 15.

4 THE COURT: -- in the, in the absolute it said 15 years.

5 MR. SHAFFER: It was 15 at the time?

6 MR. SMART: It carries 15 years.

7 MR. SHAFFER: Okay.

8 THE COURT: Okay. All right. According to the Strickler
9 book it says 15.

10 MR. SHAFFER: Okay. And I apologize, Your Honor.

11 THE COURT: That's all right.

12 MR. SHAFFER: I was just checking because I think -- I
13 remember telling him something different.

14 THE COURT: All right.

15 MR. SHAFFER: But that was a while ago, and Your Honor,
16 one other thing, I was actually appellate counsel for this
17 case. Okay. He has not raised any issues of ineffective
18 assistance of appellate counsel, but if he -- and I told him
19 this whenever we -- whenever I got appointed that if he wanted
20 me to I could get off the case based off of conflict.

21 THE COURT: Well, let me ask you that. You -- I
22 understand that Mr. Shaffer represented you on your appeal; is
23 that correct?

24 MR. SMART: Yes, sir.

25 THE COURT: All right. Do you know of any conflict of

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1 interest that he has in representing you in this post-
2 conviction relief hearing?

3 MR. SMART: No. No, sir.

4 THE COURT: Okay. All right. Because as I understand
5 all of your -- from reading your application all of your
6 allegations for ineffective assistance of counsel was with
7 your trial counsel; is that ---

8 MR. SMART: Right.

9 THE COURT: Okay. All right. Anything further the State
10 wants placed on the record?

11 MR. THOMAS: I think just on that last point, Your Honor,
12 I think the way the case law says he needs to on the record
13 waive any allegations of ineffective assistance of appellate
14 counsel if he's going to proceed with Mr. Shaffer as his
15 counsel here.

16 THE COURT: Okay. All right. Do we need to -- I mean,
17 do I need to let him talk to anybody or just go ahead and
18 place it on the record?

19 MR. THOMAS: I mean, if he, I guess, just ask him if he
20 understands.

21 MR. SMART: I waive all rights.

22 THE COURT: Okay. You waive your right to ineffective
23 assistance of counsel with regard to Mr. Shaffer in handling
24 your appeal?

25 MR. SMART: Yes, sir.

1 THE COURT: Okay. All right.

2 MR. THOMAS: That's, that's all from the State.

3 THE COURT: All right. Thank you very much.

4 MR. SHAFFER: Thank you, Your Honor. If I may give you a
5 brief opening --

6 THE COURT: All right.

7 MR. SHAFFER: -- just to sort of give you an idea of where
8 we're going with this. There's a couple of allegations that
9 are contained in the application for post-conviction relief.

10 THE COURT: Okay.

11 MR. SHAFFER: Probably the most predominate one is a
12 legal argument that was raised or a similar argument was
13 raised at -- on direct appeal as to whether or not he --
14 whether or not the conduct he did constitutes throwing bodily
15 fluids. Your Honor, there's a -- the statute says throws, and
16 the issue we have, I guess, is a due process claim now here as
17 to whether or not there's any evidence to support a finding
18 that he threw bodily fluids. Obviously, you know, we can't
19 challenge the sufficient -- sufficient -- we, we can't -- we
20 can't argue whether or not they proved it beyond a reasonable
21 doubt. What we can say, though, is that whenever there is a
22 complete lack of evidence in a PCR I think that we can make an
23 argument when there's a complete lack of evidence that he did
24 anything that constitutes throwing that, that then it becomes
25 a due process violation, Your Honor, and I had handed up on

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1 the last case, which I planned on citing that case again here,
2 is Thompson v. Louisville.

3 THE COURT: All right.

4 MR. SHAFFER: And that's a U.S. Supreme Court case from
5 1960. The cite is 362 U.S. 199, and essentially it says that
6 whenever there's a complete lack of evidence the due process,
7 due process is actually violated when there's a conviction in
8 a complete lack of evidence to support the conviction.

9 THE COURT: Okay. But now that, that was a post-
10 conviction relief case?

11 MR. SHAFFER: No, Your Honor. That was a, that was a
12 direct appeal. The post-conviction relief statute in -- and
13 that's a U.S. Supreme Court direct appeal. The post-
14 conviction relief statute allows us to raise any
15 constitutional violation. We believe there's a federal
16 constitutional violation in the fact that he's doing a ten-
17 year sentence for throwing bodily fluids whenever the conduct
18 he has or the conduct that he was alleged to have done does
19 not constitute throwing, Your Honor.

20 THE COURT: Okay. Now, was that issue addressed on
21 appeal?

22 MR. SHAFFER: Yes, Your Honor. It was addressed in an
23 unpublished opinion by the Court of Appeals. We then
24 submitted a cert petition, and Mr. Smart withdrew the -- his
25 appeal, and that was not a due process violation, Your Honor.

1 That was strictly a directed verdict issue. So it was a
2 matter of state law at the time whenever it was raised on
3 direct appeal. Now we're raising it as a federal
4 constitutional claim.

5 THE COURT: All right. Anything further?

6 MR. SHAFFER: Your Honor, there's also an issue that's
7 somewhat related to that. It's an ineffective assistance of
8 counsel claim. The Solicitor in the case actually pulled out
9 the dictionary -- this was raised by trial counsel whether or
10 not throwing -- spitting constitutes throwing. The Solicitor
11 during his closing argument actually pulled out a dictionary
12 and read to the jury what throwing is. Basically, he was
13 testifying from the dictionary during that. So that's a claim
14 of ineffective assistance of counsel. I think that even if as
15 a matter of law, which I certainly think it's a matter of law,
16 spitting does not fit within throwing. It would then become a
17 question for the jury. So I think he was prejudiced by it
18 because the big defense was whether he spat or threw bodily
19 fluids.

20 There's another issue in regard to, I guess, the, the
21 defense was or our contention is whenever he hired Mr. Von
22 Herrmann what, what the -- what they were planning on doing,
23 there was a five-year offer beforehand.

24 THE COURT: Okay.

25 MR. SHAFFER: There's -- might be some dispute over what

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1 the offer was or what the exact conversation was at that
2 point, but I think that the evidence is going to show that,
3 you know, Mr. Von Herrmann went forward with a theory that --
4 a sort of two-pronged theory for why he wouldn't be convicted
5 of throwing bodily fluids. One is the argument I raised
6 today. The other one is the fact that in the indictment there
7 was an error, and they listed him as a corrections officer,
8 the police officer on the scene as a corrections officer.
9 That was his second theory of the case for why he would not be
10 able to get convicted of throwing bodily fluids. He -- Mr.
11 Von Herrmann apparently may or may not have discussed this
12 with his wife, who is also a Solicitor, but right before the
13 case went to trial, the Solicitor on it, Mr. Bryan, actually
14 raised the issue to the Court and amended the indictment. We
15 believe that that's a problem, but going a little bit further
16 than that, I don't think that that's a reasonable trial
17 strategy to tell your client that you can't -- that you
18 possibly could win because the indictment says corrections
19 officer instead of police officer and all the evidence shows
20 he's a police officer. So that is another allegation we're
21 going to raise regarding the plea deal and whether or not it
22 was reasonable for him to advise him to go to trial.

23 THE COURT: Okay. All right. Anything further before we
24 get started?

25 MR. SHAFFER: No, Your Honor.

1 THE COURT: All right. You can call your first witness.

2 MR. SHAFFER: The Applicant calls Mr. Von Herrmann to the
3 stand.

4 THE COURT: All right.

5 Whereupon, William B. Von Herrmann was called to the
6 stand, duly sworn by the clerk and testified as follows:

7 DIRECT EXAMINATION

8 BY MR. SHAFFER:

9 Q Good morning, Mr. Von Herrmann.

10 A Good morning.

11 Q You were Mr. Thomas Smart's attorney for, for the trial;
12 correct?

13 A That's correct.

14 Q Okay. Tell us a little bit about your background.

15 A I was admitted to the practice of law in 1998. I worked
16 for the Honorable Judge Breeden for a year, was hired by
17 Solicitor Greg Hembree at the conclusion of that, was a
18 Prosecutor for, a line Prosecutor for probably two years,
19 promoted to senior attorney, ultimately became interim Deputy
20 Solicitor, retired after ten years as a First Assistant
21 Solicitor.

22 Q Okay. And then you became a criminal defense attorney;
23 right?

24 A In 2007, July 2007 or '08 I opened up my own law office
25 right across the street.

- 1 Q Okay. And you primarily practice in what areas?
- 2 A I primarily practice or only practice, with the exception
3 with some business law or corporate law, I only do personal
4 injury and criminal defense.
- 5 Q Okay. Now, tell us about the first time you met Thomas
6 Smart.
- 7 A I don't recall the first time we met. I believe, if I'm
8 not mistaken, that his -- one of his relatives introduced me,
9 that I had been representing for a while. We had fairly good
10 success in some cases in resolving the cases. As I recall,
11 Mr. Smart, and of course, I'm going to confuse the first and
12 the hundredth time. We met --
- 13 Q I understand.
- 14 A -- a number of times. Mr. Smart appeared to me, quite
15 frankly, to be very genuine, very intelligent. I would put
16 him above average intelligence for most of the criminal
17 Defendants that I have. He was very familiar with the system.
18 He understood -- we didn't have to go into long detail about
19 certain things that you typically would have to explain to a
20 client.
- 21 Q Was he out on bond whenever you met him?
- 22 A Yes. He was.
- 23 Q Okay. Did he have an attorney beforehand?
- 24 A Yes. He did.
- 25 Q Okay. Who was that attorney?

- 1 A That was a Public Defender, Kia Wilson. I, and I -- if I
2 recall correct, he was not happy with her. I don't recall
3 exactly what his complaints were, but he -- at the time I
4 think he indicated he preferred to hire a lawyer to represent
5 his interest.
- 6 Q Was there an open offer on his case?
- 7 A No, sir.
- 8 Q Okay. Had there been an offer on his case?
- 9 A In -- he was arrested, I believe, January 26th of 2009. I
10 believe that's, that's correct, but January 19th, 2010, he had
11 a plea offer that was revoked on February 26th. My
12 representation took place in May, and his trial was in July.
13 The revocation occurred before I was ever contacted to
14 represent him.
- 15 Q Okay. And the -- whenever you met with him to discuss
16 the case how many times did you meet with him? Do you know?
- 17 A I don't know. I know that we met several times prior to
18 trial. I know we met obviously for the initial interview. If
19 I had to, you know, which four years later, I would speculate
20 probably between hiring me and trial, seven, eight times
21 maybe, and again, that's, that's a range that I'm just going
22 to have to kind of guess at.
- 23 Q Did you ever talk to him about a plea offer? Did you
24 ever talk to him about a possible plea?
- 25 A Oh, absolutely.

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1 Q Okay. How many times did you talk to him about a plea?

2 A I, I don't recall.

3 Q Okay.

4 A We talked about every possible scenario that I could
5 think of to resolve these charges in a manner favorable to
6 him, including attempting to get the five-year offer put back
7 on the table. He indicated that he did not want to accept a
8 five-year plea offer. At the time of trial, we had -- the
9 Prosecutor and I had discussed the case. He would not put the
10 five-year plea offer back on the table. I believe he put
11 seven or eight on the table. Mr. Smart and I discussed the
12 case, as we had on a bunch of times before, and trial strategy
13 and things of that nature. He did not want to go back for the
14 eight years and chose to go forward.

15 Q Okay. Did you ever tell him that or do you recall
16 talking to him about trying to get a zero to three offer?

17 A I mean, I'm sure -- I wouldn't say I would say zero to
18 three, but I would say that I certainly discussed with him
19 trying to get a better offer than the initial five-year plea
20 offer. I mean, obviously, with all of my clients I try to get
21 as low as I can if there's going to be a potential plea offer,
22 which I think he would have taken a zero to three offer.

23 Q At any point during your representation was that five-
24 year offer back on the table?

25 A No.

1 Q Okay. Was any offer other than the seven or eight back
2 on the table?

3 A No. And I'm not sure they actually put that on the
4 table. I think that was more of a negotiation open for
5 discussion type, type situation. I believe they would have
6 put it on the table if we would have come to them and said we
7 would have taken it.

8 Q Do you have any documentation for when the plea offer,
9 the zero to five year offer expired?

10 A I do.

11 Q Okay.

12 A It might take me just one second to find it. I
13 apologize.

14 Q That's fine.

15 A Here goes the plea offer. It is dated January 19th, 2010,
16 written to Kia Wilson from Bo Bryan offering a five years,
17 must accept it by February 26, 2010. It was never marked
18 trial, guilty plea or signed by either party.

19 Q Okay.

20 A But it was marked received by the Public Defender's
21 Office.

22 Q And you came to represent him later on in May; correct?

23 A Yes. May 10th I believe was the day that the letter of
24 representation, May 10th was the day that we actually first
25 met, and I would imagine within a couple of days we sent a

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1 letter of rep. I'm sure I have that.

2 Q Okay. When you first met with him what did you -- well,
3 as you were preparing for trial, what did you advise him about
4 his chances of success in the case?

5 A I don't ever put percentages of, of success on cases. I
6 explain to them the, you know, what is going to occur. I
7 explain to them the system and how the system works and the
8 process of a trial versus a plea, their rights. I entertain
9 or give them an open forum to explain to me what witnesses
10 they might have on their behalf, what happened, things of that
11 nature. We discuss obviously fees, things of that nature. We
12 don't -- I don't put percentages on anything.

13 Q Okay.

14 A There's no -- I mean, in fact, I tell them the exact
15 opposite. There's no telling with 12 people that don't know
16 you or I is going to do.

17 Q Okay. And did you think that you were going to be
18 successful in any of the charges?

19 A Yes, sir. I felt comfortable that we had an opportunity.
20 I -- you know, again, I, I -- it's always a guess, and I
21 explained to him that there's no telling, but I did think that
22 we had legitimate arguable defenses to each of the or to some
23 of the offenses and I did explain to him and we agreed that
24 there was a possibility to plead to some of these that were
25 going to be obviously or most likely convictions by the jury

1 such as failure to stop for a blue light. I think that was
2 going to be an indefensible crime. I think we laid down
3 essentially on, on closing arguments hoping for a compromise
4 verdict. We identified, and as I always go over with my
5 clients, the number of years, the potential penalties for each
6 offense and, and essentially as our discussion went we were
7 going for a compromise verdict and hoping that the jury would
8 have enough reasonable doubt with the most serious offenses
9 to, to find him guilty of the less serious offenses, and
10 therefore, not expose him to as much time.

11 Q Okay. And --

12 A Which would have, in fact, been, of course, the zero to
13 five.

14 Q Tell us about the evidence that was against him.

15 A The evidence was pretty substantial as to failure to stop
16 for a blue light. It was on video. He clearly ran. He
17 clearly evaded police officers. There was a number of police
18 officers that were engaged in the chase. I believe there was
19 two or three officers that testified against him. In the
20 resisting arrest I believe that there was less evidence of it.
21 I believe that the sentence even reflects that. I believe
22 that Mr. Smart, when he, he wrecked his vehicle with enough
23 force to break a railroad track in half, it was a significant
24 impact. I believe that he was injured at that point. I
25 believe that law enforcement had been involved in a, a rather

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1 stressful situation, and like we see all too often, didn't
2 perhaps, didn't perhaps perform like they should have, and as
3 I explained to the jury, I believed that they intentionally
4 aggravated him. I believe that he possibly -- he -- they did
5 not seek medical help for him or attention on the side of the
6 road. I believe that they intentionally poked at him trying
7 to get him riled up knowing that he was intoxicated or
8 impaired, and there is evidence or was evidence on the video
9 of him attempting to kick one, an officer, but for no -- oh,
10 and he, he pulled away from an officer I believe is what it
11 was. There was a video of, of the scene, just one now, keep
12 in mind, where there were probably 10 or 12 vehicles there.

13 With regards to the throwing of bodily fluids, the
14 testimony mainly came from the law enforcement officers on
15 scene. There was some indication on the video that that
16 possibly occurred by virtue of the fact one of the officers
17 took his shirt and pulled it over his head indicating that he
18 was spitting on him and substantiated what the officer said.
19 We were able, I think, to successfully cross examine them on
20 those issues, that there was no -- that almost every officer
21 there was equipped with cameras, you know, obviously, the, the
22 video and the recorders in the cars, all the things like that.
23 Unfortunately, the jury just didn't believe it. They believed
24 the officer, and I believe that's -- did I get them all? The
25 threatening the life of a public official was in my opinion.

1 was not a sincere threat. It was testimony by law
2 enforcement.

3 Q Okay. Now, whenever you went to, went to trial, you had
4 made a pretrial motion involving the throwing bodily fluids;
5 correct?

6 A I don't recall. Was it pretrial? I don't recall.

7 Q Okay. You had made a motion after -- do you have a copy
8 of the transcript?

9 A I do.

10 Q Okay. If you could turn to page 60.

11 A I've done it. I'm --

12 Q And actually, I apologize. I might have misstated
13 something. Pretrial, the, the Prosecution made a motion to
14 amend the indictment; correct?

15 A The best I can recall I believe that's correct.

16 Q Okay.

17 A I'm sorry. Go ahead.

18 Q And you objected to that; correct?

19 A I believe I did object to it, but I will state, you know,
20 obviously having been a Prosecutor and dealt with indictments
21 for a number of years the -- it had to be objected to prior to
22 the swearing of the jury or else it would have been
23 ineffective and being a scrivener's error I felt comfortable,
24 even though I was making the objection, that I think it was an
25 appropriate objection, I felt like it would probably be

1 granted on behalf of the, of the State, and there is a case
2 specifically on point with regards to if it is done so. I
3 believe that State versus Leroy Wilkes I believe is the case
4 name that indicates that it confers jurisdiction whether it
5 says correctional facility or not.

6 Q And you had -- did -- you had -- had you told Thomas
7 Smart anything about that issue prior to going to trial?

8 A We discussed it. Yes, sir.

9 Q Okay. Did you tell him that he would likely be
10 successful with that or not?

11 A No, sir.

12 Q You didn't tell him anything?

13 A I told him we would raise the issue and the Court would
14 ultimately have to decide whether or not they could advance or
15 proceed on that indictment, but you know, with regards to, to
16 it, no. I, I, I don't -- again, I don't make predictions on
17 what Judges are going to do or what a jury is going to do.

18 Q Had you talked to your wife about that issue?

19 A About which issue?

20 Q About the, the issue involving the indictment.

21 A No. Let me say this, I don't specifically remember
22 talking to her about the case, but I will say this, my wife
23 and I are very close, and it would not surprise me if we
24 discussed, as we do -- I, I discuss her cases. She discusses
25 my case. I'm sure we had a discussion about this case and the

1 fact it was a trial. So I don't want to say, you know, if I
2 was confronted with evidence that said that I told my wife or
3 talked to my wife about the indictment, I couldn't deny it,
4 but I don't recall doing it.

5 Q Okay.

6 A And it -- and to be quite frankly, out of all --
7 everything, all the issues in this case, that would have been
8 the least likely that I would be concerned with because I felt
9 pretty comfortable that the Judge was going to allow the
10 amendment anyway because, you know, as you well know, there's
11 the case that indicates that it really doesn't matter what the
12 face of the indictment says, it's the body of the indictment.
13 The body of the indictment was correct, and again, under the
14 Wilkes case I believe that, that was the most insignificant
15 issue we had in this case I felt. So I doubt I discussed it
16 with her.

17 Q Okay. But she was a Solicitor at this time; right?

18 A She was an Assistant Solicitor.

19 Q Okay. Immediately after the Court amended the indictment
20 you all took a break; is that correct? Do you recall that?

21 A Do you have a page number? I don't --

22 Q Page 67. Actually, if you could go ahead and read six
23 through 12.

24 A I'm assuming out loud.

25 Q Yeah.

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24

1 A Okay. We'll start with number five if that's okay.

2 Q Okay. That's correct.

3 A Because this is me talking, Your Honor. (As read) "Mr.
4 Von Herrmann: Your Honor, we might be able to resolve this
5 case if we can step back and talk with the Court in the
6 chambers with regards to a particular ruling that I don't want
7 to be -- want to present right here, but maybe I would allow
8 the Court to understand and hear and figure out in, in a, in a
9 -- maybe in a presumption."

10 Q And did the Court ultimately allow you to take a break
11 and step back into chambers and talk?

12 A No. They did not.

13 Q Okay. Did you get a chance to speak with the Judge at
14 the bench?

15 A I believe we did have a short conversation.

16 Q Okay. And did you talk with your client at any time
17 after that prior to the beginning of testimony about a plea
18 offer?

19 A I believe I did. I believe I explained to him that, and
20 again, I don't know the exact number, but that the State was
21 looking for seven or eight years, and, you know, I explained
22 to him that the evidence hadn't changed and none of that, but
23 that that's what they were looking for, and it was his
24 decision.

25 Q Okay. And did you tell him about his exposure if he went

1 through trial?

2 A I had already told him that. We had gone through that.

3 Q Did you tell him it was likely that he was going to get
4 concurrent time if he got convicted at trial?

5 A I have explained to him that out of the, I guess at that
6 point, 12 years, 14 years that I had been practicing law that
7 concurrent sentences were generally received by Defendants,
8 especially in situations where you have substantial periods of
9 time, that consecutive sentences were available, but that it
10 typically didn't occur, that I had seen it most of the times
11 in double homicide cases that I had tried where they gave, the
12 Judge gave two consecutive sentences of life in prison, but to
13 be fair, yes, I did explain to him that in my opinion it was
14 unlikely, but that it was possible.

15 Q Okay. And you said it was likely that he would get
16 somewhere -- did you say anything about if he got consecutive
17 time it's likely he would get around ten?

18 A No. We -- I told him that I did not believe he would get
19 consecutive time.

20 Q I mean, if he got concurrent time he would get around
21 ten?

22 A I told him that typically what happens is at trial the
23 Judges that I had practiced before, and I think at that time
24 it was about 26 or 28 of them that I had had trials in front
25 of, that typically they head towards the higher end of the

1 most significant sentence, and most of the time they ran
2 concurrently, while we couldn't, just like we couldn't predict
3 the jury, we couldn't predict what the Judge would do, and
4 that it wasn't my job to, to invade the province of the Court.

5 Q But you didn't think his decision to turn down seven or
6 eight was that bad considering his exposure was ten? Did you
7 not think that? I mean, you --

8 A Yeah. I just don't recall, to be honest with you.

9 Q Okay.

10 A I, I, -- you know, it's easy sitting here to say that,
11 yeah, it was a horrible decision, but four years ago I don't
12 recall. I -- if -- I was fairly confident that the case was
13 weaker on the State. I didn't believe that they could -- they
14 would carry the day in a lot of their charges. I felt like it
15 would be a compromise verdict. I explained to him, without
16 giving percentages or anything like that, that that was what
17 we were going to ultimately be going for, that he was not
18 facing a not guilty across the board in my opinion, but I, I
19 can't recall whether we did that or not, no.

20 Q Okay. Is it fair to say that part of your defense at
21 trial was that spitting was not throwing?

22 A Certainly. Yes.

23 Q And if I could direct you to 196.

24 A And if I could just elaborate, if you don't mind, on
25 that.

- 1 Q Okay.
- 2 A I will say that we did, and I say we, I had talked to
3 other defense lawyers who I was working with on -- as co-
4 counsel on other cases and ran it by not with any names
5 attached or anything else and asked them their opinion, and I
6 personally did research, and we were not able to find anything
7 in South Carolina that had, had done that, had determined
8 that. The only thing that we were able to find is that the
9 Court had to strictly interpret as the General Assembly wrote
10 the statute. So I did feel fairly comfortable that combined
11 with the lack of evidence on the videotape, no other pictures
12 or indicia of any, any spitting, combined with the strict
13 interpretation of the law, I did feel, you know, fairly
14 comfortable with that case. I apologize. I just wanted to
15 elaborate.
- 16 Q Okay. On page 196.
- 17 A Uh-huh.
- 18 Q Do you, do you know what this section of the transcript
19 is from the context? Do you recall what it is?
- 20 A It looks like my closing arguments.
- 21 Q If I told you it was the State's closing argument, would
22 you disagree with me?
- 23 A No. I mean, without having a chance to look at it --
- 24 Q Okay.
- 25 A -- it just says closing arguments and Judge's charge so.

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1 Q If you could read 196 and 197 to yourself and just see if
2 that familiarizes -- if you're familiar with what that is.

3 A I believe that's Mr. Bryan's closing arguments. I
4 apologize.

5 Q Okay. And if you could, look at line 12 through 22. In
6 that Mr. Bryan is telling the jury what the dictionary says is
7 throwing; right?

8 A That's correct.

9 Q Do you recall objecting to that?

10 A I didn't object to that.

11 Q Okay.

12 MR. SHAFFER: The Court's indulgence. No further
13 questions, Your Honor.

14 THE COURT: All right. Cross examination.

15 MR. THOMAS: May it please the Court?

16 THE COURT: Yes, sir.

17 CROSS EXAMINATION

18 BY MR. THOMAS:

19 Q Mr. Von Herrmann, do you feel like you had sufficient
20 meetings with Mr. Smart before the trial?

21 A Absolutely.

22 Q And I'm assuming you filed the standard discovery
23 motions?

24 A Absolutely.

25 Q And you had an opportunity to review all the State's

1 evidence with him?

2 A Yes. I did.

3 Q Did you discuss -- you got an opportunity to discuss with
4 him his version of events that night?

5 A Yes. I did, to the best he could recall. Obviously, he
6 was, and I believe was impaired, and then, of course, the
7 accident. I mean, it, it -- I believe it rendered him
8 unconscious and possibly unable to explain all of the details.
9 I think we had to rely on, on the discovery, the videotape and
10 what he could remember.

11 Q So it's safe to say that you discussed any possible
12 defenses he might have?

13 A Absolutely.

14 Q Did you explain to him all the elements of all the
15 charges?

16 A Yes. I did.

17 Q You said there was never an actual plea offer for the
18 seven to eight officially on the table?

19 A The best I can recall. There's certainly never been
20 anything in writing. I believe it was just a conversation and
21 negotiation in trial.

22 Q But I think you also testified that he, Mr. Smart, wasn't
23 interested in going to jail, that he wanted to have a trial on
24 these charges?

25 A Correct. He did not want to accept seven or eight years.

William Von Herrmann - Cross by Mr. Thomas

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1 I believe there was one time a discussion about if I could get
2 it below the five, and I think I approached Mr. Bryan, and
3 again, I'm trying to recall from four years ago. I believe I
4 tried to recall or approach Mr. Bryan and try to get it lower
5 than five, and I believe there was actually some
6 consideration. I mean, I think Mr. Bryan at one point
7 considered it. He talked to law enforcement, and they were
8 totally against it, and there, kind of, you know, we were kind
9 of stuck there.

10 Q So whose decision ultimately was it to, I guess, go to
11 trial instead of trying to take a plea for seven or eight
12 years?

13 A It was Mr. Smart's.

14 Q And you said you discussed with him the arguments you
15 were going to make that throwing isn't spitting under the
16 statute?

17 A That's correct.

18 Q And you raised that in a pretrial motion?

19 A Again, I don't recall whether I did in a pretrial motion
20 or whether I did it -- I, I quite possibly have, but I
21 certainly raised it to the jury, and I raised it in the
22 directed verdict portion.

23 Q Let me refer you to the transcript --

24 A Sure.

25 Q -- on page 68. If you would just read for yourself

1 starting at line 19 all the way through page 69, line six.

2 A Yeah. I guess I did. That's correct.

3 Q And also since you've already read that did -- I see

4 there Mr. Bryan in his response to your motion he referenced

5 the dictionary.

6 A Yes. He did.

7 Q Okay. So, so you renewed your motion to dismiss on those

8 grounds at the directed verdict stage?

9 A Yeah. Absolutely, and I'll say I do not believe that

10 that there would have been any change had he not read from the

11 dictionary. I don't think the dictionary played into this one

12 little bit.

13 MR. SHAFFER: Objection. Speculation.

14 THE COURT: Sustained.

15 Q When he read from the dictionary at the end, why did you

16 not object?

17 A I believe it would have caused -- called more attention

18 to what he was doing and his interpretation. I was -- we made

19 a calculated decision to not present any evidence, thereby

20 allowing me last closing, and I felt like I could adequately

21 handle that and address those issues, that the American Law

22 Dictionary or American Heritage Dictionary didn't control,

23 that the, that the law of the land and what the Judge charged

24 the jury controlled, and I felt like it would draw more

25 attention and would be not advantageous to my client.

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1 Q And so you raised a directed verdict motion on these
2 grounds. I know this is kind of elementary, but what's the
3 standard for a directed verdict?

4 A If there's -- it's depending, of course, whether it's a
5 circumstantial evidence case or whether it's a direct evidence
6 case, you know, the standard being whether there's any
7 evidence that tends to prove the guilt of the Defendant, and
8 in this case it was direct evidence as well as circumstantial
9 on, I believe, all the charges.

10 Q And you renewed all your motions post-trial?

11 A Yes. I did.

12 Q You said you may have discussed this case with your wife,
13 but you don't recall that specifically?

14 A I'm pretty sure I discussed it. You know, at trials we
15 don't obviously, and of course, now she's no longer a
16 Prosecutor, but, you know, to be, you know, perfectly candid
17 with everyone, you know, when it came down to trials, my wife
18 and I would discuss. I don't know that we discussed in great
19 detail or anything like that, but if I had, you know, an idea
20 of something that I thought would work or if she was trying a
21 case that I wasn't involved in, I believe she would do the
22 same with me.

23 Q Is it safe to say your wife had no involvement in this
24 case?

25 A No. She had no involvement, and in fact, she wouldn't

1 have -- she would never communicate anything that was shared
2 in the privacy of our house.

3 MR. SHAFFER: Objection. Speculation.

4 THE COURT: Overruled. I'll allow that.

5 Q To the best of your knowledge, did she ever communicate
6 anything you've said to her to anybody else?

7 A Absolutely not, and quite frankly, it wouldn't have
8 mattered if -- it wasn't -- this wasn't rocket science.

9 Q And that's what I was about to ask. I mean, I'm sure you
10 discussed with Mr. Bryan your take on the spitting versus
11 throwing issue before trial.

12 A Well, I mean, we did in motion in limine. I, you know, I
13 don't want to lay it out for him, I mean, and I have to be
14 careful here. Mr. Bryan, who I've known for a long time,
15 would -- did not have the trial experience that my wife would
16 have, and in order to perhaps have picked up on that, you
17 would have to be an experienced trial lawyer, and I don't know
18 that Mr. Bryan had that much experience at that time. He may
19 well have, but I certainly wouldn't have laid it out even if
20 we discussed it.

21 Q You do recall objecting to the amendment of the
22 indictment?

23 A Yes. I do.

24 Q And I recalled in your opening and closing arguments to
25 the jury you basically told them that you were going to ask

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1 them to convict him of failing to stop but not of the other
2 charges. Is that sort of your recollection what your trial
3 strategy was?

4 A That's correct.

5 Q Did you discuss that with him beforehand?

6 A Yes. We discussed that to great extent, and the issue
7 there was whether or not to go ahead and plead guilty to the
8 obvious or wait and allow the jury to convict him and hope for
9 them to convict him of that and think that would be punishment
10 enough.

11 Q And that was his decision to not plead guilty to those
12 charges?

13 A With my advice, and I believe he, if I recall correctly,
14 I believe he went and spoke with some family members. His
15 family, you know, he comes from a great family who was very
16 involved behind the scenes. I don't believe -- and I may
17 have, but I've never -- I don't recall meeting with them and
18 discussing the case ad nauseam, but they were involved in it,
19 and I believe he did seek, you know, other opinions, but I
20 mean, he did turn that down with, with my advice.

21 Q Just in regards to some of the particular evidence, some
22 of the crimes or the incident that happened, they did call EMS
23 out to the scene; didn't they?

24 A I don't recall. I was -- if they did he was by that time
25 -- I know EMS was not there by the time they had handcuffed

1 him and taken him to the car. It's --

2 Q Do you recall if -- he declined medical attention,
3 though, after EMS got there?

4 A It does seem like he declined, and again, I believe I
5 argued this in my closing arguments. I don't know that he was
6 in a condition to have declined medical attention. I believe
7 that I was fairly critical of law enforcement as to not have
8 him checked out at the hospital prior to him being taken to J.
9 Reuben Long or anything else. I felt like that they were -- I
10 mean, quite frankly, I think that they were under a high
11 pressure situation and didn't handle it very well.

12 Q And the nature of the threat against the public official
13 was he said he was going to sit in a tree stand and shoot one
14 of the officers?

15 A That's correct.

16 Q You never told him the indictment would be quashed -- did
17 you -- based on that?

18 A No.

19 Q The law enforcement versus corrections officer, you
20 didn't tell him that the indictment was going to get dismissed
21 for that matter?

22 A No. Absolutely not. I, I told him and explained to him
23 the possibilities that existed, whether or not they were going
24 to be able to go forward, but never indicated that it would
25 be. I never -- I never guess what a jury or a Judge is going

1 to do.

2 Q Thank you very much, Mr. Bryan [sic]. That's all the
3 questions I have -- or I'm sorry -- Mr. Von Herrmann.

4 THE COURT: Redirect?

5 REDIRECT EXAMINATION

6 BY MR. SHAFFER:

7 Q You said there was some consideration for less than five;
8 is that correct -- for --

9 A Some consideration by me?

10 Q No. No. By the Solicitor, by Mr. Bryan.

11 A I mean, I can only assume that's what he was considering
12 when I went and talked to him, but I, I don't know what he was
13 considering.

14 Q Okay.

15 A That was certainly my proposal was less than five.

16 Q But you said he went, went back to the police and they
17 weren't going to have it?

18 A That's my understanding.

19 Q Okay. When did -- when's the first time they mentioned
20 the seven or eight?

21 A It would have been the day of trial.

22 Q The day of trial they mentioned the seven or eight? Was
23 it before the jury was struck or when?

24 A I don't recall.

25 Q Okay.

1 A It was an ongoing negotiation.

2 Q Okay. Now, you also said that you, you thought that
3 objecting would draw attention to them in reading from the
4 dictionary?

5 A I believe it would have brought unnecessary objection
6 that could have been dealt with in other ways. I think the
7 Judge was -- well, I know the Judge was going to charge the
8 law, and I was going to be able to address it in my closing,
9 and, quite frankly, I believe I was going to get more latitude
10 because he read from the dictionary.

11 Q Had anyone -- did you ever raise it to the, to the Judge
12 that you wanted a different charge related to -- you said that
13 you were going to get more latitude from the charge. Did you
14 make any objection to the Judge's charge?

15 A No, sir. That's, that's not what I said. I said I would
16 have gotten more latitude in my closing argument.

17 Q Okay. You would have gotten more latitude in your
18 closing argument. So, basically, you would have been able to
19 go into other stuff that you wouldn't have been able to go
20 into otherwise.

21 A I felt like the Judge would allow me to comment on the
22 fact that it was the dictionary and things of that nature.

23 Q Okay.

24 A And that ultimately the Prosecutor was not the instructor
25 on the law, the Court was.

1 Q You wouldn't have been able to say that otherwise?

2 A I certainly couldn't have made any comment about the
3 dictionary or any of that if he hadn't read.

4 Q Okay. So you wouldn't have been able to rebut the
5 argument that he made?

6 A Maybe if I had -- maybe artfully done I could have.

7 Q Okay. During, during trial nobody read from the
8 dictionary; did they, in front of the jury?

9 A No.

10 Q Did anyone define what throwing was during the trial?

11 A The Judge did.

12 Q Did anyone define it to the jury --

13 A The Judge did in his trial.

14 Q -- that spitting constitutes throwing?

15 A The, the Judge in his jury instructions defined what it
16 was, I mean, what the law says.

17 Q I apologize. Prior to, to what the, the Judge
18 instructed, did any witness other than Mr. Bryan say that the
19 dictionary says spitting is included in throwing?

20 A I don't believe so.

21 Q Okay. You would have objected to it if it had?

22 A Yes.

23 Q Okay. Now, going back to the, the plea offer, you said
24 that there was -- the plea offer was made. You don't know
25 when that was made during the trial, the day of trial?

- 1 A . Again, I don't know that there was an open plea offer.
- 2 Q . Okay.
- 3 A It was negotiations.
- 4 Q Okay.
- 5 A The -- through -- and, and it's not atypical, and I, you
- 6 know, have done this as a Prosecutor and I've done it as a, as
- 7 a Defense lawyer, you know, where you're trying to essentially
- 8 come up with a number everybody can live with, including the
- 9 Court being willing to accept it. In this particular case, I
- 10 don't know that seven or eight was ever a number that was put
- 11 on the table. I know that we discussed that number, but it
- 12 was readily apparent from Mr. Smart that he wasn't going to
- 13 accept that number anyway. So I don't, I don't know that any
- 14 formal offer was ever made. I know that to get back to the
- 15 five I proposed a five or less, and again, he went and talked
- 16 to law enforcement and law enforcement didn't want it, and
- 17 they very well could have talked about the seven or eight. I
- 18 don't know what they talked about, but I do know that that was
- 19 the tenor of the conversation.
- 20 Q But you also -- it's fair to say he was back and forth on
- 21 whether or not to plead guilty, to accept any offer; right?
- 22 A Mr. Smart?
- 23 Q Yeah.
- 24 A Absolutely.
- 25 Q Okay. Now, after your -- after you made the objection

1 regarding the throwing versus spitting and after you had
2 objected to them amending the indictment, you actually took a
3 break and spoke with Mr. Smart; right?

4 A I believe that's correct.

5 Q What did you all speak about? Do you recall
6 specifically?

7 A Well, I know that I explained to him the rulings of the
8 Court in case he didn't understand them, and but other than
9 that I don't, I don't recall.

10 Q You don't recall whether or not you asked him about
11 taking a seven or eight year offer or anything like that?

12 A I'm sure we discussed that.

13 Q Okay.

14 A You know, again, not knowing, not remembering at what
15 point we were discussing it with the Prosecution, but yes, I'm
16 sure I mentioned that to him.

17 Q Okay. And then you went through the -- after you came
18 back you asked the Judge to put him on record about whether or
19 not he wanted to plead guilty or go to trial?

20 A That's correct.

21 Q Okay. And that was after the jury was sworn; right?

22 A I'm sure it is.

23 Q Okay. Did anything in particular or do you recall
24 anything in particular that prompted you to do that at that
25 time?

1 A I think it typically, you know, having done several of
2 these trials I want to make sure that it's crystal clear on
3 the record. I probably should have done that beforehand, but
4 I felt like for him to make a, a, an informed decision on
5 whether he wanted to go to trial or not, there were some
6 issues that needed to be resolved, that being the indictment
7 and whether or not the, the indictment could be altered and
8 things like that. So it's, you know, it was hard for Mr.
9 Smart. He was, you know, he understood how serious this case
10 was and he understand the potential sentence and how long it
11 could, and I think we did everything we could to, to give him
12 all the information he needed to go forward or accept a plea,
13 and I wanted to make sure that it was on the record that it
14 was, in fact, his decision to go forward with a trial.

15 Q Okay.

16 MR. SHAFFER: No further questions.

17 A Thank you.

18 THE COURT: All right. You may step down.

19 A Thank you, Your Honor.

20 THE COURT: Thank you. All right. Mr. Shaffer, you can
21 call your next witness.

22 MR. SHAFFER: Thank you, Your Honor. The Applicant calls
23 Thomas Smart.

24 THE COURT: All right.

25 MR. THOMAS: Your Honor, go ahead and ask that Mr. Von

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1 Herrmann be excused.

2 THE COURT: Any objection?

3 MR. SHAFFER: No objection, Your Honor.

4 THE COURT: All right. He's free to go.

5 A Thank you.

6 THE COURT: Thank you very much.

7 THE CLERK: Is he still under oath?

8 THE COURT: Let's place, place him under oath again.

9 Whereupon, Thomas Allen Smart was called to the stand,

10 duly sworn by the clerk and testified as follows:

11 THE COURT: All right. Mr. Shaffer.

12 MR. SHAFFER: Thank you, Your Honor.

13 DIRECT EXAMINATION

14 BY MR. SHAFFER:

15 Q Good morning, Mr. Smart.

16 A Good morning.

17 Q Where are you from, sir?

18 A Conway, South Carolina.

19 Q Okay. Have you lived here all your life?

20 A Yes, sir.

21 Q Okay. How old are you?

22 A Fifty years old.

23 Q Okay. And where, where do you currently reside?

24 A Evans Correctional Institution.

25 Q Where did you reside prior to that?

- 1 A [REDACTED].
- 2 Q And is that property -- was that yours or your parents?
- 3 A My family's.
- 4 Q Family's. Okay. Your whole family resides out there;
- 5 right?
- 6 A Out there. Yes, sir. On a farm.
- 7 Q Okay. What'd you do prior to getting locked up?
- 8 A I worked in Myrtle Beach.
- 9 Q Okay.
- 10 A Landscaping.
- 11 Q And now on the night -- do you remember specifics about
- 12 what happened the night that you were arrested for this?
- 13 A Yes, sir. It was on Christmas.
- 14 Q Okay.
- 15 A And I'd been drinking, and I went to Minnesota, a bar out
- 16 there on the river and was drinking and everything was fine,
- 17 and the next thing I knowed I was in, in a wreck and can't
- 18 remember but bits and pieces, and I explained to Bert Von
- 19 Herrmann that I thought I had been drugged in that bar. Those
- 20 issues were never brought up in my trial. He said he thought
- 21 it better because I couldn't prove that, just to leave that
- 22 out and let him handle my trial. The day I went to his office
- 23 and I asked him would he represent me, he said that -- I told
- 24 him they'd offered me five years and he explained to me, he
- 25 says, "I was -- I, I went to California with Bo Bryan for 30

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- 1 days, with the Solicitor."
- 2 Q Now, now, let me slow this down.
- 3 A Okay.
- 4 Q Because you sort of jumped subject.
- 5 A All right. I was wanting to give you the whole story and
- 6 make it --
- 7 Q Tell us -- okay. Well, tell us about the first time you
- 8 met Mr., Mr. Von Herrmann.
- 9 A He told me that to bring him \$5,000 and he figured, he
- 10 think, he thought he could get me three-year sentence, that
- 11 five years was too much, and he wouldn't take my money if he
- 12 couldn't help me. My nephew was in the, in the courtroom, in,
- 13 in his office when he told me that. He said, "I normally
- 14 charge 10, but if you," he said, "I won't charge you but five
- 15 since I've done business with your nephew." He said, "I
- 16 wouldn't take your money if I didn't think I could help you,"
- 17 and then I said, "They offered, offered me five." He said,
- 18 "That's too much time for your charges. I'll, I'll try to get
- 19 you three."
- 20 Q Okay.
- 21 A Also --
- 22 Q Now, now, you had mentioned they had offered you five.
- 23 Did you accept that offer or reject that offer or what
- 24 happened?
- 25 A No. I had never talked to an attorney or even had an

1 attorney at the time the offer was made and I'd never even
2 spoke to a lawyer.

3 Q Okay.

4 A I couldn't remember what happened at the scene. So I
5 didn't want to plead guilty to something without talking to a
6 lawyer.

7 Q You said that you hadn't talked to a lawyer when they
8 made you that offer. Had you been appointed a lawyer?

9 A No. I -- they, they sent me a -- when he brought me that
10 -- I don't even think I had a lawyer at that time because the
11 Solicitor came to -- out here to the jail and he saw me by
12 himself. I didn't even have a lawyer with me. I, I can't
13 remember if she had been appointed to me or not, but she
14 wasn't here if I had a been. I hadn't even spoke to her. In
15 fact, I never saw her but one time the whole five months I was
16 here before I bonded out.

17 Q Okay. And you said that the Solicitor gave you that
18 offer?

19 A The Solicitor.

20 MR. THOMAS: Your Honor, I'm going to object to this line
21 of questioning. He's gone kind of far afield. There's -- it
22 seems like we're getting into an allegation of un-conveyed
23 plea offer and that's not been pled. If he wants to talk
24 about the discussions he had with Mr. Von Herrmann about pleas
25 that's fine, but --

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1 THE COURT: Overruled.

2 MR. THOMAS: -- there's been no allegation Ms. Wilson --

3 THE COURT: Overruled. I'll allow it. Go ahead.

4 BY MR. SHAFFER:

5 Q So but did you ever -- did you ever send anything to --
6 did you, did you send anything to the Solicitor accepting the
7 offer?

8 A No. I never did.

9 Q When did you bond out?

10 A I bonded out, I think, May 10th.

11 Q Okay. Did you have a chance to talk to the attorney when
12 you bonded out?

13 A I went to see my attorney.

14 Q Okay. Did she tell you about the plea offer, too?

15 A She told me that he had offered five, originally offered
16 five, but she didn't know if he was still going to give me the
17 five-year plea because I didn't sign it at the time he brought
18 it to me. That was the first time I had seen her.

19 Q Okay.

20 A I went to her office when I got out on bond. She never
21 came to see me.

22 Q Okay. And when you hired, when you hired Mr. Von
23 Herrmann, did he tell you anything about whether or not you
24 would likely win if you went to trial or what your exposure
25 was going to be?

1 A Well, he -- the first time I saw him, he, he, he didn't
2 even say anything about trial. He said that, "I could
3 probably get you a plea of three years," and he said -- and I
4 said, "How much would you charge?" He said, "Normally 10,000
5 but this time I'm going, I'm going to charge you 5,000." He
6 said, "And me, me and Bo Bryan went to California for 30
7 days." I wouldn't know if he didn't tell me, "And we were out
8 there," some kind of law thing they had to do in California
9 somewhere out west and they went, they spent 30 days together
10 and they were pretty good friends or -- so like he could talk
11 to him and, and get me that time.

12 Q Okay. Is that why you hired him?

13 A And when he said -- yeah, that's the reason I hired him
14 because he said he could get me less than five years.

15 Q Okay. All right. Did he ever talk to you later about
16 any plea offers that were made?

17 A No. He -- I only -- he said he -- I came to his office
18 seven, eight times. I never been to his office but twice and
19 talked to him.

20 Q Okay.

21 A That's when I hired him, and then I, I went to his office
22 the day that they said I was going to trial. I had -- he
23 needed a continuance because he wasn't ready like 30 days
24 after I got out on bond. They took me to trial. I got out on
25 bond. They took me trial in two months later after I got out

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1 on bond, and I came in the courtroom with him and they give
2 him a continuance. I didn't see him again till the morning of
3 the trial. He called, he called my house and told, told me
4 that -- to be at his office at eight o'clock in the morning
5 across the street, and when I went to his office him and his
6 secretary was in there looking at the video trying to see if
7 they seen anything in the video. I don't even know if he had
8 ever watched the video up to that time, and he just didn't --
9 I know something, you know, he hadn't spent no time on my case
10 because, I mean, I really hadn't had much time to even talk to
11 him.

12 Q Well, tell, tell me this, that morning did he tell you
13 anything about seven or eight years?

14 A No, sir. He said that he'd talk to the Solicitor when he
15 gets over there to the courthouse. We were sitting on the --
16 at the, at the thing. I can't remember if he -- I think he
17 had already swore the jury in and all, but he, he -- I asked
18 him about it. He said, "Do you want to go to trial?" I said,
19 "See what kind of plea you can get me. Will he give me the
20 five?" He said -- he went over. I said, "Ask him if he'll
21 let me plea for six." So he left the table, and he walked,
22 and when he left he walked out the courtroom, didn't come back
23 say nothing to me. When he came back to the table, he said,
24 "No, he ain't going to do six." I said, "Well, what will he
25 do?" He said, "I don't know." He said, "Probably, probably

- 1 seven or eight or, you know, if you, if you lucky." He said,
2 "But I don't see you getting more than that in trial, if you
3 lose in trial. I wouldn't take that plea, you know, because I
4 don't see you getting more time than that if you lose on all,
5 all the cases, and I think they're going to throw out the
6 throwing of bodily fluids because you didn't throw anything,
7 that they, that they mis-charged you. The State should have
8 charged you with assault on a police officer, not throwing a
9 bodily fluid on a correctional officer."
- 10 Q Okay. So he said that, that there was a difference
11 between the corrections officer and the police officer?
- 12 A Yes, sir.
- 13 Q Okay.
- 14 A And also that spitting don't constitute throwing.
- 15 Q Okay. So he said that he thought that was going to get
16 thrown out?
- 17 A Yes, sir.
- 18 Q Did you admit that you had done any of the charges that
19 you were charged with?
- 20 A Only failure to stop for a blue light.
- 21 Q Okay. So you, you recall doing that; right?
- 22 A I remember driving down the road and the blue lights was
23 on I wouldn't stop.
- 24 Q Okay. Did he tell you anything -- I know you said that
25 you wouldn't get a whole lot more than seven or eight if you

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1 went to trial and lost, but did he tell you anything about
2 whether that would be consecutive or concurrent time or
3 anything like that?

4 A He told me that -- he said that -- he said, "If they find
5 you guilty on, guilty on all the charges," he said, "the
6 throwing body fluids carried the most. Whatever they do with
7 it, the other ones would be run concurrent. You'll most
8 likely be run concurrent. You wouldn't even -- I don't see
9 you doing more than eight years if you lose on all four
10 counts."

11 Q Okay.

12 A He said, "What do you want to do?" I said, "I want to go
13 to trial then."

14 Q Okay.

15 A But I asked him two or three times sitting at the table
16 in front of them, when we were in the courtroom, to go try to
17 talk to the Solicitor but he, he just act like he didn't want
18 to -- he like -- he acted like he wanted to go to trial. He
19 told me that Bo Bryan had a bad, a bad trial record. He
20 wasn't a good trial lawyer. He could beat the case.

21 Q Now, if you could, tell me this, so he told you he could
22 beat the case?

23 A He told me he thought he could beat the case --

24 Q Okay.

25 A -- even when we were in the courtroom when the jurors

1 were already went back, he says, "I think we got a -- I know
2 we got -- I know -- I believe we got them beat on two of them
3 already. I'm sure."

4 Q Okay. Which two did he think he had, had it beat on?

5 A He didn't say.

6 Q Okay.

7 A He didn't say.

8 Q Okay. Now, do you recall after the pretrial motions,
9 after they amended the indictment, do you recall taking a
10 break and speaking to him?

11 A After -- you talking about after they -- oh, yeah, that's
12 when he -- that's when he asked me what I wanted to do when
13 they, when they wouldn't throw out the throwing the bodily
14 fluids.

15 Q Okay.

16 A That's when he asked me, and I said, "Go ask him will he,
17 will he, will he let me plead to six," and he went over to the
18 table and come back and said, "I don't think he's going to do
19 six." I said, "Well, what will he do?" He said, "I don't
20 know. Probably eight," and I said -- but he never would come
21 tell me a specific.

22 Q Yeah.

23 A You know, "Go ask the man what he'll offer me and come
24 back and tell me. If he said seven, would I take it or would
25 I take six or would I take eight," but he wouldn't never give

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1 me an exact year.

2 Q Did he ever tell you you had the right to plea, plea
3 straight up, you know, to all the charges straight up? Did he
4 ever tell you anything about that?

5 A I'm not sure.

6 Q Okay. Now, after, after you all took that break, he, he
7 had you talk to the Judge; is that right?

8 A Yes, sir.

9 Q Do you recall talking to the Judge?

10 A Yes, sir. I told him I was satisfied with my lawyer, and
11 --

12 Q Okay.

13 A -- all that, but can I say something?

14 Q Yeah. Go ahead.

15 A You can, you can have a contractor build your house and
16 it's a beautiful home and you're satisfied. Two years later
17 starts rotting and the floors are cracking because the
18 foundation sunk, you ain't too satisfied. So it took me a
19 while to figure out what was going on.

20 Q Okay. Did he tell you why you were going to speak to the
21 Judge or did he warn you that you were going to speak to the
22 Judge?

23 A Yeah. He said just agree with everything or they want to
24 -- you know, in order to get him to continue trial.

25 Q Okay.

1 A "If you want to go to trial just you have" -- I got to be
2 -- have to say I'm satisfied. If I'm -- you know, and at the
3 time I was satisfied with the lawyer until I, I found out a
4 lot of stuff.

5 Q Okay. I mean, what stuff did you find out?

6 A Well, at the end of trial when I lost or when we were
7 going into trial he told me he was up to -- he said that he
8 never discussed it with his wife, he couldn't remember. The
9 day of trial he told me him and his wife was up till two
10 o'clock in the morning, that she was an attorney and that she
11 helped him prepare my case. I found out when I got to prison
12 somebody -- that Ms. Von Herrmann was a Prosecutor in the
13 Prosecutor's -- she was Prosecutor's Office. So what was she
14 even doing messing with my case? He shouldn't even been
15 discussing my case with her. That's client-attorney
16 privilege. That's, that's conflict of interest. That's
17 against the law. He should have never told her anything, but
18 they -- he told me they were up till two o'clock in the
19 morning, my momma and my sister were with me.

20 Q Now --

21 A And that they were up till two o'clock in the morning
22 doing my case.

23 Q Tell me this.

24 A He was up all night. He was tired.

25 Q Tell me this, throughout the trial did he tell you

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1 whether or not he believed that they, they could not charge
2 you with throwing bodily fluids based off the fact it was
3 spitting, not throwing?

4 A He told me they couldn't.

5 Q Okay.

6 A I even wrote him two letters from prison from R and E ask
7 him, "Do you think your wife told the Prosecutors?"

8 Q Okay.

9 A So he's got to remember that, that, that, "Do you think
10 she went and told them what our strategy was, that you said
11 you was going to -- about them -- the word in the indictment,"
12 because they had it changed when we went in the courtroom.
13 So, I mean, how did Bert Von Herrmann, I mean, how did Bo
14 Bryan even know that we were going to have that argument?
15 Somebody had to tell him --

16 Q Did he --

17 A -- because it had never been changed.

18 Q -- did he tell you whether.

19 A He changed it the morning of the trial.

20 Q Oh, I'm sorry. Did --

21 A The only way he knew that is his wife had to tell the
22 Prosecutor's Office that we were going to try to get it done
23 because there's no way that morning he just all of a sudden
24 out of all this time thought to change the wording in the
25 indictment.

1 Q No further questions. I mean, no further questions at
2 this time. I might have -- no further questions at this time.

3 THE COURT: All right. Cross examination.

4 MR. THOMAS: May it please the Court?

5 THE COURT: All right.

6 CROSS EXAMINATION

7 BY MR. THOMAS:

8 Q So, Mr. Smart, you never went over discovery with Mr. Von
9 Herrmann?

10 A Discovery?

11 Q You never discussed the video they had or the fact that
12 all those --

13 A Yes, I did.

14 MR. SHAFFER: Your Honor, I have one, one additional
15 point to raise at this time. I think that I should probably
16 go ahead and do it now out of all fairness to the State.
17 Your Honor, there's -- right now, pursuant to, I guess, 15(B)
18 the Rules of Civil Procedure, I'm moving to amend the
19 application to include a claim that -- of conflict of
20 interest. I don't believe that it's actually spelled out in
21 the application of that, that, that, by, by telling his wife
22 or conferring with his wife about the substance of the case
23 that it's a conflict of interest.

24 THE COURT: So he didn't put that in his application?
25 Hold for a second.

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1 MR. SHAFFER: I, I believe he mentioned that he might
2 have talked to his wife, but I don't think he spelled out in
3 those terms, Your Honor, because he, he had just testified
4 that he -- his wife helped him prepare the case.

5 A Yeah. I put that in my application.

6 THE COURT: Okay. I'll, I'll allow that because I see in
7 the return where you reference that he alleges trial counsel's
8 wife worked for the Solicitor and trial counsel shared his
9 defense strategy with her. So I'll allow that.

10 MR. SHAFFER: Thank you, Your Honor.

11 MR. THOMAS: And you'll just note my objection to any
12 amendment for a conflict of interest I believe.

13 THE COURT: I understand. All right. Go ahead.

14 BY MR. THOMAS:

15 Q So you went over the video with Mr. Von Herrmann?

16 A Yes, sir.

17 Q All right. And you all discussed the fact that he was
18 going to try to get the case dismissed because spitting is not
19 throwing as you all have pointed out?

20 A Yep.

21 Q And you discussed with him that he was going to admit
22 that you were guilty of failure to stop?

23 A No. He wasn't going to -- I wasn't pleading guilty to
24 nothing. I was going to trial on all four counts.

25 Q But you discussed with him that he was going to get up

1 and tell the jury to convict you of failure to stop but find
2 you not guilty of everything else.

3 A Oh, yeah. He told me that.

4 Q You retained Mr. Von Herrmann in, I believe, May of that
5 year; isn't that correct?

6 A Yes, sir.

7 Q And at that point there was no plea offer on the table?

8 A No, sir.

9 Q And you told Mr. Von Herrmann to go try and find you a
10 plea less than three years?

11 A That's not what I told him.

12 Q Less than five.

13 A I told him that I had been offered five. He said, "I can
14 get you better than that." I didn't ask him anything what he
15 could get me. He told me what he could do.

16 Q But you, you definitely didn't want to do the seven or
17 eight that the -- that you talked about with him?

18 A He never gave me a specific. Seven and eight's a whole
19 different, that's a whole year. If you doing time, it's a
20 difference. If he didn't come to me with a specific year,
21 that's like a thousand dollars and 2,000 for a car.

22 Q So --

23 A I can get it for a thousand or two, which one it's going
24 to be, is that seven or eight years, make it plain and simple.
25 Don't --

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1 Q So you told him to go get you a plea offer and he never
2 brought you one back?

3 A Never brought me back a plea, not one plea.

4 Q So you decided to go to trial in that case?

5 A Yes.

6 Q You said you wrote him some letters about his wife
7 working on the case?

8 A Yes.

9 Q Did you bring those with you today?

10 A Yes, sir. He wouldn't even respond to my letters once I
11 went to prison.

12 Q I don't think I have any more questions for you. Thank
13 you, Mr. Smart.

14 THE COURT: All right. Redirect.

15 MR. SHAFFER: Yes, Your Honor.

16 REDIRECT EXAMINATION

17 BY MR. SHAFFER:

18 Q You said that they never gave you a specific of seven or
19 eight. So you decided to go to trial. Would --

20 A Right. He said, "If they give you eight," he said, "I
21 don't see you getting more than that in trial anyway," was his
22 exact words. "I don't see you getting more than that if you
23 lose all four counts."

24 Q If he, if he said he, he could see you getting a lot more
25 than that would you have gone to trial?

1 A No.

2 Q He said you -- he could see you getting 16 would you have
3 gone to trial?

4 A No.

5 Q If he said you -- he could see you getting 15 would you
6 have gone to trial?

7 A No.

8 Q Okay. No further questions.

9 THE COURT: All right. You may step down.

10 All right. Mr. Shaffer, you can call your next witness.

11 MR. SHAFFER: Your Honor, we don't have any further
12 witnesses.

13 THE COURT: All right. Mr. Thomas.

14 MR. THOMAS: Your Honor, at this time the State doesn't
15 have any witnesses. However, I would move to -- perhaps
16 recess or take this matter because now that we've added an
17 allegation that -- actually I withdraw that.

18 THE COURT: All right.

19 MR. THOMAS: No witnesses from the State.

20 THE COURT: All right. Mr. Shaffer.

21 MR. SHAFFER: Your Honor, briefly, concerning the, the
22 new allegation just because of the fact that I amended, the
23 reason that I made the amendment is the actual word is
24 preparing the case for trial. If him and his wife sat there
25 and worked on it together that would be a different

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1 allegation, a conflict of interest, to have a Solicitor
2 helping you prepare the case for trial. There's also a
3 confidentiality issue, an ineffective assistance of counsel
4 based off of that in the application as it, as it is, but I
5 believe that actually allowing a Solicitor to help you prepare
6 for a trial, someone who represents the State certainly in the
7 same circuit, in the same county, that would be a conflict of
8 interest and probably create a structural error in the trial,
9 Your Honor. That's, that's the reason I had raised that
10 allegation.

11 Regarding the, the evidence on whether or not the, the
12 offer was -- when the offer was conferred and whether or not
13 there was an offer conferred, I think that it's pretty clear
14 that going into it Mr. Von Herrmann would have said that
15 there's a chance of success off of this issue, which is
16 consistent with my client's testimony that he believed that at
17 least on the most serious charge, the throwing bodily fluids
18 that that would get dismissed, and, you know, I think that's
19 pretty clear in the fact that they take a break afterwards so
20 that they can bring, bring him back in to question him about
21 whether or not he still wants to go forward at trial. You
22 know, I think Mr. Von Herrmann's exact words were, "If we
23 could take a minute we might be able to wrap all of this up in
24 one thing." You know, so, I, I think that, you know, he, he
25 specifically took a break to inform him of whether or not that

1 strategy was going to work, probably wasn't going to work at
2 that point, so, you know, I think that that supports his
3 contention that he believed that at least going into trial and
4 going into that day that it was not going to be -- he was not
5 going to be successful or that he thought that, excuse me, I
6 think that it supports the fact that Mr. Von Herrmann would
7 have thought that his motions would have been successful, and
8 I, I do believe that one of them actually is correct, and you
9 know, that there simply was not enough evidence to support or
10 any evidence that he threw bodily fluids, rather spit bodily
11 fluids, and I think that that's a -- it was a due -- it's a
12 due process violation to have him here serving time for that
13 offense whenever that's not actually what, you know, that,
14 that's not in the statute, he didn't have any notice of, you
15 know, if, if you know the law, if you know throwing, I think
16 the plain and ordinary meaning of throwing and spitting does
17 not constitute that. I also think that that -- that, you
18 know, having him serving time when there's no evidence of that
19 is a due process violation.

20 THE COURT: But according to the statute doesn't -- I
21 picked up on Mr. Bryan's argument, the statute includes
22 saliva.

23 MR. SHAFFER: Yes, Your Honor.

24 THE COURT: Okay. So you're saying that it is a
25 violation of the statute to throw saliva, but it's not a

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1 violation of the statute to spit saliva.

2 MR. SHAFFER: Yes, Your Honor.

3 THE COURT: Okay.

4 MR. SHAFFER: And the, the Court of Appeals of Utah has
5 agreed with me on that exact point.

6 THE COURT: That it's -- that --

7 MR. SHAFFER: Plain and unambiguous language of their
8 statute, which is virtually identical to ours or at least was
9 whenever the opinion was read, they ended up amending it later
10 to include spitting, but their argument and I apologize. I
11 thought I had copied this, but I did not. It's State v. Paul.

12 THE COURT: Where is this from?

13 MR. SHAFFER: Utah, Your Honor.

14 THE COURT: All right. Are there any states that hold
15 contrary positions?

16 MR. SHAFFER: No, Your Honor. Not that I was able to
17 find.

18 THE COURT: Okay. So you looked at all 50 states and all
19 --

20 MR. SHAFFER: I'm not going to say I, I looked at every
21 -- all of the 50 states, but I did a -- this was fairly early
22 and when I was at Appellate Defense and I was spending a whole
23 lot of time on each case. So --

24 THE COURT: But, I mean, didn't the Court of Appeals
25 address that issue?

1 MR. SHAFFER: The Court of Appeals did, Your Honor.
2 They, they addressed it as to whether or not the Judge erred
3 in denying the directed verdict. So I guess their holding is,
4 is contrary to my argument, but there's no published opinion
5 in South Carolina that addresses this specific issue.

6 THE COURT: Okay. All right.

7 MR. SHAFFER: And there's, there's Circuit Court Judges
8 that go both ways, Your Honor. I mean, I'm not just making
9 this up. I've -- you know, I'm aware of cases where, you
10 know, I believe Judge Barber has ruled on this issue and
11 basically kicked out something for spitting whenever it's
12 throwing. You know, it's not -- I, I don't think that it's
13 just me and Utah who are saying this. I think it's, you know,
14 certainly a disputed fact.

15 THE COURT: All right. Go ahead.

16 MR. SHAFFER: And Your Honor, I think that is pretty much
17 it unless you have any questions.

18 THE COURT: All right.

19 MR. SHAFFER: Thank you, Your Honor.

20 THE COURT: All right. Mr. Thomas. Oh, excuse me,
21 before we go forward, I see your client keeps raising his
22 hand. You need to speak with your attorney; okay?

23 MR. SMART: Okay. Yeah.

24 THE COURT: All right.

25 MR. THOMAS: And Your Honor, I'll kind of work backwards

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1 on the three things he just highlighted. Regarding Utah being
2 the only other state that has fought -- that has decided that
3 spitting is not throwing, I would note, and again, everything
4 I'm about to say to you is in the appellate briefs from this
5 case where the Court of Appeals has already decided this
6 issue. So first I would submit this is an attempt to re-
7 litigate an issue that's already been decided in this case,
8 and therefore, not appropriate for PCR. Second, the Utah
9 legislature actually amended the statute because they thought
10 the reasoning of State versus Paul was wrong. So now it does
11 say throw or otherwise propel, and regarding that, it was
12 raised as a directed motion. The standard is obviously any
13 evidence. The Court of Appeals has found that there was
14 evidence. The trial court here found there was evidence.
15 Just in terms of policy arguments, the purpose of the statute
16 is to discourage conduct that would cause law enforcement and
17 correctional officials to suffer disgrace of having another's
18 bodily fluids forced upon him and that harm results whether
19 it's spit or thrown or, you know, the statute includes urine,
20 things of that nature. I mean, just because he did not put it
21 into his hand and then discharge it doesn't change the policy
22 reasons for the statute being in place.

23 Regarding the discussion about the plea deal and the
24 seven or eight years and the decision to go to trial, Mr. Von
25 Herrmann was very clear that all of those decisions were made,

1 they were all discussed, everything was explained fully, and
2 that the decision ultimately to go to trial was Mr. Smart's.

3 Regarding the fact that Ms. Von Herrmann may have
4 discussed the case with Mr. Von Herrmann, I think there's a
5 stark difference in -- sort of it's a -- and it's for the
6 Court to decide at this point, but I would submit that there's
7 a difference in the testimony from Mr. Von Herrmann about what
8 he discussed with his wife and the allegations that the
9 Applicant has raised about the discussions, and I would just
10 submit that just because he may have discussed some facts of
11 the case with her that's not a violation of the attorney-
12 client privilege. It certainly doesn't rise to the level of a
13 conflict of interest because Mr. Von Herrmann himself did not
14 represent any diametrically opposed interest in that case, and
15 I would just submit we'd rest on the record that the
16 application should be denied.

17 THE COURT: All right.

18 MR. SHAFFER: Your Honor, may I address one point just so
19 we don't have to do it, and if may be a 59(E), the -- Mr. Von
20 Herrmann said that he could not remember the -- what --
21 whether he discussed it with his wife or not. I don't think
22 that that's inconsistent with that the preparation that he had
23 said. I don't think there's any evidence disputing the fact
24 that he said that he, he prepared it with his wife. He, he
25 did state that as a matter of course that they do talk about

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1 his cases, Your Honor. So I don't think that it's
2 inconsistent with his testimony, Your Honor.

3 THE COURT: All right. Anything further?

4 MR. SHAFFER: Nothing, Your Honor.

5 THE COURT: All right.

6 MR. THOMAS: Nothing.

7 THE COURT: All right. Mr. Thomas, if you would prepare
8 an order that denies the Applicant's request for post-
9 conviction relief. I don't know that or I don't find that Mr.
10 Von Herrmann's conduct constitutes ineffective assistance of
11 counsel as contemplated. I don't know that it fell below the
12 standard that most attorneys exercise under the same or
13 similar circumstances, first, that's number one. Number two,
14 I'm confident that the results would not have been different
15 as a result of any ineffective assistance of counsel. So I
16 think it's a two-prong test where you have to show ineffective
17 assistance of counsel and that it was so ineffective that the
18 results of trial would have been different or that there would
19 have probably been a different outcome, and I find that the
20 Applicant has failed in his burden of proof of proving that.
21 All right.

22 MR. SHAFFER: Your Honor.

23 THE COURT: Yes.

24 MR. SHAFFER: Specifically I think that the -- and this,
25 this'll save me from having to do a 59(E) on it, the, the due

1 process issue is judged under a different standard as to
2 whether or not it constitutes.

3 THE COURT: Okay. Yeah. I think the statute, I mean,
4 put in there that I don't think his failure to -- well, I
5 mean, he did raise it. He did argue that spitting was not
6 throwing, and the Judge denied the directed verdict on that
7 regard. So how do you want me to address that?

8 MR. SHAFFER: Your Honor, as to whether or not -- I guess
9 whether or not the statute -- I, I guess, the -- the argument
10 that I would raise is essentially that there, there needs to
11 be a ruling on whether or not the statute itself as a matter
12 of law -- whether there was any evidence that he threw, Your
13 Honor, bodily fluids.

14 THE COURT: Okay. Well, the Court of Appeals, even
15 though it's an unpublished opinion, they did say that the
16 Court must interpret this statute according to its literal
17 meaning, and if it's unclear the Court must interpret the term
18 used in its customary meaning within the context of the
19 statute, and I find that there is no due process, due process
20 violation because interpreting the statute in the context of
21 its customary meaning I don't think the legislature meant for
22 it to be against the law to spit in your hand and throw it at
23 an officer, but not against the law to spit at an officer. I
24 don't think they meant that it was against the law to urinate
25 in your hand and throw the urine at the officer but not

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1 urinate on the officer directly. So I think there is no due
2 process argument there.

3 MR. SHAFFER: And Your Honor, the conflict of interest
4 probably isn't a Strickland test either.

5 THE COURT: Okay. And I don't see where there's a
6 conflict of interest. Mr. Von Herrmann, I don't see where --
7 well, number one, he did testify that his wife, though
8 employed with the Solicitor's Office, had absolutely no
9 involvement in this case whatsoever. So I don't see where --
10 I mean, unless you've got some case law that says the mere
11 fact that he worked or discussed it with his wife entitles
12 your client to have these convictions set aside.

13 MR. SHAFFER: And Your Honor, I, I actually don't have
14 any case law right now, but my argument, I guess, would have
15 been that, you know, if you're actually taking the steps to
16 prepare a case with a Solicitor to, to guide you, help you
17 through what you're going to argue, that that -- at that point
18 there's a conflict of interest because she's actually
19 assisting in the, the preparation of the case, even if she's
20 not appearing at court.

21 THE COURT: But I mean, how is -- how is the trial -- how
22 was the trial preparation in conflict with the Applicant's
23 interest in this case?

24 MR. SHAFFER: Your Honor, I, I don't think we necessarily
25 would have to show there -- that there's an actual conflict of

1 interest. If she's actually involved in the preparation of
2 the case I don't think we would actually have to show any
3 prejudice.

4 THE COURT: Well, I don't think that that -- I mean, I
5 know your client's testimony, but he -- I, I gather from Mr.
6 Von Herrmann's testimony that the -- his wife did not assist
7 him in the preparation of trial for this case.

8 MR. SHAFFER: Okay.

9 THE COURT: That he may have discussed certain issues
10 like he did with other cases, just different factual issues,
11 but Mr. Herrmann [sic] -- I mean, the Applicant was not there.
12 I know he says Mr. Herrmann [sic] told him that. Mr.
13 Herrmann's [sic] testimony, which I find to be more credible,
14 says that he may have mentioned it, but he never mentioned --
15 I'm sure he would have recalled had he sat down and prepared
16 for trial in this case with his wife.

17 MR. SHAFFER: Okay.

18 THE COURT: All right.

19 MR. SMART: I wanted to ask him did he -- don't you
20 remember telling me the morning of trial --

21 THE COURT: Sir, you need to talk to your lawyer.

22 MR. SMART: Okay.

23 (Mr. Shaffer and Mr. Smart confer.)

24 MR. SHAFFER: And Your Honor, I'll share the proposed
25 order with Mr. Shaffer before I send it to you just so we can

Smart v. State

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1 avoid any confusion.

2 THE COURT: All right. Thank you very much.

3 (Adjourned.)

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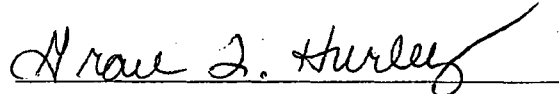
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C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the PCR Hearing held in the case of Thomas Allen Smart v. the State, held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on June 18, 2014.

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



Grace L. Hurley, CVR-CM-M

Official Reporter

October 29, 2014.

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Thomas A. Smart, #299433,)

Case No. 2013-CP-26-225

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

HORRY COUNTY
14 AUG 13 PM 2:20
MELANIE J. JENNINGS-WARD
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 4, 2013. Respondent made a timely Return on or about October 24, 2013. The Court convened an evidentiary hearing into the matter on June 18, 2014, at the Horry County Courthouse. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, William B. von Herrmann, Esquire, also testified. The Court had before it a copy of the trial transcript, the records of the Horry County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the return. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is currently incarcerated in the South Carolina Department of Corrections pursuant to orders of commitment from the Horry County Clerk of Court. In January 2010, the Horry County Grand Jury indicted Applicant for throwing bodily fluids on a correctional facility

employee or local law enforcement officer (2010-GS-26-0682), threatening a public official (2010-GS-26-0684), and resisting arrest (2010-GS-26-0685). William B. Von Herrmann, Esquire ("trial counsel"), represented Applicant.

On July 19, 2010, Applicant proceeded to trial before The Honorable William H. Seals, Jr. and a jury. On July 20, 2010, the jury found Applicant guilty as indicted. Judge Seals sentenced Applicant to consecutive terms of ten (10) years imprisonment for throwing bodily fluids, three (3) years imprisonment for threatening a public official, and six (6) months imprisonment resisting arrest.

Applicant filed a timely notice of appeal, and Tristan M. Shaffer, Esquire, then of the Office of Appellate Defense, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction. State v. Smart, Op. No. 2012-UP-371, 2012 WL 10844371 (S.C. Ct. App. filed June 20, 2012). Applicant petitioned the South Carolina Supreme Court for review of the Court of Appeals' decision, but later voluntarily withdrew his appeal. By order dated February 22, 2013, the Supreme Court dismissed the appeal. The Supreme Court returned the remittitur to the circuit court on February 26, 2013.

II. ALLEGATIONS

In his application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of counsel"
 - a. "My attorney told me I couldn't be legally charged with throwing of bodily fluid because the officer that was in question was a police officer and not a correctional officer."
 - b. "I was charged with the throwing of bodily fluid on a correctional officer. My attorney told me not to plead guilty because the officer in question was not a correctional officer but a police officer. Also because it was said that I spit on the

Officer. That's what I was accused of. My attorney said spitting does not constitute throwing. Therefore I'm not guilty of throwing anything. That the judge would have to throw out the charge. Transcript – pg 60-line #11 – pg 70-line #13.”

- c. “My attorney also had his wife whom is an attorney help him prepare my defense. He stated that she was an attorney also and that she agreed that I should not have been charged with throwing of bodily fluids on a correctional officer because the said officer was in fact a police officer. Also my attorney stated that I should have been charged with assault on a police officer instead. I later found out that his wife worked for the prosecutors office. He was giving knowledge of my defense to the prosecutor. That's a conflict of interest. It's illegal for my lawyer to discuss my case with anyone but me. The prosecution knew my whole defense because my attorney Bert Von Hermen told his wife my defense and she works for the prosecutions office.”
- d. “Before trial I told my lawyer about the night I received the charges in which I'm incarcerated on. I told him I believed I was drugged. Alost ha when I woke up in jail that all my money was gone. He never told the jury my thoughts or opinions on what happened the night I was arrested. He told me to plea the 5th Amendment. Not to testify. He stated let him handle my trial. The jury should have heard my whole story.”
- e. “I believe I was convicted over a definition of the word throw. The court and myself picked 12 jurors to judge wheather or not I was guilty of throwing bodily fluids. The 12 jurors were competent and knows what the word throw means. Because my attorney didn't object to the use of a dictionary I was found guilty of the throwing of bodily fluids on a correctional officer. The prosecution stated that any forward motion was throwing (Not true.) But because the definition that the prosecutor found in a dictionary said any forward motion is throwing I was found guilty. The jury should have been aloud to use their own interpretation of throwing. The jury didn't find me guilty. A dictionary did. My lawyer should have objected to the use of a dictionary.”

At the evidentiary hearing, the Applicant proceeded on the following allegations:

1. Violation of due process because there is no evidence Applicant actually threw bodily fluids.
2. Ineffective assistance of counsel for failing to object to the solicitor's use

- of a dictionary during closing arguments.
3. Ineffective assistance of counsel for advising Applicant to proceed to trial under a theory that spitting does not constitute throwing.
 4. Ineffective assistance of counsel for discussing defects in the indictment with his wife, an assistant solicitor.
 5. Conflict of interest when trial counsel allowed his wife to assist with the preparation of Applicant's case.

Respondent consented to Applicant amending his application to include the above grounds for relief with the exception of the conflict of interest allegation. The Court overruled Respondent's objection and allowed Applicant to proceed on this ground. Because Applicant's post-conviction counsel was also his appellate counsel, Applicant also knowingly and voluntarily waived any claims he may have regarding counsel's performance on appeal.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed 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).

A. Summary of Testimony

Trial counsel testified he is a former deputy solicitor who now practices primarily criminal defense. He testified Applicant was intelligent and familiar with the criminal process. Trial counsel recalled Applicant had an appointed public defender before bonding out and retaining trial counsel. Trial counsel testified he met with Applicant seven (7) or eight (8) times. He recalled filing for discovery from the State and reviewing the State's response with Applicant.

Trial counsel believed the State offered Applicant a plea before Applicant retained him, but the plea was not on the table when Applicant retained him. Trial counsel recalled Applicant did not want to enter a plea that would expose him to more than five (5) years incarceration. He recalled he attempted to negotiate a lower plea offer for Applicant, but the State did not officially make any plea offers during his representation. However, he was confident the State would have allowed Applicant to enter a plea with a sentence of seven (7) or eight (8) years. However, trial counsel testified Applicant stated he would not enter such a plea. He also recalled advising Applicant of the risks of going to trial.

Trial counsel testified he and Applicant discussed every possible scenario Applicant was facing at trial. Trial counsel also testified he discussed his trial strategy with Applicant. Specifically, trial counsel told Applicant he could plead to the failure to stop for a blue light charge or go to trial and admit his guilt to that charge in hopes the jury would reach a compromised verdict. Trial counsel explained his theory of the case was the officers did not handle themselves professionally and there was no video of the resisting or throwing bodily fluids. He also sought to convince the jury Applicant's threat to "sit in a tree stand and shoot" an officer was not sincere. Trial counsel discussed with Applicant these strategies as well as his theory that spitting did not constitute throwing bodily fluids. However, trial counsel was adamant that he never told Applicant the case would be dismissed because spitting did not constitute throwing bodily fluids. Instead, trial counsel testified Applicant made the decision to go to trial with a full understanding this defense may not be successful.

Trial counsel was also adamant he never told Applicant the indictment would be quashed because it incorrectly indicated the victim was a correctional officer. Trial counsel testified he

explained this discrepancy in the indictment to Applicant and told him the State would likely be successful in amending the indictment. Trial counsel admitted he regularly discusses his cases with his wife, then an assistant solicitor, but that he has no knowledge of her ever sharing their discussions with any other solicitors. He also admitted he discussed this case with several other attorneys because of the novelty of the argument regarding spitting. Trial counsel testified he did not tell his wife about the indictment issue in this case. He also testified she had no involvement in the preparation of this case for trial.

Trial counsel articulated he did not object to the solicitor's use of a dictionary in closing arguments because he did not find it objectionable. Rather, he testified an objection to the use of the dictionary would have been overruled and would have brought attention to the solicitor's preferred definition. Trial counsel believed he could address the use of a dictionary to his advantage in his closing by arguing to the jury to use their common sense in deciding if spitting constituted throwing.

Applicant testified he had been drinking at a bar the night of his arrest. Applicant also testified he retained trial counsel because trial counsel said he could get a three (3) year plea offer. He testified he only went to trial counsel's office twice. Applicant testified trial counsel told him to not take a plea offer of seven (7) or eight (8) years because he would get the same sentence if convicted at trial. He testified he believed trial counsel only wanted to take this case to trial because he thought the assistant solicitor did not have a very good trial record. He also testified the assistant solicitor could not have known to amend the indictment unless he was told by trial counsel's wife. Applicant testified trial counsel shared trial strategy and privileged communications with his wife.

B. Due Process

The Court finds Applicant failed to demonstrate his conviction offends the Due Process Clauses¹ of the United States Constitution. Although a conviction may be unconstitutional when it rests upon no evidence at all, Thompson v. City of Louisville, 362 U.S. 199 (1960), the Court finds the question of whether any evidence supports Applicant's conviction is not properly addressed in post-conviction relief.

Initially, the Court notes the issue of the existence and sufficiency of the evidence was raised and ruled upon in Applicant's direct appeal. There, Applicant challenged the trial court's refusal to direct a verdict in his favor, "arguing his act of spitting blood on an arresting officer did not constitute throwing bodily fluids under the statute." Smart, 2012 WL 10844371, at *1. The Court of Appeals affirmed Applicant's conviction and indicated spitting is a prohibited conduct covered by the language of the statute. Id. Applicant contends the due process issue he now raises is distinct from the issue on appeal. However, the argument that spitting does not constitute throwing was raised on appeal in the context of a directed verdict issue. A directed verdict motion asks the court to consider merely "the existence of evidence, not its weight." State v. Wiggins, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998). Thus, the existence of any evidence to support Applicant's conviction was directly raised at trial and on appeal. Accordingly, Applicant cannot now attempt to re-litigate that issue in a collateral attack. S.C. Code Ann. § 17-27-20(b) (post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction."); see also

¹ See U.S. Const. amend V and U. S. Const. amend XIV, § 1.

Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal.").

Furthermore, Applicant cannot make a collateral attack on his conviction based on the sufficiency of the evidence used to convict him. Simmons, 264 S.C. at 423, 215 S.E.2d at 885 ("[T]he Uniform Post-conviction Procedure Act 'shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.'" (quoting Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973))). In Sullivan v. State, the petitioner was convicted of violating the safe cracking statute. Sullivan, 251 S.C. 53, 54, 159 S.E.2d 918 (1968). He sought *habeas corpus* relief on the grounds "that the compartment broken into was not a safe within the meaning of the statute[.]" Id. at 55, 159 S.E.2d at 918. The Supreme Court held this challenge to the statutory language was "an attack upon the sufficiency of the evidence [and] may not be raised by *habeas corpus*." Id. (citing Dickson v. State, 247 S.C. 153, 146 S.E.2d 257 (1966); Shelnut v. State, 247 S.C. 41, 145 S.E.2d 420 (1965); Medlock v. Spearman, 185 S.C. 296, 194 S.E. 21 (1937). Similarly, Applicant now contends his actions the night of his arrest do not meet the statutory definition of throwing bodily fluids on an officer. Because this is a challenge to the sufficiency of the evidence supporting Applicant's conviction, the Court finds this allegation should be dismissed as an improper ground for collateral relief.

Finally, were the Court to reach the merits of Applicant's argument, it would agree with the Court of Appeals that spitting is within the ambit of behaviors prohibited by the statute. When faced with an undefined statutory term, a court must interpret the term in accord with its usual and customary meaning. State v. Morgan, 352 S.C. 359, 366, 574 S.E.2d 203, 206 (Ct. App. 2002) (citation omitted). Courts should consider not merely the language of the particular

clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 569, 703 S.E.2d 197, 200 (2010) (citation omitted). The clear purpose of section 24-13-470² is to discourage conduct that would cause law enforcement and correctional officers to suffer the disgrace of having another's bodily fluid forced upon him, and also to protect law enforcement from potential diseases that may be transmitted through bodily fluids. Applicant's argument that spitting does not constitute throwing is at odds with legislative intent behind the statute. The term "saliva" is specifically listed as one of the prohibited bodily fluids, and saliva is typically thrown via the act of spitting. It would eviscerate the statute to excuse conduct such as Applicant's simply because Applicant neglected to spit into his hand before throwing it upon the officer. Accordingly, this Court declines to adopt Applicant's narrow interpretation that only criminalizes hand-launched bodily fluids.

C. Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be

² "An inmate, a detainee, a person taken into custody, or a person under arrest, who attempts to throw or throws body fluids including, but not limited to, urine, blood, feces, vomit, saliva, or semen on an employee of a state correctional facility or local detention facility, a state or local law enforcement officer, a visitor of a state correctional facility or local detention facility, or any other person authorized to be present in a state correctional facility or local detention facility in an official capacity is guilty of a felony and, upon conviction, must be imprisoned not more than fifteen years. ..." S.C. Code Ann. § 24-13-470(A)

/s/ BHC

relied upon as having produced a just result." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 386 S.E.2d at 625.

1. Failure to object to the solicitor's use of a dictionary during closing arguments

The Court finds Applicant failed to meet his burden of proving trial counsel was ineffective for not objecting to the solicitor's use of a dictionary during closing arguments. Trial counsel testified he chose not to object because it would call attention to the definition the solicitor read. The Court finds this rationale is a valid reason for not objecting. Cf. Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (no ineffective assistance in not requesting

curative instructions because it tends precisely focus the jury on an issues counsel wants to keep out). Furthermore, trial counsel testified he expected more latitude to challenge the solicitor's definition of "throw" in his closing arguments if he did not object to the solicitor's use of the dictionary. Accordingly, the Court finds trial counsel articulated a valid strategy for not objecting. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))).

Applicant has also not shown how he was prejudiced by the solicitor's use of the dictionary in closing arguments. The Court finds nothing objectionable in allowing the solicitor to read a definition from the dictionary during a closing argument. Furthermore, the trial judge charged the jury on the statutory definition of throwing bodily fluids on a law enforcement officer. (Trial Tr. 224:16-225:5). He also admonished the jury that the solicitor's arguments were not evidence. (Trial Tr. 82:2-12) The trial judge's instructions to the jury allowed them determine on their own whether Applicant's actions met the statutory definition of throwing bodily fluids. See Smith v. State, 375 S.C. 507, 523, 654 S.E.2d 523, 532 (2007) (trial judge's instructions can cure any objectionable material in solicitor's arguments (citing Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998))). Accordingly, Applicant has not shown he was prejudiced by trial counsel's lack of an objection to the solicitor's closing argument.

2. Advice to proceed to trial rather than plea

The Court also finds Applicant failed to show trial counsel was ineffective for advising Applicant to proceed to trial. Regarding this allegation, the Court finds trial counsel's testimony

very credible and Applicant not credible. Applicant alleged trial counsel virtually guaranteed a dismissal of his charges because the indictment was invalid and because spitting does not constitute throwing. In contrast, trial counsel credibly testified he never promised Applicant any specific outcome to his charges. He also testified he had lengthy discussion about the trial strategy and the likelihood of being unsuccessful in challenging the throwing bodily fluids charge. Trial counsel also testified Applicant was unwilling to enter a plea longer than five (5) years, and made the decision to proceed to trial. Applicant was also arraigned before trial and admitted it was his decision to proceed to trial. (Trial Tr. 73:18-77:5). Therefore, the Court finds Applicant knowingly and voluntarily exercised his right to a jury trial with a full understanding of the risks thereof. The Court further finds counsel adequately conferred with Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

D. Trial Counsel's Discussions with His Wife.

The Court finds Applicant failed to demonstrate any constitutional violations resulting from trial counsel's discussion of the case with his wife. Regarding these allegations, the Court finds trial counsel's testimony very credible; correspondingly, the Court finds Applicant's testimony not credible.

Trial counsel was not ineffective for having a discussion about a pending case with his wife. Trial counsel vehemently denied sharing any privileged information with his wife. Rather, he testified he and his wife regularly discuss the cases they are working on. Trial counsel also vehemently denied his wife ever relayed their discussions to other assistant solicitors. He specifically recalled he did not discuss the indictment issue in this case with his wife and she did not actively assist in preparing this case for trial. Applicant has presented no evidence, other

than his own testimony, that trial counsel shared any privileged or sensitive information with his wife, nor that she shared any such discussions with the assistant solicitor prosecuting Applicant's case.

Likewise, Applicant has not demonstrated a conflict of interest was created by trial counsel being married to an assistant solicitor. "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendants." State v. Gregory, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005) (citing Fuller v. State, 347 S.C. 630, 557 S.E.2d 664 (2001)). Contrary to Applicant's contentions, the Court finds trial counsel's wife did not actively participate in the preparation of this case for trial. Accordingly, there were no competing duties here giving rise to a conflict of interest.

Trial counsel testified he discussed the novel issues in this case with several other attorneys as well. Certainly such discussions were calculated to assist trial counsel in carrying out his representation of Applicant. Applicant has not presented, and the record does not contain, any evidence suggesting trial counsel's behavior was directly adverse to Applicant's interests. Accordingly, the Court finds Applicant is not demonstrated the result of his trial would have been different had trial counsel not discussed his case with others, including his wife.

E. All Other Allegations

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

IV. CONCLUSION

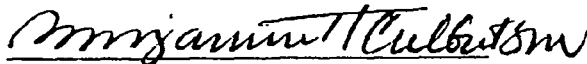
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 1st day of August, 2014.


 THE HONORABLE BENJAMIN H. CULBERTSON
 RESIDENT JUDGE
 FIFTEENTH JUDICIAL CIRCUIT

Georgetown, South Carolina

WITNESSES

J Brantly Horry County Police Department

DOCKET NO. 2010-GS-26-00682

The State of South Carolina

County of Horry

Robert B. Bryan

09H05084

COURT OF GENERAL SESSIONS

JANUARY, 2010 TERM

ARREST WARRANT NUMBER

J324650

CDR: 2526 24-13-0470

DOA: 12/26/2009

THE STATE

VS.

Thomas Allen Smart
W/M

Conway, SC 29526-0000

DOB: 7

SSN:

ATTORNEY: Wilson, Kia T.

Indictment for

THROWING BODILY FLUIDS ON CORRECTIONAL
FACILITY EMPLOYEE OR LOCAL LAW ENFORCEMENT
OFFICER

J. Gregory Hembree, Solicitor

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Petit Jury
Date: FEB 18 2010

VERDICT

Foreperson of Petit Jury
Date:

ORIGINAL

380

STATE OF SOUTH CAROLINA

COUNTY OF
STATEHorry
VS.

Thomas Allen Smart

AKA:

Race: W Sex: M Age: 46

DOB: [REDACTED] SS#: [REDACTED]

Address: [REDACTED]

City, State, Zip: Conway, SC 29526-0000

DL#: [REDACTED] SID#: [REDACTED]

CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

Disposition of the said indictment comes now the Defendant who was

O: Threat / Threatening life, person or family of public official, teacher, principal

In violation of § 16-03-1040 of the S.C. Code of Laws, bearing CDR Code # 0541

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

TEST:

Bryan, Robert B.

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

HEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 3 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.

☐ CONCURRENT or ☒ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

] RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

] Set by SCDPPPS _____

Recipient: _____

Fine: _____

14-1-206 (Assessments 107.5 %)	\$	
14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
14-1-211(A)(2) (DUI Surcharge)	\$100	\$
56-5-2995 (DUI Assessment)	\$12	\$
56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
14-1-213 (Drug Court Surcharge)	\$150	\$
50-21-114(BUI Breath Test Fee)	\$50	\$
56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
44-53-450(C) (Conditional Discharge)	\$350	\$
to County (if paid in installments)	\$	\$ 390
TAL	\$	\$ 133.90

Clerk of Court/ Deputy Clerk

Court Reporter:

Melanie Higgins Ward
 Eugene Buckner

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2010GS2600684

A/W#: J324653

Date of Offense: 12/26/2009

S.C. Code § : 16-03-1040

CDR Code #: 0541

SENTENCE SHEET

☒ CONVICTED OF or ~~LEADS~~

Presiding Judge

Judge Code:

Sentence Date:

2157
 July 20, 2010

WITNESSES

J Brantly Horry County Police Department

DOCKET NO. 2010-GS-26-00624

The State of South Carolina

County of Horry

Robert B. Bryan

09H05084

COURT OF GENERAL SESSIONS

JANUARY, 2010 TERM

ARREST WARRANT NUMBER

J324653

CDR: 0541 16-03-1040

DOA: 12/26/2009

THE STATE

VS.

ACTION OF GRAND JURY

TRUE BILL

Thomas Allen Smart
W/M

Conway, SC 29526-0000

DOB: 7
SSN: [REDACTED]

ATTORNEY: Wilson, Kia T.

Indictment for

THREATENING A PUBLIC OFFICIAL

J. Gregory Hembree, Solicitor

Forfeiture of Grand Jury
Date: FEB 18 2010

VERDICT

Forfeiture of Petit Jury
Date:

ORIGINAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on January 21, 2010, the Grand Jurors of Horry County present upon their oath:

THREATENING A PUBLIC OFFICIAL

CDR: 0541 16-03-1040(A)

That Thomas Allen Smart did in Horry County, on or about December 26, 2009, knowingly and willfully deliver or convey to a teacher, principal, or public official to wit: John Brantly, a law enforcement officer, a letter or paper, writing, print, document, or electronic or verbal communication which contained a threat to take the life of or to inflict bodily harm upon the victim or members of his immediate family, in violation of Section 16-03-1040(A), S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


J. GREGORY PEMBREE
FIFTEENTH CIRCUIT SOLICITOR

WITNESSES

J Brantly Horry County Police Department

DOCKET NO. 2010-GS-26-00685

The State of South Carolina

County of Horry

Robert B. Bryan

09H05084

COURT OF GENERAL SESSIONS

JANUARY, 2010 TERM

ARREST WARRANT NUMBER

J324654

CDR: 0326 16-09-0320(A)

DOA: 12/26/2009

THE STATE

VS.

ACTION OF GRAND JURY

TRUE BILL

Foreperson: *Thomas Allen Smart*
Date: FEB 18 2010

VERDICT

ATTORNEY: Wilson, Kia T.

Indictment for

RESISTING ARREST

J. Gregory Hembree, Solicitor

Foreperson of Petit Jury
Date:

ORIGINAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT

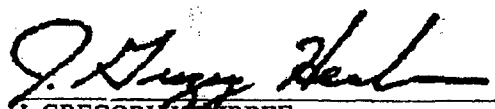
At a Court of General Sessions, convened on January 21, 2010, the Grand Jurors of Horry County present upon their oath:

RESISTING ARREST

CDR: 0326 16-09-0320(A)

That Thomas Allen Smart did in Horry County on or about December 26, 2009, knowingly and willfully oppose or resist an arrest being made by one whom the defendant knew or reasonably should have known was a Law Enforcement Officer, in violation of Section 16-09-0320(A), S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


J. GREGORY HEMBREE
FIFTEENTH CIRCUIT SOLICITOR