

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lee County

William Jeffrey Young, Circuit Court Judge

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S.C. Supreme Court

STEVEN L. MCCLAIN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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STATE OF SOUTH CAROLINA
COUNTY OF LEE

COURT OF COMMON PLEAS

STATE OF SOUTH CAROLINA,

PLAINTIFF,

v.

STEVEN MCCLAIN,

DEFENDANT.

TRANSCRIPT OF RECORD
C/A #: 2004-GS-31-137

LEE COUNTY COURTHOUSE
THURSDAY, DECEMBER 9, 2004

BEFORE:

HONORABLE HOWARD P. KING, PRESIDING JUDGE.

APPEARANCES:

Paul S. Fata, Esquire
Assistant Solicitor
Lee County
Bishopville, South Carolina 29102
Attorney for the State of South Carolina

William Wheeler, Esquire
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Attorney for Steven McClain

TAKEN BY MELISSA R. WINFIELD
CERTIFIED VERBATIM REPORTER

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EXHIBITS

(ALL STATE'S EXHIBITS WERE MARKED BEFORE BEGINNING OF TRIAL)

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HEARING

4

1 THE COURT: ALL RIGHT. WE'RE BACK ON THE RECORD
2 WITH REGARD TO THE MATTER STATE VS. STEVEN MCCLAIN 04-GS-
3 31-137. LET THE RECORD REFLECT THAT THE DEFENDANT IS
4 PRESENT WITH HIS COUNSEL AND I UNDERSTAND THAT THERE IS A
5 MOTION TO SUPPRESS THE PHOTO IDENTIFICATION, IS THAT
6 RIGHT, MR. WHEELER.

7 MR. WHEELER: THAT IS CORRECT, YOUR HONOR.

8 THE COURT: ALL RIGHT. THAT BEING THE CASE, MR.
9 FATA, IF YOU'LL PRESENT WHATEVER TESTIMONY YOU WANT TO
10 WITH REGARD TO THE IDENTIFICATION AND LET'S DO AN IN
11 CAMERA HEARING ON THAT OUT OF THE PRESENCE OF THE JURY.

12 MR. FATA: YES, SIR, YOUR HONOR. WE WOULD CALL
13 SERGEANT DEAN MILLER.

14 BAILIFF: PLACE YOUR LEFT HAND ON THE BIBLE AND
15 RAISE YOUR RIGHT HAND. THE EVIDENCE YOU SHALL GIVE THE
16 COURT SHALL BE THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT
17 THE TRUTH SO HELP YOU GOD?

18 MR. MILLER: YES.

19 (IN CAMERA)

20 (OUTSIDE PRESENCE OF JURY).

21 MR. MILLER - DIRECT EXAMINATION OF MR. FATA:

22 Q: SERGEANT MILLER, YOU'RE AN OFFICER WITH THE
23 BISHOPVILLE POLICE DEPARTMENT?

24 A: YES, SIR.

25 Q: AND ARE YOU THE LEAD INVESTIGATOR IN THE CASE OF

HEARING

5

1 ARMED ROBBERY THAT THE DEFENDANT IS CHARGED WITH
2 COMMITTING AT THE FAMILY DOLLAR STORE IN BISHOPVILLE
3 ON JULY THE 22ND, 2004?

4 A: YES, I WAS.

5 Q: AND AS PART OF YOUR ... JUST TELL ... JUST TELL THE
6 COURT WHAT YOU DID AS YOUR ... DURING YOUR
7 INVESTIGATION.

8 A: WELL, WE, MYSELF AS WELL AS OTHERS OF THE DEPARTMENT
9 TRIED TO DEVELOP LEADS AS TO POSSIBLE SUSPECTS. IN
10 THE SCOPE OF THAT WE DEVELOPED A NUMBER OF PHOTO
11 LINEUPS AND DISPLAYED THOSE TO THE WITNESSES IN THE
12 CASE.

13 Q: OKAY. NOW, THE WITNESSES ARE MS. RUTH ... MS. RUTH,
14 MS. CLYBURN, AND MR. MCDUFFIE, IS THAT RIGHT?

15 A: THAT'S CORRECT.

16 Q: AND HOW MANY LINEUPS DID YOU SHOW THESE FOLKS?

17 A: THREE IN TOTAL.

18 Q: ALL RIGHT. I'M GOING TO SHOW YOU STATE'S EXHIBIT
19 FOUR FOR IDENTIFICATION, STATE'S EXHIBIT FIVE FOR
20 IDENTIFICATION AND STATE'S EXHIBIT THREE FOR
21 IDENTIFICATION. AND ASK YOU IF YOU RECOGNIZE THOSE
22 ... THOSE THREE EXHIBITS?

23 A: I DO.

24 Q: AND WHAT ARE THEY, SERGEANT?

25 A: BASICALLY THREE INDIVIDUAL LINEUPS THAT I CREATED OR

HEARING

6

1 I CREATED TWO BUT I DISTRIBUTED ALL THREE.

2 Q: OKAY. NOW, WHAT IS ... TELL THE COURT WHAT THE
3 PURPOSE OF THIS LINEUP AND HOW ... WHY ... WHY
4 THEY'RE CONFIGURED WITH SIX PHOTOGRAPHS AND SO
5 FORTH.

6 A: GENERALLY IT'S ... IT'S OUR PRACTICE TO PLACE THE
7 SUSPECT'S PHOTO IN AN ARRAY OF NORMALLY IT'S ABOUT
8 SIX PHOTOS. OCCASIONALLY YOU'LL SEE A LITTLE MORE,
9 A LITTLE LESS. OUR NORMAL PRACTICE IS TO USE SIX.
10 AND WHAT YOU WOULD DO IS ...

11 Q: AND WHY DO YOU USE SIX PHOTOS IN AN ARRAY LIKE THAT?

12 A: JUST TO HAVE SOME ... SOME VARIETY THERE AS WELL AS
13 GIVING ...

14 Q: IS IT ... SO IT WON'T BE SUGGESTIVE?

15 A: CORRECT. THAT'S A PERFECT WAY TO PUT IT SO IT'S NOT
16 SUGGESTIVE AND IT'S FAIR TO PARTIES.

17 Q: OKAY. NOW, AND YOU SHOWED THESE PHOTO LINEUPS ONE
18 AT A TIME?

19 A: RIGHT. CORRECT.

20 Q: AND DID YOU SHOW THEM ... HOW DID YOU SHOW THEM TO
21 THEM? DID YOU GET ALL FOUR PEOPLE TOGETHER AND HAND
22 IT TO THEM OR HOW DID YOU DO THAT? HOW ... WHAT WAS
23 YOUR PROCEDURE?

24 A: EACH PERSON VIEWED THE LINEUP INDIVIDUALLY, WE
25 PULLED EACH ONE THAT WE WERE ... EACH WITNESS AWAY

1 FROM THE GROUP WHERE WE SHOWED THE LINEUPS
 2 SEPARATELY, THEY WERE ALLOWED TO LOOK AT IT AND THEN
 3 THEY WERE INSTRUCTED TO POINT OUT ANYONE THAT MAY
 4 LOOK FAMILIAR AND OF COURSE IF A PERSON WAS POINTED
 5 OUT AS LOOKING FAMILIAR THEN THEY WOULD HAVE TO
 6 INDICATE FROM WHERE.

7 Q: OKAY. WAS THERE ... WAS THERE ANY ... WAS THERE ANY
 8 OPPORTUNITY FOR ONE PERSON TO SUGGEST TO ANOTHER
 9 PERSON ANYBODY IN THESE PHOTOGRAPHS?

10 A: NO. THEY WERE EACH SHOWN SEPARATELY.

11 Q: OKAY. SEPARATELY AND APART FROM EACH OTHER.

12 A: CORRECT.

13 Q: ALL RIGHT. NOW, I'M GOING TO SHOW YOU OR POINT OUT
 14 TO YOU AND ASK YOU TO LOOK AT STATE'S EXHIBIT FOUR
 15 AND STATE'S EXHIBIT FIVE FOR IDENTIFICATION AND TELL
 16 ME ABOUT ... TELL THE COURT ABOUT THOSE TWO LINEUPS.

17
 18 A: OKAY. THESE WERE THE INITIAL ... NOW EACH ... EACH
 19 LINEUP WAS SHOWN TO THE WITNESSES ON THREE SEPARATE
 20 OCCASIONS. STATE'S EXHIBIT ... STATE'S EXHIBIT FIVE
 21 WHICH I HAVE INDICATED FROM MY OWN PERSONAL
 22 IDENTIFICATION ... LINEUP NUMBER ONE WAS THE FIRST
 23 LINEUP AND I CREATED IT ... THIS LINEUP DID NOT
 24 INCLUDE THE PHOTO OF THE DEFENDANT. AT THAT TIME HE
 25 WAS NOT A SUSPECT.

HEARING

8

1 Q: OKAY.

2 A: WE WERE EARLY ON IN THE INVESTIGATION AND THE FIRST
3 ONE WAS CREATED, THERE WAS ANOTHER ... ANOTHER CASE
4 INVOLVING SUBJECTS FROM OUT OF TOWN BEING WORKED BY
5 THE COUNTY AND THEY WERE APPREHENDED WITHIN TOWN AND
6 WE JUST USED THAT PHOTO AS A POSSIBLE SUSPECT.

7 Q: OKAY. DID YOU SHOW THAT LINEUP TO MS. RUTH, MS.
8 RUTH, MS. CLYBURN AND MR. MCDUFFIE?

9 A: I DID.

10 Q: AND WAS THERE ANYBODY PICKED OUT OF THAT LINEUP?

11 A: EACH ONE SEPARATELY SAID THE SUSPECT THAT COMMITTED
12 THE ROBBERY WAS NOT ON THAT LINEUP.

13 Q: OKAY. SO THE FIRST LINEUP AND IS THE DEFENDANT'S
14 PHOTOGRAPH IN THAT LINEUP?

15 A: IT IS NOT.

16 Q: OKAY. NOW, HOW ABOUT STATE'S EXHIBIT NUMBER FOUR.

17 A: STATE'S EXHIBIT NUMBER FOUR WAS THE SECOND LINEUP
18 THAT WE CREATED. AGAIN, WE USED JUST RANDOM PHOTOS.
19 HOWEVER, THE ONE ADDITIONAL SUSPECT THAT WE USED IN
20 THE FIRST EXHIBIT HAD JUST BEEN APPREHENDED BY THE
21 LEE COUNTY SHERIFF'S DEPARTMENT AND HIS CURRENT
22 PHOTO WAS SLIGHTLY DIFFERENT FROM THE PHOTO THAT WE
23 USED ORIGINALLY AS WELL AS HE WAS APPREHENDED WITH A
24 CO-DEFENDANT SO WE INCLUDED THE MORE RECENT PHOTO OF
25 THE ORIGINAL POSSIBLE SUSPECT AS WELL AS HIS CO-

HEARING

9

1 DEFENDANT ALONG WITH THE ARRAY OF OTHER INDIVIDUALS.

2 Q: ALL RIGHT. NOW, AND WHAT ... WHAT METHOD OR
3 PROCEDURE DID YOU USE TO SHOW THAT LINEUP TO THE
4 FOUR VICTIMS?

5 A: THE SAME PROCEDURE. INDIVIDUALLY APART FROM ONE
6 ANOTHER.

7 Q: AND DID ANYBODY PICK OUT ANYBODY IN THE PHOTOGRAPHS?

8 A: THEY DID NOT.

9 Q: NO ... NO ... NONE OF THE VICTIMS PICKED OUT
10 ANYBODY?

11 A: RIGHT. IN FACT THEY STATED THE SUSPECT IS NOT IN
12 THE PHOTO ARRAY.

13 Q: ALL RIGHT. NOW, DID YOU ... I WANT TO SHOW ...
14 POINT OUT ... CALL YOUR ATTENTION TO STATE'S EXHIBIT
15 NUMBER THREE AND IS THAT ANOTHER PHOTO ARRAY?

16 A: IT IS.

17 Q: AND HOW WAS THAT PHOTO ARRAY DEVELOPED?

18 A: THIS ONE WAS PROVIDED TO ME BY ANOTHER JURISDICTION.
19 IT INCLUDED THE PHOTO OF THE DEFENDANT.

20 Q: OKAY. BY THAT TIME HAD THE DEFENDANT BECOME A
21 SUSPECT?

22 A: HE DID.

23 Q: OKAY. AND DID YOU SHOW THAT PHOTO ARRAY TO THE
24 VICTIMS?

25 A: YES.

1 Q: AND WHAT PROCEDURE DID YOU USE WHEN YOU SHOWED THAT
2 PHOTO ARRAY TO THE VICTIMS?

3 A: SAME PROCEDURE, EACH INDIVIDUALLY AND APART FROM ONE
4 ANOTHER.

5 Q: ALL RIGHT. WAS ANYBODY PICKED OUT OF THAT PHOTO
6 ARRAY AND I'M GOING TO SHOW YOU STATE'S EXHIBIT FOR
7 IDENTIFICATION ONE AND STATE'S EXHIBIT FOR
8 IDENTIFICATION TWO AND DID ANYBODY PICK OUT ANYONE
9 IN THOSE PHOTO ARRAYS OR THAT PHOTO ARRAY?

10 A: YES. BOTH MS. BETTY RUTH AS WELL AS MS. ASHLEY RUTH
11 BOTH INDICATED IMMEDIATELY UPON SEEING THE LINEUP
12 AGAIN SEPARATELY BUT IMMEDIATELY UPON EACH ONE OF
13 THEM VIEWING IT PICKED OUT NUMBER TWO POSITIVELY.

14 Q: OKAY. NOW, YOU SAY MS. BETTY RUTH AND MS. ASHLEY
15 RUTH PICKED HIM OUT. NOW, THE PROCEDURE YOU USED
16 WAS AGAIN WHAT WAS THE PROCEDURE YOU USED?

17 A: WE ASKED THESE ... THE WITNESSES TO TAKE A LOOK AT A
18 PHOTO ARRAY ...

19 Q: NOW, WERE THEY TOGETHER?

20 A: THEY WERE SEPARATED.

21 Q: SEPARATED. AND WERE THEY IN HEARING DISTANCE ...

22 A: NO, SIR, WE WERE ALL IN THE SAME ROOM. WE JUST ...
23 WELL, THE STORE ITSELF, IT'S A LARGE STORE. THEY
24 WERE STANDING TOGETHER WHENEVER WE ... WHENEVER I
25 PRESENTED ... AND CAPTAIN BURKE WAS WITH ME ...

HEARING

1 PRESENTED THEM WITH THE ... WITH EACH LINEUP WE
2 WOULD PULL THEM APART TO ANOTHER PART IN THE FRONT
3 OF THE STORE.

4 Q: IS THERE ANY WAY THAT MS. BETTY RUTH INFLUENCED MS.
5 ASHLEY RUTH OR MS. ASHLEY RUTH INFLUENCED MS. BETTY
6 RUTH?

7 A: NOT IN ANY WAY.

8 Q: OKAY. THEY WEREN'T CLOSE ENOUGH?

9 A: RIGHT. AND EACH WAS SHOWN RIGHT AFTER THE OTHERS.
10 THERE WAS NO TIME FOR THEM TO ... TO DISCUSS WHICH
11 ... WHICH NUMBER THAT THEY HAD PICKED.

12 Q: NOW, EXHIBIT'S ONE AND TWO, WHAT ARE THEY?

13 A: THESE ... THESE ARE FORMS WE COMMONLY USE AT THE
14 POLICE DEPARTMENT HERE, WITNESS LINEUP
15 IDENTIFICATION FORMS. THEY NORMALLY GO HAND IN HAND
16 WITH ANY LINEUP WE CREATE IF A SUSPECT IS PICKED
17 OUT.

18 Q: ALL RIGHT. AND ARE THEY ... IS THERE A SUSPECT OR
19 IS THERE AN INDICATION ON THERE AS TO WHO THEY
20 PICKED OUT?

21 A: THEY WERE ALLOWED TO MARK THE NUMBER OF THE PERSON
22 THAT THEY ARE PICKING OUT. BOTH OF THOSE WITNESSES
23 CHOSE NUMBER TWO VERBALLY. I PRESENTED THEM THE
24 FORM AND ASKED THEM TO FILL IT OUT.

25 Q: AND THEY PICKED NUMBER TWO?

HEARING

12

1 A: CORRECT.

2 Q: NOW, WHAT ABOUT MS. SHIRLEY CLYBURN? WHAT DID ...
3 WHAT DID SHE DO? DID YOU SHOW HER THE PHOTO ARRAY?

4 A: SHE WAS ALSO SHOWN HOWEVER SHE ... SHE DID NOT
5 READILY PICK HIM OUT.

6 Q: DID SHE TELL YOU WHY?

7 A: SHE DID INDICATE TO ME THAT SHE WAS VERY UPSET, VERY
8 NERVOUS. SHE ... SHE JUST COULD NOT POSITIVELY
9 IDENTIFY HIM.

10 Q: DID SHE TELL YOU SHE WAS A DIABETIC OR ANYTHING LIKE
11 THAT?

12 A: I DON'T RECALL IF WE DISCUSSED HER HEALTH.

13 Q: BUT THE REASON SHE DIDN'T PICK ANYONE OUT BECAUSE
14 SHE WAS UPSET AND NERVOUS AT THE TIME OF THE
15 INCIDENT?

16 A: RIGHT. SHE DID INDICATE TO ME THAT DURING THE
17 INCIDENT SHE WAS ... SHE WAS TERRIFIED.

18 Q: OKAY.

19 A: VERY SHAKY.

20 Q: AND WHAT ABOUT MR. TREVOR MCDUFFIE? WHAT WAS HIS
21 COMMENT ABOUT THE PHOTO ARRAY?

22 A: HE DID INDICATE THE SUSPECT, THE DEFENDANT IN THE
23 PHOTO ARRAY, THE THIRD ONE THAT WAS SHOWN. HE
24 INDICATED THAT THE PHOTO NUMBER TWO WHICH WAS THE
25 DEFENDANT LOOKED VERY, VERY SIMILAR TO THE SUSPECT

HEARING

13

1 THAT CAME INTO THE STORE. HE COULD NOT ... HE COULD
2 NOT BE CERTAIN BUT HE WAS
3 VERY, VERY SIMILAR.

4 Q: AND DID HE PICK OUT ANYONE IN THE FIRST TWO ARRAYS?

5 A: NO, DID NOT.

6 Q: BUT HE INDICATED ON ... ON THE THIRD ARRAY THAT ...
7 THAT NUMBER TWO WHICH WAS A PHOTOGRAPH OF THE
8 DEFENDANT WAS VERY, VERY SIMILAR TO THE PERSON THAT
9 CAME IN THE STORE.

10 A: RIGHT. IN FACT I BELIEVE THE COMMENT THAT HE MADE
11 WAS THAT IF IT'S ANYONE ON THIS SHEET IT'S GOT TO BE
12 HIM. THAT ... THAT GUY LOOKS JUST LIKE HIM.

13 Q: OKAY. AGAIN, WAS ANY ... DID ANYONE INFLUENCE THESE
14 FOLKS? DID THEY INFLUENCE EACH OTHER IN MAKING THE
15 IDENTIFICATION? IN OTHER WORDS, DID THE VICTIMS,
16 DID THEY INFLUENCE EACH OTHER?

17 A: NO, SIR.

18 Q: DID THE POLICE DEPARTMENT, DID YOU IN ANY WAY
19 INFLUENCE THESE VICTIMS TO IDENTIFY THE DEFENDANT?

20 A: NO, SIR.

21 Q: IS IT YOUR OPINION THAT THE IDENTIFICATION WAS NOT
22 ... THE OUT OF COURT IDENTIFICATION WAS NOT TAINTED
23 OR PREJUDICIAL TOWARD THE DEFENDANT?

24 MR. WHEELER: OBJECTION, YOUR HONOR.

25 THE COURT: I SUSTAIN THAT OBJECTION. THAT'S

HEARING

14

1 ... THAT'S A DETERMINATION I MAKE.

2 MR. FATA: ANSWER ... ANSWER ANY QUESTIONS THAT
3 MR. WHEELER MAY HAVE.

4 THE COURT: ALL RIGHT. CROSS EXAMINATION, MR.
5 WHEELER?

6 MR. WHEELER: THANK YOU, YOUR HONOR, MAY IT
7 PLEASE THE COURT.

8 MR. MILLER - CROSS EXAMINATION BY MR. WHEELER:

9 Q: INVESTIGATOR MILLER, THESE ... THIS THIRD LINEUP WAS
10 SHOWN TO THE VICTIMS ON JULY 27TH, IS THAT CORRECT?

11 A: I'D HAVE TO CHECK THE DATES.

12 Q: FEEL FREE.

13 A: IF I MAY, THE IDENTIFICATION FORM WOULD HAVE THE
14 DATE ON THERE. I BELIEVE IT'S IN THE EVIDENCE.

15 Q: WELL, IF YOU'LL LOOK AT THE DATE ON THE ... WHEN
16 THEY SIGNED THE LITTLE ... WITH THE X ON IT, SIR.

17 A: IT'S LIKE THE 29TH, YES, SIR.

18 Q: OKAY. ON THE 29TH. I'M SORRY. AND THIS ALL
19 OCCURRED AT THE FAMILY DOLLAR STORE IN BISHOPVILLE?

20 A: CORRECT.

21 Q: ALL FOUR OF THESE INDIVIDUALS, MS. RUTH AND HER
22 DAUGHTER AND MR. MCDUFFIE AND MS. CLYBURN WERE ALL
23 PRESENT IN THE STORE ON THAT TIME?

24 A: CORRECT.

25 Q: OR AT THAT TIME? AND DID YOU TALK TO THEM ... YOU

HEARING

15

1 AND CAPTAIN BURKE WERE THERE AS I UNDERSTAND IT
2 TOGETHER?

3 A: RIGHT.

4 Q: ALL RIGHT. AND YOU HAD THIS OTHER LINEUP WITH YOU.

5 A: ON THAT DATE ...

6 Q: THAT YOU ...

7 A: YES, SIR.

8 Q: WHO DID YOU TAKE AWAY FROM THE GROUP SEPARATELY
9 FIRST?

10 A: I DON'T RECALL IN WHAT ORDER THEY WERE ... THEY WERE
11 SHOWN.

12 Q: OKAY. WOULD THE FORM THAT MS. RUTH AND HER DAUGHTER
13 EACH SIGNED, WOULD THEY HAVE TAKEN THAT FORM WITH
14 THEM OR WOULD YOU ALL FILL THAT OUT LATER?

15 A: THEY FILLED IT OUT RIGHT IN FRONT OF ME AS SOON AS
16 THEY WERE SHOWN THE LINEUP AND HANDED IT TO ME.

17 Q: CONTEMPORANEOUSLY WITH HAVING SEEN THE LINEUP, IS
18 THAT RIGHT?

19 A: CORRECT.

20 Q: OKAY. WELL, DOES IT STAND TO REASON THAT MS. RUTH'S
21 IS ... YOU'VE GOT TIME ON THERE OF 2:22 P.M. ... IF
22 MS. BETTY RUTH'S WAS SIGNED AT 2:22 AND HER
23 DAUGHTER'S IS SIGNED AT 2:23 THAT MS. BETTY WOULD
24 HAVE PROBABLY LOOKED AT THE LINEUP FIRST?

25 A: THAT WOULD BE LOGICAL, SURE.

HEARING

18

1 LINEUP, IS THAT CORRECT?

2 A: RIGHT.

3 Q: OKAY. NOW, IN ADDITION TO TELLING YOU THAT SHE WAS
4 NERVOUS AND SCARED YOU FILLED OUT A REPORT AND LET
5 ME SHOW IT TO YOU IF YOU DON'T HAVE IT IN FRONT OF
6 YOU. LET ME ASK YOU TO LOOK AT THIS. IF YOU HAD IT
7 IN FRONT OF YOU YOU COULD USE YOURS BUT ...

8 A: OKAY.

9 Q: ... DOES THAT LOOK FAMILIAR AS A SUPPLEMENTAL REPORT
10 YOU FILLED OUT?

11 A: IT DOES.

12 Q: IS THAT THE SAME?

13 A: I BELIEVE THIS ONE RIGHT HERE IS.

14 Q: I'M GOING TO PUT MINE OVER HERE THEN. NOW, IN
15 ADDITION TO BEING NERVOUS ACCORDING TO ... WAS THIS
16 REPORT MADE SHORTLY AFTER THEY VIEWED THE LINEUP ON
17 THE 29TH?

18 A: LET'S SEE. I BELIEVE I MADE SEVERAL NOTES ON THIS
19 ONE SHEET. THE FIRST ONE BEGINNING ON THE 23RD.
20 ANOTHER NOTE ON THE 26TH, 27TH, AND THEN AGAIN ON THE
21 30TH.

22 Q: OKAY. WELL, WHEN YOU MADE THIS REPORT YOU'VE GOT
23 WRITTEN IN HERE AND TELL ME IF YOU DISAGREE THAT IN
24 ADDITION TO TELLING YOU SHE WAS NERVOUS WHICH IS NOT
25 IN YOUR REPORT SHE STATED SHE DID NOT SEE THE

25 A: I CAN'T DETERMINE THAT HE'S NOT.

1 Q: DOES THAT NOT APPEAR TO BE THE ORANGE JUMPSUIT
2 NORMALLY WORN BY INMATES?

3 A: ALL I CAN SEE IS THE COLLAR AND I SEE SOME ORANGE
4 CLOTHING.

5 Q: OKAY. ALL RIGHT. HOW MANY OF THOSE INDIVIDUALS
6 APPEAR TO BE WEARING ... WELL, FIRST, IF YOU WOULD,
7 DESCRIBE FOR ME WHAT SOMEBODY IN JAIL NORMALLY
8 WEARS. DO THEY WEAR A JACKET OVER A T-SHIRT OR
9 ANYTHING LIKE THAT?

10 A: I'M ... I CAN'T ANSWER AS TO WHAT THEY NORMALLY
11 WEAR. I'VE VIEWED, YOU KNOW, SEVERAL IN DIFFERENT
12 TYPES OF OUTFITS DEPENDING ON WHAT ...

13 Q: DO THEY NORMALLY WEAR GOLF SHIRTS IN JAIL?

14 A: NOT THAT I'VE SEEN.

15 Q: NUMBER SIX, DOES HE AT LEAST APPEAR TO BE WEARING A
16 GOLF SHIRT? APPEARS TO BE A COLLAR SHIRT?

17 A: YES, SIR.

18 Q: NUMBER THREE, DOES HE APPEAR TO BE WEARING WHAT I
19 MIGHT DESCRIBE AS A SWEATSHIRT JACKET OVER A WHITE
20 T-SHIRT OR SOMETHING IN THAT ...

21 A: IT'S POSSIBLE.

22 Q: OKAY. AND NUMBER ONE, IS HE WEARING ... WOULD WHAT
23 NUMBER ONE IS WEARING STRIKE YOU AS SOMETHING THAT
24 SOMEBODY IN JAIL NORMALLY WEARS?

25 A: IF I GAVE IT ANY THOUGHT, NO.

HEARING

21

1 Q: OKAY.

2 MR. WHEELER: BEG THE COURT'S INDULGENCE FOR A
3 MOMENT.

4 THE COURT: YES, SIR.

5 Q: AND YOU CAN'T RECALL ... AS BETWEEN BETTY RUTH AND
6 ASHLEY RUTH YOU CAN TELL BY THE FORMS THAT BETTY
7 RUTH LOOKED AT THE LINEUP FIRST BECAUSE THEY'RE
8 SIGNED SEQUENTIALLY IN TIME, IS THAT CORRECT?

9 A: RIGHT. THOSE TWO ... WE WOULD KNOW THAT ONE WAS
10 BEFORE THE OTHER.

11 Q: DO YOU KNOW IF THEREAFTER MR. ... MR. MCDUFFIE AND
12 MS. CLYBURN CAME OR DID MR. MCDUFFIE AND MS. CLYBURN
13 GO BEFORE MS. RUTH?

14 A: I DON'T RECALL WHAT ORDER.

15 Q: OKAY. BUT IT DID ALL HAPPEN AT THE SAME TIME ON THE
16 SAME DAY?

17 A: THE IDENTIFICATION?

18 Q: ALL FOUR OF THEM IN THE SAME STORE AT THE SAME TIME.

19 A: YES...

20 MR. WHEELER: THANK YOU, YOUR HONOR. THANK YOU.

21 THE COURT: REDIRECT?

22 MR. FATA: NOTHING, YOUR HONOR.

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

25 MR. MILLER: THANK YOU.

HEARING

22

1 THE COURT: ALL RIGHT. THE ISSUE BEFORE THE
2 COURT RIGHT NOW IS THE SUPPRESSION OF THE PHOTO ... THE
3 IDENTIFICATION THROUGH THE PHOTO LINEUP. IS THERE ANY
4 OTHER TESTIMONY THAT THE STATE WISHES TO PRESENT ON THIS
5 ISSUE, MR. FATA?

6 MR. FATA: NO, SIR.

7 THE COURT: ALL RIGHT. ANY TESTIMONY THAT THE
8 DEFENSE WISHES TO ...

9 MR. WHEELER: NO, SIR.

10 THE COURT: ALL RIGHT. I'LL BE GLAD TO HEAR
11 FROM YOUR, MR. WHEELER.

12 MR. WHEELER: THANK YOU, YOUR HONOR. YOUR HONOR
13 WITH REGARD TO THE ... AND I WAS KIND OF THINKING IT
14 MIGHT BE TWO ISSUES IN ONE IF I COULD GO AHEAD AND
15 PRESENT ALL OF THEM AT ONE TIME IS THE PHOTO LINEUP.
16 YOUR HONOR, OUR POSITION ON THE PHOTO LINEUP WOULD BE
17 THERE WAS A PRETTY SERIOUS POSSIBILITY OF SUGGESTIVENESS.
18 THESE INDIVIDUALS WEREN'T TAKEN INTO ANY SEPARATE ROOM.
19 THEY WEREN'T EVEN TAKEN TO THE BACK OF THE STORE. YOU'VE
20 GOT A MOTHER IDENTIFYING ... I DON'T THINK THERE'S ANYWAY
21 YOU CAN SAY THAT IT'S IN OR OUT OF EARSHOT. SHE
22 CERTAINLY ... IF MS. RUTH IDENTIFIED AND THEN FILLED OUT
23 THE FORM I DON'T SEE HOW YOU CAN SAY THAT ASHLEY RUTH
24 COULDN'T POSSIBLY HAVE OVERHEARD THAT AND THEN COME ABOUT
25 A MINUTE BEHIND HER ACCORDING TO THE FORMS JUST ONE

HEARING

23

1 MINUTE LATER IN MAKING HER IDENTIFICATION. THE FACT THAT
2 THOSE FORMS WERE FILLED OUT, YOUR HONOR, THE FORMS ARE
3 SUBMITTED IN ONE IS ... THE TIME ON IT IS 2:22. THE
4 OTHER ONE THE TIME ON IT IS 2:23. I MEAN, HOW FAR ...
5 YOUR HONOR, YOU THINK OF HAVING THE ... INDIVIDUAL ONE
6 LOOKS, GO BACK, GET INDIVIDUAL, YOU KNOW, AND SHOW IT TO
7 THEM. I MEAN ACCORDING TO THE FORMS THAT THE STATE
8 PRESENTED IT HAPPENED WITHIN ONE MINUTE.

9 THE COURT: BUT ISN'T THAT A CREDIBILITY ISSUE
10 RATHER THAN SUGGESTIVENESS ISSUE?

11 MR. WHEELER: YOUR HONOR, IT SEEMS ... I'VE GOT
12 A CASE ON POINT AND IT'S NOT DIRECTLY ANALOGOUS TO THE
13 FACTS BUT I THINK THE TWO INDIVIDUALS VIEW A LINEUP
14 TOGETHER IT'S PATENTLY SUGGESTED.

15 THE COURT: NO QUESTION ABOUT THAT.

16 MR. WHEELER: AND WHILE THEY WEREN'T BY THE
17 TESTIMONY STANDING TOGETHER THE FACT THAT THEY WERE
18 ARGUABLY WITHIN EARSHOT, THE FORMS WERE FILLED OUT WITHIN
19 ONE MINUTE ...

20 THE COURT: I HAVE NO BASIS ON THE TESTIMONY
21 THAT'S IN THE RECORD ... THE TESTIMONY ON THE RECORD IS
22 THAT THE OFFICER SAID THEY WERE NOT WITHIN EARSHOT, THEY
23 COULD NOT HEAR EACH OTHER. AND I, YOU KNOW, THAT ...
24 THAT'S THE WAY ... WHAT CASE ARE YOU REFERRING TO?

25 MR. WHEELER: WITH REGARD TO THE ISSUE OF BEING

HEARING

24

1 SHOWN THE LINEUP TOGETHER, YOUR HONOR ...

2 THE COURT: YES, SIR?

3 MR. WHEELER: I BELIEVE IT IS STATE V. JONES.

4 BUT LET ME CHECK AGAIN. I'M SORRY, YOUR HONOR, STATE V.
5 TRAYLOR. I'LL BE GLAD TO HAND UP ...

6 THE COURT: YES, SIR, I'LL BE GLAD TO LOOK AT
7 IT.

8 MR. FATA: WHAT'S THE NAME OF IT? STATE V.
9 WHAT?

10 MR. WHEELER: STATE V. TRAYLOR.

11 MR. FATA: TRAYLOR?

12 MR. WHEELER: T-R-A-Y-L-O-R. DO WE NEED A COPY
13 FOR MR. FATA?

14 THE COURT: JUST LET HIM GLANCE AT IT. ALL
15 RIGHT. FOR YOUR PURPOSES, MR. FATA, STATE VS. TRAYLOR,
16 T-R-A-Y-L-O-R. ALL RIGHT. I'VE REVIEWED THAT CASE. GO
17 AHEAD, MR. WHEELER.

18 MR. WHEELER: YOUR HONOR, THE ONLY OTHER THING I
19 GUESS IS THE TRAYLOR CASE KIND OF GOES ON TO THIS TWO
20 PRONG ANALYSIS, THE SUGGESTIBILITY ... THE ONLY OTHER
21 THING I WOULD SUBMIT, YOUR HONOR, IS THERE'S BEEN NO
22 TESTIMONY AT THIS STAGE THAT INDICATES ... I THINK TO
23 LOOK AT THE SUGGESTIBILITY OF THE LINEUP ALSO IN MAKING
24 THAT DETERMINATION THE ABILITY OF THE LINEUP

25 IDENTIFICATION TO BE RELIABLE. NOTHING WAS TESTIFIED TO

HEARING

25

1 BY THE STATE AS TO HOW LONG THESE PEOPLE HAD TO VIEW IT
2 OR ANYTHING IN THAT REGARD AS TO THAT OTHER PRONG OF
3 THAT. YOUR HONOR, THAT WOULD BE OUR ONLY OTHER ARGUMENT
4 WITH REGARDS TO THE THIRD LINEUP.

5 THE COURT: ALL RIGHT, SIR. ALL RIGHT, MR.
6 FATA, WHAT SAY YOU WITH REGARD TO THE THIRD LINEUP?

7 MR. FATA: YOUR HONOR, THE THIRD LINEUP I DON'T
8 BELIEVE WAS SUGGESTIVE. THE VICTIMS WERE SHOWN THREE
9 LINEUPS, TWO LINEUPS DID NOT CONTAIN THE DEFENDANT, THEY
10 DIDN'T PICK HIM OUT. THE THIRD LINEUP SHOWED HIM.
11 THERE'S NO DIFFERENCE BETWEEN THE FIRST TWO LINEUPS AND
12 THE THIRD LINEUP EXCEPT THE DEFENDANT APPEARS IN THE
13 THIRD LINEUP. THE OFFICER TESTIFIED THAT HE FOLLOWED THE
14 STANDARD PROCEDURE BY TAKING THE PEOPLE OUT OF EARSHOT
15 AND HAVE THEM LOOK ... LOOK AT THE ARRAY AND THEY ...
16 THEY DID NOT IDENTIFY THE ... THE DEFENDANT IN THE FIRST
17 AND THEY DIDN'T IDENTIFY HIM IN THE SECOND. I DON'T
18 THINK THE LINEUP WAS SUGGESTIVE AT ALL. AND ... AND NONE
19 OF THE PARTIES, NONE OF THE PEOPLE INFLUENCED EACH OTHER
20 OR HAD THE OPPORTUNITY TO INFLUENCE EACH OTHER WHEN THEY
21 WERE MAKING THE IDENTIFICATION.

22 THE COURT: ALL RIGHT, THEN. THANK YOU, SIR.
23 ALL RIGHT, COUNSEL, I HAVE REVIEWED THE CASE THAT WAS
24 CITED BY MR. WHEELER, THE TRAYLOR CASE AND THE FACTS
25 INVOLVED IN THAT CASE AS WELL AS THE LEADING CASE BASED

HEARING

26

1 ON IDENTIFICATION AND THAT IS THE CASE OF VICKERS, THE
2 UNITED STATES SUPREME COURT CASE AND VICKERS. AND WHAT'S
3 TESTED IS OUTLINED IN VICKERS IS IF THERE IS A
4 SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION IN EVIDENCE
5 CONCERNING THE OUT OF COURT IDENTIFICATION BY THE VICTIM
6 AND THE EVIDENCE SHOULD BE SUPPRESSED. THERE ARE ALSO A
7 NUMBER OF FACTORS THAT ARE MENTIONED IN VICKERS THAT ARE
8 ALSO MENTIONED IN ... IN TRAYLOR BUT THESE FACTORS HAVE
9 BEEN CONSIDERED BY THE COURT IN ADDITION TO SOME OTHER
10 FACTORS. THE SOUTH CAROLINA SUPREME COURT FURTHER STATED
11 THE TEST IN STAVE VS. WASHINGTON, 315-SC-108-432 SE2nd
12 448 PRETRIAL IDENTIFICATION EVIDENCE IN A PHOTOGRAPHIC
13 LINEUP WAS NOT UNNECESSARILY SUGGESTIVE AS TO GIVE RISE
14 TO SUBSTANTIAL LIKELIHOOD OF IRREPARABLE
15 MISIDENTIFICATION. NOW THAT SEEMS TO BE THE TEST IN THIS
16 STATE AS TO WHETHER OR NOT THE PHOTOGRAPH ...
17 PHOTOGRAPHIC LINEUP WAS UNNECESSARILY SUGGESTIVE SO AS TO
18 GIVE RISE TO A SUBSTANTIAL LIKELIHOOD OF IRREPARABLE
19 MISIDENTIFICATION. WHILE THAT COURT SAID THERE THAT A
20 PHYSICAL LINEUP WOULD BE A BETTER AND MORE RELIABLE
21 PRACTICE THAT THEY DID NOT CONDEMN THE ... AND ADOPT A
22 BROAD LINE TEST THAT IT HAD TO BE A PHYSICAL LINEUP AND
23 THEY DON'T REQUIRE THAT AND PHYSICAL ... AND PHOTOGRAPHIC
24 LINEUPS ARE ACCEPTABLE IN THIS STATE AND AGAIN THE TEST
25 IS WHETHER OR NOT IT IS A SUBSTANTIAL LIKELIHOOD OF

HEARING

27

1 IRREPARABLE MISIDENTIFICATION. THE FACTS IN TRAYLOR ARE
2 SOMEWHAT DIFFERENT THAN IN THIS CASE HERE. THE TESTIMONY
3 IN THAT CASE WAS THAT ALL THE WITNESSES WERE IN THE SAME
4 ... NOT ONLY IN THE SAME ROOM BUT IN THE SAME AREA RIGHT
5 IN TOGETHER WHEN IT WAS PASSED AROUND AND IN THAT CASE
6 THE SUPREME COURT FOUND IN THAT WE FIND THAT THE LINEUP
7 PROCEDURE UTILIZED IN THIS CASE WAS BLATANTLY SUGGESTIVE.
8 TO BRING THREE VICTIMS IN THE SAME ROOM WITHIN SEVERAL
9 FEET OF EACH OTHER IS BLATANTLY UNACCEPTABLE. THERE'S
10 SIMPLY NO NEED FOR SUCH A PROCEDURE. AND WE STRONGLY
11 ACKNOWLEDGE THE STATE IS UTILIZING THE SIMULTANEOUS
12 VIEWINGS IN THE FUTURE. THAT'S DIFFERENT IN THIS CASE.
13 THIS WAS NOT A SIMULTANEOUS VIEWING. THERE THE COURT
14 WOULD ... HOWEVER, NOTWITHSTANDING THE SUGGESTIVENESS OF
15 THE LINEUP IN THIS CASE WE SIMPLY CANNOT CONCLUDE THAT IT
16 GAVE RISE TO A SUBSTANTIAL LIKELIHOOD OF IRREPARABLE
17 MISIDENTIFICATION. SO EVEN IN THE TRAYLOR CASE WITH THE
18 PEOPLE SITTING AROUND A TABLE AND HANDING THE PICTURES
19 AROUND IT AMONG THEMSELVES THE COURT FOUND THAT THERE WAS
20 NO ... IT DID NOT GIVE RISE TO A SUBSTANTIAL LIKELIHOOD
21 OF IRREPARABLE MISIDENTIFICATION. SIMILARLY IN THIS CASE
22 I WILL FIND THAT THERE IS NOT SUBSTANTIAL LIKELIHOOD OF
23 IRREPARABLE MISIDENTIFICATION FOR SEVERAL REASONS IN
24 ADDITION TO THE VICKERS FACTORS. THE FACT THAT WE HAD
25 THREE LINEUPS NONE OF WHICH ONLY ONE OF THE SIX ... OF

HEARING

28

1 THE THREE LINEUPS WAS THE DEFENDANT'S PICTURE IN AND HE
2 WAS PICKED OUT THERE. THE OTHER TWO LINEUPS THE
3 WITNESSES WHILE SEPARATED NEITHER ONE OF THEM PICKED OUT
4 EITHER HIM OR ANY SUSPECTS IN THAT LINEUP. I THINK THAT
5 ADDS TO THE RELIABILITY OF IT THE FACT THAT THEY WERE
6 SEPARATED AND THEY MADE THESE DETERMINATIONS SEPARATELY.
7 I AM GOING TO RULE THAT THE LINEUPS ARE ADMISSIBLE UNDER
8 THE TESTS IN THIS STATE. ALL RIGHT.

9 MR. FATA: YOUR HONOR, I WOULD MOVE THOSE INTO
10 ...

11 THE COURT: ALL RIGHT. THEY WILL BE MARKED INTO
12 EVIDENCE AS STATE'S EXHIBITS. THE IDENTIFICATION NUMBERS
13 WILL BE TAKEN OVER SUBJECT TO THE OBJECTION OF MR.
14 WHEELER AND OVER THE OBJECTION OF MR. WHEELER.
15 (STATE'S EXHIBITS NUMBERS ONE, TWO, THREE, FOUR, AND FIVE
16 WERE ADMITTED INTO EVIDENCE).

17 THE COURT: ALL RIGHT. NOW, YOU HAD SAID
18 SOMETHING ABOUT ANOTHER MATTER, MR. WHEELER?

19 MR. WHEELER: YOUR HONOR, I THINK IT MIGHT GIVEN
20 THE TESTIMONY AND GO AHEAD AND SAVE US SOME TIME LATER IF
21 I WENT AHEAD AND ADDRESSED THE ABILITY OF MS. CLYBURN AND
22 MR. MCDUFFIE TO MAKE AN IN COURT IDENTIFICATION. BASED
23 ON THE TESTIMONY BY ...

24 THE COURT: ALL RIGHT, DO YOU PROPOSE, MR. FATA,
25 TO HAVE THOSE WITNESSES IDENTIFY THE DEFENDANT IN COURT?

HEARING

29

1 MR. FATA: YES, SIR.

2 THE COURT: ALL RIGHT. WE NEED TO DO AN IN
3 CAMERA HEARING AS FAR AS THEIR IDENTIFICATION IS
4 CONCERNED.

5 MR. FATA: YOUR HONOR, WE WOULD CALL TREVOR
6 MCDUFFIE.

7 THE COURT: ALL RIGHT, COME ON AROUND, PLEASE.

8 BAILIFF: PLACE YOUR LEFT HAND ON THE BIBLE AND
9 RAISE YOUR RIGHT HAND, PLEASE. THE EVIDENCE YOU
10 SHALL GIVE THE COURT SHALL BE THE TRUTH, THE WHOLE
11 TRUTH AND NOTHING BUT THE TRUTH SO HELP YOU GOD?

12 MR. MCDUFFIE: YES.

13 MR. FATA: YOUR HONOR, JUST ONE HOUSEKEEPING
14 MATTER. THIS DIAGRAM WAS ADMITTED FOR IDENTIFICATION.
15 MR. WHEELER NOW SAYS HE WOULD ... HE WOULD AGREE TO ADMIT
16 IT AS AN EXHIBIT.

17 THE COURT: ALL RIGHT. WHAT'S THE NUMBER?

18 MR. FATA: IT'S SEVEN, STATE'S SEVEN.

19 THE COURT: STATE'S EXHIBIT NUMBER SEVEN IS
20 ADMITTED INTO EVIDENCE WITHOUT OBJECTION.

21 (STATE'S EXHIBIT NUMBER SEVEN WAS ADMITTED INTO
22 EVIDENCE).

23 MR. MCDUFFIE - DIRECT EXAMINATION BY MR. FATA:

24 Q: MR. MCDUFFIE, ON JULY THE 22ND, 2004, WERE YOU AN
25 EMPLOYEE OF THE FAMILY DOLLAR STORE?

- 1 A: YES, SIR.
- 2 Q: YOU'RE GONNA HAVE TO SPEAK UP.
- 3 A: YES, I WAS.
- 4 Q: OKAY. AND WHAT WAS YOUR JOB THERE?
- 5 A: I WAS A STOCKER AND CASHIER.
- 6 Q: ALL RIGHT. WERE YOU WORKING ON THE 22ND?
- 7 A: YES, SIR.
- 8 Q: AND WHERE ... WERE YOU THERE WHEN THE ROBBERY
- 9 OCCURRED?
- 10 A: YES, SIR.
- 11 Q: WHERE WERE YOU?
- 12 A: I WAS IN THE STOCKROOM WHEN I FIRST SAW MR. MCCLAIN.
- 13 Q: OKAY. WHO WAS IN THE STOCKROOM WITH YOU?
- 14 A: ME AND ASHLEY.
- 15 Q: YOU AND ASHLEY RUTH?
- 16 A: YES, SIR.
- 17 Q: WHAT WERE YOU DOING IN THE STOCKROOM?
- 18 A: WE WAS JUST SITTING THERE TALKING ABOUT WHAT CAMPS
- 19 SHE WAS GOING TO.
- 20 Q: OKAY. NOW, THE STOCKROOM ... AND I'M GOING TO SHOW
- 21 YOU STATE'S EXHIBIT NUMBER SEVEN ... IS AT THE BACK
- 22 OF THE STORE?
- 23 A: YES, SIR.
- 24 Q: AND IS THERE A DOUBLE DOOR AT THE BACK?
- 25 A: YES, SIR.

HEARING

31

1 Q: NOW, WERE THE DOORS OPEN OR CLOSED WHEN YOU WERE IN
2 THE STOCKROOM AT THAT TIME?

3 A: THEY WERE OPEN WHEN I FIRST SAW MR. MCCLAIN BECAUSE
4 ...

5 Q: ALL RIGHT. WHAT DREW YOUR ATTENTION TO MR. MCCLAIN?
6 ANYTHING OR ...

7 A: HE WAS STARING AT ASHLEY.

8 Q: SAY THAT AGAIN.

9 A: HE WAS STARING AT ASHLEY RUTH--

10 MR. FATA: CAN YOU HEAR HIM, JUDGE?

11 THE COURT: NO, SIR. YOU DON'T ... YOU DON'T
12 NEED TO GET THAT CLOSE TO THE MICROPHONE.

13 Q: NOW, SAY THAT AGAIN.

14 A: HE WAS STARING AT ASHLEY.

15 Q: HE WAS STARING AT ASHLEY RUTH? WHAT WAS SO STRANGE
16 ABOUT HIS STARE?

17 A: HE STARED AT HER FOR A LONG TIME AND I ASKED ASHLEY
18 DO SHE KNOW HIM AND SHE SAID NO.

19 THE COURT: ALL RIGHT. YOU NEED TO GET A LITTLE
20 BIT CLOSER THAN THAT.

21 A: ALL RIGHT. THAT'S GOOD?

22 Q: ALL RIGHT. THAT SOUNDS OKAY. RIGHT THERE, GO
23 AHEAD. GO AHEAD.

24 A: HE WAS STARING AT ASHLEY AND I ASKED HER DID SHE
25 KNOW HIM AND SHE WAS LIKE NO AND HE STARED AT HER

HEARING

32

1 FOR A GOOD 20 SECONDS.

2 Q: ALL RIGHT. WAS HE ... WELL, DID HE HAVE ANYTHING IN
3 HIS HANDS OR WAS HE LOOKING LIKE HE WAS SHOPPING OR
4 ANYTHING?

5 A: HE WAS LOOKING AROUND AT PAPER TOWELS.

6 Q: BUT WHAT CALLED YOUR ATTENTION TO HIM WAS HE WAS
7 STARING AT ASHLEY.

8 A: YES, SIR.

9 Q: AND DID ASHLEY LOOK UP AT HIM?

10 A: YES, SIR.

11 Q: AND YOU ASKED ASHLEY IF SHE KNEW HIM.

12 A: YES, SIR.

13 Q: ALL RIGHT. WHEN DID YOU NEXT SEE THE DEFENDANT?

14 A: I SAW MR. MCCLAIN WHEN I WAS COMING OUT OF THE
15 STOCKROOM AND ASHLEY WAS COMING TOWARDS THE BACK AND
16 SAID SOMEBODY'S ROBBING US, HE HAS A GUN AND I SAW
17 HIM AS HE WAS LEAVING THE STORE.

18 Q: ALL RIGHT. POINT OUT OF THE JUDGE ON HERE YOU WERE
19 LEAVING THE STOCKROOM, RIGHT?

20 A: YES, SIR.

21 Q: ARE THESE THE FRONT DOORS?

22 A: YES, SIR.

23 Q: IN DOOR AND A OUT DOOR, IS THAT RIGHT?

24 A: YES, SIR.

25 Q: YOU WERE RUNNING DOWN THE AISLE. WHERE DID YOU SEE

HEARING

33

1 THE DEFENDANT?

2 A: I SAW THE DEFENDANT ABOUT TEN FEET AWAY FROM THE
3 REGISTER.

4 Q: ABOUT TEN FEET AWAY FROM WHICH REGISTER?

5 A: THE EXIT REGISTER.

6 Q: THIS REGISTER HERE?

7 A: YES, SIR.

8 Q: SO YOU ... ALL RIGHT, I'M GONNA BACK UP FROM YOU.

9 YOU TELL ME WHERE YOU SAW HIM. TELL ME TO STOP

10 WHERE YOU SAW HIM. SAW HIM HOW CLOSE YOU WERE.

11 A: RIGHT THERE.

12 Q: RIGHT HERE?

13 A: YES, SIR.

14 Q: AND WHAT WAS HE DOING?

15 A: HE WAS RUNNING OUT OF THE STORE WITH A GUN.

16 Q: WITH A GUN? WHAT DID YOU DO?

17 A: I LOCK THE DOOR.

18 Q: ALL RIGHT. AND WHEN YOU ... YOU SAW HIM RUN OUT THE

19 STORE WITH A GUN WHICH WAY DID HE GO?

20 A: HE WENT TO THE ... TOWARDS THE MOVIE GALLERY.

21 Q: DID YOU EVER SEE HIM AGAIN?

22 A: NO, SIR.

23 Q: SO YOU SAW HIM AS HE WAS STARING INTO THE STOCKROOM

24 AT ASHLEY AND THEN YOU SAW HIM AGAIN AS HE WAS

25 RUNNING OUT THE STORE. WAS HIS BACK TO YOU OR WAS

HEARING

34

1 HE FACING YOU WHEN HE WAS RUNNING OUT THE STORE?

2 A: HE WAS SORT OF ANGLED.

3 Q: AT AN ANGLE? ALL RIGHT. HERE ... ALL RIGHT, I'M
4 RIGHT HERE. TELL ME WAS IT ANGLED TO THE RIGHT ...

5 A: YEAH, TO THE RIGHT.

6 Q: TO THE RIGHT? I WAS GOING TO THE LEFT. THIS WAY?
7 TELL ME TO STOP WHEN ... WHEN ...

8 A: TURN AROUND THAT WAY. THE OTHER WAY. RIGHT THERE.

9 Q: RIGHT THERE?

10 A: UH-HUH (AFFIRMATIVE RESPONSE).

11 THE COURT: TALKING ABOUT HIS RIGHT.

12 Q: OH, YOUR RIGHT. EXCUSE ME. I'M SORRY. AND WHICH
13 WAY WAS HE FACING? WHICH WAY WAS HIS FACE?

14 A: WAS HE FACING ME?

15 Q: YES, SIR.

16 A: HE ... HE LOOKED AT ME AND SEE WAS I CLOSE ...

17 Q: DID HE TURN LIKE THIS?

18 A: YES.

19 Q: SO HE TURNED AND YOU GOT A LOOK AT HIS FACE?

20 A: YES.

21 Q: AND THEN HE WENT OUT THE DOOR.

22 A: YES.

23 Q: NOW, DID OFFICER OR DID SERGEANT MILLER SHOW YOU ...

24 I'M GOING TO SHOW YOU STATE'S EXHIBIT FIVE. LET ME

25 SHOW YOU THESE PHOTO LINEUPS?

HEARING

35

1 A: YES, SIR.

2 Q: NOW, AND OF COURSE HE SHOWED IT ... DID HE SHOW THEM
3 TO YOU SEPARATELY?

4 A: YES, SIR.

5 Q: NOW, WERE YOU EVER ABLE TO IDENTIFY ANYONE IN
6 STATE'S EXHIBIT FIVE OR FOUR?

7 A: NO, SIR.

8 Q: ALL RIGHT. NOW, DID HE ... WHEN HE SHOWED YOU
9 STATE'S EXHIBIT THREE WHAT DID YOU INDICATE TO
10 SERGEANT MILLER?

11 A: IF ... NUMBER TWO LOOKED SIMILAR. IT COULDN'T HAVE
12 BEEN ANYBODY ELSE.

13 Q: OKAY. WAS THAT YOUR STATEMENT?

14 A: YES.

15 Q: ALL RIGHT. YOU SAID HE LOOKED ... HE LOOKED SIMILAR
16 TO THE ... TO THE PERSON THAT YOU SAW IN THE STORE
17 ROBBING THE STORE?

18 A: YES, SIR.

19 Q: HAVE YOU SEEN THE DEFENDANT SINCE THEN?

20 A: NO, SIR.

21 Q: DO YOU RECOGNIZE THE PERSON THAT WAS ROBBING THE
22 STORE ... OR DO YOU SEE THAT PERSON TODAY?

23 A: YES, SIR.

24 Q: AND WHERE IS HE?

25 A: RIGHT THERE.

HEARING

36

1 Q: SITTING AT THE DEFENSE TABLE?

2 A: YES, SIR.

3 Q: ALL RIGHT. WHAT DOES HE HAVE ON?

4 A: A ... I GUESS A GREEN SUIT WITH A TIE.

5 Q: OKAY. AND ARE YOU POSITIVELY SURE THAT THAT IS THE
6 MAN?

7 A: 100 PERCENT.

8 MR. FATA: YOUR HONOR, LET THE RECORD REFLECT
9 THAT HE IDENTIFIED THE DEFENDANT.

10 THE COURT: YES, SIR, THE RECORD WILL SO
11 REFLECT.

12 Q: NOW, DID YOU HAVE ANY RESERVATION AS TO WHETHER OR
13 NOT NUMBER TWO ON THAT STATE'S EXHIBIT NUMBER THREE
14 WAS THE DEFENDANT OR NOT?

15 A: REPEAT. SAY THAT AGAIN.

16 Q: DID YOU HAVE ANY RESERVATIONS THAT NUMBER TWO WAS
17 THE ... WAS THE DEFENDANT?

18 A: YES.

19 Q: YOU DID HAVE A LITTLE RESERVATION AT THAT TIME?

20 A: YES.

21 Q: YOU WEREN'T ABSOLUTELY SURE IT WAS HIM?

22 A: YES. I WASN'T ... I WASN'T ABSOLUTELY SURE BUT IT
23 COULDN'T HAVE BEEN ANYONE ELSE.

24 Q: COULD HAVE BEEN ANYONE ELSE.

25 A: COULDN'T HAVE BEEN ANYONE ELSE.

HEARING

37

1 Q: SEEING THE PERSON TODAY ARE YOU 100 PERCENT SURE?

2 A: YES, SIR.

3 Q: HAS ANYTHING INFLUENCED YOU?

4 A: NO, SIR. NOTHING AT ALL.

5 MR. FATA: ANSWER ANY QUESTIONS THAT MR. WHEELER
6 MAY ASK YOU.

7 THE COURT: MR. WHEELER, CROSS EXAMINATION.

8 MR. WHEELER: THANK YOU. MAY IT PLEASE THE
9 COURT.

10 MR. MCDUFFIE - CROSS EXAMINATION BY MR. WHEELER:

11 Q: MR. MCDUFFIE, BEFORE JULY 22ND, 2004, HAD YOU EVER
12 SEEN THE MAN THAT CAME IN THE STORE BEFORE? DID YOU
13 KNOW HIM PERSONALLY?

14 A: NO, SIR.

15 Q: NEVER SEEN HIM IN THE COMMUNITY ANYWHERE?

16 A: NO, SIR.

17 Q: OKAY. YOU OBSERVED HIM FROM THE STOCKROOM IN THE
18 BACK OF THE STORE, IS THAT CORRECT?

19 A: YES, SIR.

20 Q: YOU AND ASHLEY WERE STANDING BACK THERE TOGETHER?

21 A: YES, SIR.

22 Q: ALL RIGHT. AND HE LOOKED AT ASHLEY?

23 A: YES, SIR.

24 Q: OKAY. DID THERE COME A TIME AFTER THAT WHEN YOU
25 DIDN'T SEE HIM AGAIN? HE LEFT THAT GENERAL VICINITY.

HEARING

38

1 OR SOMETHING?

2 A: I SAW HIM AGAIN WHEN HE WAS GOING TOWARDS THE
3 OFFICE.

4 Q: OKAY. WAS THERE SOME TIME LAPSE BETWEEN THAT AND
5 WHEN THINGS HAPPENED AT THE FRONT OF THE STORE?

6 A: ABOUT THREE OR FOUR MINUTES.

7 Q: OKAY. NOW, AND WHAT DID YOU DO DURING THOSE THREE
8 TO FOUR MINUTES? YOU CONTINUED STOCKING OR WHATEVER
9 YOU WERE DOING IN THE BACK?

10 A: I WAS STRAIGHTENING UP IN THE BACK BECAUSE WE WERE
11 GETTING A TRUCK.

12 Q: OKAY. SO WHAT DID STRAIGHTENING UP INVOLVE? MOVING
13 THINGS AROUND SO THAT YOU COULD ...

14 A: YES, SIR.

15 Q: OKAY. NOW, AND JUST ONE POINT OF INTEREST. YOU
16 SAID WHEN YOU ALL OBSERVED HIM HE WAS PICKING UP
17 PAPER TOWELS?

18 A: YES, HE WAS COMING AROUND THE PAPER TOWELS.

19 Q: OKAY. LIKE THE SAME KIND OF PAPER TOWELS YOU USE AT
20 YOUR HOUSE?

21 A: YES.

22 Q: BRAWNY OR ...

23 A: YES, SIR.

24 Q: IT WAS COVERED IN PLASTIC?

25 A: YES.

HEARING

39

- 1 Q: OKAY. ALL RIGHT. JUST WANT TO MAKE SURE. AND HOW
2 DID YOU COME TO FIND OUT ... SOMETHING ALERTED YOU
3 TO THE FACT THAT THE STORE WAS BEING ROBBED, IS THAT
4 RIGHT?
- 5 A: NO.
- 6 Q: WHAT MADE YOU RUN TO THE FRONT OF THE STORE?
- 7 A: I WAS COMING TO THE FRONT BECAUSE I WAS GETTING THE
8 KEY BECAUSE THE TRUCK DRIVERS WAS JUST PULLING UP.
- 9 Q: OKAY. ALL RIGHT. AND THAT'S WHEN YOU OBSERVED THE
10 MAN ROBBING THE STORE AND RUNNING?
- 11 A: YES.
- 12 Q: OKAY. AND YOU SAID HE TURNED AND LOOKED AT YOU ...
- 13 A: YES.
- 14 Q: WAS THAT A BRIEF LOOK AND THEN HE TURNED AND RAN?
- 15 A: YES.
- 16 Q: OKAY. AND BETWEEN JULY 22ND AND TODAY OR MONDAY
17 WHEN WE PICKED THE JURY IN THIS CASE YOU'VE NEVER
18 HAD THE OPPORTUNITY TO SEE MY CLIENT ...
- 19 A: BESIDES ON THIS PICTURE.
- 20 Q: ... AGAIN. ON THAT PICTURE. WHICH YOU INDICATED
21 YOU HAD SOME RESERVATION ABOUT.
- 22 A: YES.
- 23 Q: I BELIEVE THAT WAS YOUR TESTIMONY. AND YOU COULDN'T
24 BE 100 PERCENT SURE THAT WAS HIM.
- 25 A: YES.

HEARING

40

1 Q: OKAY. AT THAT TIME.

2 A: AT THAT TIME.

3 Q: ALL RIGHT. AND THAT WAS THE 29TH. THAT WAS SEVEN
4 DAYS AFTER THE ROBBERY, IS THAT RIGHT?

5 A: YES, SIR.

6 Q: ARE YOU TELLING US YOUR MEMORY HAS GOTTEN BETTER IN
7 THE LAST FOUR MONTHS?

8 A: AFTER SEEING HIM I KNOW IT'S HIM.

9 Q: OKAY. HAVE YOU HAD THE OPPORTUNITY TO TALK WITH
10 BETTY RUTH AND ASHLEY RUTH AND MS. CLYBURN ON
11 VARIOUS OCCASIONS?

12 A: YES.

13 Q: OKAY. DID YOU ALL COME TO THE COURTHOUSE TOGETHER
14 ON MONDAY?

15 A: WE CAME SEPARATELY.

16 Q: OKAY. BUT DID YOU SIT TOGETHER ONCE YOU WERE HERE?

17 A: YES.

18 Q: AND YOU'VE TALKED ABOUT THE CASE AT DIFFERENT TIMES?

19 A: YES.

20 Q: OKAY. YOU'VE NEVER HAD THE OPPORTUNITY TO SEE MY
21 CLIENT IN A CROWD OF MORE PEOPLE?

22 A: NO, SIR.

23 Q: OKAY. THE ONLY OTHER TIME YOU'VE SEEN HIM SINCE
24 THAT WAS HIM IN THE PHOTO LINEUP WAS SITTING AT THE

25 DEFENSE TABLE IN THIS COURTROOM, IS THAT RIGHT?

HEARING

41

1 A: YES, SIR.

2 MR. WHEELER: THANK YOU, YOUR HONOR.

3 THE COURT: ANYTHING FURTHER OF THIS WITNESS?

4 MR. FATA: NOTHING, YOUR HONOR.

5 THE COURT: ALL RIGHT. THANK YOU, SIR. YOU MAY
6 STEP DOWN.

7 MR. FATA: WE WOULD CALL MS. SHIRLEY CLYBURN.

8 BAILIFF: PLACE YOUR LEFT HAND ON THE BIBLE AND
9 RAISE YOUR RIGHT HAND. THE EVIDENCE YOU SHALL GIVE
10 THE COURT SHALL BE THE TRUTH, THE WHOLE TRUTH AND
11 NOTHING BUT THE TRUTH SO HELP YOU GOD?

12 MS. CLYBURN: YES.

13 MS. CLYBURN - DIRECT EXAMINATION BY MR. FATA:

14 Q: SHIRLEY, YOU ARE AN EMPLOYEE OF FAMILY DOLLAR STORE
15 HERE IN BISHOPVILLE?

16 A: YES, SIR.

17 Q: AND WERE YOU AN EMPLOYEE ON JULY 22ND, 2004, ABOUT
18 9:00, 9:45 IN THE MORNING?

19 A: YES, SIR.

20 Q: AND WERE YOU THERE WHEN THE STORE WAS ROBBED?

21 A: YES, SIR, I WAS.

22 Q: AND POINT OUT ON HERE ON THIS DIAGRAM, STATE'S
23 EXHIBIT NUMBER SEVEN, THIS ... THESE BEING THE CASH
24 REGISTERS, THIS BEING THE FRONT DOOR WHERE WERE YOU
25 STANDING?

HEARING

42

- 1 A: I WAS AT THE REGISTER RIGHT THERE.
- 2 Q: AT THIS REGISTER HERE?
- 3 A: YES, SIR.
- 4 Q: YOU WERE BEING THE CHECK OUT ... YOU WERE CHECKING
- 5 EVERYBODY?
- 6 A: YEAH, THAT'S WHAT I DO.
- 7 Q: WAS BETTY RUTH IN THE STORE?
- 8 A: YES, SIR.
- 9 Q: WHERE WAS SHE? AT THE TIME OF THE ROBBERY WHERE WAS
- 10 SHE?
- 11 A: OH, SHE WAS BACK BEHIND ME.
- 12 Q: YEAH, SURE, I'M SORRY. SHE WAS BACK BEHIND YOU?
- 13 A: YEAH ... YES, SIR, SHE WAS BACK BEHIND ME.
- 14 Q: OKAY. YOU AND ... YOU AND MS. RUTH WERE TALKING?
- 15 A: YES, SIR.
- 16 Q: AND WHAT WAS MS. RUTH TELLING YOU?
- 17 A: SHE WAS GETTING READY TO GO TO THE BACK AND SHE WAS
- 18 GIVING ME THE KEY IN CASE I NEEDED IT WHILE SHE WAS
- 19 GONE.
- 20 Q: DID YOU SEE THE DEFENDANT, THIS MAN OVER HERE? DID
- 21 YOU SEE THE DEFENDANT?
- 22 A: NOT RIGHT THEN. BUT A FEW MINUTES HE WALKED UP BY
- 23 ME.
- 24 Q: HE WALKED UP WHERE? TELL ME WHERE HE WALKED UP.
- 25 A: HE WALKED UP TO THE END OF MY REGISTER.

HEARING

43

1 Q: END OF YOUR REGISTER RIGHT HERE?

2 A: YES, SIR.

3 Q: WHAT DID HE ... WHAT DID HE DO?

4 A: HE HAD SOME TOWELS, THE WASH CLOTHS. HE HAD SOME OF
5 THOSE. AND SOMETHING ELSE IN HIS HAND. HE PUT IT
6 ON THE REGISTER AND HE STARE AT US AND SO ...

7 Q: DID YOU LOOK AT HIM?

8 A: YES, SIR, I DID.

9 Q: AND THEN WHAT HAPPENED?

10 A: SO HE SAID SOMETHING BUT WE DIDN'T UNDERSTOOD WHAT
11 HE SAID SO WE LOOKED AT EACH OTHER AND STUFF. AND
12 SO BETTY ASKED HIM MAY I HELP YOU AND SO THEN HE
13 WENT ON TO SAY ...

14 Q: DID HE MOVE ... DID HE MOVE ...

15 A: YES, HE KIND OF LIKE WALK AROUND ...

16 Q: WALK AROUND WHERE?

17 A: HE CAME AROUND HERE.

18 Q: OVER HERE?

19 A: YES. AND BETTY AND ME WAS STANDING UP THERE.

20 Q: AND WHAT DID HE DO?

21 A: HE SAID ... SHE HAD THE BLUE BAG UNDER HER SHOULDER
22 ... A POCKETBOOK ON HER SHOULDER. HE SAID GIVE HIM
23 THE HE WAS USING PROFANITY.

24 Q: OKAY.

25 A: AND HE SAY ... DO I SAY OR NOT?

HEARING

44

1 Q: JUST USE THE INITIALS OF THE WORD. WHAT DID HE SAY?

2 A: HE SAY GIVE HIM THE MONEY BAG. AND I'LL JUST LEAVE
3 OUT THE PROFANITY.

4 Q: OKAY.

5 A: AND SO HE SAID GIVE HIM THE MONEY BAG AND SO WE
6 STILL DIDN'T UNDERSTAND AND HE SAID, "YOU THINK I'M
7 PLAYING?" AND SO HE PULLED HIS SHIRT AND HE PULLED
8 OUT A GUN AND HE SAID GIVE HIM THE MONEY BAG OR
9 HE'LL BLOW OUR BRAINS OUT.

10 Q: OKAY.

11 A: AND SO BETTY GIVE HIM THE MONEY BAG AND SO BETTY
12 SAID, "PLEASE DON'T HURT ANYBODY YOU CAN HAVE IT AND
13 SO SHE GAVE IT TO HIM.

14 Q: AND THEN WHAT HAPPENED?

15 A: THE DOOR OPENED AND ASHLEY RUTH CAME IN AND SHE WAS
16 COMING IN AND SO HE PUT THE GUN ON HER AND TELL HER
17 TO GET TO THE BACK, HE ORDERED HER TO THE BACK AND
18 SO HE FOLLOWED US A LITTLE WAY AND HE SAID, "RUN IF
19 YOU DON'T WANT TO GET ...

20 Q: IF YOU DON'T WANT TO GET SHOT?

21 A: YEAH, YOU DON'T WANT TO GET SHOT.

22 Q: ALL RIGHT. NOW, DID THE POLICE SHOW YOU SOME
23 LINEUPS? STATE'S NUMBER FOUR AND STATE'S NUMBER
24 FIVE AND STATE'S NUMBER THREE? THREE, FOUR AND

25 FIVE?

HEARING

45

- 1 A: YES, SIR.
- 2 Q: DID YOU SEE FOUR AND FIVE FIRST?
- 3 A: YES, SIR.
- 4 Q: NOW, WERE YOU EVER ... WERE YOU ABLE TO PICK ANYONE
- 5 OUT OF THOSE TWO LINEUPS?
- 6 A: NO, SIR.
- 7 Q: ALL RIGHT. DID YOU LOOK AT STATE'S EXHIBIT NUMBER
- 8 THREE?
- 9 A: YES, SIR.
- 10 Q: WERE YOU ABLE TO PICK ANYBODY OUT OF THAT LINEUP?
- 11 A: NO, SIR.
- 12 Q: TELL ME ... TELL ME DID YOU SEE THE DEFENDANT? DID
- 13 YOU SEE THE PERSON THAT ROBBED YOU?
- 14 A: YES, SIR.
- 15 Q: YOU LOOKED HIM IN THE FACE?
- 16 A: YES, SIR.
- 17 Q: WELL, WHAT HAPPENED TO YOU WHEN THAT OCCURRED?
- 18 A: I WAS LIKE ... I WAS SO NERVOUS IT WAS LIKE I WAS
- 19 ... EVERYTHING JUST WENT ALL BLACK. BUT HE WAS
- 20 FACING ME FACE ON BECAUSE HE WAS STANDING UP FACING
- 21 ME HE WAS LOOKING STRAIGHT IN OUR FACE.
- 22 Q: NOW, CAN YOU IDENTIFY THE PERSON THAT ROBBED YOU
- 23 TODAY?
- 24 A: YES, SIR.
- 25 Q: ALL RIGHT. DO YOU SEE HIM?

HEARING

46

1 A: YES, SIR.

2 Q: WHERE IS HE?

3 A: SITTING RIGHT IN FRONT OF ME. RIGHT STRAIGHT AT THE
4 TABLE.

5 Q: AND WHAT'S HE WEARING?

6 A: GREEN SHIRT, GREEN TIE, GREEN SUIT.

7 MR. FATA: YOUR HONOR, LET THE RECORD REFLECT
8 THAT THE WITNESS HAS IDENTIFIED THE DEFENDANT.

9 THE COURT: THE RECORD WILL SO REFLECT.

10 Q: NOW, SHIRLEY, WHY COULD YOU NOT IDENTIFY THE
11 DEFENDANT IN THAT PHOTOGRAPH BUT YOU CAN IDENTIFY
12 HIM TODAY? HAS ANYONE TOLD YOU THAT THIS IS THE
13 MAN?

14 A: NO, SIR.

15 Q: HOW CAN YOU IDENTIFY HIM TODAY BUT YOU COULDN'T
16 IDENTIFY HIM IN THAT PHOTOGRAPH?

17 A: BECAUSE IT'S DIFFERENT. I'M FACING HIM. AND LIKE
18 THERE'S STILL YET THE SAME NERVOUS FEELING WHEN HE
19 PULL OUT THE GUN WHEN I SEEN HIM THE FIRST DAY WE
20 CAME FOR JURY SELECTION IT WAS THERE AND IT WAS
21 STILL BECAUSE I WAS LOOKING AT HIM FACE TO FACE.

22 Q: SO YOU CAN IDENTIFY HIM BETTER IN PERSON THAN YOU
23 CAN FROM THE PHOTOGRAPH?

24 A: YES, SIR, I CAN.

25 Q: HAS ANYBODY INFLUENCED YOU IN ANY WAY TO IDENTIFY

HEARING

47

1 THE DEFENDANT AS THE ROBBER?

2 A: NO, SIR.

3 Q: OF COURSE YOU ... WE'VE TALKED. YOU'VE TALKED TO ME
4 ABOUT THIS CASE.

5 A: YES, SIR.

6 Q: AND YOU AND THE OTHER VICTIMS HAVE TALKED ABOUT THIS
7 CASE.

8 A: YES, SIR.

9 Q: HAS ANY ... HAVE I OR HAVE ANY OF THE VICTIMS TOLD
10 YOU TO IDENTIFY THE DEFENDANT?

11 A: NO, SIR.

12 Q: HAS LAW ENFORCEMENT INFLUENCED YOU TO IDENTIFY THE
13 DEFENDANT?

14 A: NO, SIR.

15 Q: AND I THINK IT'S YOUR REASON FOR BEING ABLE TO
16 IDENTIFY HIM TODAY IS BECAUSE YOU ACTUALLY SEE HIM
17 IN PERSON?

18 A: YES, SIR, I DO BECAUSE HE WAS FACE TO FACE.

19 Q: OKAY. ANSWER ANY QUESTIONS THAT MR. WHEELER MAY
20 HAVE.

21 THE COURT: CROSS EXAMINATION, MR. WHEELER?

22 MR. WHEELER: THANK YOU, YOUR HONOR.

23 MS. CLYBURN - CROSS EXAMINATION BY MR. WHEELER:

24 Q: MS. CLYBURN, YOU INDICATED YOU'RE DIABETIC?

25 A: YES, SIR.

HEARING

48

- 1 Q: AND THAT EXISTED BEFORE JULY 22ND ...
- 2 A: YES, SIR, IT DID.
- 3 Q: DID YOUR BLOOD SUGAR ... YOU THINK IT WENT OUT OF
- 4 WHACK?
- 5 A: YES, SIR. I HAD TO TAKE A BREAK AFTER ALL THE
- 6 EXCITEMENT.
- 7 Q: I CAN IMAGINE.
- 8 A: YES.
- 9 Q: YOU WERE QUITE SCARED, IS THAT CORRECT?
- 10 A: YES, I WAS.
- 11 Q: CAN YOU REMEMBER A TIME IN YOUR LIFE BEING MORE
- 12 SCARED THAN THAT?
- 13 A: NO, SIR.
- 14 Q: OKAY.
- 15 A: NOBODY HAD EVER PULLED A GUN ON ME BEFORE.
- 16 Q: AND YOU SAID SOMETHING ABOUT YOUR BLOOD, ARE YOU
- 17 ALSO HYPERTENSIVE? WHAT'S THE ... DIABETES AND THEN
- 18 HYPERTENSION, DO YOU HAVE ANY OF THAT ... BLOOD
- 19 PRESSURE PROBLEMS?
- 20 A: YES, I DO.
- 21 Q: OKAY. AND THOSE TWO THINGS TOGETHER I IMAGINE
- 22 CONTRIBUTED TO THE WAY YOU FELT AFTERWARDS.
- 23 A: YES.
- 24 Q: IS THAT FAIR? NOW, YOU LOOKED AT THE LINEUP ON THE
- 25 29TH, ABOUT SEVEN DAYS LATER, IS THAT RIGHT?

HEARING

49

1 A: YES.

2 Q: OKAY. AND YOU TOLD INVESTIGATOR MILLER YOU COULDN'T
3 PICK ANYBODY OUT OF THAT LINEUP AND I'LL JUST MAKE
4 SURE I'M REFERRING TO STATE'S EXHIBIT THREE, IS THAT
5 CORRECT?

6 A: YES, SIR.

7 Q: OKAY. AND IN FACT, YOU TOLD INVESTIGATOR MILLER
8 ABOUT WHAT YOU JUST TOLD ME THAT YOUR SUGAR WENT UP
9 AND YOUR HYPERTENSION WAS BAD AND YOU WERE SCARED,
10 IS THAT RIGHT?

11 A: NO, I DIDN'T DISCUSS MY HEALTH PROBLEM WITH THE
12 OFFICER.

13 Q: OKAY.

14 A: BUT I WAS NERVOUS.

15 Q: OKAY. AND DID YOU TELL HIM THAT? DID YOU TELL HIM
16 THAT YOU HAD BEEN NERVOUS?

17 A: I ... WELL, I SAID I WAS NERVOUS, YES, I DID. BUT I
18 DIDN'T DISCUSS MY HEALTH PROBLEMS.

19 Q: AND DID YOU TELL HIM AS HE'S TESTIFIED THAT YOU WERE
20 NOT ABLE TO SEE HIM?

21 A: HE WAS STANDING RIGHT HERE BEFORE ME. NO, BECAUSE
22 HE WAS STANDING RIGHT BEFORE ME.

23 Q: ALL RIGHT. IF ... DO YOU KNOW ... DID YOU SAY
24 ANYTHING TO THE EFFECT THAT YOU DID NOT SEE THE
25 SUBJECT CLEARLY AND COULD NOT IDENTIFY HIM?

HEARING

50

1 A: HE ... HE WAS STANDING RIGHT IN FRONT OF ME THERE
2 WITH THE GUN.

3 Q: AND I'M ... JUST KEEP IN MIND ... IN REGARD TO WHAT
4 YOU TOLD INVESTIGATOR MILLER, DID YOU TELL HIM WHAT
5 I JUST MENTIONED?

6 A: NO. I DON'T RECALL THAT BECAUSE HE WAS RIGHT BEFORE
7 ME.

8 Q: OKAY.

9 A: I DON'T RECALL THAT.

10 Q: NOW, YOU DIDN'T KNOW THE PERSON THAT CAME IN THE
11 STORE ...

12 A: NO.

13 Q: ... PRIOR TO THIS? NEVER SEEN HIM IN THE COMMUNITY
14 AT THE ... ANYWHERE BEFORE?

15 A: NO, SIR.

16 Q: YOU'VE NEVER HAD ANY OPPORTUNITY TO SEE HIM AGAIN
17 BETWEEN LOOKING AT THAT LINEUP ON THE 29TH AND
18 MONDAY WHEN WE PICKED THE JURY IN THIS CASE, HAVE
19 YOU?

20 A: NO, SIR.

21 Q: OKAY. AND I KNOW NOBODY HAS TOLD YOU TO PICK HIM
22 OUT. DID ANYBODY TELL YOU TO TAKE A GOOD LOOK AT
23 THAT PERSON WHEN YOU CAME IN THE COURTROOM HERE?

24 A: NO, SIR.

25 Q: OKAY. WAS THERE ANYBODY ELSE. OBVIOUSLY MR.

HEARING

51

1 MCCLAIN AND I LOOK A LOT DIFFERENT. WAS THERE
2 ANYBODY OTHER THAN HE AND I AT THE TABLE WHEN YOU
3 ALL CAME IN TO PICK THE JURY ON MONDAY?

4 A: YES, SIR.

5 Q: OKAY. WHO ELSE? AND MY LAW PARTNER. DOES MY LAW
6 PARTNER RESEMBLE MR. MCCLAIN AT ALL?

7 A: NO, SIR.

8 Q: OKAY. THANK YOU, MS. CLYBURN.

9 THE COURT: ANYTHING ELSE ...

10 MR. FATA: NOTHING, YOUR HONOR.

11 THE COURT: ALL RIGHT. THANK YOU. YOU MAY STEP
12 DOWN. MR. FATA, I HAD THE JURY SITTING IN THE JURY ROOM
13 FOR LONGER THAN THEY NEEDED TO BE AND I THOUGHT I
14 INSTRUCTED THEM TO NOT HERE UNTIL 9:30. APPARENTLY THERE
15 WAS A MISCOMMUNICATION ON THAT. THEY CAME IN AT 9:00. I
16 WANT YOU TO GO AND TELL THEM THAT WE'LL BE WITH THEM IN
17 ABOUT 15 MINUTES OR SO DOING THIS AND YOU CAN TELL THEM
18 IF YOU LIKE. THEY DON'T NEED TO JUST SIT THERE AND IF
19 THEY WOULD LIKE TO WALK OUTSIDE I KNOW IT'S NOT REALLY A
20 VERY GOOD DAY TO GET A LITTLE BIT OF EXERCISE. ASK THEM
21 TO BE BACK IN THE JURY ROOM ... AND ASK EVERYBODY TO BE
22 BACK IN THE JURY ROOM PLEASE AT 10:45. IN 15 MINUTES
23 WE'LL BE READY TO GO. BUT I HATE TO HAVE THEM JUST SIT
24 THERE WHILE WE'RE TAKING CARE OF THIS. THANK YOU. ALL
25 RIGHT, GO AHEAD, MR. FATA.

HEARING

52

1 MR. FATA: WE HAVE NOTHING ELSE ONLY THAT ARE
2 YOU ...

3 THE COURT: WELL, WAIT JUST A MINUTE.

4 MR. FATA: THOSE ARE THE ONLY TWO WITNESSES THAT
5 WERE IN QUESTION.

6 THE COURT: OKAY. TELL THEM TO HOLD OFF ON
7 THAT.

8 OKAY. DON'T DO THAT. LOOKS LIKE WE'RE GOING TO BE READY
9 TO GO FORWARD. ALL RIGHT. I THOUGHT WE WERE GOING TO
10 HAVE ... I THOUGHT THERE WAS SOME OBJECTION TO THE
11 IDENTIFICATION OF THE OTHER WITNESSES AS WELL. ALL
12 RIGHT. SO WHAT YOU'RE QUESTIONING OR MOVING TO SUPPRESS
13 IS THE IN COURT IDENTIFICATION OF THESE TWO WITNESSES
14 ONLY, IS THAT RIGHT, MR. ...

15 MR. WHEELER: YES, SIR, AND I THINK YOUR RULING
16 ON THE OTHER WITH REGARD TO THE RUTHS PRETTY WELL
17 RESOLVED WHAT YOUR RULING MIGHT BE ...

18 THE COURT: I'LL HEAR FROM YOU.

19 MR. WHEELER: YOUR HONOR, WITH REGARD TO MS.
20 CLYBURN AND MR. MCDUFFIE I THINK THEIR INABILITY JUST IN
21 AND OF ITSELF TO MAKE A PICK OUT OF THE PHOTO LINEUP
22 SEVEN DAYS AFTER THE ... AFTER THE CRIME WAS COMMITTED,
23 YOU KNOW, WHEN YOU LOOK AT THE ONLY OTHER OPPORTUNITY
24 THAT THEY'VE HAD TO VIEW MY CLIENT IS SITTING AT THE
25 DEFENSE TABLE IN THE ... IN THE COURTROOM IS SO

HEARING

53

1 SUGGESTIVE THAT NOT HAVING BEEN ABLE TO PICK HIM OUT OF
2 THE PHOTO IT DOES CREATE A HIGH LIKELIHOOD OF ERROR.
3 ESPECIALLY, YOUR HONOR, WITH REGARD TO MS. CLYBURN. IN
4 HER TESTIMONY THAT SHE SUFFERS FROM HYPERTENSION AND
5 DIABETES, THAT SHE WAS VERY NERVOUS, AND IN FACT HAD TO
6 TAKE A BREAK, YOU KNOW, AFTER THIS AND WAS ... WAS SCARED
7 AND ACCORDING TO OFFICER MILLER WHO TESTIFIED EARLIER ...
8 I THINK THE TESTIMONY WAS PRETTY CLEAR THAT SHE TOLD HIM
9 SHE DIDN'T GET A GOOD LOOK AT HIM AND COULDN'T IDENTIFY
10 THE MAN WHEN IT CAME TIME TO DO THE PHOTO LINEUP. TO
11 THINK THAT HER MEMORY HAS IMPROVED SINCE THE 22ND OF JULY
12 ...

13 THE COURT: BUT ISN'T IT MORE LIKELY THAT SHE
14 WOULD HAVE BEEN UPSET AND ALL THE TIME THE ACTUAL
15 OCCURRING OF THE THING AND LESS LIKELY IN REFLECTION TO
16 ... WOULD SHE HAVE A TENDENCY ... SEEMS LIKE TO ME JUST
17 THE OPPOSITE WOULD BE TRUE.

18 MR. WHEELER: YOUR HONOR, IT MIGHT BE IF IT WAS
19 SOMEBODY YOU KNEW. A STRANGER ... AND I THINK THAT'S
20 ANOTHER IMPORTANT POINT. ALL THE WITNESSES HAVE
21 TESTIFIED THIS INDIVIDUAL IS A STRANGER TO THEM, NOT
22 SOMEBODY THEY'VE EVER SEEN IN THE COMMUNITY BEFORE. IT'S
23 HARD TO REFLECT ON SOMEBODY THAT YOU ... THERE'S NO
24 OPPORTUNITY TO ... TO PUT THAT TOGETHER AFTER TIME. I
25 JUST WOULD SUBMIT THAT THERE'S BEEN NO OTHER OCCASION TO

HEARING

54

1 HAVE ... TO HAVE SEEN AND THAT THE FACT THAT THEY
2 COULDN'T DO IT IN THE LINEUP TAINTS THEIR ABILITY TO MAKE
3 AN IN COURT IDENTIFICATION TODAY IN FRONT OF THE JURY.

4 THE COURT: ALL RIGHT. LET ME HEAR FROM YOU,
5 MR. FATA.

6 MR. FATA: WELL, YOUR HONOR, AS FAR AS MR.
7 MCDUFFIE IS CONCERNED HE INDICATED THAT HE SAW ... HE SAW
8 THE DEFENDANT STARING INTO THE STOCKROOM AND THEN HE SAW
9 THE DEFENDANT TURN TOWARDS HIM RUNNING OUT THE STORE
10 AFTER HE LEARNED THAT MR. MCDUFFIE ... LEARNED THE STORE
11 WAS BEING ROBBED. YOUR HONOR, HE DID NOT IDENTIFY ANYONE
12 IN LINEUP ONE AND TWO BUT HE IDENTIFIED AND SAID THAT
13 NUMBER TWO IN LINEUP THREE WAS MOST LIKELY THE
14 INDIVIDUAL. NOW, YOUR HONOR, THERE HAS BEEN NOTHING
15 SINCE THAT TIME AND NOW TO TAINT OR TO SUGGEST TO HIM
16 THAT THE DEFENDANT IS THE PERSON. MR WHEELER WOULD SAY
17 THAT WELL, HE'S SITTING AT THE DEFENSE TABLE AND SO
18 FORTH. I DON'T KNOW ANY WAY ELSE TO DO A COURTROOM ...
19 WHAT WE COULD DO IS HAVE SIX PEOPLE SITTING THERE AND
20 THEN, YOU KNOW, DO, YOU KNOW, DO SIMILAR TO THE LINEUP.
21 THAT'S THE ONLY WAY WE CAN DO IT. AND I ... I THINK HIS
22 IDENTIFICATION WOULD BE GOOD. AND I AGREE WITH YOU AS
23 FAR ... AND MS. CLYBURN, YOUR HONOR, THAT SHE WAS SO
24 NERVOUS AND UPSET THAT HER MEMORY PROBABLY BECAME BETTER
25 AT THE TIME LATER ON THAN IT WAS SOON AFTER THE INCIDENT.

HEARING

55

1 AND I WOULD THINK THAT THE ARGUMENT WOULD BE THAT ALL
2 THAT ... ALL THAT WOULD BE JURY ARGUMENT AND IT WOULD BE
3 CREDI ... CREDIBILITY ISSUE BEFORE THE JURY.

4 THE COURT: ALL RIGHT. ALL RIGHT. THANK YOU
5 VERY MUCH. AND OF COURSE AS YOU ALL KNOW AND WE ALL KNOW
6 THE CASE THAT CONTROLS THE IN COURT IDENTIFICATIONS IS
7 THE MCNEIL VS. BIGGERS CASE. THE US SUPREME COURT BACK
8 IN 1972 AND THE FACTORS THAT ARE TO BE CONSIDERED ARE
9 OFTEN NUMERATED AS THE FACTOR. AND IN EVALUATING AND
10 DETERMINING WHETHER THERE IS A LACK OF MISIDENTIFICATION
11 BECAUSE OF THE SUGGESTION AS TO THE IDENTIFICATION
12 PROCEDURES IT BECOMES THE COURT'S BELIEF CONSIDERING THE
13 FACTORS THAT ARE SET FORTH IN BIGGERS THESE INCLUDE THE
14 OPPORTUNITY OF A WITNESS TO VIEW THE CRIMINAL AT THE TIME
15 OF THE CRIME, THE WITNESS' DEGREE OF ATTENTION, THE
16 ACCURACY OF THE WITNESS' PRIOR DESCRIPTION, LEVEL OF
17 CERTAINTY DEMONSTRATED BY THE WITNESS AT THE
18 CONFRONTATION, AND THE LENGTH OF TIME BETWEEN THE CRIME
19 AND THE CONFRONTATION, THESE ARE SOME OF THE FACTORS THAT
20 ARE TO BE CONSIDERED. THERE WERE FURTHER ADOPTED AND
21 INCORPORATED BY THE STATE OF SOUTH CAROLINA IN STATE VS.
22 MANSFIELD, A COURT OF APPEALS DECISION IN 19 ... OR THE
23 YEAR 2000, 343-SC-66-538 SC2d 527. AND AGAIN, THE
24 BIGGERS FACTORS ARE DIFFERENTIATED BY THE COURT IN THAT
25 CASE. IT APPEARS TO ME THAT APPLYING THESE FACTORS TO

1 THE FACTS HERE THAT THE WITNESSES LOOKED AT ... HAD A
2 VERY GOOD OPPORTUNITY TO VIEW THE CRIMINAL OR VIEW THE
3 DEFENDANT AT THE TIME OF THE CRIME, THEIR ATTENTION WAS
4 HIGHLIGHTED ESPECIALLY THE CASHIER'S WHO WAS STANDING
5 THERE AND HAD THE GUN PULLED ON HER. I THINK THEIR
6 CREDIBILITY IS VERY STRONG IN THAT THEY ADMITTED THAT
7 THEY COULD NOT IDENTIFY HIM BY PHOTOGRAPH. IT WOULD HAVE
8 BEEN VERY EASY TO HAVE SAID THAT THEY DID. I DON'T THINK
9 THAT DAMAGES THEIR CREDIBILITY. IN MY VIEW THERE IS A
10 LITTLE LIKELIHOOD OF MISIDENTIFICATION IN THIS CASE AND
11 THERE HAS NOT BEEN ANY SUGGESTIVENESS IN ANYTHING FASHION
12 WHATSOEVER. CONSIDERING ALL THE FACTORS IN THIS CASE THE
13 TESTIMONY THAT HAS BEEN PRESENTED, THE COURT WOULD FIND
14 AND WOULD PERMIT THE IN COURT IDENTIFICATION BY THESE TWO
15 WITNESSES.

16 MR. WHEELER: THANK YOU. BEFORE WE BRING THE
17 JURY IN ...

18 THE COURT: YES?

19 MR. WHEELER: ... I HAVE ONE MORE MATTER THAT'S
20 NOT TESTIMONY. JUST HOUSEKEEPING. I WOULD ASK THAT THE
21 STATE'S WITNESSES BE SEQUESTERED.

22 MR. FATA: I NEED MY LEAD INVESTIGATOR.

23 THE COURT: ALL RIGHT. HE HAS THE RIGHT TO HAVE
24 THE INVESTIGATOR HERE AND HE HAS THE RIGHT TO HAVE THE
25 VICTIM.

1 MR. FATA: ALL FOUR?

2 THE COURT: AND ALL FOUR OF HIS VICTIMS. WHAT
3 ABOUT THAT? I MEAN UNDER THE RULES THEY DO HAVE THE
4 RIGHT TO HAVE THE VICTIMS PRESENT AS WELL. I DON'T KNOW
5 THAT THE GENTLEMAN WAS THE VICTIM. HE WASN'T ACTUALLY
6 HELD UP.

7 MR. FATA: THAT'S CORRECT, YOUR HONOR. THE
8 THREE HERE, THE GUN WAS POINTED AT THESE THREE.

9 THE COURT: AREN'T THEY THE VICTIMS IN THAT
10 SITUATION, MR. WHEELER?

11 MR. WHEELER: YOUR HONOR, I THINK ULTIMATELY THE
12 STATE'S THE VICTIM, I MEAN, I ...

13 THE COURT: NO.

14 MR. WHEELER: ... A CRIME'S BEEN COMMITTED. BUT
15 ... I DON'T KNOW THAT ASHLEY RUTH IS A ... IS A VICTIM.
16 NOW, SHE CAME INTO THE STORE AND IT WAS AS I UNDERSTAND
17 THE TESTIMONY TOLD HER TO GO TO THE BACK. I DON'T ...
18 SHE WASN'T ACTUALLY ROBBED.

19 THE COURT: I HAVEN'T HEARD HER TESTIMONY SO I
20 DON'T KNOW.

21 MR. FATA: HER TESTIMONY IS GOING TO BE, YOUR
22 HONOR, SHE CAME INTO THE STORE AND THE ROBBERY WAS IN
23 PROGRESS OR HE'D JUST GOTTEN HIS BAG ... THE BAG I
24 BELIEVE AND HE TURNED AND POINTED THE GUN AT HER AND TOLD
25 HER TO GET TO THE BACK OF THE STORE.

1 THE COURT: THAT MAKES HER A VICTIM, MR.
2 WHEELER.

3 MR. WHEELER: MY ONLY OTHER ARGUMENT, YOUR
4 HONOR, WOULD BE THAT THE CRIME IS ARMED ROBBERY. THE BAG
5 WAS TAKEN FROM MS. RUTH. FROM UNDER HER ARM IS WHAT THE
6 TESTIMONY HAS BEEN.

7 THE COURT: SAY THAT AGAIN.

8 MR. WHEELER: THE BAG, THE MONEY BAG WAS TAKEN
9 FROM UNDER MS. RUTH'S, BETTY RUTH'S ARM AND THAT SHE WAS
10 THE VICTIM OF THE ARMED ROBBERY WHICH IS THE CRIME THAT'S
11 INDICTED.

12 THE COURT: WELL, YOU GOT THE OTHER CRIME IN
13 THERE FOR POSSESSION OF A FIREARM DURING THE COMMISSION
14 OF AN ARMED ROBBERY. BUT THOSE TWO VICTIMS IT WAS
15 ACTUALLY POINTED AT THEM ... I DON'T THINK THEY ACTUALLY
16 CHARGED HIM WITH POINTING A FIREARM. THE RULING OF THE
17 COURT IS THE THREE ARE THE VICTIMS. THE OTHER WITNESS IS
18 NOT A VICTIM AND HE SHOULD BE SEQUESTERED.

19 MR. WHEELER: THANK YOU, JUDGE.

20 MR. FATA: YOU NEED TO GO OUT AND SIT IN MY
21 OFFICE.

22 THE COURT: ALL RIGHT. ANYTHING ELSE BEFORE WE
23 BRING THE JURY IN?

24 MR. FATA: NOTHING FROM THE STATE, YOUR HONOR.

25 MR. WHEELER: NOTHING FROM THE DEFENSE, YOUR

1 HONOR.

2 THE COURT: ALL RIGHT. BRING THE JURY IN,
3 PLEASE.

4 (JURY IN AT 10:40 A.M.).

5 THE COURT: ALL RIGHT. THANK YOU, LADIES AND
6 GENTLEMEN. AND THANK YOU VERY MUCH FOR YOUR PATIENCE. I
7 WANT TO FIRST APOLOGIZE TO YOU. FIRST OF ALL, THERE WAS
8 A MISCOMMUNICATION. I THOUGHT THAT I HAD TOLD YOU WHEN
9 YOU LEFT ON MONDAY THAT WE WERE GOING TO START AT 9:30
10 AND NOT 9:00 O'CLOCK AND APPARENTLY I DON'T KNOW WHETHER
11 I SAID THAT WRONG OR THE MESSAGE WAS WRONG OR WHATEVER IT
12 WAS I DID NOT REALLY INTEND FOR YOU TO BE HERE AT 9:00
13 O'CLOCK THIS MORNING. BUT I DO APOLOGIZE FOR THAT
14 MISCOMMUNICATION. I ALSO APOLOGIZE TO YOU FOR EVEN IF
15 YOU HAD COME AT 9:30 KEEPING YOU IN THE JURY ROOM BEYOND
16 THAT. WE HAD A NUMBER OF PRETRIAL MATTERS THAT WE HAD TO
17 ATTEND TO AND THAT HAD TO BE DONE ON THE RECORD AND
18 OUTSIDE OF YOUR PRESENCE BUT IT WILL EXPEDITE THE TRIAL
19 OF THIS CASE AND WILL PREVENT ME HAVING TO SEND YOU IN
20 AND OUT MORE THAN ... THAT I WOULD HAVE TO DO IF WE HAD
21 GONE AHEAD AND STARTED AND THEN STOPPED TO HANDLE THOSE
22 MATTERS DURING THE PRESENTATION OF THE TESTIMONY. SO I
23 DO APOLOGIZE TO YOU FOR THAT. IT WAS MY FAULT. I SHOULD
24 HAVE SET IT UP A LITTLE BIT DIFFERENT BUT I TRY MY BEST
25 NOT TO KEEP JURORS WAITING IN THE JURY ROOM AND I DO

HEARING

60

1 APOLOGIZE FOR THAT. BUT WE ARE READY TO BEGIN NOW AND WE
2 ARE READY TO GO FORWARD WITH THE TESTIMONY IN THIS CASE
3 AND I'M GOING TO ASK THE CLERK IF SHE WOULD SWEAR THE
4 JURY AROUND THE COURTROOM PLEASE. THANK YOU.

5 CLERK: PLEASE ALL STAND AND RAISE YOUR RIGHT
6 HAND. YOU SHALL BY THE TRUTH TRY THE TESTIMONY IN THIS
7 CASE IN A TRUE VERDICT IN ACCORDANCE WITH THE EVIDENCE SO
8 HELP YOU GOD?

9 THE JURY: I DO.

10 THE COURT: ALL RIGHT. NOW, LADIES AND
11 GENTLEMEN OF THE JURY, BEFORE WE START THE TRIAL OF THIS
12 CASE I THOUGHT IT MIGHT BE HELPFUL IF I EXPLAINED TO YOU
13 BASICALLY HOW A TRIAL PROCEEDS. I KNOW THAT ALL OF YOU
14 HAVE SEEN TRIALS ON TELEVISION BUT I THINK YOU'RE GOING
15 TO FIND THAT THIS IS A GREAT DEAL DIFFERENT THAN
16 TELEVISION AND I THINK IT IS IMPORTANT THAT YOU KNOW
17 BASICALLY HOW A TRIAL PROCEEDS. FIRST OF ALL, THE STATE
18 WILL MAKE AN OPENING STATEMENT. AN OPENING STATEMENT IS
19 NOT EVIDENCE. IT IS SIMPLY AN OUTLINE OF WHAT THE STATE
20 EXPECTS THE EVIDENCE WILL SHOW. THE DEFENDANT MAY IF HE
21 WISHES TO PRESENT AN OPENING STATEMENT BUT HE DOESN'T
22 HAVE TO FOR REASONS THAT I WILL EXPLAIN LATER. FOLLOWING
23 THE OPENING STATEMENT YOU WILL HEAR THE TESTIMONY AND
24 EVIDENCE IN THIS CASE. THIS WILL CONSIST OF TESTIMONY
25 FROM THE STATE'S WITNESSES AS WELL AS ANY PHYSICAL

1 EXHIBITS WHICH MAY BE INTRODUCED INTO EVIDENCE.

2 FOLLOWING THE COMPLETION OF THE TESTIMONY THE ATTORNEYS
3 WILL AGAIN HAVE AN OPPORTUNITY TO MAKE WHAT'S CALLED A
4 CLOSING STATEMENT OR SUMMATION TO YOU. THIS IS AN
5 OPPORTUNITY FOR THE ATTORNEYS TO SUMMARIZE THE CASE FROM
6 THEIR RESPECTIVE POINTS OF VIEW. AGAIN, THESE ARGUMENTS
7 ARE NOT EVIDENCE. FOLLOWING THE CLOSING STATEMENTS BY
8 THE ATTORNEYS I WILL INSTRUCT YOU ON THE LAW OF SOUTH
9 CAROLINA AS IT PERTAINS TO THE ISSUES THAT HAVE ARISEN IN
10 THIS CASE. WHEN I HAVE COMPLETED MY INSTRUCTIONS TO YOU
11 YOU WILL BE PERMITTED TO BEGIN YOUR DELIBERATIONS IN
12 ORDER TO REACH A VERDICT.

13 NOW, LADIES AND GENTLEMEN, YOU ARE NOW THE JURY OF
14 THIS CASE AND I WANT TO TAKE JUST A FEW MINUTES TO TELL
15 YOU SOMETHING ABOUT YOUR DUTIES AS JURORS AND TO GIVE YOU
16 SOME BASIC INSTRUCTIONS. AT THE END OF THIS TRIAL I WILL
17 GIVE YOU MORE DETAILED INSTRUCTIONS AND THOSE WILL
18 CONTROL YOUR DELIBERATIONS. IT WILL BE YOUR DUTY TO
19 DECIDE FROM THE EVIDENCE WHAT THE FACTS ARE. YOU AND YOU
20 ALONE ARE THE JUDGES OF THE FACTS. YOU WILL HEAR THE
21 EVIDENCE, DECIDE WHAT THE FACTS ARE AND THEN APPLY THOSE
22 FACTS TO THE LAW THAT I GIVE TO YOU AT THE CONCLUSION OF
23 THIS CASE. THAT'S HOW YOU REACH A VERDICT. IN DOING SO
24 YOU MUST FOLLOW THE LAW WHETHER YOU AGREE WITH IT OR NOT.
25 THE EVIDENCE WILL CONSIST OF THE TESTIMONY OF THE

1 WITNESSES, DOCUMENTS AND OTHER THINGS RECEIVED INTO
2 EVIDENCE AS EXHIBITS, AND ANY FACTS ON WHICH THE LAWYERS
3 AGREE OR WHICH I MAY INSTRUCT YOU TO ACCEPT. AND I WILL
4 TELL YOU THAT I KNOW THAT THERE ARE GOING TO BE SOME
5 PHYSICAL EXHIBITS THAT ARE INTRODUCED INTO EVIDENCE IN
6 THIS CASE AND THE LAWYERS MAY ASK ME FOR PERMISSION TO
7 ALLOW THEM TO PUBLISH THE EXHIBITS. THAT JUST SIMPLY
8 MEANS TO SHOW THE EXHIBITS TO THE JURY. AND THEY HAVE
9 THE RIGHT TO PASS THOSE EXHIBITS AROUND TO YOU WHILE
10 YOU'RE SITTING THERE IN THE JURY BOX. DO NOT BE
11 CONCERNED IF YOU DO NOT HAVE AS LONG TO LOOK AT THE
12 EXHIBITS AS YOU WOULD LIKE TO WHILE YOU'RE SITTING THERE
13 IN THE JURY BOX. ANYTHING THAT IS ADMITTED INTO EVIDENCE
14 WILL GO WITH YOU TO THE JURY ROOM WHEN YOU RETIRE TO
15 REACH A VERDICT IN THIS CASE AND YOU WILL HAVE AMPLE
16 OPPORTUNITIES TO STUDY THAT EXHIBIT FOR AS LONG AS YOU
17 WOULD LIKE.

18 NOW, LADIES AND GENTLEMEN, YOU SHOULD NOT ANYTHING
19 THAT I MAY SAY AND DO DURING THIS TRIAL AS INDICATING
20 WHAT I THINK OF THE EVIDENCE OR WHAT YOUR VERDICT SHOULD
21 BE. I DO NOT HAVE AN OPINION OF THE FACTS. THE LAW DOES
22 NOT ALLOW ME TO HAVE AN OPINION OF THE FACTS. THAT IS A
23 MATTER THAT IS SOLELY UP TO YOU. HOWEVER, THE SAME LAW
24 THAT MAKES YOU THE JUDGE OF THE FACTS MAKES ME THE JUDGE
25 OF THE LAW. YOU MUST TAKE THE LAW AS I GIVE IT TO YOU

1 REGARDSLESS OF WHAT YOU THINK THE LAW IS OR WHAT THE LAW
2 OUGHT TO BE. IF I'M WRONG ON THE LAW THERE'S ANOTHER
3 TIME AND PLACE FOR THAT ERROR TO BE CORRECTED. BUT FOR
4 THIS CASE YOU MUST ACCEPT THE LAW AS I CHARGE IT TO YOU.

5 NOW, THIS IS A CRIMINAL CASE BROUGHT BY THE STATE OF
6 SOUTH CAROLINA. THE STATE CHARGES THE DEFENDANT WITH TWO
7 CRIMES, THE CRIME OF ARMED ROBBERY AND THE CRIME OF
8 POSSESSION OF A FIREARM DURING A CRIME OF VIOLENCE. THE
9 CHARGES AGAINST THE DEFENDANT ARE CONTAINED IN THE
10 INDICTMENT WHICH I HOLD IN MY HAND. THE INDICTMENT IS
11 NOT EVIDENCE OF ANYTHING. IT IS SIMPLY A DESCRIPTION OF
12 THE CHARGES MADE BY THE STATE AGAINST THE DEFENDANT. TO
13 THESE CHARGES THE DEFENDANT HAS PLED NOT GUILTY AND IS
14 PRESUMED INNOCENT UNLESS AND UNTIL PROVEN GUILTY BEYOND A
15 REASONABLE DOUBT. A REASONABLE DOUBT IS THE KIND OF
16 DOUBT THAT WOULD CAUSE A REASONABLE PERSON TO HESITATE TO
17 ACT. THE DEFENDANT HAS A RIGHT NOT TO TESTIFY AND NEVER
18 HAD TO PROVE INNOCENCE. THE BURDEN OF PROOF IS ALWAYS ON
19 THE STATE OF SOUTH CAROLINA TO PROVE THE GUILT OF THE
20 DEFENDANT.

21 NOW THERE ARE CERTAIN THINGS THAT ARE NOT EVIDENCE
22 AND YOU MUST NOT CONSIDER THEM AS EVIDENCE IN DECIDING
23 THE FACTS OF THIS CASE. STATEMENTS AND ARGUMENTS OF THE
24 ATTORNEYS ARE NOT EVIDENCE. OBJECTIONS OF THE ATTORNEYS
25 ARE NOT EVIDENCE. AND TESTIMONY THAT I INSTRUCT YOU TO

1 DISREGARD IS NOT EVIDENCE. EVIDENCE MAY BE DIRECT OR
2 CIRCUMSTANTIAL. DIRECT EVIDENCE IS TESTIMONY BY A
3 WITNESS ABOUT WHAT THAT WITNESS PERSONALLY SAW OR HEARD
4 OR DID. CIRCUMSTANTIAL EVIDENCE IS INDIRECT EVIDENCE.
5 THE LAW PERMITS YOU TO GIVE EQUAL WEIGHT TO BOTH OF THEM.
6 BUT IT IS FOR YOU TO DECIDE HOW MUCH WEIGHT TO GIVE TO
7 ANY OF THE EVIDENCE. THERE ARE RULES OF EVIDENCE WHICH
8 CONTROL WHAT CAN BE RECEIVED IN THE COURT. WHEN A LAWYER
9 ASKS A QUESTION OR OFFERS AN EXHIBIT INTO EVIDENCE AND
10 THE LAWYER ON THE OTHER SIDE THINKS THAT IT IS NOT
11 PERMITTED BY THE RULES OF EVIDENCE THAT LAWYER MAY
12 OBJECT. IF I OVERRULE THE OBJECTION THE QUESTION MAY BE
13 ANSWERED OR THE EXHIBIT MAY BE RECEIVED. IF I SUSTAIN
14 THE OBJECTION THE QUESTION CANNOT BE ANSWERED AND THE
15 EXHIBIT CANNOT BE RECEIVED. WHENEVER I SUSTAIN AN
16 OBJECTION TO A QUESTION OR DENY A MOTION TO ADMIT AN
17 EXHIBIT INTO EVIDENCE YOU MUST IGNORE THE QUESTION OR THE
18 EXISTENCE OF THE EXHIBIT AND YOU MUST NOT GUESS WHAT THE
19 ANSWER WOULD HAVE BEEN OR WHAT THE EXHIBIT WOULD HAVE
20 SHOWN. SOMETIMES IT MAY BE NECESSARY FOR ME TO REQUEST
21 THAT YOU LEAVE THE COURTROOM WHILE I DISCUSS WITH THE
22 ATTORNEYS LEGAL QUESTIONS THAT COME UP DURING THE COURSE
23 OF THE TRIAL. IF THIS OCCURS YOU SHOULD NOT SPECULATE
24 ABOUT OUR DISCUSSIONS OR THE REASONS THAT YOU WERE ASKED
25 TO LEAVE THE ROOM. THIS IS SIMPLY A PROCEDURE THAT THE

1 LAW REQUIRES WHEN CERTAIN LEGAL ISSUES ARISE. THERE ALSO
2 MAY BE DAYS WHEN I ASK THE ATTORNEYS TO APPROACH THE
3 BENCH SO THAT I CAN DISCUSS A LEGAL ISSUE WITH THEM IN
4 PRIVATE. I WILL DO THIS AS OFTEN AS POSSIBLE SO THERE
5 WILL NOT BE ... SO THAT YOU WILL NOT BE REQUIRED TO LEAVE
6 THE ROOM MORE THAN IS ABSOLUTELY NECESSARY. AGAIN, IF I
7 ASK THE ATTORNEYS TO STEP UP TO THE BENCH OR IF I ASK YOU
8 TO LEAVE THE COURTROOM PLEASE DON'T THINK THAT ANYBODY IS
9 TRYING TO HIDE ANYTHING FROM YOU OR KEEP ANY EVIDENCE
10 FROM YOU. THIS IS SIMPLY A PROCEDURE USED BY ALL LAWYERS
11 AND BY ALL COURTS TO DETERMINE AND DECIDE LEGAL
12 QUESTIONS.

13 NOW ON DECIDING THE FACTS OF THIS CASE YOU MAY HAVE
14 TO DECIDE WHICH WITNESSES TO BELIEVE AND WHICH WITNESSES
15 NOT TO BELIEVE. THIS IS CALLED CREDIBILITY. YOU MAY
16 BELIEVE EVERYTHING THE WITNESS SAYS, ONLY PART OF IT, OR
17 NONE OF IT. IN DECIDING WHAT TO BELIEVE YOU MAY CONSIDER
18 A NUMBER OF FACTORS INCLUDING THE FOLLOWING: THE WITNESS'
19 ABILITY TO SEE OR HEAR OR KNOW THE THINGS THAT THE
20 WITNESS TESTIFIED TO WHETHER THEY WERE PREJUDICE.
21 WHETHER THE WITNESS WAS CONTRADICTED BY ANYTHING THE
22 WITNESS SAID OR WROTE BEFORE THE TRIAL OR BY ANY OTHER
23 WITNESSES OR EVIDENCE. AND FINALLY HOW REASONABLE WAS
24 THE WITNESS' TESTIMONY WHEN CONSIDERED IN THE LIGHT OF
25 OTHER EVIDENCE WHICH YOU DO BELIEVE.

1 NOW, LADIES AND GENTLEMEN, JUST A FEW WORDS TO YOU
2 ABOUT YOUR CONDUCT AS JURORS. FIRST OF ALL, DO YOU NOT
3 TALK TO EACH OTHER ABOUT THIS CASE UNTIL THE END OF THE
4 CASE WHEN YOU GO TO THE JURY ROOM TO DECIDE ON YOUR
5 VERDICT. ANY DISCUSSION ABOUT THE CASE BEFORE THAT TIME,
6 BEFORE I TELL YOU IT IS TIME TO DELIBERATE YOUR VERDICT
7 WOULD BE PREMATURE. DO NOT TALK TO ANYONE ELSE ABOUT THE
8 CASE UNTIL THE TRIAL HAS ENDED AND YOU HAVE BEEN
9 DISCHARGED AS JURORS. THIS MEANS DO NOT DISCUSS THE CASE
10 WITH YOUR FAMILY OR YOUR FRIENDS OR ANYONE ELSE. YOU CAN
11 TELL THEM THAT YOU'RE A JUROR BUT THAT YOU CAN'T TALK
12 ABOUT THE CASE BECAUSE THE JUDGE TOLD YOU NOT TO AND YOU
13 CAN'T TALK WITH THEM ABOUT IT UNTIL YOU HAVE BEEN
14 DISCHARGED BY ME. DO NOT LET ANYONE TALK TO YOU ABOUT
15 THE CASE. IF ANYONE SHOULD TRY TO TALK TO YOU ABOUT IT
16 GET THEIR NAME OR THEIR DESCRIPTION AND REPORT IT TO THE
17 BAILIFFS AND I WILL DEAL WITH THEM. DO NOT READ ANY NEWS
18 STORIES OR ARTICLES OR LISTEN TO ANY RADIO OR TELEVISION
19 REPORTS ABOUT THE CASE. YOU ARE NOT TO CONSIDER AS
20 EVIDENCE ANYTHING THAT YOU MAY SEE OR HEAR WHEN COURT IS
21 NOT IN SESSION EVEN IF WHAT YOU SEE OR HEAR IS SAID OR
22 DONE BY ONE OF THE PARTIES OR ONE OF THE WITNESSES. DO
23 NOT DO ANY RESEARCH SUCH AS CONSULTING DICTIONARIES OR
24 OTHER REFERENCE MATERIALS. AND DO NOT MAKE ANY
25 INVESTIGATION ABOUT THE CASE ON YOUR OWN. IF YOU NEED TO

1 COMMUNICATE WITH ME SIMPLY GIVE A SIGNED NOTE TO THE
2 BAILIFF AND HE WILL GIVE IT TO ME AND I WILL TRY TO
3 RESOLVE YOUR PROBLEM. AND FINALLY DO NOT MAKE UP YOUR
4 MIND ABOUT WHAT YOUR VERDICT SHOULD BE UNTIL YOU HAVE
5 HEARD ALL OF THE TESTIMONY AND EVIDENCE IN THIS CASE AND
6 THE INSTRUCTIONS ON THE LAW BY THE COURT. YOU WILL BE
7 INSTRUCTED WHEN TO BEGIN YOUR DELIBERATION BY EITHER ME
8 OR THE BAILIFF. NOW JUST TWO OR THREE HOUSEKEEPING
9 MATTERS SOME OF WHICH I MAY HAVE ALREADY TOLD YOU BUT
10 THERE ARE NO SEATS IN THE JURY BOX THAT ARE RESERVED
11 EXCEPT THE SEAT WHERE THE ALTERNATE IS SITTING AND THE
12 SEAT WHERE THE FOREMAN WILL SIT. LATER ON IN THIS TRIAL
13 I WILL DESIGNATE ONE OF THE 12 MEMBERS OF THE PRINCIPLE
14 JURY AS THE FOREPERSON IN THE JURY. WHEN I DO THAT THAT
15 PERSON SHOULD SIT IN THE FIRST SEAT ON THE FRONT ROW.
16 THE ALTERNATE SHOULD ALWAYS SIT IN THE SEAT WHERE HE IS
17 SITTING. THE OTHER SEATS ARE NOT RESERVED AND YOU CAN
18 SIT IN ANY OF THE SEATS AND IT DOES NOT MATTER WHAT ORDER
19 YOU COME AND GO FROM THE COURTROOM. I WILL SIMPLY ASK
20 THAT YOU GO ALL THE WAY DOWN SO THERE WOULDN'T BE A
21 SITUATION OF CRAWLING OVER ONE ANOTHER. RESERVE THE
22 FIRST SEAT ON THE FRONT ROW FOR THE FOREPERSON WHEN I
23 DESIGNATE THAT FOREPERSON AND THE FIRST SEAT ON THE BACK
24 ROW FOR THE ALTERNATE AT ALL TIMES. ALSO I DO NOT OBJECT
25 IF YOU BRING YOUR WATER OR YOUR COFFEE OR YOUR SOFT

1 DRINKS BACK INTO THE COURTROOM WITH YOU. THE CLERKS OF
2 COURT DO NOT LIKE FOR ME TO SAY THIS BECAUSE THEY'RE
3 CHARGED WITH THE MAINTENANCE OF THE COURTROOMS AND
4 THEY'RE ALWAYS CONCERNED ABOUT SPILLS AND I DIDN'T LEARN
5 THIS UNTIL ABOUT SEVEN OR EIGHT YEARS AGO WHEN MY
6 DAUGHTER WAS SERVING ON A JURY IN GEORGIA WHERE SHE LIVES
7 AND SAID SHE WAS SITTING OVER THERE THE LAWYERS HAVE
8 WATER ON THEIR DESK AND THE JUDGE HAS GOT WATER ON HIS
9 DESK AND THE LAWYERS ON THEIR DESK AND THE JURY WAS
10 SITTING OVER THERE PARCHED AS THEY COULD BE AND COULDN'T
11 GET ANYTHING TO DRINK. SO I DON'T MIND IF YOU BRING YOUR
12 WATER, YOUR COFFEE, YOUR SOFT DRINKS BACK INTO THE
13 COURTROOM WITH YOU.

14 AND FINALLY SOMETIMES JURORS ASK ME ABOUT TAKING
15 NOTES. UNLESS A CASE IS GOING TO BE EXTREMELY LONG AND
16 COMPLEX IT'S NORMALLY MY POLICY NOT TO ALLOW JURORS TO
17 TAKE NOTES AND THERE ARE TWO REASONS FOR THIS. ONE IS
18 THAT SOMETIMES IF YOU'RE TAKING NOTES YOU WILL MISS
19 SOMETHING THAT'S JUST AS IMPORTANT OR MORE IMPORTANT THAN
20 THE MATTER ABOUT WHICH YOU ARE TAKING THE NOTE. BUT MOST
21 IMPORTANTLY IS THAT IF YOU HAVE THREE JURORS OR FIVE OR
22 SEVEN JURORS HOW TAKE NOTES AND THE REST OF THE JURORS
23 DON'T TAKE NOTES THEN THOSE JURORS WHO DID NOT TAKE NOTES
24 MAY PUT MORE EMPHASIS ON THE RECOLLECTION OF THE
25 TESTIMONY OF THOSE JURORS WHO DID TAKE NOTES THAN THEIR

1 OWN RECOLLECTION AND THIS SHOULD NOT BE EVERYBODY
2 SHOULD HAVE AN EQUAL VOICE IN THE JURY ROOM. AND UNLESS
3 THE CASE IS GOING TO BE LONG AND COMPLEX I NORMALLY DO
4 NOT ALLOW THE TAKING OF NOTES AND I'VE BEEN ADVISED BY
5 COUNSEL THAT THIS IS NOT SUCH A LONG, COMPLEX CASE THAT
6 YOU WOULD NEED TO TAKE NOTES. I THINK YOU WILL BE ABLE
7 TO REACH A VERDICT IN THIS CASE BY GIVING STRICT
8 ATTENTION TO THE TESTIMONY AS WE PROCEED THROUGHOUT THE
9 TRIAL.

10 ANY OBJECTION TO MY OPENING REMARKS ON BEHALF OF THE
11 STATE, MR. FATA?

12 MR. FATA: NONE, YOUR HONOR.

13 THE COURT: THE DEFENDANT, MR. WHEELER?

14 MR. WHEELER: NONE, YOUR HONOR.

15 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN,
16 THE FIRST THING THAT WE'LL DO IS HAVE THE OPENING
17 STATEMENTS AND I WILL CALL ON MR. FATA.

18 MR. FATA: THANK YOU, YOUR HONOR. GOOD MORNING,
19 LADIES AND GENTLEMEN. MY NAME IS PAUL FATA. I'M AN
20 ATTORNEY HERE IN BISHOPVILLE AND I'M IN PRIVATE PRACTICE
21 BUT DURING THE TERMS OF COURT, CRIMINAL COURT, YOU KNOW
22 WHAT I'M SAYING, I ASSIST THE SOLICITOR IN THE
23 PROSECUTION OF CRIMINAL CASES. I WANT TO THANK YOU FOR
24 YOUR PRESENCE TODAY. I KNOW THAT MAYBE SITTING ON THE
25 JURY IS THE LAST THING YOU WANTED TO DO. IF YOU ... IF

1 YOU HAD A CHOICE YOU PROBABLY WOULDN'T DO THIS. THANK
2 YOU VERY MUCH. WHAT YOU DO TODAY IS VERY, VERY IMPORTANT.
3 AND YOUR HONOR HAS TOLD YOU THE DEFENDANT SEATED HERE IS
4 CHARGED WITH ARMED ROBBERY AND POSSESSION OF A WEAPON
5 DURING A VIOLENT CRIME. NOW, HIS HONOR IS GOING TO TELL
6 YOU WHAT THE ... HE'S GOING TO GIVE YOU THE LAW AND TELL
7 YOU WHAT AN ARMED ROBBERY IS, HE'S GOING TO TELL YOU WHAT
8 A VIOLENT CRIME IS AND POSSESSION OF A WEAPON DURING ONE.
9 I WANT YOU TO BEGIN THINKING ABOUT THAT NOW. SO WHAT IS
10 AN ARMED ROBBERY? WELL, A ROBBERY IS THE TAKING OF
11 PROPERTY FROM ANOTHER PERSON WITH THE INTENT TO
12 PERMANENTLY DEPRIVE THAT PERSON OF THE PROPERTY. IN
13 OTHER WORDS, I REACH OUT AND I GRAB YOUR WALLET AND RUN
14 OFF WITH IT. I INTEND TO KEEP IT. AN ARMED ROBBERY IS
15 WHEN I DO THAT IN CONJUNCTION WITH USE OF SOME SORT OF
16 WEAPON. IN THIS CASE IT WAS A GUN. OKAY? SO I USE A
17 WEAPON TO TAKE YOUR PROPERTY. THAT'S AN ARMED ROBBERY.
18 NOW, A USE OF A WEAPON DURING A VIOLENT CRIME. WELL, AN
19 ARMED ROBBERY IS A VIOLENT CRIME. IT'S CLASSIFIED AS A
20 VIOLENT CRIME. WHEN YOU THINK ABOUT IT SOMEBODY PUTS A
21 GUN IN A PERSON'S FACE THAT'S PRETTY VIOLENT. WELL, THE
22 ... IN THIS CASE WE HAVE A VIOLENT CRIME AND THE
23 DEFENDANT USED A WEAPON DURING THAT CRIME SO THERE ARE
24 TWO COUNTS. ONE'S THE ARMED ROBBERY AND THE OTHER COUNT
25 IS USE OF A WEAPON DURING THAT VIOLENT CRIME. OKAY?

1 NOW, THE STATE IS GOING TO PRESENT I'M
2 GOING TO PRESENT ON BEHALF OF THE STATE SEVERAL
3 WITNESSES. DIRECT YOUR ATTENTION OVER HERE. THE LEAD
4 INVESTIGATOR IN THIS CASE IS SERGEANT DEAN MILLER WITH
5 THE BISHOPVILLE POLICE DEPARTMENT. HE IS GOING TO
6 TESTIFY ABOUT HIS INVESTIGATION, ABOUT THE LINEUP
7 PROCEDURES THAT HE DID, AND SO FORTH. BACK HERE BEHIND
8 SERGEANT MILLER IS BETTY RUTH, WHO IS THE STORE MANAGER
9 OF FAMILY DOLLAR STORE. SHE WILL TESTIFY AS TO WHAT
10 HAPPENED AND HOW SHE WAS ABLE TO IDENTIFY THE DEFENDANT
11 AS THE ROBBER. THIS IS MS. ASHLEY RUTH. NOW, INDEED
12 THIS IS MOTHER/DAUGHTER. SHE WAS IN THE STORE THAT DAY
13 AND SHE WILL TESTIFY REGARDING THE DEFENDANT, WHAT SHE
14 ... WHAT SHE SAW HIM DO AND HER OPPORTUNITY TO SEE. THIS
15 IS MS. SHIRLEY CLYBURN. SHE WAS THE CLERK IN THE STORE
16 ON THAT DAY. SHE WILL TESTIFY ALSO THAT THIS DEFENDANT
17 WAS THE PERSON WHO PULLED A GUN OUT AND DEMANDED MONEY ON
18 JULY THE 22ND, 2004, AT THE FAMILY DOLLAR STORE IN
19 BISHOPVILLE, SOUTH CAROLINA.

20 I WANT YOU TO ... AND THERE'S ONE OTHER WITNESS WHO
21 IS NOT IN HERE AT THIS TIME. HE IS WHAT IS KNOWN AS
22 SEQUESTERED. HIS NAME IS TREVOR MCDUFFIE. HE WAS THE
23 STOCK MAN AT THE TIME OF THE ROBBERY AND HE WILL ALSO
24 TESTIFY AS TO WHAT HE DID, HOW HE OBSERVED THE DEFENDANT
25 AND WHAT HE OBSERVED THE DEFENDANT DO. OKAY? NOW, THERE

1 WILL BE VARIOUS EXHIBITS. THERE'LL BE LINEUP EXHIBITS.

2 THERE'LL BE A DIAGRAM. AND YOU WILL HAVE THESE IN THE
3 ... IN THE JURY ROOM WHEN YOU GO BACK TO DELIBERATE. THE
4 STATE INTENDS TO PROVE THAT ON JULY 22ND, 2004, THIS
5 DEFENDANT ... THIS DEFENDANT RIGHT HERE WENT IN THE
6 FAMILY DOLLAR STORE, PULLED OUT A GUN, AND ROBBED THESE
7 LADIES OF \$2,000.00. THANK YOU.

8 THE COURT: THE STATE ... THE DEFENSE WISH TO
9 MAKE AN OPENING STATEMENT, MR. WHEELER?

10 MR. WHEELER: YES, SIR, YOUR HONOR. IF IT
11 PLEASE THE COURT.

12 THE COURT: ALL RIGHT.

13 MR. WHEELER: GOOD MORNING, LADIES AND
14 GENTLEMEN. MY NAME IS WILL WHEELER. I MET YOU YESTERDAY
15 DURING THE JURY SELECTION. AND I PRACTICE LAW HERE IN
16 BISHOPVILLE. I WORK WITH JACOB JENNINGS AND ROBERT
17 JENNINGS AND BRYAN DOBY IN A LAW PRACTICE. AND IT'S MY
18 PLEASURE TO REPRESENT BEFORE YOU ALL TODAY MR. STEVEN
19 MCCLAIN WHO'S BEEN CHARGED WITH A CRIME. NOW, MR. FATA
20 HAS TOLD YOU WHAT ARMED ROBBERY IS AND I SUSPECT YOU ALL
21 HAD A PRETTY GOOD IDEA WHAT ARMED ROBBERY WAS WHEN YOU
22 WALKED IN THE DOOR THIS MORNING. WHAT'S MORE IMPORTANT
23 IN THE TRIAL OF THIS CASE ... IT'S NOT GOING TO BE ONE OF
24 THESE ELEMENTS OF ARMED ROBBERY CASES I DON'T SUSPECT.
25 IT'S GOING TO BE DID STEVEN MCCLAIN DO IT. A COUPLE

1 THINGS MR. FATA DIDN'T TELL YOU ABOUT ESPECIALLY IN YOUR
2 SERVICE AS JURORS IN THIS CASE. ALL RIGHT. THE WAY THAT
3 YOU'RE TO SEE MR. MCCLAIN DURING THE TRIAL.
4 CONSTITUTIONALLY HE HAS ... HIS HONOR TOLD YOU THIS
5 YESTERDAY AND WILL PROBABLY TELL YOU AGAIN, A PRESUMPTION
6 OF INNOCENCE. THAT'S NOT SOMETHING THAT WE JUST SAY
7 TONGUE IN CHEEK, LADIES AND GENTLEMEN. IT'S NOT JUST
8 SOMETHING THAT WE SAY. IT'S SOMETHING THAT OUR
9 FOREFATHERS PUT IN OUR CONSTITUTION THAT EVERYBODY THAT'S
10 CHARGED WITH A CRIME IS PRESUMED INNOCENT. I'VE HEARD IT
11 EXPRESSED THIS WAY, YOU CAN IMAGINE MR. MCCLAIN AS THOUGH
12 THERE'S A WHITE SHEET OF INNOCENCE PLANTED OVER HIM
13 DURING THE COURSE OF THIS TRIAL. THE ONLY TIME THAT THE
14 SHEET OR CLOAK CAN BE REMOVED AND HE'S JUDGED GUILTY IS
15 WHEN THE STATE WHO HAS THE BURDEN OF PROOF PROVES BEYOND
16 A REASONABLE DOUBT THAT HE COMMITTED A CRIME.
17 NOW, WE CAN UNDERSTAND WHY OUR SYSTEM IS SET UP THIS
18 WAY. THE GOVERNMENT'S A POWERFUL THING. OUR FOREFATHERS
19 WHO CAME FROM ENGLAND AND VARIOUS OTHER PLACES REALIZED
20 THAT. YOUR ONE MAN SITTING ALONE. WHAT RESOURCES MAY
21 YOU HAVE? YOU'VE GOT GOVERNMENT, YOU'VE GOT LABS TO DO
22 TESTING AND COMPUTERS AND ALL KINDS OF OTHER THINGS THAT
23 YOU JUST WON'T HAVE. SO THAT'S WHY WE HAVE THE CLOAK OF
24 INNOCENCE. THAT'S WHY THE BURDEN OF PROOF IS SO HIGH.
25 AND DON'T BE MISTAKEN. THIS IS A VERY HIGH BURDEN OF

1 PROOF. IN A CIVIL CASE THE BURDEN OF PROOF IS THE
2 PREPONDERANCE OF THE EVIDENCE. THE PLAINTIFF IN A CIVIL
3 CASE HAS ... IF YOU WERE USING A FOOTBALL GAME AS AN
4 ANALOGY YOU HAVE TO GET YOUR BALL PAST THE 50. IN A
5 CRIMINAL CASE YOU HAVE TO GET THE BALL A LOT FARTHER THAN
6 THAT. YOU DON'T HAVE TO SCORE A TOUCHDOWN BUT YOU GOT TO
7 GET AWFUL CLOSE TO IT. WHAT HIS HONOR HAS INSTRUCTED YOU
8 IS IT'S ANY DOUBT THAT WOULD CAUSE A REASONABLE PERSON TO
9 HESITATE. YOU KNOW, WAIT BEFORE YOU JUMP, SOMETHING TO
10 MAKE YOU THINK. NOW, MR. FATA HAS INTRODUCED YOU TO THE
11 STATE'S WITNESSES IN THIS CASE. I'M NOT GOING TO TALK TO
12 YOU ABOUT WHAT THEY'RE GOING TO SAY BECAUSE I DON'T KNOW
13 WHAT THEY'RE GOING TO SAY. WE'LL FIND OUT SHORTLY. YOU
14 ALL WILL FIND OUT WHEN I FIND OUT. ALL I'M ASKING YOU TO
15 DO AT THIS STAGE IS LISTEN. LISTEN TO THEM. PLEASE
16 LISTEN WHEN I CROSS EXAMINE THEM AND TALK TO THEM. HIS
17 HONOR HAS TOLD YOU THAT YOU ALL WILL BE THE JUDGE OF
18 CREDIBILITY IN THESE WITNESSES. NOW, CREDIBILITY JUMPS
19 INTO OUR MINDS LOTS OF TIMES WHETHER SOMEBODY'S TELLING
20 THE TRUTH OR THEY'RE NOT. THERE'S MORE TO IT THAN THAT.
21 PEOPLE DON'T ... PEOPLE AREN'T WRONG OFTENTIMES BECAUSE
22 THEY MEAN TO BE. THEY'RE WRONG BECAUSE THEY MAKE MISTAKES
23 BECAUSE THEY HAVE TO ACT UNDER PRESSURE FOR MANY REASONS.
24 IT'S NOT A CONSCIOUS DECISION. WHAT I'M GOING TO ASK YOU
25 ALL TO DO IS TO LISTEN TO THESE WITNESSES CLOSELY AND

1 KNOWING WHAT YOU KNOW ABOUT SOMEBODY OR NOT TO DETERMINE
2 IF WHAT THEY SAY IS CORRECT. I'M ALSO GOING TO ASK YOU
3 AND THIS SOUND SILLY TO LISTEN FOR WHAT WE DON'T HEAR
4 FROM THE WITNESS STAND. HIS HONOR HAS TOLD YOU ABOUT
5 EXHIBITS AND MR. FATA HAS TOLD YOU ABOUT EXHIBITS THAT
6 YOU MIGHT SEE. EXAMINE THE CASE AND SEE IF YOU FIND ANY
7 PHYSICAL EVIDENCE THAT LINKS MR. MCCLAIN TO THIS CRIME.
8 THINGS LIKE FINGERPRINTS. THERE ARE SO MANY SHOWS AS
9 THERE OUT THERE NOW YOU ALL PROBABLY KNOW MORE ABOUT
10 THESE THINGS THAN I DO NOW ABOUT PHYSICAL EVIDENCE. BUT
11 LISTEN AND SEE IF YOU FIND ANYTHING LIKE THAT IN THE
12 TRIAL OF THIS CASE. I SUBMIT TO YOU THAT ... THAT YOU
13 WON'T. THAT THE STATE IS NOT GOING TO BE ABLE TO PROVE
14 IT'S CASE BEYOND A REASONABLE DOUBT. ALL I ASK YOU TO DO
15 AT THIS POINT IS LISTEN AS HIS HONOR HAS TOLD YOU AT THE
16 BEGINNING OF THE CASE TOLD US THAT --- AFTER YOU AND I
17 HAVE HAD A CHANCE TO LISTEN TO THE TESTIMONY AND DURING
18 THE TRIAL I ASK YOU TO JUST KEEP IN MIND THE PRESUMPTION
19 OF INNOCENCE. THAT CLOAK REMAINS OVER HIM UNTIL YOU ALL
20 GO BACK INTO THE JURY ROOM. THANK YOU.

21 THE COURT: ALL RIGHT, MR. FATA, YOU MAY CALL
22 YOUR FIRST WITNESS.

23 MR. FATA: THANK YOU, YOUR HONOR. YOUR HONOR, I
24 WOULD CALL SERGEANT MILLER.

25 THE COURT: ALL RIGHT. COME AROUND, PLEASE,

1 STR:

2 BAILIFF: PLACE YOUR LEFT HAND ON THE BIBLE AND
3 RAISE YOUR RIGHT HAND. THE EVIDENCE YOU SHALL GIVE THIS
4 COURT SHALL BE THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT
5 THE TRUTH SO HELP YOU GOD?

6 MR. SERGEANT: YES.

7 MR. MILLER - DIRECT EXAMINATION BY MR. FATA:

8 Q: SERGEANT MILLER, WOULD YOU PLEASE TELL THE JURY WHAT
9 YOUR OCCUPATION IS?

10 A: I'M A SERGEANT WITH THE BISHOPVILLE POLICE
11 DEPARTMENT.

12 Q: AND HOW LONG HAVE YOU BEEN A SERGEANT WITH THE
13 POLICE DEPARTMENT?

14 A: I'VE BEEN A SERGEANT FOR A LITTLE OVER HALF THE
15 YEAR. I'VE BEEN WITH THE POLICE DEPARTMENT FOR OVER
16 SIX.

17 Q: OKAY. AND ARE YOU A CERTIFIED POLICE OFFICER?

18 A: YES, I AM.

19 Q: AND WHAT DID YOU DO TO BECOME CERTIFIED?

20 A: NINE WEEKS OF POLICE ACADEMY TRAINING AND THEN
21 ADDITIONAL TRAINING FOR THE LAST SIX YEARS.

22 Q: ADDITIONAL TRAINING IN WHAT SORT OF THINGS?

23 A: BASIC DETECTIVE STUDIES.

24 Q: CRIME SCENE INVESTIGATION, STUFF LIKE THAT?

25 A: CRIME SCENE INVESTIGATION. MANY, MANY AREAS.

1 Q: NOW AND YOU ARE AN INVESTIGATOR NOW WITH THE CITY
2 POLICE DEPARTMENT?

3 A: YES. I'M A ... I'M A PATROL OFFICER AS WELL AS
4 OTHER DUTIES.

5 Q: ON JULY 22ND OF 2004, WERE YOU CALLED TO THE SCENE
6 OF A ROBBERY?

7 A: YES, SIR.

8 Q: AND WHERE WAS THAT ROBBERY?

9 A: FAMILY DOLLAR IN THE CITY OF BISHOPVILLE.

10 Q: AND THE CITY OF BISHOPVILLE IS LOCATED IN WHAT
11 COUNTY?

12 A: LEE COUNTY.

13 Q: IN WHAT STATE?

14 A: SOUTH CAROLINA.

15 Q: OKAY. AND WHEN YOU GOT THERE WHAT ... WHAT DID YOU
16 LEARN?

17 A: THE VICTIMS AT THE FAMILY DOLLAR, THE EMPLOYEES
18 THERE INDICATED THAT THEY HAD BEEN THE VICTIMS OF AN
19 ARMED ROBBERY. A BRIEF DESCRIPTION WAS GIVEN OF THE
20 SUBJECT AND THE DIRECTION THAT HE LEFT, A BRIEF
21 LIST.

22 Q: DID THE ... DID YOU AS THE INVESTIGATOR BEGIN TO
23 INVESTIGATE?

24 A: YES, SIR.

25 Q: ALL RIGHT. THAT SOUNDS KIND OF REDUNDANT BUT WHAT

1 DID YOU DO?

2 A: OF COURSE I SPOKE WITH OTHER PEOPLE THAT WERE IN THE
3 AREA AT THE TIME OF THE ROBBERY, OTHER IMMEDIATE
4 STORE OWNERS IN THAT IMMEDIATE AREA, CITIZENS THAT
5 WERE IN THE AREA AT THAT TIME, NEAR THE PARKING LOT
6 AREA. CHECKED WITH OTHER STORES' FOLKS. MADE
7 INQUIRIES WITH OTHER NEARBY JURISDICTIONS, THEIR
8 POLICE DEPARTMENTS AND SHERIFF'S OFFICES GIVING THEM
9 A DESCRIPTION OF THE TYPE OF ROBBERY THAT OCCURRED,
10 THINGS OF THAT NATURE TRYING TO GIVE AS MUCH
11 INFORMATION AS POSSIBLE TO THEM.

12 Q: DID YOU GET A DESCRIPTION OF WHAT THIS ROBBER WAS
13 WEARING?

14 A: I DID.

15 Q: WHAT WAS THAT?

16 A: IF I MAY CHECK MY NOTES?

17 Q: YOU MAY.

18 A: I PREPARED AN INCIDENT REPORT SHORTLY AFTER
19 ARRIVING. IT WAS INDICATED THAT IT WAS A BLACK MALE
20 WEARING BLUE JEANS, BLACK T-SHIRT, BROWN CAP, HAD NO
21 FACIAL HAIR. AGE RANGE ANYWHERE FROM 25 TO 35
22 PERHAPS. AND APPROXIMATE HEIGHT OF SIX ONE MAYBE
23 AROUND 180 POUNDS.

24 Q: DID YOU TAKE FINGERPRINTS, FOOTPRINTS AND ALL THAT
25 SORT OF THING?

1 A: NOT THERE ON THE SCENE. THE VICTIMS DID INDICATE
2 THAT THE DEFENDANT HAD PICKED UP AN ITEM IN THE
3 STORE. I COLLECTED THAT. IT WAS SET OF TERRY CLOTH
4 TYPE WASH CLOTHS FOR ... TO DRY YOUR CAR.

5 Q: AND CAN YOU GET FINGERPRINTS OFF OF TERRY TOWELS?

6 A: I WAS NOT ABLE TO, NO.

7 Q: OKAY. NOW, AS YOU ... AS YOUR INVESTIGATION
8 PROGRESSED DID YOU ... DID YOU ACQUIRE SOME LEADS?

9 A: WE DID.

10 Q: ALL RIGHT. AND DID YOU DO ANYTHING IN RELATION TO
11 THOSE LEADS? WHAT DID YOU DO?

12 A: I PREPARED A COUPLE OF PHOTO LINEUPS.

13 Q: ALL RIGHT. I'M GOING TO SHOW YOU STATE'S EXHIBIT
14 NUMBER FOUR AND STATE'S EXHIBIT NUMBER FIVE AND ASK
15 YOU TO DESCRIBE WHAT THOSE ARE.

16 A: YES, SIR, THESE ARE TWO PHOTO LINEUPS THAT I CREATED
17 AT THE POLICE DEPARTMENT.

18 Q: DESCRIBE TO THE JURY WHAT A PHOTO LINEUP IS. WHAT
19 ... WHAT IS THAT?

20 A: OH, IT BASICALLY ... WHAT WE DO IS IF WE HAVE ANY
21 POSSIBLE SUSPECT, WE ACQUIRE A PHOTO OF THAT
22 SUSPECT. WE PLACE IT IN A SERIES WITH OTHER PHOTOS
23 OF INDIVIDUALS WHO CLOSELY RESEMBLE THE DESCRIPTION
24 THAT WE'RE LOOKING FOR SO IT'S NOT UNDULY SUGGESTIVE.
25 WE TRY TO MAKE IT AS CLOSE AS POSSIBLE, YOU KNOW,

1 ~~WITHIN~~ ~~WITHIN THE RANGE OF POSSIBILITY~~

2 GENERALLY WE USE SIX PHOTOS MOST OF THE TIME. THOSE
3 PHOTOS ARE THEN NUMBERED. THERE'S NO OTHER
4 IDENTIFICATION ON THE SHEET OTHER THAN THOSE NUMBERS
5 AND PHOTOGRAPHS. THE WITNESSES OR VICTIMS IN THIS
6 CASE ARE THEN SHOWN THE PHOTO LINEUP. THEY ARE TO
7 INDICATE IF THEY RECOGNIZE ANYONE'S PHOTO AND IF
8 THEY DO RECOGNIZE A PHOTO THEY'RE ASKED WHERE FROM
9 OR FROM WHAT INCIDENT DO YOU RECOGNIZE THIS PERSON.

10 Q: ALL RIGHT. AND WHICH ONE OF THESE PHOTO LINEUPS WAS
11 PREPARED FIRST?

12 A: OKAY. NOTATED ON THE BACK WHICH ONE ... I INDICATED
13 LINEUP NUMBER ONE WAS MADE STATE'S EXHIBIT NUMBER
14 FIVE.

15 Q: OKAY. NOW, STATE'S EXHIBIT NUMBER FIVE CONTAINS SIX
16 PHOTOGRAPHS OF INDIVIDUALS, IS THAT CORRECT?

17 A: CORRECT.

18 Q: SIX DIFFERENT INDIVIDUALS. NOW, WAS ANYONE ... I
19 MEAN WHO WAS THIS SHOWN TO?

20 A: THIS WAS SHOWN TO THE ... THE FOUR VICTIMS FROM ...
21 EXCUSE ME, FROM FAMILY DOLLAR.

22 Q: ALL RIGHT. WAS ANYONE PICKED OUT OF THIS LINEUP?

23 A: NO, SIR.

24 Q: DOES ... IS THE DEFENDANT'S PHOTOGRAPH IN THIS
25 LINEUP?

1 A: IT IS NOT.

2 Q: ALL RIGHT. WAS THE DEFENDANT A SUSPECT AT THIS
3 TIME?

4 A: NOT AT THE TIME WHEN THAT WAS CREATED.

5 Q: ALL RIGHT. WAS ANOTHER LINEUP CREATED?

6 A: IT WAS.

7 Q: AS A RESULT OF FINDING ANOTHER SUSPECT, IS THAT
8 CORRECT?

9 A: ACTUALLY IT ... IT CONTAINED THE SAME ORIGINAL
10 SUSPECT THAT APPEARED WITH AN ADDITION.

11 Q: WHY DID YOU PUT THE SAME SUSPECT IN LINEUP ONE THAT
12 YOU DID IN LINEUP ... IN LINEUP TWO THAT YOU HAD IN
13 LINEUP ONE?

14 A: AROUND THE SAME TIME PERIOD WE GOT INFORMATION OF AN
15 INDIVIDUAL THAT HAD FLED THE CAMDEN AREA I BELIEVE
16 AND HE WAS LOCATED HERE IN LEE COUNTY. GIVEN THAT
17 WE HAD NO OTHER SUSPECTS AT THE TIME THAT THIS
18 ROBBERY OCCURRED WE WERE JUST GOING TO PLAY A HUNCH
19 AND SEE IF POSSIBLY THIS WAS AN INDIVIDUAL THAT WAS
20 INVOLVED.

21 Q: OKAY.

22 A: WE ACQUIRED THE DRIVER'S LICENSE PHOTO OF THAT
23 INDIVIDUAL IS WHAT WE USED IN THE FIRST. WHEN WE
24 DEVELOPED THE SECOND, THE INDIVIDUAL HAD BEEN
25 APPREHENDED ALONG WITH A CO-DEFENDANT AND HIS

1 PRESENT PHOTO WAS DIFFERENT FROM HIS DRIVER'S
2 LICENSE PHOTO. SO TO MAKE IT CLEAR WE USED THE MORE
3 CURRENT PHOTO AS WELL AS THE ADDITION OF HIS CO-
4 DEFENDANT.

5 Q: ARE THESE ... SO THESE ARE SIX INDIVIDUALS ... NOW,
6 IS THIS DEFENDANT, MCCLAIN IN THIS LINEUP?

7 A: HE IS NOT.

8 Q: ALL RIGHT. AND WHO WAS THIS LINEUP SHOWN TO?

9 A: THE SAME. VICTIMS FROM FAMILY DOLLAR.

10 Q: ALL RIGHT. DID THE VICTIMS FROM FAMILY DOLLAR PICK
11 ANYONE OUT OF THIS LINEUP?

12 A: THEY DID NOT.

13 Q: DID NOT. SO LINEUP ONE AND TWO WHICH ARE STATE'S
14 EXHIBIT FOUR AND FIVE DID NOT CONTAIN THE DEFENDANT.

15 A: CORRECT.

16 Q: AND NO ONE AT FAMILY DOLLAR PICKED ANYONE OUT.

17 A: RIGHT. THEY INDICATED TO ME THAT THE DEFENDANT WAS
18 NOT IN THOSE TWO LINEUPS.

19 Q: OKAY. DID YOUR INVESTIGATION CONTINUE?

20 A: YES, SIR.

21 Q: AND DID YOU COME UP WITH ANOTHER SUSPECT?

22 A: WE DID.

23 Q: AND WHO WAS THAT SUSPECT?

24 A: THE DEFENDANT.

25 Q: ALL RIGHT. NOW, I'M GOING TO SHOW YOU STATE'S

1 EXHIBIT NUMBER THREE AND WHAT IS THAT?

2 A: THIS IS A PHOTO LINEUP CONTAINING THE PHOTO OF THE
3 DEFENDANT.

4 Q: AND DOES IT ... OKAY, CONTAINING THE PHOTOGRAPH OF
5 THE DEFENDANT?

6 A: CORRECT.

7 Q: AND FIVE OTHER PEOPLE.

8 A: CORRECT.

9 Q: NOW, WHO WAS THIS SHOWN TO?

10 A: THE SAME VICTIMS FROM FAMILY DOLLAR.

11 Q: ALL RIGHT. NOW, WHO WAS ... WAS ANYBODY INDICATED
12 FROM THAT LINEUP AS BEING THE PERSON THAT ROBBED
13 THEM ON JULY 22ND, 2004?

14 A: YES.

15 Q: WHO WAS INDICATED?

16 A: THE DEFENDANT.

17 Q: AND THE DEFENDANT BEING ON THIS LINEUP WHICH ONE IS
18 THE DEFENDANT?

19 A: HE'S NUMBER TWO IN THAT ARRAY.

20 Q: HE'S NUMBER TWO IN THIS ARRAY? ALL RIGHT. TELL ME
21 HOW DID YOU CONDUCT ALL THREE OF THESE ... LET ME
22 BACK UP. EXCUSE ME. I'M SORRY. SHOW YOU EXHIBITS
23 ONE, AND TWO AND WHAT ARE THESE?

24 A: THESE ARE FORMS WE USE AT THE POLICE DEPARTMENT

25 CALLED WITNESS LINEUP IDENTIFICATION FORMS. AFTER A

1 ~~A WITNESS OR VICTIM WAS SHOWN A PHOTO LINEUP~~

2 THEY ARE ASKED TO MARK THE NUMBER OF THE PHOTO FROM
3 WHICH THEY RECOGNIZE A PERSON.

4 Q: ALL RIGHT. NOW, STATE'S EXHIBIT NUMBER ONE IS WHOSE
5 LINEUP FORM?

6 A: NUMBER ONE IS MS. BETTY RUTH'S.

7 Q: AND NUMBER TWO IS ... STATE'S EXHIBIT NUMBER TWO IS
8 WHOSE LINEUP?

9 A: ASHLEY RUTH.

10 Q: AND WHO DID THEY INDICATE ON THE LINEUP FORM AS THE
11 PERSON THAT THEY IDENTIFIED?

12 A: NUMBER TWO WHICH WAS THE PICTURE OF THE DEFENDANT.

13 Q: PICTURE OF THE DEFENDANT. AND DO YOU SEE THE PERSON
14 THAT WAS IDENTIFIED BY MS. RUTH AND MS. RUTH, MS.
15 BETTY RUTH AND MS. ASHLEY RUTH, DO YOU SEE HIM IN
16 THE COURTROOM TODAY?

17 A: YES, SIR.

18 Q: WHERE IS HE?

19 A: THE DEFENDANT SITTING AT THE DEFENSE TABLE.

20 Q: WHAT IS HE WEARING?

21 A: A SUIT AND TIE.

22 MR. FATA: AND YOUR HONOR, REQUEST THAT THE
23 RECORD REFLECT THAT HE'S IDENTIFIED THE DEFENDANT.

24 THE COURT: SO ... SO NOTED.

25 Q: NOW, HOW DID YOU CONDUCT EACH ONE OF THESE LINEUP

1 ... PHOTO LINEUP ARRAYS? HOW DID YOU CONDUCT THOSE?

2 A: ACCORDING TO OUR STANDARD PROCEDURE THE WITNESSES
3 ARE SHOWN THE PHOTO LINEUP SEPARATELY FROM OTHER
4 WITNESSES. GIVE THEM A CHANCE TO INDIVIDUALLY LOOK
5 AT THE PHOTOS AND INDICATE WHETHER OR NOT THEY
6 RECOGNIZE ANYONE.

7 Q: ALL RIGHT. DO YOU MAKE ANY SUGGESTIONS?

8 A: OF COURSE NOT.

9 Q: AND THEY ... DID THEY HAVE AN OPPORTUNITY TO GO BACK
10 AND DISCUSS IT AMONG THEMSELVES?

11 A: NO, SIR. NOT ... NOT BEFORE EVERYONE HAS _____.

12 Q: OKAY. SO YOU TAKE THEM INDIVIDUALLY AND SHOW THEM A
13 LINEUP INDIVIDUALLY?

14 A: RIGHT. YES, SIR. I TAKE THEM APART FROM EACH OTHER
15 AND SHOW THEM INDIVIDUALLY.

16 Q: AND BETTY RUTH AND ASHLEY RUTH IDENTIFIED THE
17 DEFENDANT?

18 A: YES, SIR.

19 Q: NOW, WHAT ABOUT TREVOR MCDUFFIE? DID YOU SHOW HIM
20 THE LINEUP?

21 A: I DID.

22 Q: DID HE IDENTIFY ANYONE IN THE FIRST TWO LINEUPS,
23 STATE'S EXHIBIT NUMBER FOUR AND FIVE?

24 MR. WHEELER: OBJECTION, YOUR HONOR. HEARSAY.
25 WHAT MR. MCDUFFIE MIGHT HAVE TOLD HIM.

1 MR. FATA: WELL, YOUR HONOR.

2 THE COURT: NO, SIR, I DON'T BELIEVE SO. I'M
3 GOING TO OVERRULE YOUR OBJECTION. YOU ASKED HIM IF HE
4 IDENTIFIED ANYBODY AND THAT WOULD ... THE OBJECTION'S
5 OVERRULED.

6 Q: DID MR. MCDUFFIE IDENTIFY ANYONE IN THE FIRST TWO
7 LINEUPS, EXHIBIT FOUR, STATE'S EXHIBIT FOUR AND
8 STATE'S EXHIBIT FIVE?

9 A: HE DID NOT.

10 Q: OKAY. WAS HE SHOWN STATE'S EXHIBIT NUMBER THREE
11 WHICH WAS THE LINEUP ARRAY THAT CONTAINED THE
12 DEFENDANT? WAS HE SHOWN THAT ONE?

13 A: HE WAS.

14 Q: AND DID HE MAKE AN IDENTIFICATION?

15 A: HE DID.

16 Q: AND WHAT ... WHAT ... WHO DID HE IDENTIFY?

17 A: HE INDICATED NUMBER TWO.

18 Q: OKAY. NOW, AGAIN, DID YOU SHOW THE PHOTO ARRAYS,
19 STATE'S EXHIBIT FOUR AND STATE'S EXHIBIT FIVE TO
20 SHIRLEY CLYBURN, MS. CLYBURN?

21 A: YES.

22 Q: THESE ONES THAT DID NOT CONTAIN THE DEFENDANT. DID
23 SHE IDENTIFY ANYONE IN THIS ONE?

24 A: SHE DID NOT.

25 Q: ALL RIGHT. NOW, DID YOU SHOW HER STATE'S EXHIBIT

1 NUMBER THREE?

2 A: YES.

3 Q: THE ONE CONTAINING THE DEFENDANT AND DID SHE PICK
4 ANYONE OUT IN THAT?

5 A: SHE WAS UNABLE TO.

6 Q: SHE WAS UNABLE TO PICK ANYONE OUT. DID SHE SAY WHY?

7 THE COURT: I WOULD SUSTAIN THAT OBJECTION.

8 MR. WHEELER: OKAY.

9 Q: WAS A GUN RECOVERED, SERGEANT?

10 A: NO, SIR.

11 Q: WAS THE MONEY BAG RECOVERED?

12 A: NO, SIR.

13 Q: WAS ANY OF THE MONEY RECOVERED?

14 A: NO, SIR.

15 Q: ABOUT HOW MUCH MONEY WAS TAKEN?

16 A: I BELIEVE IT WAS INDICATED TO BE APPROXIMATELY
17 \$2,000.00 IN CASH AND CHECKS.

18 Q: AND WERE ANY THREATS MADE TO THE EMPLOYEES?

19 A: THE ...

20 MR. WHEELER: OBJECTION, YOUR HONOR.

21 THE COURT: YES?

22 MR. FATA: THAT'S ALL I HAVE, YOUR HONOR.

23 THE COURT: CROSS EXAMINATION?

24 MR. WHEELER: THANK YOU, YOUR HONOR. MAY IT

25 PLEASE THE COURT.

1 MR. MILLER - CROSS EXAMINATION BY MR. WHEELER:

2 Q: INVESTIGATOR MILLER, WERE YOU THE INITIAL OFFICER
3 DISPATCHED TO THIS SCENE?

4 A: I BELIEVE I WAS. I'M NOT 100 PERCENT SURE BUT I WAS
5 WORKING THAT MORNING AND I WAS ... I WAS NOT THE
6 FIRST TO RESPOND. I'M NOT SURE I WAS ACTUALLY
7 PERSONALLY DISPATCHED.

8 Q: OKAY. IT'S THE POLICY OF THE DEPARTMENT TO RESPOND
9 TO CRIME SCENES PRETTY QUICKLY, IS THAT CORRECT?

10 A: YES, SIR.

11 Q: OKAY. DID YOU ALL MAKE IT TO THIS SCENE PRETTY
12 QUICKLY FROM THE TIME ...

13 A: YES, SIR. IT'S NOT VERY FAR FROM ONE END OF THE
14 CITY TO THE OTHER.

15 Q: OKAY.

16 A: SO IT DOESN'T TAKE VERY LONG.

17 Q: DID YOU OR ANYONE ON BEHALF OF THE DEPARTMENT
18 UNDERTAKE ANY EFFORTS TO CORDON OFF THE SCENE?

19 A: NO, SIR.

20 Q: OKAY. DIDN'T PUT UP ANY YELLOW CRIME SCENE TAPE OR
21 ANYTHING LIKE THAT?

22 A: NO, SIR.

23 Q: OKAY. DID THE STORE ... YOU PREPARED A REPORT IN
24 CONNECTION WITH THIS MATTER, IS THAT CORRECT?

25 A: YES, SIR.

1 Q: IS IT GENERALLY YOUR IDEA TO MAKE THAT REPORT AS
2 ACCURATE AS POSSIBLE?

3 A: SURE.

4 Q: OKAY. TO YOUR KNOWLEDGE IS ANYTHING IN THE REPORTS
5 THAT YOU PREPARED INACCURATE?

6 A: NOT TO MY KNOWLEDGE.

7 Q: OKAY. AND ACCORDING TO YOUR REPORT THE CRIME
8 OCCURRED AT ABOUT 9:45, IS THAT CORRECT?

9 A: YES, SIR, THAT'S A BEGINNING TIME FRAME. AROUND
10 9:45 IN THE MORNING.

11 Q: OKAY. AND WHAT TIME DID YOU ALL ARRIVE AT THE
12 SCENE?

13 A: I INDICATE ON THE REPORT THAT I WAS DISPATCHED AT
14 9:52 AND ARRIVED AT 9:57.

15 Q: OKAY. DID ... NOW, I KNOW YOU ALL DIDN'T SHUT THE
16 STORE DOWN FOR THE ENTIRE DAY BUT WHILE YOU ALL WERE
17 INITIALLY THERE RESPONDING DID YOU ALL CEASE
18 OPERATIONS IN THE STORE AS FAR AS PEOPLE CONTINUING
19 TO SHOP ...

20 A: YES.

21 Q: LOOKED OVER THE SCENE?

22 A: YES.

23 Q: OKAY. NOW, YOU SAID THAT THE ITEM THAT YOU SAW FIT
24 TO TEST FOR FINGERPRINTS WAS TERRY CLOTH.

25 A: OR TERRY CLOTH LIKE. I'M NOT SURE OF THE EXACT NAME

- 1
- 2 Q: TOWELS, IS THAT RIGHT?
- 3 A: RIGHT.
- 4 Q: OKAY. NOW, GENERALLY FINGERPRINTS CAN'T BE OBTAINED
- 5 OFF OF CLOTH, WOULD YOU AGREE WITH THAT?
- 6 A: I'M SURE IT'S VERY DIFFICULT.
- 7 Q: OKAY. BUT CAN THEY GENERALLY BE OBTAINED FROM
- 8 METAL?
- 9 A: UNDER CERTAIN CIRCUMSTANCES, SURE.
- 10 Q: OKAY. OR PLASTIC?
- 11 A: SURE.
- 12 Q: OKAY. OR GLASS?
- 13 A: SURE.
- 14 Q: OKAY. OR SOMETHING LIKE A DOOR HANDLE?
- 15 A: POSSIBLY.
- 16 Q: OKAY. DID YOU ALL UNDERTAKE ANY EFFORTS TO LIFT
- 17 FINGERPRINTS FROM THE DOOR OF THE FAMILY DOLLAR
- 18 STORE?
- 19 A: NO, SIR.
- 20 Q: OKAY. DURING THE COURSE OF YOUR INVESTIGATION DID
- 21 YOU TALK WITH ... OF COURSE YOU TALKED WITH THESE
- 22 ... I UNDERSTAND MR. MCDUFFIE'S OUTSIDE ... FOUR
- 23 INDIVIDUALS, IS THAT CORRECT?
- 24 A: RIGHT.
- 25 Q: OTHER THAN THE TERRY CLOTH, DID THEY INDICATE THAT

1 THE PERSON WHO WAS IN THE STORE HAD PICKED UP
2 ANYTHING ELSE?

3 A: NOTHING SPECIFIC TO ME AT THE TIME. I DO RECALL
4 MENTIONING THAT HE WAS POSING AS A CUSTOMER AND
5 LOOKING THROUGH SOME MERCHANDISE.

6 Q: OKAY. IF HE ... IF THE PERSON IN THE STORE HAD
7 PICKED UP SOMETHING ENCASED IN PLASTIC WOULD IT HAVE
8 BEEN GENERALLY WORTHWHILE TO TEST SOMETHING WITH A
9 PLASTIC COATING ON IT FOR FINGERPRINTS?

10 A: SURE. IF IT WAS INDICATED.

11 Q: BUT NOTHING WAS EXAMINED BUT THE TERRY CLOTH AND I'M
12 TAKING SOME LIBERTY WITH THAT BUT THE TOWEL SET THAT
13 YOU TESTED, RIGHT?

14 A: RIGHT.

15 Q: OKAY.. NOW, DID YOU TALK ... IN OBTAINING YOUR
16 DESCRIPTION OF THE INDIVIDUAL THAT ... THAT YOU PUT
17 OUT WHICH I BELIEVE WAS THE JEANS, THE BLACK T-
18 SHIRT, THE BROWN CAP, THAT KIND OF THING. DID YOU
19 TALK WITH ANY PERSONS OTHER THAN THESE INDIVIDUALS
20 IN OBTAINING THAT DESCRIPTION?

21 A: IN OBTAINING THE DESCRIPTION, NO, SIR.

22 Q: OKAY. NOW DID YOU ... DO YOU RECALL WHETHER ONE OF
23 THEM IN PARTICULAR GAVE YOU THAT DESCRIPTION OR WAS
24 THAT A DESCRIPTION JOINTLY ARRIVED AT BY EVERYONE?

25 A: AS I RECALL THE ... WHAT I INDICATED AS THE

1 DESCRIPTION WAS THE BASIC DESCRIPTION THAT WAS GIVEN
2 OVER THE POLICE RADIO FROM WHOEVER THE ... THE
3 CALLER WAS TO THE 911 DISPATCH CENTER. I DON'T KNOW
4 WHAT INDIVIDUAL ACTUALLY MADE THE CALL OF THE FOUR.
5 BUT THAT WAS THE GENERAL DESCRIPTION GIVEN TO US
6 OVER THE POLICE RADIO. UPON TALKING WITH THE
7 VICTIMS INDIVIDUALLY EACH CONFIRMED THAT YES, THAT'S
8 HOW THEY RECALL HIM TO BE.

9 Q: AND DID THE DESCRIPTION YOU ENDED UP PUTTING IN YOUR
10 REPORT IS ACCURATE?

11 A: RIGHT.

12 Q: AS WAS GIVEN TO YOU.

13 A: CORRECT.

14 Q: OKAY. AND THAT DESCRIPTION MENTIONED THAT THE
15 INDIVIDUAL WHO ROBBED THE STORE HAD NO FACIAL HAIR,
16 IS THAT CORRECT?

17 A: RIGHT.

18 Q: OKAY. NOW, IF I CAN APPROACH, YOUR HONOR.

19 THE COURT: YES, SIR.

20 Q: IN THE VARIOUS LINEUPS THAT YOU PREPARED THESE
21 INDIVIDUALS HAVE FACIAL HAIR, IS THAT CORRECT?

22 A: NOT ALL OF THEM. SOME TO VARYING DEGREES.

23 Q: I MEAN SOME DID AND SOME DIDN'T.

24 A: CORRECT.

25 Q: OKAY. AND IN FACT MY CLIENT WHO WAS NUMBER IN THE

1 THIRD LINEUP PREPARED HAD SOME DEGREE OF FACIAL
2 HAIR, DID HE NOT?

3 A: IN THIS PHOTO, YES, SIR.

4 Q: OKAY.

5 A: TO A SMALL, SMALL DEGREE.

6 Q: OKAY. AND ... AND OF COURSE YOU HAVE IDENTIFIED HIM
7 TODAY ON THE RECORD BUT YOU WERE NOT THERE OR
8 PRESENT AT THE TIME OF THE ... OF THE INCIDENT IN
9 QUESTION, AT THE TIME OF THIS ROBBERY.

10 A: CORRECT.

11 Q: OKAY. YOU'VE IDENTIFIED HIM AS THE PERSON THAT MS.
12 RUTH AND MS. RUTH IDENTIFIED OUT OF THE LINEUP,
13 THAT'S ... IS THAT CORRECT?

14 A: I'M NOT EXACTLY SURE.

15 Q: OKAY. THE ONLY METHOD YOU HAD ... YOU POINTED HIM
16 OUT AS BEING THE PERSON THAT ... THAT YOU WANTED TO
17 IDENTIFY EARLIER. THE ONLY METHOD YOU HAD FOR DOING
18 THAT IS WHAT THEY REPORTED TO YOU AT A LINEUP, IS
19 THAT CORRECT?

20 A: I'M STILL NOT SURE I'M EXACTLY UNDERSTANDING YOUR
21 QUESTION. I MAY NEED YOU TO CLARIFY. I CAN ... I
22 CAN IDENTIFY THE DEFENDANT AS BEING THE PERSON WHOSE
23 PHOTO WAS USED IN THE THIRD LINEUP WHICH WAS
24 IDENTIFIED BY THE VICTIMS.

25 Q: RIGHT. BUT YOU HAD NO OTHER INDEPENDENT BASIS BASED

1 ON ANYTHING THAT YOU'VE SEEN TO IDENTIFY HIM.

2 A: RIGHT. OTHER THAN THAT.

3 Q: OKAY. NOW, YOU INDICATED THE THIRD TIME THAT THE
4 THIRD LINEUP CONTAINED A PICTURE OF MY CLIENT THAT
5 HAD BEEN OBTAINED, IS THAT CORRECT?

6 A: YES, SIR.

7 Q: OKAY. AND I BELIEVE YOUR TESTIMONY HAS BEEN THAT
8 MS. RUTH AND HER DAUGHTER, ASHLEY RUTH IDENTIFIED
9 HIM BASED ON THAT LINEUP.

10 A: RIGHT.

11 Q: IS THAT CORRECT? NOW, YOU SAID MS. CLYBURN DID NOT
12 MAKE AN IDENTIFICATION.

13 A: RIGHT.

14 Q: OKAY. AND DID YOU PREPARE A REPORT DURING THE
15 COURSE OF VIEWING THESE LINEUPS AND PREPARING THESE
16 LINEUPS?

17 A: WELL, OTHER THAN THE INITIAL REPORT I KEPT
18 INVESTIGATIVE NOTES.

19 Q: HAS THAT BEEN MARKED AS A ... AS A SUPPLEMENTARY
20 REPORT IN YOUR HANDWRITTEN NOTES?

21 A: YES, I THINK WHAT YOU INDICATED THE TOP OF THE FORM
22 DOES STATE SUPPLEMENTARY REPORT. THOSE ARE FORMS WE
23 NO LONGER USE.

24 Q: WELL, JUST SO WE ... WE'RE SURE DO YOU HAVE THIS
25 DOCUMENT IN FRONT OF YOU?

1 A: YES, SIR.

2 Q: OKAY. IF YOU'LL LET'S TALK ABOUT IT. OKAY? IS IT
3 A CASE THAT ACCORDING TO YOUR REPORT MS. CLYBURN
4 SAID SHE DID NOT SEE THE SUBJECT CLEARLY, IS THAT
5 WHAT YOUR REPORT CONTAINS?

6 A: THAT'S WHAT I HAVE WRITTEN, YES, SIR.

7 Q: OKAY. AND SHE COULD NOT IDENTIFY THE SUBJECT. IS
8 THAT WHAT YOUR REPORT SAYS AS WELL, SHE COULD NOT
9 IDENTIFY THE SUBJECT?

10 A: RIGHT.

11 Q: NOW, THE PEOPLE THAT DID MAKE SOME IDENTIFICATION
12 FOR YOU YOU HAD FILL OUT WHAT I BELIEVE YOU REFERRED
13 TO AS LINEUP IDENTIFICATION FORMS.

14 A: YES, SIR.

15 Q: OKAY. NOW, YOU DID NOT HAVE TREVOR MCDUFFIE FILL
16 OUT ONE OF THOSE FORMS, DID YOU?

17 A: RIGHT. DID NOT.

18 Q: AND IS THAT BECAUSE HE SAID HE COULD NOT BE 100
19 PERCENT SURE?

20 A: RIGHT.

21 Q: OKAY. AND HE HESITATED ... I MEAN IS THAT WHY YOU
22 DIDN'T HAVE THE FORM OUT, HE WAS SOMEWHAT HESITANT?

23 A: HE HAD SOME RESERVATIONS. HE INDICATED THAT ... HE
24 PICKED NUMBER TWO OUT OF THE THIRD LINEUP AND STATED
25 THAT HE WAS EXTREMELY SIMILAR TO THE GUY BUT HE

1 COULD NOT WITHOUT HESITATION SAY THAT THAT WAS

2 DEFINITELY HIM ON THE PHOTOGRAPH.

3 Q: OKAY. NOW, LET'S TALK A LITTLE BIT ABOUT THE WAY
4 THESE PHOTO LINEUPS WERE PRESENTED. YOU DIDN'T
5 BRING THESE INDIVIDUALS FROM THE STORE DOWN TO THE
6 POLICE DEPARTMENT, DID YOU?

7 A: NO.

8 Q: OKAY. YOU WENT AND MET WITH THEM AT THE FAMILY
9 DOLLAR STORE.

10 A: CORRECT.

11 Q: OKAY. THE DATE THAT YOU TOOK THE THIRD LINEUP WAS I
12 BELIEVE JULY THE 29TH, 2004, IS THAT CORRECT?

13 A: IF I MAY SEE THE EXHIBIT.

14 Q: SURE.

15 A: I HAVE THE DATE THERE.

16 Q: SURE.

17 A: THE 29TH.

18 Q: OKAY. AND YOU'VE TESTIFIED FOR MR. FATA THAT
19 THERE'S NO POSSIBILITY THAT ANY SUGGESTION COULD
20 HAVE OCCURRED IN THE IDENTIFICATIONS MADE BASED ON
21 THIS LINEUP, IS THAT RIGHT?

22 A: YES, SIR.

23 Q: OKAY. NOW, WHAT YOU ALL DID WHEN YOU ALL TOOK DOWN
24 THE LINEUP WAS THE FOUR INDIVIDUALS WERE AT THE
25 FRONT OF THE STORE, IS THAT CORRECT?

1 A: RIGHT.

2 Q: OKAY. NOW, AND YOU INDICATED THAT YOU ... YOU TOOK

3 ONE BY ONE AWAY FROM THE REST OF THE GROUP, IS THAT

4 RIGHT?

5 A: RIGHT.

6 Q: OKAY. DID YOU TAKE THEM TO THE BACK OF THE STORE

7 INTO AN OFFICE?

8 A: NO, SIR. TOOK THEM TO ANOTHER PART OF THE STORE

9 AWAY FROM THE ...

10 Q: OKAY. WAS IT AT THE BACK OF THE STORE?

11 A: NO, SIR, IT WAS AT THE FRONT.

12 Q: SO YOU STAYED AT THE FRONT OF THE STORE?

13 A: RIGHT.

14 Q: OKAY. AND YOU JUST WALKED DOWN BESIDE AWAY FROM THE

15 OTHER THREE INDIVIDUALS?

16 A: RIGHT.

17 Q: OKAY. AND THIS IS ... DIDN'T MEASURE IT BY ... YOU

18 COULDN'T HAVE BEEN ANY FARTHER AWAY FROM THOSE THREE

19 PEOPLE THAN THE FAMILY DOLLAR STORE IS WIDE, COULD

20 YOU?

21 A: NO, SIR.

22 Q: OKAY. AND MS. BETTY RUTH, THE MOTHER OF ASHLEY RUTH

23 WAS THE FIRST INDIVIDUAL TO MAKE AN IDENTIFICATION,

24 IS THAT CORRECT?

25 A: I'M NOT SURE EXACTLY IN WHAT ORDER ...

1 Q: OKAY.

2 A: ... THEY ALL ...

3 Q: BUT IF WE LOOKED AT THE TIME, IF HER FORM IS SIGNED
4 AT 2:22 AND HER DAUGHTER'S IS SIGNED AT 2:23 DOES
5 THAT PROBABLY MEAN THAT THE MOM MADE HER
6 IDENTIFICATION FIRST?

7 A: YES, FOR THE ... FOR THE TWO OF THEM THAT SIGNED THE
8 FORMS.

9 Q: RIGHT. EXACTLY. OKAY. SO BETWEEN MS. BETTY RUTH
10 AND HER DAUGHTER, ASHLEY, IS IT TRUE THAT BETTY RUTH
11 MADE HER IDENTIFICATION FIRST?

12 A: IT APPEARS TO BE, YES, DUE TO THE TIME.

13 Q: OKAY. WHEN SEPARATED FROM THE OTHER GROUP OF
14 INDIVIDUALS.

15 A: RIGHT.

16 Q: OKAY. AND IN THE COURSE OF A MINUTE YOU WERE HAVING
17 TO GO BACK AND GET ASHLEY RUTH AND BRING HER AND
18 SHOW HER THE IDENTIFICATION.

19 A: WELL, THE TIME WAS ACTUALLY FILLED IN ... THE PERSON
20 WHO USES THE IDENTIFICATION FORM PUTS THEIR
21 SIGNATURE AND THEN DATES AND TIME SO AN INDIVIDUAL
22 WITNESS USES WHATEVER METHOD THEY HAVE TO TELL TIME,
23 WHATEVER TIME THEIR WATCH MAY HAVE. SO I CAN'T SAY
24 FOR CERTAIN, YOU KNOW, IF BOTH OF THEIR WATCHES WERE
25 SET THE SAME BUT I DO HAVE THAT BETTY RUTH SIGNED

1 HER FORM AT 2:22 P.M. AND ASHLEY RUTH SIGNED HERS AT
2 2:23 P.M.

3 MR. WHEELER: BEG THE COURT'S INDULGENCE FOR ONE
4 MOMENT.

5 THE COURT: YES, SIR.

6 Q: AND GIVEN ... WAS THERE SOME ... BEFORE THESE FORMS
7 WERE SIGNED OR AT THE SAME TIME THAT THESE FORMS
8 WERE SIGNED YOU WERE STANDING WITH MS. RUTH OR
9 ASHLEY RUTH ...

10 A: RIGHT.

11 Q: ... EITHER TIME, RIGHT? YOU WERE THE ONE WITH THEM?

12 A: RIGHT. YES, SIR.

13 Q: NOW, IN ADDITION TO SIGNING THE FORM THEY MADE SOME
14 VERBAL COMMUNICATION TO YOU THAT I THINK IT'S THIS
15 PERSON, IS THAT RIGHT?

16 A: YES, SIR, I'M SURE THAT NORMALLY PEOPLE LOVE TO
17 POINT.

18 Q: OKAY. AND THERE'S NO WAY THAT YOU CAN SAY A 100
19 PERCENT THAT YOU ALL WERE OUT OF EARSHOT WITH THE
20 OTHER THREE INDIVIDUALS WHEN THAT HAPPENED.

21 A: I'D SAY IT'S INCREDIBLY UNLIKELY BUT THERE REALLY
22 ISN'T 100 PERCENT CERTAINTY.

23 Q: OKAY. SO YOU'RE NOT SURE IF YOU COULD HAVE BEEN
24 HEARD TALKING FROM ONE SIDE OF THE FAMILY DOLLAR TO
25 THE OTHER IN THE FRONT?

1 A: I ... I CAN'T BE SURE BUT I WAS UNABLE TO HEAR ANY
2 OTHER CONVERSATIONS FROM ANY OTHER PERSON IN THE
3 ROOM OTHER THAN THE ONE THAT I HAD PULLED TO THE
4 SIDE TO TALK WITH AND FROM PAST EXPERIENCE, YOU
5 KNOW, I'M NORMALLY NOT GOING TO SHOUT OUT
6 INFORMATION WHEN YOU'RE TALKING WITH SOMEBODY YOU'VE
7 PULLED TO THE SIDE.

8 Q: BUT YOU KNOW NOT TO DO THAT, DON'T YOU?

9 A: CORRECT.

10 Q: OKAY. SOMEBODY ELSE THAT'S NOT A POLICE PERSON
11 MIGHT NOT KNOW THAT. IS THAT FAIR TO SAY?

12 A: SURE.

13 Q: OKAY. AND YOU WEREN'T LISTENING FOR SOMEBODY ELSE
14 TALKING, WERE YOU?

15 A: NO, SIR.

16 Q: YOU WERE FOCUSING ON THE PERSON THAT YOU WERE
17 TALKING TO.

18 A: CORRECT.

19 Q: OKAY. AND DID YOU GO ALL THE WAY TO THE OTHER END
20 OF THE STORE?

21 A: NOT ALL THE WAY. PROBABLY MORE THAN HALF. IF ... I
22 DON'T KNOW EXACT DISTANCES BUT IF I BELIEVE THE
23 FAMILY DOLLAR PROBABLY IS AS WIDE AS THE COURTROOM
24 IS LONG IT WAS PROBABLY A LITTLE MORE THAN HALF WAY.
25

1 Q: OKAY. IN NO PART OF THE DESCRIPTION THAT YOU TOOK
2 WERE GLOVES DESCRIBED AS BEING WORN BY THE ROBBER,
3 WERE THEY?
4 A: NOT ... CORRECT, NO, SIR.
5 Q: OKAY. WERE THERE ANY OTHER WITNESSES WHO WERE
6 CUSTOMERS IN THE STORE IDENTIFIED TO YOU?
7 A: NO, SIR.
8 Q: OKAY.. TO YOUR KNOWLEDGE WERE THERE CUSTOMERS IN THE
9 STORE AT THE TIME OF THE ROBBERY?
10 A: I CAN'T RECALL.
11 Q: OKAY.
12 A: THERE WERE NO OTHER PEOPLE IDENTIFIED AS WITNESSES
13 TO ME.
14 Q: OKAY. AND IN THE FIRST TWO LINEUPS THAT WERE SHOWN
15 THERE WERE PEOPLE THAT YOU WANTED THE ... THE
16 VICTIMS TO SEE WHO WERE POTENTIAL SUSPECTS, IS THAT
17 CORRECT?
18 A: RIGHT, IN THE FIRST TWO?
19 Q: UH-HUH (AFFIRMATIVE RESPONSE).
20 A: YES, SIR.
21 Q: I MEAN THEY WEREN'T JUST WILD GUESS LINEUPS.
22 A: CORRECT.
23 Q: THERE WAS SOMEBODY THAT ...
24 A: THEY WERE --- THERE WASN'T ONE SPECIFIC ...
25 Q: OKAY.

MR. WHEELER: THANK YOU.

THE COURT: REDIRECT?

MR. FATA: THANK YOU, YOUR HONOR.

MR. MILLER - REDIRECT EXAMINATION BY MR. FATA:

Q: FAMILY DOLLAR IS A LARGE STORE, ISN'T IT?

A: IT'S ...

Q: A FAIRLY LARGE STORE.

A: FAIRLY LARGE. PROBABLY ... PROBABLY AS LARGE OR
LARGER THAN MOST IN TOWN.

Q: A LOT OF CUSTOMERS IN AND OUT?

A: YES, SIR.

Q: CUSTOMERS TOUCHING EVERYTHING IN THE STORE?

A: YES, SIR.

Q: TOUCHING THE FRONT DOOR?

A: SURE.

Q: TOUCHING THE MERCHANDISE IN THERE?

A: YES, SIR.

Q: LEAVING THEIR FINGERPRINTS ALL OVER THE PLACE?

A: CORRECT.

Q: WOULD THAT HAVE AN AFFECT ON GETTING FINGERPRINTS?

A: YES, SIR. WITH MANY OF THE CASES THAT WE WORK IF
IT'S A ... A USUAL BUSINESS IN TOWN THERE ARE VERY
FEW SURFACES AND ITEMS THAT WE'LL ACTUALLY ATTEMPT
TO FINGERPRINT GIVEN THE NUMBER OF PEOPLE THAT COME
IN AND OUT DAILY. WE REALLY TEND TO DO SPECIFIC

1 ITEMS.

2 Q: NOW, THE PHOTO LINEUP THAT MR. WHEELER ASKED YOU A
3 LOT ABOUT ... WHEN THE IDENTIFICATION WAS MADE WAS
4 IT SHOUTED OUT ALL THROUGH THE STORE?

5 A: NO, SIR.

6 Q: HOW WAS THE IDENTIFICATION MADE?

7 A: THE ... THE PHOTO WAS LAID DOWN ON THE COUNTER OR ON
8 A BOX OR SOMETHING THAT HAPPENED TO BE THERE, SET
9 DOWN FOR A PERSON TO LOOK AT. THEY'RE ASKED TO

10 TO LOOK AT THE FORM, POINT OUT, PICK OUT ANY ONE
11 THAT THEY RECOGNIZE AND THAT'S WHEN WE ...

12 Q: AND IT WASN'T ... WAS IT LIKE HALLELUJAH, THAT'S IT
13 OR SOMETHING WHERE YOU COULD HEAR ALL THE WAY DOWN
14 TO THE COURTHOUSE?

15 A: NO, SIR.

16 MR. WHEELER: OBJECTION, YOUR HONOR, LEADING A
17 LITTLE BIT.

18 THE COURT: I THINK WE'RE OKAY. I'M GOING TO
19 OVERRULE THE OBJECTION.

20 Q: WAS ANYTHING SUGGESTIVE ABOUT THE LINEUP?

21 A: NO, SIR.

22 Q: WAS IT ... WAS IT HANDLED IN NORMAL POLICE
23 PROCEDURES?

24 A: YES, SIR.

25 MR. FATA: THAT'S ALL I HAVE, YOUR HONOR.

1 THE COURT: RECROSS?

2 MR. WHEELER: VERY BRIEFLY, YOUR HONOR.

3 THE COURT: ALL RIGHT.

4 MR. WHEELER: THANK YOU.

5 MS. MILLER - RECROSS EXAMINATION BY MR. WHEELER:

6 Q: INVESTIGATOR MILLER, YOU SAID THAT IT'S GENERALLY
7 NOT THE POLICY TO ATTEMPT TO DO FINGERPRINTS ON THE
8 DOOR, IS THAT RIGHT, BECAUSE OF THE NUMBER OF PEOPLE
9 COMING IN AND OUT?

10 A: IT'S ... IT'S AT THE INVESTIGATOR'S DISCRETION BUT
11 YES.

12 Q: OKAY.. AND YOUR DISCRETION BEING THERE 15 MINUTES OR
13 SO AFTER A ROBBERY OCCURRED YOU DECIDED IT WOULDN'T
14 BE WORTHWHILE TO CHECK THAT DOOR FOR FINGERPRINTS?

15 A: RIGHT. BECAUSE OF THE MASSIVE AMOUNTS OF PRINTS
16 THAT ARE GOING TO BE ON THAT DOOR AND IT'S ... IT'S
17 NOT HOW WE SEE ON TV. YOU'RE NOT GOING TO HAVE THAT
18 PERFECT PRINT JUST BECAUSE SOMEBODY TOUCHED A DOOR.
19 YOU'RE GOING TO HAVE SMEARS AND WIPES AND YOU KNOW.
20 IT'S DIFFICULT TO GET A ... A GOOD PRINT OFF OF THE
21 DOOR IN MY OPINION THAT WAS USED SO MANY TIMES
22 DURING THE DAY.

23 Q: BUT YOU'LL NEVER KNOW IF YOU DON'T TRY, WILL YOU,
24 INVESTIGATOR MILLER?

25 A: SURE.

1 MR. WHEELER: THANK YOU.

2 THE COURT: ALL RIGHT. THANK YOU, SIR. GO
3 AHEAD AND STEP DOWN.

4 (COMPLIED).

5 THE COURT: ALL RIGHT, LADIES AND GENTLEMEN OF
6 THE JURY, WE'VE BEEN IN THE COURTROOM 45, MAYBE 50
7 MINUTES AND WE NEED TO TAKE A RECESS FOR COURT PERSONNEL
8 AT THIS TIME PLUS I'VE GOT ONE SHORT ... ONE OR TWO SHORT
9 MATTERS THAT I'VE GOT TO DO. ... SO WE'RE GOING TO TAKE
10 ABOUT A TEN MINUTE BREAK AT THIS TIME. PLEASE GO TO YOUR
11 JURY ROOM. DO NOT DISCUSS THE CASE AMONG YOURSELVES.
12 IT'S STILL PREMATURE FOR YOU TO BEGIN ANY DISCUSSION OF
13 THE CASE AMONG YOURSELVES. THANK YOU. WE'LL SEND FOR
14 YOU VERY SHORTLY.

15 (JURY OUT AT 11:37 A.M.).

16 (JURY IN AT 11:58 A.M.).

17 THE COURT: ALL RIGHT, PROCEED. THANK YOU,
18 LADIES AND GENTLEMEN, WE ARE NOW READY TO PROCEED.

19 MR. FATA: THANK YOU, YOUR HONOR. THE STATE
20 CALLS BETTY RUTH.

21 BAILIFF: PLACE YOUR LEFT HAND ON THE BIBLE AND
22 RAISE YOUR RIGHT HAND. THE EVIDENCE YOU SHALL GIVE THE
23 COURT SHALL BE THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT
24 THE TRUTH SO HELP YOU GOD?

25 MS. RUTH: YES.

~~MS. B. RUTH - DIRECT EXAMINATION BY MR. FATA~~

- 2 Q: YOU ARE BETTY RUTH?
- 3 A: YES, SIR.
- 4 Q: AND BETTY, DO YOU LIVE HERE IN LEE COUNTY?
- 5 A: I STAY HERE.
- 6 Q: YOU'VE LIVED THERE HOW LONG?
- 7 A: ALL MY LIFE. 47 YEARS.
- 8 Q: HOW MANY?
- 9 A: 47 YEARS.
- 10 Q: OKAY. AND WHAT IS YOUR OCCUPATION?
- 11 A: MANAGER OF THE FAMILY DOLLAR..
- 12 Q: HERE IN BISHOPVILLE?
- 13 A: YES.
- 14 Q: AND THAT'S IN LEE COUNTY, SOUTH CAROLINA?
- 15 A: UH-HUH (AFFIRMATIVE RESPONSE).
- 16 Q: AND HOW LONG HAVE YOU BEEN THE MANAGER OF THE FAMILY
- 17 DOLLAR
- 18 A: I WAS THERE 19 YEARS, MANAGER 17.
- 19 Q: YOU'VE BEEN THE MANAGER 17 YEARS AT THAT SAME STORE?
- 20 A: YES, SIR.
- 21 Q: WERE YOU THE MANAGER ON JULY 22ND, 2004?
- 22 A: YES, SIR.
- 23 Q: AND WERE YOU WORKING ON THAT DAY?
- 24 A: YES, SIR.
- 25 Q: AND WERE YOU IN THE STORE IN THE DURING HOURS?

1 A: YES, SIR.

2 Q: WHAT TIME DO YOU ALL OPEN?

3 A: 9:00 O'CLOCK.

4 Q: AND ABOUT 9:45 WERE YOU THERE WHEN ALL THIS

5 HAPPENED?

6 A: YES, SIR.

7 Q: PRIOR TO ... WHEN YOU OPENED THE STORE AT 9:00

8 O'CLOCK DID YOU HAVE CUSTOMERS COMING IN?

9 A: YES, SIR.

10 Q: AND WERE THEY ... THEY WERE BUYING STUFF AND

11 HANDLING MERCHANDISE AND ALL THAT SORT OF THING,

12 COMING IN AND OUT OF THE STORE?

13 A: YES, SIR.

14 Q: ALL RIGHT. NOW, DID ANYTHING HAPPEN IN THE EARLY

15 MORNING HOURS ABOUT 9:00, 9:15, 9:45, SOMEWHERE IN

16 THAT TIME FRAME, DID SOMETHING HAPPEN IN THE STORE?

17 A: YES, SIR.

18 Q: WHAT HAPPENED?

19 A: OKAY, THAT'S WHEN ... DURING THE TIME THE ROBBERY

20 TOOK PLACE.

21 Q: DURING THE ROBBERY TOOK PLACE. NOW, LET ME GET THIS

22 OUT OF THE WAY JUST FOR A SECOND. DO YOU SEE THE

23 PERSON IN THE COURTROOM THAT ROBBED YOU ON THAT DAY?

24 A: YES, SIR.

25 Q: AND WHERE IS HE?

1 A: SITTING AT THE TABLE.

2 Q: SITTING AT THE TABLE?

3 A: YES, SIR.

4 Q: WHAT'S HE WEARING?

5 A: THAT GREEN BUT IT'S NOT REALLY A DARK GREEN, IT'S

6 LIKE GREENISH AND A TIE AND SHIRT.

7 Q: AND HE'S SITTING AT THIS TABLE?

8 A: YES, SIR.

9 MR. FATA: YOUR HONOR, LET THE RECORD REFLECT

10 SHE'S IDENTIFIED THE DEFENDANT, PLEASE.

11 THE COURT: THE RECORD WILL SO REFLECT.

12 Q: NOW, WHEN DID YOU FIRST SEE THIS DEFENDANT?

13 A: I WAS IN MY OFFICE AND I WAS DOING SOME WORK AT THE

14 COMPUTER.

15 YOUR HONOR, MAY SHE COME DOWN TO THIS EXHIBIT?

16 THE COURT: YES, SIR. YOU MAY STEP DOWN, MA'AM.

17

18 Q: I'M GONNA SHOW YOU EXHIBIT ... STATE'S EXHIBIT

19 NUMBER SEVEN AND WE'LL BRING IT UP WHERE EVERYBODY

20 CAN SEE IT HERE. YOU WANT HER TO COME TO THIS SIDE?

21 YOU'LL COME TO THIS SIDE SO THAT THE COURT REPORTER

22 CAN HEAR YOU. NOW, IS THIS DRAWN SORT OF THE FAMILY

23 DOLLAR STORE, A SKETCH OF IT?

24 A: YES, SIR.

25 Q: IT'S NOT TO SCALE, IS IT?

1 A: UH-UH (NEGATIVE RESPONSE) BUT IT'S EXACTLY HOW IT
2 IS SET UP.
3 Q: ALL RIGHT. NOW WHAT IS THIS RIGHT HERE? THIS ...
4 THIS ... THIS ... THIS PART RIGHT HERE?
5 A: IT'S THE FRONT PART.
6 Q: AND THESE ARE THE DOORS?
7 A: DOORS.
8 Q: AND THIS IS AN IN DOOR AND AN OUT DOOR?
9 A: YES, SIR.
10 Q: CAN YOU GO IN THE IN DOOR? EXCUSE ME, CAN YOU GO
11 OUT THE IN DOOR AND COME IN THE OUT DOOR?
12 A: NO.
13 Q: OKAY.. SO YOU HAD A SPECIFIC DOOR TO GO IN AND OUT?
14 WHAT ARE THESE THINGS RIGHT HERE?
15 A: THE REGISTERS.
16 Q: ALL RIGHT. AND BACK HERE IS WHAT?
17 A: THE STOCK ROOM.
18 Q: AND WHAT IS THIS?
19 A: MY OFFICE.
20 Q: ALL RIGHT. WHAT ARE THESE THINGS RIGHT HERE?
21 A: GONDOLAS.
22 Q: ALL RIGHT. AND WHAT ARE THE GONDOLAS FOR?
23 A: GONDOLAS ARE ... THIS IS THE PLASTIC GONDOLA WHERE
24 THE PLASTICS ARE KEPT. AND THIS IS THE PET GONDOLA
25 WHERE THE PET FOOD AND STUFF ARE KEPT ON THIS

- 1 GONDOLA.
- 2 Q: AND ... AND THIS IS WHAT BACK HERE?
- 3 A: THIS IS MY OFFICE.
- 4 Q: THAT'S YOUR OFFICE?
- 5 A: YES.
- 6 Q: AND ON THE 22ND, EARLY MORNING HOURS YOU WERE IN
- 7 YOUR OFFICE?
- 8 A: YES; SIR.
- 9 Q: IS THAT WHAT YOU MEAN? NOW, I'M GONNA SHOW YOU
- 10 STATE'S EXHIBIT NUMBER SIX-E ... EXCUSE ME, SIX-H
- 11 AND DOES ... WHAT DOES THAT INDICATE? WHAT DOES
- 12 THAT SHOW?
- 13 A: IT'S SHOWING MY OFFICE WHERE I WAS WITH THE COMPUTER
- 14 AND EVERYTHING WITH THE DOOR OPEN.
- 15 Q: AND WHAT I ... THE DOOR WAS PROPPED OPEN AND WHAT
- 16 WE ... WAS THAT THE WAY IT WAS ON THAT DAY?
- 17 A: YES, SIR.
- 18 Q: AND WHAT WERE YOU DOING IN THE OFFICE AT THAT TIME?
- 19 A: AT THAT TIME I WAS RUNNING OFF MY MESSAGES, CHECKING
- 20 ALL MY E-MAILS.
- 21 Q: OKAY. WERE YOU MAKING A DEPOSIT?
- 22 A: NO, NOT AT THAT TIME.
- 23 Q: OKAY. DID YOU HAVE A DEPOSIT?
- 24 A: YEAH.
- 25 Q: AND ABOUT HOW MUCH WAS THAT DEPOSIT?

- 1 A: A LITTLE OVER \$2,000.00.
- 2 Q: ALL RIGHT. NOW, YOU SAID OUT FRONT OF THIS OFFICE
- 3 ARE THE TWO GONDOLAS. YOU SAID PLASTICS AND PET
- 4 FOOD?
- 5 A: YES, SIR.
- 6 Q: I'M GONNA SHOW YOU STATE'S EXHIBIT SIX-E NOW. WHAT
- 7 DOES THAT INDICATE?
- 8 A: THE PLASTICS GONDOLA AND THE PET ... THIS IS THE
- 9 PLASTIC AND THAT'S THE PET.
- 10 Q: OKAY. WHERE DID YOU FIRST ... CAN EVERYONE SEE?
- 11 WHERE DID YOU FIRST NOTICE THE DEFENDANT?
- 12 A: THE PLASTICS RIGHT HERE.
- 13 Q: OKAY. RIGHT HERE AT THIS PLASTIC ONE?
- 14 A: UH-HUH (AFFIRMATIVE RESPONSE).
- 15 Q: WHICH WOULD BE ...
- 16 A: RIGHT IN FRONT OF MY DOOR.
- 17 Q: RIGHT IN FRONT OF YOUR DOOR. WHAT WAS HE DOING?
- 18 A: JUST LOOKING ... HE KIND OF OBSERVED ... JUST
- 19 LOOKING LIKE HE WAS GONNA, YOU KNOW, BUY SOMETHING,
- 20 JUST LOOKING, CUT HIS EYE BACK IN THE OFFICE AT ME.
- 21 LIKE THIS. EVERY TIME I WOULD LOOK HE WOULD BE
- 22 LOOKING AT ME LIKE THIS. AND THAT KIND OF MADE ME
- 23 KIND OF WONDER.
- 24 Q: WONDER WHAT?
- 25 A: WHY WAS HE ACTING STRANGE. BY BEING IN RETAIL FOR

1 19 YEARS I MEAN, WE KNOW THERE ARE --- THERE ARE ALL

2 DIFFERENT EYE CONTACTS AND STUFF THEY JUST TO TELL
3 US TO LOOK FOR.

4 Q: OKAY. SUSPICIOUS CONDUCT?

5 A: RIGHT.

6 Q: DID HE SAY ANYTHING TO YOU?

7 A: YES.

8 Q: WHAT DID HE SAY?

9 A: WHAT HE SAID WAS AND I SAY IT WAS KIND OF STUPID
10 BECAUSE HE'S --- HE ASKED ME WAS THIS THE SMALLEST
11 ONE BIGGER THAN THE LARGE ONE.

12 Q: HE ASKED YOU IF THIS WERE BIGGER THAN THIS.

13 A: RIGHT.

14 Q: OKAY.

15 A: AND I SAID NO. AND THEN HE WENT DOWN ... THAT'S
16 WHEN HE PUT IT DOWN AND HE DIRECTLY WALKED ON AROUND
17 TO PET GONDOLA. AND ...

18 Q: WHAT DID YOU DO AT THAT POINT?

19 A: AT THAT POINT HE ... EVERY TIME, YOU KNOW, HE'D BE
20 CUTTING HIS EYES AT ME IN THE OFFICE AND THEN I
21 LOOKED AT HIM SO I ... HE WAS SO SUSPICIOUS TIL I
22 GOT UP AND CAME OUT OF MY OFFICE. AND WHEN I GOT UP
23 AND CAME OUT THAT'S WHEN HE SHOOT, WENT UP TOWARD
24 THE FRONT.

25 Q: SO YOU SAY HE LEFT HERE ...

1 A: AND WENT AROUND THERE.

2 Q: ... PET FOOD ...

3 A: NEXT TIME I LOOK --- THEN WHEN I, YOU KNOW, BECAUSE
4 HE WAS ACTING SO SUSPICIOUS AND I CAME ... WHEN I
5 GOT UP AND CAME OUT BECAUSE I WAS GONNA LOOK AROUND
6 AND SEE WHY HE WAS ACTING LIKE THAT AND ...

7 Q: RIGHT. THIS ... I'M GONNA SHOW YOU STATE'S EXHIBIT
8 SIX-G. IS THAT YOUR OFFICE DOOR OVER THERE?

9 A: YES, SIR.

10 Q: THE PLASTICS AND THE PET FOODS LOOKING TOWARDS YOUR
11 OFFICE, RIGHT?

12 A: YES, SIR.

13 Q: WITH THE DOOR CLOSED. HE WAS THERE, THERE AND HE
14 DISAPPEARED ...

15 A: RIGHT.

16 Q: ... WHEN YOU CAME OUT. AND THAT ALL OCCURRED BACK
17 HERE AT THE VERY BACK OF THE STORE?

18 A: NEAR THE BACK OF THE STORE.

19 Q: ALL RIGHT. HE THEN DISAPPEARED?

20 A: YEAH, HE WENT BACK ... BACK TOWARDS THE FRONT SO I
21 THOUGHT MAYBE HE WAS GOING TO CASH OUT.

22 Q: OKAY. DID YOU SEE HIM AGAIN?

23 A: YES, SIR.

24 Q: ALL RIGHT. WHAT DID ... WHERE DID YOU SEE HIM
25 AGAIN?

1 A: WHEN I GOT READY AND WENT TO THE BANK TO TAKE MY
2 DEPOSIT.

3 Q: ALL RIGHT. TELL ME WHERE WHEN YOU GOT READY TO GO
4 TO THE BANK DID YOU GO TO TALK TO ANYONE?

5 A: YES.

6 Q: WHO?

7 A: THE CASHIER, SHIRLEY CLYBURN.

8 Q: AND WHERE DID YOU TALK TO HER?

9 A: AT THE REGISTER.

10 Q: WHERE WAS SHE?

11 A: SHE WAS AT THE REGISTER, HERE. RUNNING THE REGISTER.

12 Q: RIGHT HERE?

13 A: UH-HUH (AFFIRMATIVE RESPONSE). AND I CAME. I WAS
14 ON THIS SIDE, CAME AROUND THIS SIDE.

15 Q: ALL RIGHT. HOLD ON JUST SECOND. YOU WERE STANDING
16 BEHIND SHIRLEY TALKING TO HER?

17 A: YEAH, JUST LIKE SHE WAS ON ... I WAS ON THIS SIDE
18 AND SHE WAS ON THAT SIDE.

19 Q: I'M GOING TO SHOW YOU STATE'S EXHIBIT SIX-D. DOES
20 THAT ... WHAT DOES THAT SHOW?

21 A: YES. THE REGISTER. SHE WAS HERE ...

22 Q: SHE WAS HERE BEHIND THE REGISTER.

23 A: UH-HUH (AFFIRMATIVE RESPONSE). AND I WAS RIGHT BACK
24 THERE ON THE SIDE UP THERE.

25 Q: ALL RIGHT. WHAT DID YOU TELL SHIRLEY?

1 A: I TOLD HER THAT I WAS ON ... GETTING READY TO GO TO
2 THE BANK AND I CAME ON THE SIDE OF THE REGISTER TO
3 GIVE HER THE KEY IN CASE SHE HAD TO DO LIKE A REFUND
4 OR ANYTHING BEFORE I GOT BACK.
5 Q: WHAT HAPPENED NEXT?
6 A: NEXT, HE CAME UP TO THE REGISTER.
7 Q: THE DEFENDANT CAME UP TO THE REGISTER?
8 A: THE DEFENDANT CAME TO THE REGISTER.
9 Q: WHERE DID HE ... ALL RIGHT, LET ME SHOW YOU STATE'S
10 EXHIBIT NUMBER SIX-C.
11 A: OKAY. HE CAME UP TO THE REGISTER ...
12 Q: OR I BELIEVE IT'LL BE BETTER SEEN ON SIX-B.
13 A: YEAH.
14 Q: ALL RIGHT.
15 A: AND HE CAME UP TO THE REGISTER RIGHT UP IN THERE.
16 Q: ALL RIGHT. THIS IS THE REGISTER HERE?
17 A: RIGHT.
18 Q: HE CAME RIGHT UP HERE?
19 A: YEAH. AND HE JUST LIKE STAND THERE AND JUST LIKE
20 LOOK AT EACH OTHER AND HE WAS JUST STANDING THERE
21 AND THEN AFTER A WHILE I ASKED HIM COULD I HELP HIM.
22 AND THEN HE LOOKED AT ME AND I SAID, "CAN I HELP
23 YOU, SIR?" AND THAT'S WHEN HE TOLD ME SAID ... HE
24 MUMBLED AT FIRST AND I COULDN'T UNDERSTAND HIM AND
25 THEN ... AND I ASKED SHIRLEY, I SAID, "SHIRLEY," I

1 SAID, "WHAT DID HE SAY?" AND THEN HE TOLD US THAT

2 IT WAS STICK UP.

3 Q: ALL RIGHT. WHAT DID ... WHEN HE TOLD YOU IT WAS
4 STICK UP WHAT DID HE DO THEN? DID HE MOVE OR DID HE
5 DO ANYTHING ...

6 A: YEAH, HE CAME A LITTLE BIT CLOSER COME RIGHT UP IN
7 HERE.

8 Q: CAME BETWEEN YOU AND ...

9 A: YEAH, RIGHT UP BETWEEN THERE, RIGHT UP IN THERE.

10 Q: ALL RIGHT. WHAT DID HE DO THEN?

11 A: THEN HE LOOKED AT US BECAUSE WE WAS LIKE STARTLED
12 AND HE SAID, "SO YOU THINK I'M PLAYING? DO YOU ALL
13 THINK I'M PLAYING?" AND HE SAID, "I'LL SHOW YOU
14 WHETHER I'M PLAYING." AND THAT'S WHEN HE PULLED THE
15 SHIRT OUT AND PULLED THE GUN, A PISTOL OUT OF HIS
16 SHIRT.

17 Q: PULLED A PISTOL OUT OF HIS SHIRT?

18 A: OUT OF HIS PANTS.

19 Q: OUT OF HIS PANTS, OKAY. SO HE CAME UP WHERE? HERE?

20 A: RIGHT UP IN THERE.

21 Q: RIGHT UP IN HERE? AND HE SAID WHAT?

22 A: HE SAID ... HE TOLD US THAT HE WOULD SHOW US WHETHER
23 HE WAS PLAYING OR NOT AND THAT'S WHEN HE PULLED HIS
24 SHIRT UP AND PULLED A PISTOL OUT OF HIS PANTS. AND
25 DRAW IT ON US.

1 Q: AND WHAT DID HE SAY THEN?

2 A: AND HE SAID, "I WANT THE BAG, GIVE ME THE MONEY."

3 Q: AND WHAT DID YOU SAY?

4 A: AND I TOLD HIM OKAY, I GIVE HIM THE BAG AND I TOLD

5 HE COULD HAVE IT JUST DON'T HURT ANYBODY..

6 Q: ALL RIGHT. WHAT HAPPENED NEXT?

7 A: THEN THAT'S WHEN MY DAUGHTER NAMED ASHLEY ...

8 Q: ASHLEY WALKED IN.

9 A: AND SHE CAME IN THROUGH THAT DOOR AND THAT'S HE

10 CAME RIGHT BACK UP IN HERE AND HE SAW THAT SHE CAME

11 IN THAT'S WHEN HE TOOK THE GUN AND POINTED ON HER

12 AND TOLD HER HE MEANT GET TO THE BACK, JUST GO RIGHT

13 NOW.

14 Q: AND DID SHE DO THAT?

15 A: YES..

16 Q: AND WHAT DID YOU DO?

17 A: WE JUST ... WE JUST STILL WAS STARTLED, WE JUST

18 STILL STANDING THERE. AND THEN THAT'S WHEN HE TOLD

19 ... AFTER THAT IS WHEN HE TOLD US ... I MEAN ALL OF

20 YOU GET TO THE BACK OF THE STORE. HE SAID, "YOU ALL

21 GO TO THE BACK, TOO."

22 Q: AND DID YOU?

23 A: "BEFORE I BLOW YOUR BLANK BLANK BRAINS OUT."

24 Q: OKAY. AND WHERE DID YOU GO?

25 A: ME AND SHIRLEY WENT TO THE BACK OF THE STORE.

1 Q: TO THE BACK OF THE STORE?

2 A: UH-HUH (AFFIRMATIVE RESPONSE) YEAH. WE WAS GOING TO

3 THE BACK.

4 Q: ALL RIGHT.

5 A: AND HE WAS STOMPING AND CURSING.

6 Q: DID ... HE WAS STOMPING AND CURSING?

7 A: YEAH.

8 Q: ACTING REAL BULLYISH?

9 A: YEAH.

10 Q: WHAT HAPPENED NEXT?

11 A: THEN AS WE GOT TO ... WE WERE GOING TO THE BACK OR

12 WHATEVER I THINK THAT'S WHEN TREVOR CAME TO RUN AND

13 COME OUT THE STOCKROOM AND I GUESS WHEN HE SEE

14 TREVOR THAT'S WHEN HE LEFT THE STORE.

15 Q: ALL RIGHT. HAVE A SEAT. IS THERE ANY DOUBT IN YOUR

16 MIND AS TO WHO IT WAS THAT ROBBED YOU AT GUNPOINT ON

17 JULY 22ND, 2004?

18 A: NO, SIR.

19 Q: AND IT IS THE DEFENDANT?

20 A: YES, SIR.

21 Q: NOW, THE STATE PREPARED SOME LINEUPS, IS THAT RIGHT?

22 A: YES.

23 Q: THE POLICE DEPARTMENT, NOT THE STATE. THE POLICE

24 DEPARTMENT.

25 A: YES, SIR.

1 Q: AND THEY SHOWED YOU ... LET ME SHOW YOU DEFENDANT'S
2 ... STATE'S EXHIBIT FOUR AND STATE'S EXHIBIT FIVE.
3 THESE ARE THE ... THESE ARE LINEUPS ONE AND TWO THAT
4 YOU SAW. NOW, DID YOU IDENTIFY ANYBODY IN THAT
5 LINEUP, THOSE TWO LINEUPS?

6 A: NO, SIR.

7 Q: ALL RIGHT. LATER ON THE STATE SHOWED YOU STATE'S
8 EXHIBIT ... I'M GONNA SHOW YOU STATE'S EXHIBIT
9 NUMBER THREE AS ANOTHER LINEUP. DID YOU IDENTIFY
10 ANYONE IN THAT LINEUP?

11 A: YES, SIR.

12 Q: WHICH ONE DID YOU IDENTIFY?

13 A: NUMBER TWO.

14 Q: AND NUMBER TWO IS THE DEFENDANT?

15 A: YES, SIR.

16 Q: NOW, TELL ME HOW THESE LINEUPS WERE CONDUCTED. HOW
17 DID ... HOW DID SERGEANT MILLER CONDUCT THOSE
18 LINEUPS?

19 A: HE CAME IN THE STORE AND TOLD US HE HAD SOME PHOTOS
20 FOR US TO LOOK AT A LINEUP AND EACH ONE OF US
21 OBSERVED THEM SEPARATELY. EACH ONE WAS PULLED AWAY
22 AND LOOKED AT THEM AND OBSERVED.

23 Q: DID ANYONE ... DID ANYONE INFLUENCE YOU TO EITHER
24 PICK OUT OR NOT PICK OUT SOMEBODY?

25 A: NO, SIR.

1 Q: DID YOU HEAR ANYONE PICK OUT SOMEBODY?

2 A: NO, SIR.

3 Q: ALL RIGHT. IN FACT, WAS YOUR DAUGHTER IN THE STORE
4 WHEN YOU VIEWED THE LINEUP?

5 A: NO, MATTER OF FACT, SHE WAS HELPING ... SHE HELPS MY
6 SISTER AT CITI TRENDS AND SHE WAS DOWN THERE SO I
7 HAD TO CALL HER TO COME DOWN WHEN HE CAME IN WITH
8 THAT LINEUP AND ASKED ME IF I COULD GET HER. AND I
9 HAD TO CALL HER OVER AT CITI TRENDS TO COME DOWN TO
10 THE FAMILY DOLLAR TO DO THE LINEUP.

11 Q: OKAY. WAS ANYTHING RECOVERED ... WAS THE GUN
12 RECOVERED, THE MONEY BAG OR ANY OF THE MONEY
13 RECOVERED?

14 A: NO, SIR.

15 Q: OKAY. DID ANYONE GET HURT?

16 A: NO, SIR. JUST I WAS SHOCKED OR WHATEVER BUT NOBODY
17 GOT HURT.

18 Q: ALL RIGHT. ABOUT HOW LONG HAD YOU HAVE ... HOW LONG
19 WAS IT THAT YOU HAD OBSERVED THE DEFENDANT INITIALLY
20 IN THE STORE?

21 A: IT WAS ... HE WAS IN THERE OH, OVER ... OVER 15 OR
22 20 MINUTES BECAUSE HE ... I HAD TALKED TO HIM. WE
23 HAD A CONVERSATION. BECAUSE HE ASKED, LIKE I TOLD,
24 HE WAS BY MY OFFICE AND BY THE DOOR SO I SEEN HIM
25 CONSTANTLY IN THE STORE. I HAD GOTTEN CLOSE.

1 Q: AND YOU WERE SUSPICIOUS OF HIM.

2 A: YEAH.

3 Q: HE WAS ... HOW WAS HE ACTING?

4 A: SUSPICIOUS. BECAUSE HE KEEP WATCHING ME. EVERY
5 MOVE I MADE JUST WATCHING ME.

6 Q: AND WHEN HE PULLED A GUN OUT ON YOU DID YOU GET A
7 GOOD LOOK AT HIM THEN?

8 A: YEAH, I'LL NEVER FORGET IT.

9 Q: AND WHAT WAS HE WEARING?

10 A: BLACK T-SHIRT, BLUE JEANS AND HAD A BROWN CAP ON HIS
11 HEAD.

12 Q: ALL RIGHT. AND SHIRLEY CLYBURN AND TREVOR MCDUFFIE
13 WERE WORKING IN THE STORE THAT DAY.

14 A: YES, SIR.

15 Q: AND YOUR DAUGHTER CAME IN RIGHT ABOUT THAT TIME?

16 MR. WHEELER: OBJECTION. HE'S LEADING, YOUR
17 HONOR.

18 THE COURT: YES, SIR, HE IS. YOU'RE LEADING.

19 Q: DID YOUR DAUGHTER COME IN ABOUT THAT TIME?

20 A: YEAH.

21 MR. FATA: ANSWER ANY QUESTIONS THAT MR. WHEELER
22 MAY HAVE.

23 THE COURT: ALL RIGHT. CROSS EXAMINATION, MR.
24 WHEELER?

25 MR. WHEELER: THANK YOU, YOUR HONOR. MAY IT

1 PLEASE THE COURT:

2 THE COURT: YES, SIR.

3 MS. B. RUTH - CROSS EXAMINATION BY MR. WHEELER:

4 Q: GOOD MORNING, MS. RUTH.

5 A: GOOD MORNING.

6 Q: I KNOW YOU'VE BEEN THROUGH QUITE AN EXPERIENCE. I
7 KNOW IT WAS PRETTY TOUGH. MS. RUTH, ON THE DATE
8 THAT THIS HAPPENED HOW LONG HAD YOU BEEN THE MANAGER
9 OF THE ... OF THE FAMILY DOLLAR STORE?

10 A: 18 YEARS.

11 Q: OKAY. HAVE YOU SPENT PRETTY MUCH YOUR WHOLE CAREER
12 THERE AT THE FAMILY DOLLAR?

13 A: WELL, I'M KIND OF LIKE A TRAINING STORE MANAGER. I
14 WORKS AT FAMILY DOLLAR BUT I ALSO TRAIN I GOES OUT
15 AND TRAIN OTHER MANAGERS TO BE FAMILY DOLLAR
16 MANAGERS.

17 Q: OKAY. SO SOMETIMES YOU'RE OUT OF TOWN?

18 A: YEAH.

19 Q: OKAY. I NOTICE YOU'RE WEARING GLASSES TODAY. DO
20 YOU HAVE A PRESCRIPTION FOR THEM?

21 A: YEAH.

22 Q: OKAY. NOW, I TALKED WITH YOU ON MONDAY. I DON'T
23 KNOW IF YOU REMEMBER MEETING WITH ME. WERE YOU
24 WEARING YOUR GLASSES ON MONDAY?

25 A: NO.

1 Q: OKAY. DO YOU ALWAYS WEAR THEM?

2 A: SOMETIMES BUT NOT ALL THE TIME.

3 Q: OKAY. WERE YOU WEARING THEM ON JULY 22ND?

4 A: WHEN WE WERE BEING ROBBED?

5 Q: UH-HUH (AFFIRMATIVE RESPONSE).

6 A: YES.

7 Q: THE WHOLE TIME OR PART OF THE TIME?

8 A: FOR PART OF THE TIME.

9 Q: OKAY. SO SOMETIME YOU HAD THEM ON AND SOMETIME YOU

10 HAD THEM OFF?

11 A: YES.

12 Q: OKAY. AND WHICH ... DO YOU KNOW WHICH TIMES YOU HAD

13 THEM OFF?

14 A: I HAD THEM ON.

15 Q: ALL RIGHT. DO YOU HAVE ANY MEDICAL CONDITIONS? DO

16 YOU SUFFER FROM HYPERTENSION OR ANYTHING LIKE THAT?

17 A: NO.

18 Q: NOW, I KNOW WHAT YOU WENT THROUGH WAS BAD BUT IT ...

19 DID IT SCARE YOU? NOT THE FIRST PART SO MUCH WHEN

20 YOU WERE AT THE BACK AND THAT EXCHANGE. BUT WHEN

21 THE GUN GOT PULLED AT THE ... AT THE FRONT OF THE

22 STORE?

23 A: NO, NOT AT THE TIME BECAUSE WHEN I WAS ... I MEAN, I

24 DIDN'T HAVE ANY TIME TO BE SCARED. EVERYTHING

25 HAPPENED SO FAST.

- 1 Q: OH, SO IT WAS THAT FAST?
- 2 A: YEAH, BECAUSE WHEN HE PULLED THE GUN AND DID THAT,
- 3 YEAH, IT WAS — IT WAS JUST REALLY, YOU KNOW, GET
- 4 REAL, REAL SCARED AFTER ... AFTER EVERYTHING AND
- 5 TALK ABOUT IT YOU KNOW, WHEN YOU TALK ABOUT IT, YOU
- 6 GET SCARED THEN.
- 7 Q: BUT IT HAPPENED SO FAST YOU DIDN'T HAVE A CHANCE TO
- 8 GET SCARED WHEN IT HAPPENED.
- 9 A: THEY'RE ALL COUNTING ON ME TO GIVE HIM WHAT HE WANT
- 10 ...
- 11 Q: OKAY. NOW WHEN ASHLEY ... YOU HAD ALREADY HANDED
- 12 THIS PERSON THE MONEY BAG BEFORE ASHLEY CAME IN, IS
- 13 THAT RIGHT?
- 14 A: YEAH.
- 15 Q: OKAY. AND ASHLEY CAME IN AND THE PERSON TOLD ASHLEY
- 16 TO RUN TO THE BACK OF THE STORE.
- 17 A: RIGHT.
- 18 Q: OR GO TO THE BACK OF THE STORE.
- 19 A: RIGHT.
- 20 Q: I'M ASSUMING SHE RAN.
- 21 Q: YEAH.
- 22 Q: OKAY. AND THEN YOU WENT TO THE BACK OF THE STORE,
- 23 IS THAT RIGHT?
- 24 A: YEAH.
- 25 Q: OKAY. AND YOU SAID IT HAPPENED VERY FAST. BETWEEN

- 1 THE TIME THAT THE GUN GOT OUT AND YOU GOT TO THE
2 BACK OF THE STORE, I MEAN, VERY FAST, NOT FAST
3 ENOUGH TO BE SCARED, IS IS POSSIBLE THAT MEANS LESS
4 THAN 30 SECONDS OR ... OR WHAT?
- 5 A: NO. IT HAD TO BE MORE THAN 30 SECONDS.
- 6 Q: OKAY.
- 7 A: SEE HE ... HE TOLD ... WAS TALKING TO ME AND SHIRLEY
8 THE BANK BAG IN HIS HAND AND THE GUN WAVING AND MY
9 DAUGHTER WALKED IN. THEN I KIND OF FOCUSED ON HER
10 BECAUSE I KIND OF HESITATE FROM GOING TO THE BACK
11 BECAUSE I WAS WAITING FOR HER TO GO TO THE BACK
12 BECAUSE I WANTED HIM TO KILL ME THAN KILL HER. I
13 HESITATE. SO I HESITATED FROM GOING TO THE BACK
14 WHERE SHE WOULD GET A CHANCE TO GET ...
- 15 Q: OKAY.
- 16 A: THEN WE WENT TO THE BACK, SHIRLEY ... THEN LET'S GO
17 TO THE BACK. SHE DIDN'T KNOW I WAS HESITATE ...
18 HESITATE BECAUSE THAT'S MY ... THAT WAS MY BABY.
- 19 Q: NOW, YOU SAID WHEN ASHLEY CAME IN, THOUGH, YOU
20 FOCUSED ON ASHLEY.
- 21 A: YES.
- 22 Q: YOU WERE LOOKING ... AND YOU WERE LOOKING AT ASHLEY
23 TO MAKE SURE SHE GOT TO THE BACK ALL RIGHT?
- 24 A: YEAH.
- 25 Q: SO WHILE YOUR ATTENTION WAS ON ASHLEY YOU WEREN'T

- 1 LOOKING AT ANYTHING ELSE, WERE YOU?
- 2 A: WHILE THAT GUN WAS RIGHT THERE AND HE WAS THERE.
- 3 Q: BUT YOU COULDN'T HAVE BEEN LOOKING AT HIM IF YOU
- 4 WERE LOOKING AT ASHLEY.
- 5 A: YEAH, BUT I KNOW ...
- 6 Q: OKAY.
- 7 A: ... I KNOW HE DID IT.
- 8 Q: AFTERWARDS YOU SAID IT SCARED YOU.
- 9 A: YEAH.
- 10 Q: AFTER YOU HAD A CHANCE TO SIT DOWN AND THINK ABOUT
- 11 IT A LITTLE BIT.
- 12 A: OH, YEAH.
- 13 Q: DID ... DID THERE EVER COME A TIME AFTER THAT WHEN
- 14 YOU WERE ... WHEN YOU WERE SHAKING OR TREMBLING?
- 15 AFTERWARDS NOW?
- 16 A: (Nods head affirmatively).
- 17 Q: NOW, YOU TOLD ME THAT ON THE DATE THAT YOU DID THIS
- 18 LINEUP THAT ASHLEY WASN'T EVEN IN THE STORE. WASN'T
- 19 IN THAT GROUP OF PEOPLE. YOU HAD TO GO GET HER FROM
- 20 CITI TRENDS OR CALL HER ...
- 21 A: YEAH, SHE CALLED AND SHE CAME DOWN THERE FROM CITI
- 22 TRENDS. SHE RODE WITH MY SISTER THAT DAY.
- 23 Q: OKAY. WHO WAS IN THE STORE THAT DAY YOU MADE YOUR
- 24 ... YOUR IDENTIFICATION ACCORDING TO THAT LINEUP?
- 25 A: SHIRLEY WAS RUNNING THE REGISTER. TREVOR WAS IN THE

1 BACK.

2 Q: I'M SORRY, I'M TALKING ABOUT ON THE ... NOT THE DAY
3 OF THE ROBBERY BUT THE DAY THAT INVESTIGATOR MILLER
4 CAME BY TO SHOW YOU ALL THE LINEUP.

5 A: YEAH. TREVOR ... SHIRLEY WAS RUNNING THE REGISTER
6 AND TREVOR WAS IN THE BACK.

7 Q: DID ... DID YOU ASK TREVOR TO COME TO THE FRONT?

8 A: YEAH.

9 Q: OKAY. AND SO WERE YOU AND SHIRLEY STANDING THERE

10 ... SO TREVOR WASN'T WITH YOU ALL EITHER. HE WAS IN
11 THE BACK AND HE CAME UP LATER?

12 A: YEAH, SEE TREVOR WAS IN THE BACK AND I CALLED HIM TO
13 COME AFTER I ... HE GOT FINISHED WITH ME AND
14 SHIRLEY.

15 Q: OKAY. AND ASHLEY DIDN'T COME BY TIL LATER?

16 A: NO, SHE CAME UP THERE IN MY CAR. SHE CAME.

17 Q: FROM CITI TRENDS, THOUGH.

18 A: UH-HUH (AFFIRMATIVE RESPONSE).

19 Q: OKAY. ALL RIGHT. WHO WAS THE FIRST ONE TO GO LOOK
20 AT THE LINEUP?

21 A: I DID.

22 Q: OKAY. DO YOU KNOW WHO WAS NEXT?

23 A: ASHLEY.

24 Q: OKAY. AND WHO CAME AFTER THAT? DO YOU REMEMBER WHO
25 WENT AFTER THAT?

1 A: OKAY, IT WAS ME, THEN ASHLEY, SHIRLEY AND THEN
2 TREVOR:
3 Q: OKAY. NOW, SO IF YOU HAD TO CALL ASHLEY FROM CITI
4 TRENDS TO COME DOWN INVESTIGATOR MILLER'S
5 RECOLLECTION THAT YOU WERE ALL THERE TOGETHER, IS
6 THAT ...
7 A: WHEN HE GOT THERE ... WHEN HE GOT THERE SHE WAS
8 THERE.
9 Q: OKAY. SO WHEN MR. MILLER GOT THERE ALL OF YOU WERE
10 THERE?
11 A: YEAH BUT WE WASN'T TOGETHER.
12 Q: BUT YOU WEREN'T TOGETHER THERE.
13 A: UH-UH (NEGATIVE RESPONSE).
14 Q: OKAY. OKAY. DESCRIBE FOR ME IF YOU WILL WHAT THE
15 GENTLEMAN THAT CAME IN THE STORE WAS WEARING AGAIN.
16 A: BLUE JEANS, BLACK SHIRT AND A CAP.
17 Q: OKAY. DID YOU NOTICE HIS SHOES?
18 A: NO.
19 Q: OKAY. DID YOU NOTICE A BELT?
20 A: NO. BECAUSE HE HAD THE SHIRT WAS ON THE OUTSIDE.
21 Q: DID HE PULL UP HIS SHIRT TO GET THE GUN?
22 A: YEAH.
23 Q: DID YOU NOTICE IT THEN?
24 A: NO.
25 Q: OKAY. WHAT SHADE OF BLUE WERE THE BLUE JEANS?

1 A: A REGULAR NORMAL JEAN.

2 Q: I MEAN WERE THEY LIGHT DENIM OR DARK DENIM?

3 A: THEY WERE REGULAR. NOT DARK DENIM BUT LIKE MEDIUM.

4 Q: MEDIUM?

5 A: YEAH.

6 Q: OKAY. DID THE BLACK T-SHIRT HAVE ANY KIND OF LOGO

7 ON IT?

8 A: I DON'T THINK SO.

9 Q: OKAY. DID ... DID THE MAN THAT YOU SAW HAVE FACIAL

10 HAIR?

11 A: NOT BUT A LITTLE MUSTACHE LIKE HE'S GOT NOW.

12 Q: OKAY. LIKE HE'S GOT NOW? WHAT DID YOU TELL THE

13 POLICE, THOUGH?

14 A: THAT'S WHAT I TOLD THEM HE ... HE DIDN'T HAVE ANY

15 ... HE WAS A CLEAN CUT GUY WITH JUST A LITTLE

16 MUSTACHE.

17 Q: IS THAT ... DOES THIS MEAN NO FACIAL HAIR OR DOES

18 THIS MEAN SOME FACIAL HAIR OR IS IT A MUSTACHE?

19 WHAT IS IT?

20 A: IT'S A MUSTACHE.

21 Q: OKAY, IT'S A MUSTACHE.

22 A: RIGHT.

23 Q: ALL RIGHT. IS THAT NO FACIAL HAIR?

24 A: YEAH, FACIAL HAIR I THINK WILL BE ALL OVER THE FACE,

25 ALL AROUND.

- 1 Q: OKAY. SO YOU DON'T CONSIDER A MUSTACHE FACIAL HAIR?
- 2 A: NO.
- 3 Q: OKAY. ALL RIGHT. MS. RUTH, YOU'RE UPSET BY THIS
- 4 ROBBERY, AREN'T YOU? YOU'RE MAD ABOUT IT, AREN'T
- 5 YOU?
- 6 A: NO, I'M NOT MAD.
- 7 Q: YOU'RE NOT UPSET THAT YOUR DAUGHTER WAS THREATENED?
- 8 A: I MEAN, LIKE I SAID, YOU KNOW, I WAS ... SHE COME IN
- 9 I COULD HAVE BEEN KILLED BUT I MEAN, ...
- 10 Q: AND THAT MAKE ... THAT DOESN'T MAKE YOU ANGRY?
- 11 A: WELL, I THINK THEY CAUGHT HIM SO ...
- 12 Q: BUT YOU'RE NOT WILLING TO WAIVER FROM YOUR TESTIMONY
- 13 IN THIS CASE, I MEAN, YOU'RE ... YOU'RE VERY SOLID
- 14 ON IT, AREN'T YOU?
- 15 A: YEAH BECAUSE I REMEMBER WHAT WENT ON THAT DAY. I
- 16 KNOW ...
- 17 Q: TO THE POINT THAT YOU DON'T CONSIDER THIS TO BE PART
- 18 OF YOUR FACE, DO YOU?
- 19 A: YEAH, IT'S PART OF THE FACE BUT ...
- 20 Q: IF YOU WOULD DESCRIBE FOR ME THE PISTOL THAT YOU SAW
- 21 THAT DAY.
- 22 A: IT HAD A IVORY HANDLE.
- 23 Q: WAS IT A REVOLVER OR A AUTOMATIC?
- 24 A: I COULDN'T TELL YOU. I MEAN, WHEN HE DRAW IT AND
- 25 THEN HE WENT BACK TO TALKING AND HOLLERING AND

1 STUFF. THAT'S WHEN EVERYTHING ASHLEY WALKED IN THE
2 STORE AND THAT'S WHEN HE WAS HOLLERING AT HER WHEN
3 SHE WALKED IN. I WAS CONCENTRATING ON HER WHEN SHE
4 WALKED IN.

5 Q: YOU WERE CONCENTRATING ON ASHLEY.

6 A: UH-HUH (AFFIRMATIVE RESPONSE). AND HE TOLD HER TO
7 GET TO THE BACK AND THEN HE TOLD US TO GET TO THE
8 BACK SO ...

9 Q: DO YOU ... DO YOU ... AND MAYBE IT'S AN UNFAIR
10 QUESTION, DO YOU KNOW THE DIFFERENCE BETWEEN A
11 REVOLVER AND AN AUTOMATIC?

12 A: I DON'T KNOW TOO MUCH ABOUT GUNS. I MEAN, I HAVEN'T
13 EVER HAD TOO MANY.

14 Q: DID IT HAVE A LITTLE ... A THING ON THE BACK YOU
15 PULL BACK AND A ROUND THING IN IT OR WAS IT ...

16 A: OH, I CAN'T ... I CAN'T SAY.

17 Q: YOU DON'T REMEMBER?

18 A: I KNOW I SAW A PISTOL. BUT I CAN'T REMEMBER JUST
19 FROM CONSTANTLY LOOKING AT IT ...

20 Q: OKAY. NOW, THIS DIAGRAM OF THE STORE THAT MR. FATA
21 HAS GONE OVER WITH YOU, IT'S GOT THE REGISTERS ...
22 LET ME TURN IT, YOU DON'T HAVE TO COME DOWN. BUT
23 CAN YOU KIND OF SEE IT FROM WHERE YOU ARE THERE?

24 A: UH-HUH (AFFIRMATIVE RESPONSE).

25 Q: OKAY. I JUST WANT TO GO OVER SOME BASIC THINGS

1 ABOUT IT. IT'S GOT THE REGISTERS HERE AND THEN IT'S
2 GOT TWO AISLES AND THEN IT'S GOT YOUR OFFICE.

3 A: UH-HUH (AFFIRMATIVE RESPONSE).

4 Q: THERE'S MORE THAN TWO AISLES BETWEEN YOUR OFFICE AND
5 THE REGISTERS, I MEAN ...

6 A: CORRECT.

7 Q: I KNOW THAT HE DREW THIS PROBABLY FOR JUST FOR HIS
8 ILLUSTRATION PURPOSES BUT WHAT ALL ... THERE'S A ...
9 WHAT ALL IS BETWEEN YOUR OFFICE AND THESE REGISTERS
10 UP HERE? I MEAN IT'S MORE THAN ... WHAT ELSE IS IN
11 THERE?

12 A: YOU GOT THE CANDLE AISLE, YOU GOT THE SHOE AISLE AND
13 YOU GOT THE CLOTHES RACKS.

14 Q: HOW MANY CLOTHES RACKS ARE THERE?

15 A: OH, WE GOT 12 OR 13 ... 16 MAX.

16 Q: OKAY. SO IN ADDITION TO THESE TWO THINGS DRAWN HERE
17 THERE WERE 16 CLOTHES RACKS AND THREE AISLES OF
18 OTHER THINGS THAT YOU JUST MENTIONED THAT ARE REALLY
19 BETWEEN THERE, IS THAT RIGHT?

20 A: YEAH.

21 Q: NOW, YOU SAID THE FIRST TIME YOU HAD AN OCCASION TO
22 SEE THE MAN IN THE STORE YOU WERE SITTING IN YOUR
23 OFFICE, IS THAT RIGHT?

24 A: YES.

25 Q: AND IS WHAT DREW YOUR ATTENTION TO HIM WHEN HE ASKED

1 YOU A SILLY QUESTION ABOUT THESE PLASTIC TUBS?

2 A: YES, SIR, HE WAS ... NO, WHAT REALLY BROUGHT MY

3 ATTENTION TO HIM HE WAS STARING AT ME, CONSTANTLY

4 WALKING ... STANDING AROUND THAT SAME SPACE JUST

5 LOOKING BACK AT ME THERE IN THE OFFICE.

6 Q: UH-HUH (AFFIRMATIVE RESPONSE).

7 A: REMAINING IN THE SAME SPACE.

8 Q: DID YOU ASK HIM CAN I HELP YOU OR ...

9 A: THEN THAT'S WHEN HE ASKED ABOUT THE TOTES.

10 Q: OKAY. THE TUBS ...

11 A: IT'S ACTUALLY TOTES, THEY CALL THEM TOTES.

12 Q: OH, TOTES, I'M SORRY. I'M SORRY. DID HE HOLD THEM

13 UP AND ASK WHICH ONE'S BIGGER?

14 A: UH-HUH (AFFIRMATIVE RESPONSE). HE HOLD IT ... LIFT

15 IT UP.

16 Q: AND HE ... AND ... AND IT WAS A SILLY QUESTION

17 BECAUSE ONE OF THEM WAS OBVIOUSLY LARGER THAN THE

18 OTHER ONE.

19 A: YEAH. UH-HUH (AFFIRMATIVE RESPONSE)..

20 Q: OKAY. SO HE TOUCHED THOSE PLASTIC TOTES?

21 A: YES, HE DID.

22 Q: OKAY. DID YOU TELL INVESTIGATOR MILLER THAT?

23 A: YEAH.

24 Q: OKAY.

25 A: I TOLD HIM HE WAS OVER BY THE TOTES.

1 Q: ALL RIGHT. DID YOU SEE ANY OTHER CUSTOMERS TOUCH
2 THE PLASTIC TUBS THAT MORNING? ... TOTES THAT
3 MORNING?

4 A: NO.

5 Q: DID YOU ALL CONTINUE TO DO BUSINESS ... I MEAN RIGHT
6 AFTER THIS HAPPENED YOU ALL DIDN'T CONTINUE TO CHECK
7 PEOPLE OUT AT THE REGISTER, DID YOU?

8 A: NO.

9 Q: I MEAN I CAN UNDERSTAND YOU'D WANT TO TAKE A BREAK.
10 HOW LONG DID YOU ALL CLOSE THE STORE THAT MORNING?

11 A: ABOUT 30 MINUTES.

12 Q: OKAY. SO NOBODY ELSE CAME IN AND OUT THE STORE
13 BETWEEN THE TIME OF THE ROBBERY AND WHEN THE POLICE
14 ENDED UP BEING THERE?

15 A: NO.

16 Q: OKAY.

17 A: WE JUST CLOSED DOWN FOR A LITTLE WHILE.

18 Q: NOW, WHEN I TALKED TO YOU ON MONDAY DID YOU ...

19 THERE WERE SOME OTHER CUSTOMERS IN THE STORE ...

20 A: UH-HUH (AFFIRMATIVE RESPONSE).

21 Q: ... WEREN'T THERE? WERE THEY REGULAR CUSTOMERS?

22 A: YEAH.

23 Q: OR PEOPLE YOU KNEW?

24 A: YEAH.

25 Q: WHAT WERE THEIR NAMES?

1 A: I CAN'T NAME THEM.

2 Q: SO TODAY YOU CAN'T REMEMBER THE NAMES OF PEOPLE YOU
3 KNOW WHO WERE IN THE STORE THAT DAY?

4 A: I KNOW THE LITTLE GIRL THAT PLAYS ... SOME OF THEM
5 THAT PLAYS ON THE BASKETBALL TEAM WERE.

6 Q: OKAY. YOU NEVER KNEW THIS MAN OR THE MAN THAT CAME
7 IN THE STORE BEFORE THIS HAPPENED.

8 A: NO.

9 Q: DON'T KNOW HIM ... I MEAN IT WASN'T SOMEBODY YOU'D
10 SEEN IN THE COMMUNITY SEEN AT THE GROCERY STORE
11 OR FOOTBALL FIELD OR ANYTHING ELSE BEFORE, WAS IT?

12 A: NO, NOT ...

13 Q: OKAY. YOU'VE NEVER SEEN MR. MCCLAIN ... YOU SAY YOU
14 SAW HIM ON THAT DAY BUT BETWEEN THEN AND NOW, HAVE
15 YOU?

16 A: NO.

17 Q: OKAY. BUT YOU'RE CERTAIN THAT HE'S THE MAN THAT
18 ROBBED YOUR STORE?

19 A: I'M POSITIVE.

20 Q: OKAY. FOUR MONTHS LATER.

21 A: YES.

22 Q: OKAY. BUT WE DON'T REMEMBER THE NAMES OF THE
23 REGULAR CUSTOMERS THAT WERE IN THE STORE THAT DAY.

24 A: I CAN'T REMEMBER THE NAME OF EVERY CUSTOMER THAT
25 COMES THROUGH THAT STORE.

1 MR. WHEELER: THANK YOU, MS. RUTH.

2 THE COURT: REDIRECT?

3 MR. FATA: YES, SIR, JUST ONE QUESTION.

4 MS. B. RUTH - REDIRECT EXAMINATION BY MR. FATA:

5 Q: MS. RUTH, DO YOU RECOGNIZE THOSE CUSTOMERS THAT COME
6 IN YOUR STORE?

7 A: YEAH.

8 Q: IF THEY WERE TO COME IN HERE WOULD YOU BE ABLE TO
9 IDENTIFY THEM?

10 A: YEAH.

11 MR. FATA: THAT'S ALL I HAVE, YOUR HONOR.

12 THE COURT: ANYTHING FURTHER?

13 MR. WHEELER: NO, SIR, YOUR HONOR.

14 THE COURT: ALL RIGHT. THANK YOU, MA'AM, YOU
15 MAY STEP DOWN. CALL YOUR NEXT WITNESS, MR. FATA.

16 MR. FATA: YES, SIR, YOUR HONOR, THANK YOU. WE
17 WOULD CALL ASHLEY RUTH.

18 THE COURT: ALL RIGHT, MS. RUTH, COME AROUND,
19 PLEASE.

20 BAILIFF: PLACE YOUR LEFT HAND ON THE BIBLE AND
21 RAISE YOUR RIGHT HAND. THE EVIDENCE YOU SHALL GIVE SHALL
22 BE THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH
23 SO HELP YOU GOD?

24 MS. A. RUTH: YES.

25 MS. A. RUTH - DIRECT EXAMINATION BY MR. FATA:

HEARING

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- 1 Q: ASHLEY, YOU LIVE HERE IN LEE COUNTY?
- 2 A: YES, SIR.
- 3 Q: AND I BELIEVE BETTY RUTH IS YOUR MOTHER.
- 4 A: YES, SIR.
- 5 Q: NOW, YOU'RE GOING TO HAVE TO SPEAK UP.
- 6 A: YES, SIR.
- 7 Q: YOU DON'T HAVE TO --- IF I CAN HEAR YOU EVERYBODY
- 8 ELSE SHOULD BE ABLE TO HEAR YOU. OKAY? WERE YOU IN
- 9 THE FAMILY DOLLAR STORE ON JULY 22ND ...
- 10 A: YES, SIR.
- 11 Q: ... 2004? YOU WERE?
- 12 A: YES, SIR.
- 13 Q: WHERE WERE YOU?
- 14 A: AT FIRST I WAS IN THE STOCKROOM.
- 15 Q: ALL RIGHT. MAY SHE COME DOWN, YOUR HONOR?
- 16 THE COURT: YES, SIR.
- 17 Q: AT FIRST YOU WERE IN THE STOCKROOM?
- 18 A: YES.
- 19 Q: AND WHERE IS THAT LOCATED?
- 20 A: RIGHT HERE.
- 21 Q: RIGHT HERE AT THE DOUBLE DOORS?
- 22 A: YES, SIR.
- 23 Q: AND YOU WERE ... WHAT WERE YOU DOING BACK THERE?
- 24 A: I WAS BACK THERE TALKING TO TREVOR MCDUFFIE ABOUT
- 25 THE CAMP, BASKETBALL CAMP I JUST RECENTLY WENT TO.

HEARING

1 Q: ALL RIGHT. NOW, DID YOU WHILE YOU WERE BACK HERE
2 DID YOU NOTICE ANYTHING?

3 A: YEAH. THE GUY RIGHT THERE WAS STARING AT ME SO I
4 WAS WONDERING WHY ... HE WAS LIFTING UP THESE PAPER
5 TOWELS ACTING LIKE HE WAS LOOKING AT THEM WHEN HE
6 WAS STARING AT ME IN THE BACK, LOOKING AT ME AND
7 TREVOR IN THE STOCKROOM.

8 Q: OKAY. WHAT HAPPENED NEXT?

9 A: AND THEN HE JUST KEPT STARING AND SO I ASKED TREVOR
10 WHY IS THE GUY STARING. AND I GUESS WHEN HE NOTICE
11 US LOOKING AT HIM HE JUST LIKE WALK OFF TOWARDS THE
12 FRONT.

13 Q: DID ... DID YOU SEE HIM AGAIN?

14 A: YEAH.

15 Q: WHERE DID YOU SEE HIM?

16 A: WELL, WHEN I ...

17 Q: WHAT DID YOU DO ... AFTER HE WALKED OFF WHAT DID YOU
18 DO?

19 A: I WAS IN THE STOCKROOM TALKING TO TREVOR ...

20 Q: UH-HUH (AFFIRMATIVE RESPONSE).

21 A: ... AND I TOLD HIM I WAS LIKE ABOUT TO GO BACK TO
22 THE LAUNDROMAT WITH MY GRANDMOTHER.

23 Q: AND WHERE'S THE LAUNDROMAT?

24 A: YOU HAVE TO GO OUT THE DOOR AND TO THE ...

25 Q: DOWN AT THE OTHER END?

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- 1 A: YES, SIR.
- 2 Q: OKAY. AND CHECK ON YOUR GRANDMOTHER?
- 3 A: YEAH AND MY AUNT. THEY WAS IN THE LAUNDROMAT.
- 4 Q: DID YOU COME BACK INTO THE STORE?
- 5 A: YEAH.
- 6 Q: WHAT DID YOU NOTICE WHEN YOU CAME IN THE STORE?
- 7 A: WELL, WHEN I CAME IN THE STORE HE WAS ...
- 8 Q: HE WHO?
- 9 A: THE MAN RIGHT THERE.
- 10 Q: THE DEFENDANT?
- 11 A: YEAH.
- 12 Q: WAS WHERE?
- 13 A: HE WAS OVER THERE WITH SHIRLEY AND MY MOTHER ...
- 14 Q: POINT IT OUT ... POINT OUT WHERE HE WAS.
- 15 A: AT THE REGISTER. POINTING A GUN.
- 16 Q: YOUR MOTHER WAS HERE?
- 17 A: RIGHT.
- 18 Q: AND WHERE WAS SHIRLEY?
- 19 A: AT THE REGISTER. MY MOTHER ... SHIRLEY WAS RIGHT
- 20 HERE AND MY MOTHER WAS RIGHT THERE.
- 21 Q: AND WHERE WAS THE MAN?
- 22 A: RIGHT HERE.
- 23 Q: RIGHT HERE. AND WHAT WAS HE DOING?
- 24 A: HOLDING A GUN TOWARDS THEIR FACE.
- 25 Q: ALL RIGHT. DID HE SAY ANYTHING TO YOU?

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1 A: YEAH, HE TOLD ME TO GET TO THE BACK.

2 Q: DID HE TURN ... DID HE LOOK AT YOU?

3 A: YEAH.

4 Q: DID YOU LOOK AT HIM? WHAT DID HE DO WITH THE GUN?

5 A: POINTED IT AT ME AND TOLD ME TO GET TO THE BACK.

6 Q: AND WHAT DID YOU DO?

7 A: I RAN TO THE BACK AND CALLED THE POLICE.

8 Q: ALL RIGHT. HAVE A SEAT. WHERE DID YOU CALL THE
9 POLICE FROM?

10 THE COURT: WAIT JUST A ... WAIT UNTIL SHE GETS
11 BACK ON THE STAND. GO AHEAD.

12 A: FROM THE TELEPHONE IN THE STOCKROOM.

13 Q: AND YOU DIALED WHAT, 911?

14 A: YES, SIR.

15 Q: ALL RIGHT. NOW, THE PERSON THAT YOU SAW ON THAT
16 DAY, THE PERSON THAT YOU OBSERVED IN THE STOCKROOM,
17 AND THE PERSON THAT YOU OBSERVED HOLDING THE GUN ON
18 YOUR MOTHER AND HOLDING THE GUN ON YOU, DO YOU SEE
19 HIM?

20 A: SITTING RIGHT ACROSS FROM ME.

21 Q: YOU SEE HIM TODAY?

22 A: YEAH.

23 Q: WHERE IS HE?

24 A: SITTING ACROSS FROM ME.

25 Q: WHAT IS HE WEARING?

1 A: LIKE A GREEN SUIT, SHIRT AND TIE.

2 Q: HE'S SITTING AT THE DEFENSE TABLE?

3 A: YEAH.

4 MR. FATA: YOUR HONOR, LET THE RECORD REFLECT
5 THAT SHE HAS IDENTIFIED THE DEFENDANT.

6 THE COURT: THE RECORD WILL SO REFLECT.

7 Q: NOW, IN THE PROCESS OF THE INVESTIGATION DID THE
8 ... DID THE POLICE SHOW YOU SOME PHOTO LINEUPS?

9 A: YES, SIR.

10 Q: NOW, DID ... I'M GONNA SHOW YOU STATE'S EXHIBITS
11 FOUR AND FIVE. DID YOU SEE THOSE TWO LINEUPS?

12 A: YES, SIR.

13 Q: NOW, WERE YOU ABLE TO PICK ANYONE OUT IN THOSE TWO?

14 A: NO, SIR.

15 Q: IS THE DEFENDANT'S PHOTOGRAPH IN THOSE TWO?

16 A: NO, SIR.

17 Q: ALL RIGHT. NOW, I'M GONNA SHOW YOU STATE'S EXHIBIT
18 NUMBER THREE. AND IS THAT ... THAT'S A LINEUP ALSO.
19 WERE YOU SHOWN THAT LINEUP?

20 A: YES, SIR.

21 Q: AND WERE YOU ABLE TO PICK ANYONE OUT?

22 A: YES, SIR.

23 Q: WHO WERE YOU ... WHO DID YOU PICK OUT?

24 A: NUMBER TWO.

25 Q: AND NUMBER TWO IS WHO?

1 A: IT WAS THE DEFENDANT ...

2 Q: SPEAK UP.

3 A: THE DEFENDANT.

4 Q: THE DEFENDANT. NOW, WHEN YOU VIEWED THOSE LINEUPS,
5 WHAT WAS THE PROCEDURE USED BY THE POLICE
6 DEPARTMENT?

7 A: HE PULLED OVER TO ... WELL, NOW, MY MOM CALLED TO
8 CITI TRENDS WHERE I GO WITH MY AUNT AND HE TOLD ME
9 ... WHEN I WENT HE TOOK ME OVER RIGHT IN THERE AND
10 TOLD ME TO READ THE DIRECTIONS AND MARK OFF WHO I
11 SAW.

12 Q: READ THE DIRECTIONS ON THOSE OTHER TWO FORMS.
13 EXHIBIT ONE AND TWO ... READ THE DIRECTIONS?

14 A: YES, SIR.

15 Q: WHAT DID THE DIRECTIONS TELL YOU TO DO?

16 A: TO PUT AN X ON WHICH ONE I PICK OUT THE LINEUP THE
17 PHOTOGRAPH ...

18 Q: UH-HUH (AFFIRMATIVE RESPONSE). AND ON THE FIRST TWO
19 LINEUPS YOU ... YOU ... YOU VIEWED DID YOU PICK
20 ANYONE OUT?

21 A: NO, SIR.

22 Q: BUT ON THE THIRD ONE YOU PICKED OUT ...

23 A: YES, SIR.

24 Q: ... NUMBER TWO?

25 A: YES, SIR.

1 Q: AND THAT WAS THE DEFENDANT?

2 A: YES, SIR.

3 Q: NOW, DID ANYBODY INFLUENCE YOU TO PICK OUT NUMBER

4 TWO?

5 A: NO, SIR.

6 Q: WAS ANYBODY WITH YOU OTHER THAN THE POLICE OFFICER

7 WHEN YOU VIEWED THOSE LINEUPS?

8 A: NO, SIR.

9 Q: WAS YOUR MOTHER AROUND?

10 A: NO, SIR.

11 Q: NEAR YOU? WAS ... WAS SHIRLEY CLYBURN WITH YOUR OR

12 WAS TREVOR ...

13 A: NO, SIR.

14 Q: ... MCDUFFIE? YOU ... JUST YOU AND THE POLICE

15 OFFICER? NOW, DID YOU HAVE AMPLE OPPORTUNITY TO

16 VIEW THE DEFENDANT? IN OTHER WORDS, ON THIS DAY, ON

17 THE DATE OF ... ON JULY 22ND, THE DAY OF THE ROBBERY

18 DID YOU HAVE A GOOD OPPORTUNITY TO VIEW HIM?

19 A: YES, SIR.

20 Q: AND WHAT CALLED YOUR ATTENTION TO HIM?

21 A: HE POINTED ... WELL, HE THE GUN OUT WHEN I WALK IN

22 THE STORE POINT AT MY MOTHER.

23 Q: ALL RIGHT.

24 A: THEN HE POINT AT ME.

25 Q: AND THEN BEFORE THEN?

1 A: AND THEN WHEN I WAS IN THE STOCKROOM HE WAS STARING.

2 Q: ALL RIGHT. WHEN HE POINTED THE GUN AT YOU ... I'M
3 GONNA GET UP CLOSE ... WHEN HE POINTED THE GUN ...
4 I'M GONNA BACK UP. STOP ME WHEN ... WHEN HE WAS ...
5 THE DISTANCE BETWEEN YOU AND HIM WHEN HE PULLED THE
6 GUN ON YOU.

7 A: LIKE RIGHT THERE.

8 Q: RIGHT THERE. AND WHAT DID HE DO WITH THE GUN?

9 A: POINT TOWARDS ME AND TOLD ME TO GET TO THE BACK.

10 Q: AND DID YOU LOOK DIRECTLY AT HIM?

11 A: YES, SIR.

12 Q: ALL RIGHT. AND WHEN YOU WERE IN THE STOCKROOM BACK
13 HERE, YOU AND TREVOR, DID YOU LOOK AT HIM?

14 A: YES, SIR.

15 Q: AND WHAT CALLED YOUR ATTENTION TO HIM IN THE
16 STOCKROOM?

17 A: HOW HE WAS STARING.

18 Q: WAS IT UNUSUAL FOR HIM TO STARE ... WAS IT AN
19 UNUSUAL STARE?

20 A: YES, SIR.

21 Q: WHY WAS IT ... WHAT WAS UNUSUAL ABOUT IT?

22 A: BECAUSE HOW HE WAS MESSING WITH PAPER TOWELS. MY MOM
23 AND MY AUNT, I USED TO HELP MY MOM LOOK FOR
24 SHOPLIFTERS.

25 Q: HE WAS ACTING LIKE A SHOPLIFTER?

1 A: YEAH.

2 Q: IS THERE ANY DOUBT IN YOUR MIND THAT IT WAS THE
3 DEFENDANT THAT ROBBED YOUR MOTHER OR ROBBED THE
4 FAMILY DOLLAR STORE ON JULY 22ND, 2004?

5 A: NO, SIR.

6 MR. FATA: ANSWER ANY QUESTIONS MR. WHEELER MAY
7 HAVE.

8 THE COURT: CROSS EXAMINATION, MR. WHEELER?

9 MR. WHEELER: THANK YOU, YOUR HONOR, MAY IT
10 PLEASE THE COURT.

11 THE COURT: YES, SIR.

12 MS. A. RUTH - CROSS EXAMINATION BY MR. WHEELER:

13 Q: GOOD MORNING, MS. RUTH, HOW YOU DOING? HOW OLD ARE
14 YOU?

15 A: 17.

16 Q: OKAY. HOW OLD WERE YOU ... WELL, WERE YOU 17 OR 16,
17 HAVE YOU HAD A BIRTHDAY SINCE THEN?

18 A: 17.

19 Q: OKAY. NOW, ON THE 22ND OF JULY WERE YOU AN EMPLOYEE
20 AT THE FAMILY DOLLAR? WERE YOU WORKING THERE?

21 A: NO, SIR.

22 Q: YOU WERE JUST I MEAN, YOUR MOM WAS THE MANAGER,
23 YOU WERE THERE ...

24 A: YES, SIR.

25 Q: ... KIND OF VISITING OR WHATEVER?

- 1 A: I CAME NEXT DOOR BECAUSE MY GRANDMOTHER AND AUNT WAS
2 WASHING CLOTHES NEXT DOOR AT THE LAUNDROMAT.
3 Q: SO YOU HAD ACTUALLY COME TO THE SHOPPING CENTER UP
4 THERE WITH YOUR GRANDMA AND YOUR AUNT?
5 A: YES, SIR.
6 Q: OKAY. AND SO MAKE SURE I UNDERSTAND. YOU CAME IN
7 THE STORE ONE TIME AND YOU AND TREVOR WERE IN ... IN
8 THE BACK IN THE STOCKROOM.
9 A: YES, SIR.
10 Q: WAS TREVOR WORKING?
11 A: YEAH.
12 Q: AND YOU WERE NOT AN EMPLOYEE, YOU WERE JUST KIND OF
13 TALKING WITH TREVOR HANGING OUT?
14 A: YEAH.
15 Q: OKAY. NOW, YOU SAID THAT YOU NOTICED THE MAN.
16 STARING AT YOU WHILE YOU WERE BACK IN THE STOCKROOM.
17 THAT'S RIGHT HERE?
18 A: YES, SIR.
19 Q: OKAY. IS THAT A ... ARE THERE TWO DOORS TO THE
20 STOCKROOM, IT'S A DOUBLE DOOR?
21 A: DOUBLE.
22 Q: OKAY. ARE THEY THE SWINGING KIND OF DOORS?
23 A: YES, SIR.
24 Q: OKAY. DID ... DID TREVOR HAVE BOTH OF THEM PINNED
25 OPEN OR SOMETHING?

1 A: I THINK ONE WAS PINNED.

2 Q: OKAY. SO ONE WAS OPEN AND ONE WAS CLOSED.

3 A: UH-HUH (AFFIRMATIVE RESPONSE).

4 Q: OKAY. NOW, WERE YOU JUST LIKE IF THE DOOR'S HERE

5 WERE YOU JUST SITTING IN A CHAIR RIGHT IN FRONT OF

6 THE DOOR?

7 A: I WAS STANDING UP.

8 Q: OVER TO THE SIDE?

9 A: YES, SIR.

10 Q: OKAY. WERE YOU ACTUALLY STANDING IN THE DOORWAY OR

11 WERE YOU BACK BEHIND THE DOORWAY OFF TO THE SIDE?

12 A: LIKE RIGHT THERE IN FRONT OF THE DOORWAY.

13 Q: LIKE IF THIS IS THE DOORWAY YOU WERE ... WERE YOU

14 LEANING UP AGAINST ... UP AGAINST THE WALL BESIDE IT

15 OR SOMETHING?

16 A: NO.

17 Q: JUST STANDING THERE BESIDE THE DOORWAY? OKAY. HOW

18 LONG HAD YOU BEEN THERE WITH TREVOR WHEN YOU NOTICED

19 THIS BOY?

20 A: I'M NOT ACTUALLY SURE. HOW LONG I BEEN THERE?

21 Q: WITH TREVOR, BEFORE ANYTHING HAPPENED NOW, JUST WHEN

22 YOU ALL ARE SITTING BACK THERE TALKING, HOW LONG HAD

23 YOU BEEN THERE?

24 A: PROBABLY ABOUT FIVE MINUTES.

25 Q: OKAY. AND YOU NOTICED THIS FELLOW LOOKING AT YOU.

- 1 A: YEAH.
- 2 Q: OKAY. AND HE WAS LOOKING AT PAPER TOWELS, YOU SAID?
- 3 A: YES, SIR.
- 4 Q: OKAY. NOW, THESE ARE LIKE BRAWNY PAPER TOWELS, THE
- 5 KIND YOU USE IN THE KITCHEN?
- 6 A: YES, SIR.
- 7 Q: OKAY. NOT ... NOT CLOTH RAGS BUT PAPER TOWELS.
- 8 A: EXACTLY.
- 9 Q: OKAY. AND WAS HE PICKING THEM UP AN COMPARING THEM
- 10 AND LOOKING AT THEM OR SOMETHING?
- 11 A: HE WAS JUST LOOKING AT THEM.
- 12 Q: OKAY. SO YOU DON'T RECALL IF HE TOUCHED THEM OR
- 13 NOT?
- 14 A: YEAH, HE TOUCHED THEM.
- 15 Q: OKAY. HE DID TOUCH THEM.
- 16 A: BUT HE DIDN'T PICK THEM UP.
- 17 Q: OKAY. THEY'RE ... THEY'RE WRAPPED IN PLASTIC THERE
- 18 IN THE STORE ...
- 19 A: YEAH.
- 20 Q: ... AREN'T THEY, THAT KIND OF SARAN WRAP TYPE OF
- 21 STUFF?
- 22 A: YES, SIR.
- 23 Q: OKAY. DID YOU TELL THE POLICE THAT?
- 24 A: YEAH.
- 25 Q: OKAY. NOW, AFTER THAT YOU WENT TO THE LAUNDROMAT

1 AGAIN.

2 A: YES, SIR.

3 Q: IS THAT RIGHT? DID YOU GO THROUGH THE BACK OF THE
4 STORE OR DID YOU COME TO THE FRONT OF THE STORE?

5 A: I WENT TO THE FRONT OF THE STORE.

6 Q: OKAY. HOW LONG DID YOU STAY OVER AT THE LAUNDROMAT?

7 A: FOR ABOUT TEN, 15 MINUTES.

8 Q: OKAY. AND YOU CAME BACK TO THE STORE? NOW, YOU HAD

9 NO REASON TO KNOW THAT ANYTHING WAS WRONG BEFORE YOU

10 WALKED IN THE FRONT DOOR OF THE STORE, RIGHT? AND

11 ...

12 THE COURT: YOU HAVE TO ANSWER OUT. GIVE A

13 VERBAL ANSWER, PLEASE.

14 A: YES, SIR.

15 Q: OKAY. AND IF ... MAKE SURE I UNDERSTAND SOMETHING.

16 IF THIS IS THE FAMILY DOLLAR THE LAUNDROMAT'S OVER

17 HERE, ISN'T IT?

18 A: YES, SIR.

19 Q: IF YOU'RE LOOKING AT IT FROM MAIN STREET OUT HERE?

20 A: YES, SIR.

21 Q: AND YOU CAME AND YOU CAME IN THIS DOOR AT THE ...

22 ACCORDING TO MR. FATA'S DRAWING WHICH I'LL ASSUME IS

23 RIGHT THIS IS THE IN DOOR OR IS THIS THE IN DOOR?

24 A: THAT'S THE IN DOOR THERE ON THE RIGHT.

25 Q: THIS ONE HERE?

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1 A: THAT'S WHERE I WENT IN.

2 Q: OKAY, THIS IS THE IN DOOR? ALL RIGHT. SO YOU COME
3 IN AND WHAT WAS THE FIRST THING THAT YOU NOTICED
4 WHEN YOU GOT IN?

5 A: WELL, I WAS COMING IN ANYWAY TO ASK MY MOTHER
6 SOMETHING SO WHEN I SAW HER AT THE FRONT I SAW THE
7 MAN POINTING A GUN AT HER.

8 Q: OKAY.

9 A: I KIND OF HESITATED.

10 Q: DID YOU LOOK AT YOUR MOM?

11 A: YEAH.

12 Q: DID SHE TRY AND MOUTH ANY WORDS TO YOU OR EXPRESS
13 ANYTHING TO YOU?

14 A: LIKE HER FACE EXPRESSION. SO THEN WHEN HE POINT THE
15 GUN AT ME AND TOLD ME TO GET TO THE BACK.

16 Q: OKAY. DID YOU RUN TO THE BACK OR DID YOU WALK?

17 A: I RAN. HE WAS POINTING AT ME WITH A GUN.

18 Q: I KNOW. THAT'S WHAT I WOULD DO. DID YOU LOOK BACK?

19 A: I LOOKED BACK ONCE I GOT DOWN THE AISLE I CUT MY
20 EYES BUT I JUST KEPT GOING TO TRY TO CALL THE
21 POLICE.

22 Q: OKAY.

23 A: BUT I TOLD TREVOR WHEN I GOT IN THE STOCKROOM THAT
24 SOMEBODY WAS ROBBING THE STORE.

25 Q: OKAY.

- 1 A: THEN I CALLED THE POLICE.
- 2 Q: OKAY. SO YOU RAN BACK IN AND KIND OF BEARED TO THE
- 3 LEFT AND RAN BACK INTO THE STOCKROOM.
- 4 A: YES, SIR.
- 5 Q: IS THERE A PHONE IN THE STOCKROOM?
- 6 A: YES, SIR.
- 7 Q: IS THAT THE ONE YOU USED TO CALL THE POLICE?
- 8 A: YES, SIR.
- 9 Q: OKAY. DID THE MAN THAT YOU SAW HAVE FACIAL HAIR?
- 10 A: LIKE A LITTLE MUSTACHE.
- 11 Q: OKAY. DO YOU KNOW ANY REASON THAT THE POLICE WOULD
- 12 PUT NO FACIAL HAIR BASED ON THEIR INITIAL INTERVIEW?
- 13 A: NO, SIR.
- 14 Q: OKAY. NOW, ON THE DAY THAT YOU VIEWED THAT THIRD
- 15 LINEUP WHICH I THINK WAS JULY THE 29TH, YOU ...
- 16 WHERE WERE YOU BEFORE THAT?
- 17 A: HELPING MY AUNT OUT AT CITI TRENDS.
- 18 Q: OKAY. NOW, CITI TRENDS IS DOWN ON ... DOWNTOWN ON
- 19 MAIN STREET, ISN'T IT?
- 20 A: YES, SIR.
- 21 Q: OKAY. DID YOU GET A CALL FROM YOUR MOTHER?
- 22 A: YES, SIR.
- 23 Q: OKAY. AND WHAT DID SHE TELL YOU? THE POLICE ARE
- 24 THERE AND THEY WANT YOU TO LOOK AT ...
- 25 A: SHE TOLD ME THE POLICE WAS THERE AND HE WANTED ME TO

1 DO A PHOTO LINEUP.

2 Q: OKAY. DID SHE SAY ANYTHING ELSE TO YOU OTHER THAN

3 COME ON DOWN?

4 A: THAT'S IT.

5 Q: DID YOU RIGHT THEN GO ON DOWN TO FAMILY DOLLAR?

6 A: YES, SIR.

7 Q: OKAY. NOW, BY THE TIME YOU GOT THERE HAD YOUR

8 MOTHER ALREADY VIEWED THE LINEUP?

9 A: I SURE ... WHEN I WALK IN THE STORE EVERYONE WAS

10 INSIDE.

11 Q: OKAY.

12 A: SO I ...

13 Q: WHICH SIDE DID YOU GO TO?

14 A: THE RIGHT.

15 Q: OVER HERE?

16 A: YES, SIR.

17 Q: WHERE WAS YOUR MOM?

18 A: ON THE LEFT.

19 Q: WAS SHE RIGHT HERE AT THE REGISTER?

20 A: SHE WAS OVER THIS WAY, OVER THERE BY THE OTHER

21 REGISTER.

22 Q: BY THIS ONE?

23 A: YES, SIR.

24 Q: OKAY. WERE YOU ALL REAL BUSY AT THE TIME THAT HE

25 HAD COME BY TO DO THE LINEUPS OR DID YOU KIND OF

1 WAIT FOR WHEN THINGS SLOWED DOWN IN THE STORE A
2 LITTLE BIT?
3 A: OH, I'M NOT SURE. I WASN'T PAYING NO ATTENTION.
4 Q: OKAY. THE PERSON WHO ROBBED THE STORE YOU'VE NEVER
5 SEEN BEFORE.
6 A: NO, SIR.
7 Q: OKAY. YOU DON'T KNOW MR. MCCLAIN FROM ANYWHERE
8 ELSE, YOU'D NEVER SEEN HIM BEFORE.
9 A: NO, SIR.
10 Q: AND I ... I KNOW I'M ASKING THE SAME PEOPLE THE SAME
11 QUESTIONS. NEVER SEEN HIM AT THE GROCERY STORE OR
12 THE BALL GAME, ANYWHERE LIKE THAT?
13 A: NO, SIR.
14 Q: OKAY. STRANGER TO YOU.
15 A: YES, SIR.
16 Q: ALL RIGHT. DID YOU SEE THE PISTOL? CAN YOU
17 DESCRIBE THE PISTOL?
18 A: IT WAS LIKE A PEARL HANDLED ONE.
19 Q: WAS IT A REVOLVER ... DO YOU ... FIRST LET ME ASK
20 YOU THIS, DO YOU KNOW THE DIFFERENCE BETWEEN A
21 REVOLVER AND AN AUTOMATIC?
22 A: I WASN'T PAYING ATTENTION.
23 Q: OKAY. CAN YOU SAY WHETHER IT WAS A REVOLVER OR AN
24 AUTOMATIC?
25 A: NO.

1 Q: BUT IT WAS ... BUT HE POINTED IT AT YOU?

2 A: YES.

3 Q: AND YOU WERE STANDING ...

4 A: ABOUT RIGHT THERE.

5 Q: ... YOU THINK ABOUT RIGHT HERE?

6 MR. WHEELER: THANK YOU, ASHLEY.

7 THE COURT: REDIRECT?

8 MR. FATA: NONE, YOUR HONOR. WE CALL ... ARE
9 YOU READY FOR ANOTHER WITNESS.

10 THE COURT: THANK YOU. YOU MAY STEP DOWN. ALL
11 RIGHT. YES, GO AHEAD AND CALL YOUR NEXT WITNESS.

12 MR. FATA: SHIRLEY CLYBURN.

13 THE COURT: ALL RIGHT. COME AROUND, PLEASE.

14 BAILIFF: PLACE YOUR LEFT HAND ON THE BIBLE AND
15 RAISE YOUR RIGHT HAND. THE EVIDENCE YOU SHALL GIVE THIS
16 COURT SHALL BE THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT
17 THE TRUTH SO HELP YOU GOD?

18 MS. CLYBURN: I DO.

19 MS. CLYBURN -- DIRECT EXAMINATION BY MR. FATA:

20 Q: SHIRLEY, YOU STILL WORKING AT FAMILY DOLLAR STORE?

21 A: YES, SIR.

22 Q: AND WHAT IS YOUR JOB THERE?

23 A: CASHIER.

24 Q: ON JULY THE 22ND, 2004, IN THE MORNING HOURS WERE
25 YOU WORKING AT THE FAMILY DOLLAR?

- 1 A: YES, SIR.
- 2 Q: AND WHAT WERE YOU DOING THERE?
- 3 A: I WAS RUNNING THE REGISTER.
- 4 Q: OKAY. NOW, MAY SHE COME DOWN, YOUR HONOR?
- 5 THE COURT: YES, SIR.
- 6 Q: NOW, YOU WERE RUNNING THE REGISTER. WHAT REGISTER
- 7 WERE YOU RUNNING?
- 8 A: THIS ONE.
- 9 Q: THE ONE RIGHT HERE?
- 10 A: YES, SIR.
- 11 Q: AND HAD YOU BEEN RUNNING THE REGISTER ALL MORNING?
- 12 A: YES, SIR.
- 13 Q: AND WHAT TIME DID YOU ALL OPEN?
- 14 A: AT 9:00 O'CLOCK.
- 15 Q: AND WERE A LOT ... WERE THERE ANY CUSTOMERS IN THE
- 16 STORE?
- 17 A: PEOPLE BACK AND FORTH.
- 18 Q: OKAY. WAS IT JUST AN AVERAGE DAY?
- 19 A: AVERAGE DAY.
- 20 Q: FIVE OR TEN CUSTOMERS? TEN OR 20 CUSTOMERS? WHAT
- 21 WOULD YOU ESTIMATE THE NUMBER OF CUSTOMERS?
- 22 A: ABOUT FIVE OR TEN.
- 23 Q: OKAY. NOW, IS THIS A PICTURE OF THE CHECK OUT
- 24 STAND, STATE'S EXHIBIT NUMBER SIX?
- 25 A: YES, SIR.

- 1 Q: ALL RIGHT. DID YOU SEE THE DEFENDANT ON THAT DAY?
- 2 A: YES, SIR.
- 3 Q: WHEN DID YOU FIRST NOTICE HIM?
- 4 A: WHEN DID I NOTICE HIM? WHEN HE COME UP TO THE
- 5 FRONT.
- 6 Q: ALL RIGHT. WHEN YOU WERE HERE AT THE REGISTER WHO
- 7 WAS UP THERE WITH YOU?
- 8 A: WHEN HE FIRST ...
- 9 Q: WHEN YOU ... WHEN YOU WERE AT THE REGISTER WHO WAS
- 10 ... WAS THERE ANYBODY WITH YOU UP THERE?
- 11 A: WHEN HE APPROACHED THE REGISTER BETTY WAS UP THERE.
- 12 Q: OKAY. BETTY WAS WHERE?
- 13 A: SHE WAS BEHIND ME. BEHIND THE ... IT'S A LITTLE
- 14 THING THAT IN BETWEEN THE TWO REGISTERS AND SHE WAS
- 15 BEHIND IT.
- 16 Q: ALL RIGHT. DOES THIS, STATE'S EXHIBIT SIX-D, IS
- 17 THIS ... IS THIS A PICTURE OF THE REGISTER?
- 18 A: YES, SIR.
- 19 Q: AND WHERE WERE YOU?
- 20 A: I WAS IN RIGHT BEHIND THE COUNTER WHERE THE REGISTER
- 21 IS.
- 22 Q: AND WHERE WAS BETTY?
- 23 A: SHE WAS BACK BEHIND ...
- 24 Q: RIGHT BEHIND YOU?
- 25 A: ... THE LITTLE PARTITION. YES.

1 Q: DID SHE TELL YOU ANYTHING?

2 A: YES, SIR.

3 Q: WHAT DID SHE TELL YOU?

4 A: SHE WAS GETTING READY TO GO TO THE BANK AND SHE WAS

5 GIVING ME THE KEY IN CASE I NEED TO DO ANY REFUNDS

6 OR ANYTHING BEFORE SHE GET BACK.

7 Q: ALL RIGHT. DID YOU SEE THE GENTLEMAN?

8 A: YES, SIR.

9 Q: WHERE WAS HE?

10 A: HE CAME UP ... DURING THE TIME BETTY WAS UP THERE HE

11 CAME UP TO THE REGISTER.

12 Q: ALL RIGHT.

13 A: HE WAS ...

14 Q: LET ME SHOW YOU THIS, THIS IS THE REGISTER HERE.

15 THIS IS STATE'S EXHIBIT SIX-D. HERE IS THE REGISTER

16 COUNT. WHERE WAS HE?

17 A: HE WAS LIKE RIGHT UP IN HERE.

18 Q: RIGHT WHERE THESE ... WHATEVER THOSE THINGS ARE.

19 CRACKERS AND STUFF?

20 A: YES, SIR.

21 Q: RITZ BITS. THAT'S WHERE HE WAS?

22 A: YES, SIR.

23 Q: WHAT DID HE DO?

24 A: HE HAD SOME TOWELS IN HIS HAND. HE PUT ...

25 Q: WHAT KIND OF TOWELS DID HE HAVE?

1 A: LIKE WHITE TOWELS YOU WOULD WASH A CAR WITH.
2 Q: TERRY CLOTH TOWELS?
3 A: YES, SIR.
4 Q: ALL RIGHT. WHAT DID HE DO WITH THOSE TOWELS?
5 A: HE PUT THEM ON THE END OF THE COUNTER.
6 Q: OKAY. I'M GONNA SHOW YOU STATE'S EXHIBIT SIX-C.
7 WHERE DID HE PUT ... THIS IS THE COUNTER. WHERE DID
8 HE PUT ...
9 A: IT WAS LIKE RIGHT HERE ON THE END. RIGHT THERE IN
10 FRONT OF THE BAGS.
11 Q: DID HE SAY ANYTHING TO YOU?
12 A: HE SAID SOMETHING BUT WE DIDN'T UNDERSTAND WHAT HE
13 SAID AND SO ... AND SO WE WAS LIKE ... WE LOOK AT
14 EACH OTHER SO BETTY ASK COULD SHE HELP HIM. AND SO
15 HE SAID SOMETHING ELSE AND HE WAS LIKE ...
16 Q: THIS ONE OR ... HOLD ON ... IT MUST BE THIS ONE.
17 DID HE MOVE SOMEWHERE?
18 A: YES, SIR, HE MOVE AROUND AND LIKE BY THAT TIME BETTY
19 WAS STANDING ... LIKE HE WAS STANDING SIDE BY SIDE.
20 Q: OVER HERE AT THE END OF THE COUNTER?
21 A: YES, SIR.
22 Q: THAT'S STATE'S EXHIBIT SIX-D.
23 A: OKAY. AT THE END OF THE COUNTER SIDE BY SIDE HE
24 LIKE MOVE AROUND IN FRONT OF WHERE WE WERE STANDING.
25 AND HE SAID ... HE REPEAT HIMSELF. HE SAID HE WANT

1 THE MONEY BAG AND SHE ... BETTY HAD IT UP UNDER HER
2 ARM IN HER PURSE ON HER SHOULDER AND HE SAID YOU
3 THINK ... THINK I'M PLAYING? AND HE GOT REALLY
4 UPSET AND HE START CURSING AND SO HE PULL HIS SHIRT
5 AND SAID GIVE HIM THE MONEY BAG BEFORE HE BLOW OUR
6 BRAINS OUT.

7 Q: ALL RIGHT. GO AHEAD AND HAVE A SEAT.

8 A: OKAY.

9 Q: HE LIFTED UP HIS SHIRT AND PULLED OUT WHAT?

10 A: A GUN.

11 Q: AND WHAT DID THE GUN LOOK LIKE?

12 A: IT HAD A PEARL HANDLE. IT WAS ...

13 Q: AND WHAT DID HE DO WITH THE GUN?

14 A: POINT IT AT US.

15 Q: AND WHAT DID HE SAY?

16 A: GIVE HIM THE MONEY BEFORE HE BLOW OUR ... AND HE
17 USED PROFANITY ... BRAINS OUT. AND SO BETTY GAVE
18 HIM THE BAG AND SAID PLEASE GO ON AND DON'T HURT
19 NOBODY. PLEASE DON'T HURT NOBODY, YOU CAN HAVE IT.
20 SO SHE GAVE IT TO HIM.

21 Q: ALL RIGHT. THEN WHAT HAPPENED?

22 A: ASHLEY CAME IN THE DOOR.

23 Q: AND THEN WHAT HAPPENED?

24 A: HE POINTED THE GUN AT HER AND TOLD HER TO GET TO THE
25 BACK. AND SO SHE DID. AND SO HE TOLD US TO GET TO

1 THE BACK BECAUSE HE DIDN'T WANT US ... IF WE DIDN'T
2 WANT HIM TO KILL US.
3 Q: AND WHAT DID YOU DO?
4 A: BETTY TAKING HER TIME AND FOLLOWED ASHLEY BACK TO
5 THE BACK AND WE MOVED ... I WAS MOVING TO THE BACK
6 AND SO HE SAID ... HE CAME AT US WITH THE GUN AND
7 TOLD US TO RUN, HE STOMP HIS FEET BEFORE HE BLOW OUR
8 BRAINS OUT.
9 Q: HOW DID HE ACT? WAS HE CALM? WAS HE AGITATED? WAS
10 HE ...
11 A: HE ... HE GOT REAL AGITATED WITH US SEEM LIKE WHEN
12 HE HAD PULLED THE GUN OUT HE WAS REAL AGITATED.
13 Q: WERE YOU AFRAID?
14 A: YES, I WAS.
15 Q: ALL RIGHT. NOW, DO YOU SEE THAT PERSON IN THE
16 COURTROOM TODAY THAT PULLED A GUN ON YOU AND
17 DEMANDED THE MONEY?
18 A: YES, SIR, I DO.
19 Q: WHERE IS HE?
20 A: SITTING AT THE DEFENDANT TABLE.
21 Q: AND WHAT IS HE WEARING?
22 A: GREEN SHIRT, GREEN TIE AND GREEN SUIT.
23 Q: OKAY.
24 MR. FATA: YOUR HONOR, LET THE RECORD REFLECT
25 SHE'S IDENTIFIED THE DEFENDANT, PLEASE.

- 1 THE COURT: THE RECORD WILL SO REFLECT.
- 2 Q: NOW, WERE YOU SHOWN SOME PHOTOGRAPHIC LINEUPS?
- 3 A: YES, SIR, I WAS.
- 4 Q: AND I'M GONNA ASK YOU ABOUT STATE'S EXHIBIT NUMBERS
- 5 THREE, FOUR, AND FIVE. WERE YOU SHOWN THOSE
- 6 LINEUPS?
- 7 A: YES, SIR.
- 8 Q: AND WERE YOU ABLE TO PICK OUT ANYONE IN ANY OF THOSE
- 9 LINEUPS?
- 10 A: NO, SIR.
- 11 Q: WHY NOT?
- 12 A: BECAUSE I WAS SO UPSET ... I'M A DIABETIC AND I WAS
- 13 SO UPSET AND SO ... SEEM LIKE EVERYTHING WAS JUST
- 14 ... WELL, NOT ON THE PICTURE I WASN'T BUT WHEN I
- 15 SEEN HIM THE SAME FEELING THAT I HAD WHEN I FIRST
- 16 SEE HIM BECAUSE I SEE HIM FACE TO FACE ... YEAH,
- 17 FACE TO FACE, YES, I CAN IDENTIFY HIM.
- 18 Q: BUT YOU COULDN'T IDENTIFY HIM FROM THE PHOTOGRAPH?
- 19 A: NO, SIR, I COULDN'T.
- 20 Q: BUT ANY DOUBT ... IS THERE ANY DOUBT IN YOUR MIND
- 21 THAT THIS IS THE MAN WHO PULLED THE GUN OUT, THE
- 22 DEFENDANT?
- 23 A: NO.
- 24 Q: HAS ANYBODY INFLUENCED YOU ... BY THAT I MEAN DONE
- 25 ANYTHING TO MAKE YOU BELIEVE THAT ... OR MAKE YOU

1 IDENTIFY THIS MAN ... THIS DEFENDANT AS THE MAN WHO
2 PULLED THE GUN ON YOU?
3 A: NO, SIR.
4 Q: THE POLICE DIDN'T SAY ANYTHING TO YOU?
5 A: NO, SIR.
6 Q: BETTY? SHIRLEY SAY ANYTHING?
7 A: NO, SIR.
8 Q: AND HOW ABOUT THIS OTHER WITNESS WE HAVEN'T HEARD
9 FROM YET, TREVOR MCDUFFIE, HAS HE INFLUENCED YOU IN
10 ANY WAY?
11 A: OH, NO, SIR.
12 Q: OKAY. AND AGAIN THERE'S NO DOUBT IN YOUR MIND THIS
13 IS THE MAN?
14 A: NO DOUBT.
15 Q: LET ME ASK YOU ONE OTHER THING AND I'M GONNA GET UP
16 CLOSE TO YOU HERE AND I'M GONNA START BACKING OFF
17 AND YOU TELL ME TO STOP WHEN IT WAS ... WHEN IT'S
18 THE DISTANCE THAT YOU WERE FROM THE ...
19 A: FROM WHEN I WAS ... WHEN I WAS STANDING THERE TO
20 YOU?
21 Q: YEAH. TELL ME TO STOP.
22 A: COME UP SOME.
23 Q: COME UP SOME?
24 A: RIGHT THERE.
25 Q: ALL RIGHT. DID YOU HAVE AN OPPORTUNITY TO GET A

HEARING

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1 GENTLEMEN OF THE JURY, YOU HAVE HEARD THE STATE ANNOUNCE
2 THAT THEY HAVE RESTED THEIR CASE. THAT MEANS THAT THERE
3 ARE CERTAIN MATTERS OF THE LAW WHICH I NOW NEED TO DO IN
4 THIS MATTER BEFORE WE CAN GO FORWARD. SO I AM GOING TO
5 ASK YOU TO GO TO YOUR JURY ROOM FOR JUST A VERY FEW
6 MINUTES WHILE WE TAKE CARE OF THESE MATTERS OF THE LAW
7 AND THEN WE'LL BE READY TO GO FORWARD ON THE CASE.
8 AGAIN, IT'S STILL PREMATURE FOR YOU TO BEGIN ANY
9 DISCUSSION IN THE CASE YET. YOU HAVE NOT HEARD
10 EVERYTHING THAT YOU WILL HEAR IN CONNECTION WITH THIS
11 MATTER. YOU SHOULD NOT BEGIN ANY DISCUSSIONS OR
12 DELIBERATIONS AT THIS TIME. BUT IF YOU WOULD GO WITH THE
13 BAILIFF PLEASE AND WE'LL SEND FOR YOU IN JUST A FEW
14 MINUTES. THANK YOU. GO AHEAD TO YOUR JURY ROOM.

15 (JURY OUT AT 2:33 P.M.).

16 THE COURT: ALL RIGHT. MR. WHEELER, ANY MOTIONS
17 ON BEHALF OF THE DEFENDANT?

18 MR. WHEELER: YES, SIR, YOUR HONOR. THANK YOU.
19 YOUR HONOR, AT THIS POINT THE STATE HAVING RESTED WE
20 WOULD RESPECTFULLY REQUEST A DIRECTED VERDICT OF
21 ACQUITTAL IN THIS CASE. IT WOULD BE OUR POSITION THAT
22 THE STATE HASN'T PRODUCED ANY EVIDENCE BEYOND THE
23 IDENTIFICATION MADE BY THESE WITNESSES. NO PHYSICAL
24 EVIDENCE AT ALL, NO ... HIS TESTIMONY SEEMS TO HAVE
25 INDICATED THERE WAS MORE THAN AMPLE OPPORTUNITY TO AT

THIRD JUDICIAL CIRCUIT

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1 LEAST TEST FOR THE RIGHT KIND OF EVIDENCE AND FOR THAT
2 REASON WE WOULD RESPECTFULLY SUBMIT THAT THEY HAVE NOT
3 MADE A SUFFICIENT CASE. THANK YOU.

4 THE COURT: MR. FATA?

5 MR. FATA: YOUR HONOR, WE HAVE PRESENTED
6 EVIDENCE ... THE STATE HAS PRESENTED EVIDENCE THAT IT WAS
7 THIS DEFENDANT THROUGH EYEWITNESSES, FOUR EYEWITNESSES TO
8 THIS INCIDENT THAT THIS WAS THE DEFENDANT WHO PULLED ON A
9 GUN ON THEM AND TOOK A BAG OF MONEY CONTAINING \$2,000.00
10 AND RAN OUT OF THE STORE. I DON'T BELIEVE IT TAKES
11 FINGERPRINTS OR FOOTPRINTS OR ANYTHING ELSE TO ESTABLISH
12 THE GUILT AND WE DO HAVE EYEWITNESSES WHO ACTUALLY SAW
13 THE CRIME.

14 THE COURT: I WOULD CONCUR, MR. FATA. I THINK
15 THAT THERE IS EVIDENCE. MY JOB IS NOT TO WEIGH THE
16 EVIDENCE TO DETERMINE THE BELIEVABILITY OF THE EVIDENCE.
17 THAT IS THE JURY'S. MY QUESTION IS THE MATTER ... THE
18 ISSUE BEFORE THE COURT IS THE EXISTENCE OF EVIDENCE,
19 WHETHER THERE IS EVIDENCE OF ARMED ROBBERY AND THERE VERY
20 DEFINITELY IS EVIDENCE IN THE RECORD BY WHICH THE JURY
21 COULD CONCLUDE THAT AN ARMED ROBBERY OCCURRED. ONE OF
22 THE THINGS THAT I'VE ALWAYS FELT ABOUT THE FORENSIC
23 EVIDENCE QUESTION IS THAT MOST OF THE TIME FORENSIC
24 EVIDENCE IS FOR THE BENEFIT OF THE DETECTIVE DETERMINING
25 WHO COMMITTED A CRIME RATHER THAN THE CONVICTION AND IF

1 YOU HAVE EYEWITNESSES THEN FORENSIC TESTIMONY IS
2 SUPERFLUOUS. BUT BE THAT AS IT MAY, THE FACT OF THE
3 MATTER IS MY JOB IS TO DETERMINE THAT THERE IS EVIDENCE
4 IN THE RECORD BY WHICH THE JURY COULD CONCLUDE THAT AN
5 ARMED ROBBERY OCCURRED AND I'M SURE THAT ... I'M
6 CONFIDENT THAT THERE IS THAT EVIDENCE IN THE RECORD SO I
7 WILL RESPECTFULLY DENY YOUR MOTION, MR. WHEELER. MR.
8 WHEELER, IN VIEW OF THE COURT'S RULING, WITH REGARD TO
9 THE IMPEACHABLE TESTIMONY AND OTHER THINGS INVOLVING
10 YOUR CLIENT'S RIGHT TO TESTIFY OR NOT TESTIFY DO YOU NEED
11 TO TALK WITH HIM ANYMORE ABOUT THAT OR HAS A ... IS HE IN
12 A POSITION TO MAKE A DECISION?

13 MR. WHEELER: YOUR HONOR, IN LIGHT OF YOUR
14 RULING, LET ME JUST VERY BRIEFLY MAKE SURE.

15 THE COURT: ALL RIGHT.

16 MR. WHEELER: YOUR HONOR, HE TELLS ME THE SAME
17 THING THAT HE TOLD ME A FEW MINUTES AGO. HE DOES NOT
18 WISH TO TESTIFY.

19 THE COURT: HAVE HIM COME BACK UP AND LET'S MAKE
20 SURE THAT IT'S VOLUNTARY. ALL RIGHT, RIGHT THERE, PLEASE
21 SIR. MR. MCCLAIN, BEFORE WE TOOK LUNCH RECESS I ADVISED
22 YOU ABOUT YOUR RIGHTS UNDER THE FIFTH AMENDMENT OF THE
23 CONSTITUTION AND ASKED AT THAT TIME IF YOU HAD ANY
24 QUESTIONS ABOUT THAT. ALSO ADVISED THAT I WOULD GIVE YOU
25 A CHANCE TO TALK WITH YOUR LAWYER ABOUT WHETHER YOU

1 SHOULD OR SHOULD NOT TESTIFY. HAVE YOU HAD A CHANCE TO
2 TALK WITH MR. WHEELER AS TO WHETHER YOU SHOULD OR SHOULD
3 NOT TESTIFY IN THIS CASE?

4 MR. MCCLAIN: YES, SIR, YOUR HONOR.

5 THE COURT: YOU HAVE? HAVE YOU DISCUSSED IT
6 WITH HIM WHETHER YOU SHOULD OR SHOULD NOT TESTIFY?

7 MR. MCCLAIN: YES, SIR, YOUR HONOR.

8 THE COURT: HAVE YOU UNDERSTOOD YOUR DISCUSSIONS
9 AND THE ADVICE THAT YOU'VE RECEIVED FROM MR. WHEELER?

10 MR. MCCLAIN: YES, SIR, I HAVE.

11 THE COURT: HAVE YOU UNDERSTOOD WHAT I EXPLAINED
12 TO YOU ABOUT YOUR FIFTH AMENDMENT?

13 MR. MCCLAIN: YES, SIR, I HAVE.

14 THE COURT: AND DO YOU HAVE ANY QUESTIONS FOR
15 EITHER ME OR MR. WHEELER ABOUT YOUR FIFTH AMENDMENT
16 RIGHTS?

17 MR. MCCLAIN: NO, SIR.

18 THE COURT: AND HAVE YOU MADE A DECISION AS TO
19 WHETHER YOU DO OR DO NOT WISH TO TESTIFY IN THIS CASE?

20 MR. MCCLAIN: IN THIS CASE I WILL NOT TESTIFY,
21 YOUR HONOR.

22 THE COURT: YOU DO NOT WISH TO TESTIFY?

23 MR. MCCLAIN: I DO NOT WISH TO TESTIFY.

24 THE COURT: WAS THAT DECISION ON YOUR PART
25 FREELY, VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY MADE?

1 MR. MCCLAIN: YES, SIR.

2 THE COURT: ALL RIGHT. ALL RIGHT. THE COURT
3 WOULD THEN FIND FOR THE RECORD THAT THE DEFENDANT'S
4 DECISION TO EXERCISE HIS FIFTH AMENDMENT RIGHT AND REMAIN
5 SILENT IS A FREE VOLUNTARY DECISION ON HIS PART AND HE
6 WILL NOT TESTIFY IN THIS CASE. THANK YOU, YOU MAY BE
7 SEATED.

8 MR. WHEELER: THANK YOU, YOUR HONOR.

9 THE COURT: ALL RIGHT. BASED ON THAT, MR.
10 WHEELER, WILL THE DEFENSE HAVE ANY FURTHER TESTIMONY OR
11 ANY OTHER EVIDENCE?

12 MR. WHEELER: NO, SIR, YOUR HONOR.

13 THE COURT: SO THE DEFENSE WOULD REST AS WELL?

14 MR. WHEELER: YES, SIR, YOUR HONOR.

15 THE COURT: OKAY. ALL RIGHT. COUNSEL, LET ...
16 THAT BRINGS US TO THE ... WELL, ASSUMING THAT THE DEFENSE
17 RESTED AND THAT'S WHAT THEY HAVE WE'LL PUT ALL THIS ON
18 THE RECORD SO WE WON'T HAVE ... THE SAME MOTION TO BE
19 MADE IN THE DEFENSE CASE AND THE SAME RULING BUT I WOULD
20 DENY A MOTION FOR A DIRECTED VERDICT. MR. ... YOU GOT
21 ANY ... READY TO GO FORWARD WITH CLOSING ARGUMENTS?

22 MR. FATA: I AM, YOUR HONOR.

23 THE COURT: YOU READY, MR. WHEELER?

24 MR. WHEELER: YES, SIR, YOUR HONOR.

25 THE COURT: ALL RIGHT, MR. WHEELER, YOU HAVE THE

1 RIGHT TO ARGUE LAST SINCE THERE'S NO TESTIMONY THAT'S
2 BEEN PRESENTED. HOW MUCH TIME DO YOU NEED, MR. FATA?

3 MR. FATA: 15 MINUTES.

4 THE COURT: MR. WHEELER?

5 MR. WHEELER: 15 MINUTES I THINK WOULD BE
6 SUFFICIENT, JUDGE.

7 THE COURT: ALL RIGHT. ALL RIGHT, ABOUT 20 TIL.
8 COME UP JUST ONE MINUTE, COUNSEL, AND LET'S DISCUSS ONE
9 MATTER WITH ME OFF THE RECORD.

10 (DISCUSSION WAS HELD OFF THE RECORD).

11 THE COURT: ALL RIGHT. AT THE BENCH I DISCUSSED
12 WITH THE CLIENT ... WITH THE ATTORNEYS A SITUATION THAT
13 AROSE ON MONDAY WITH ONE POTENTIAL JUROR, JUROR NUMBER
14 130, MR. LEWIS WAZNEY I BELIEVE IS THE WAY HE PRONOUNCES
15 HIS NAME. WAZNEY. W-A-Z-N-E-Y. IN WHICH HE INDICATED
16 THAT HE HAD A SITUATION ON MONDAY THAT WOULD REQUIRE HIM
17 TO PICK UP A CHILD AT SCHOOL AT 5:00 O'CLOCK AND THAT
18 THERE WAS NO ONE ELSE AVAILABLE TO PICK UP THAT CHILD AND
19 HE WANTED TO BE EXCUSED FROM THE JURY PANEL. I DID NOT
20 EXCUSE HIM AT THAT TIME BECAUSE I DIDN'T KNOW WHAT THE
21 DEVELOPMENT WAS GOING TO BE. HOWEVER, IT IS NOW QUARTER
22 OF 3:00. WE HAVE GOT TO GET SOME CHARGES READY TO CHARGE
23 THE JURY, WE'VE GOT TO HAVE ARGUMENTS. IT'S LIKELY THIS
24 CASE WILL BE FAIRLY CLOSE TO 4:00 O'CLOCK BEFORE IT GOES
25 TO THE JURY AND I THINK IT WOULD BE VERY POSSIBLY

1 PREJUDICIAL TO THE STATE AND TO THE DEFENDANT TO HAVE MR.
2 WAZNEY STAY ON THE JURY IF HE IS THAT ANXIOUS TO ... I
3 MEAN IF HE'S GOT A FAMILY PROBLEM THAT CAUSES HIM SOME
4 CONCERN. SO AFTER DISCUSSING IT WITH THE LAWYERS THEY
5 HAVE AGREED THAT WE CAN EXCUSE MR. WAZNEY AND REPLACE HIM
6 WITH THE ALTERNATE. ANY OBJECTION TO THAT DECISION, MR.
7 FATA?

8 MR. FATA: NONE FROM THE STATE, YOUR HONOR.

9 THE COURT: ALL RIGHT. ANY OBJECTION?

10 MR. WHEELER: NONE FROM THE DEFENSE, YOUR HONOR.

11 THE COURT: ALL RIGHT. WE WILL DO THAT WHEN WE
12 COME BACK. ALL RIGHT, COUNSEL, LET'S BE READY TO START
13 AT 3:00 O'CLOCK. WE'RE GOING TO GET OUR CHARGES
14 TOGETHER. YOU ALL HAVE YOUR ARGUMENTS READY. WE'LL GET
15 OUR CHARGES TOGETHER AND ALSO I'LL TAKE CARE OF THIS
16 MATTER WITH THE ATF AGENTS WHO ARE NOW.

17 (WHEREUPON THERE WAS A PAUSE).

18 THE COURT: ALL RIGHT. BACK ON THE RECORD WITH
19 REGARD TO THE MATTER OF THE STATE VS. MCCLAIN. LET THE
20 RECORD REFLECT THAT THE DEFENDANT IS PRESENT WITH HIS
21 COUNSEL. THE STATE IS PRESENT AND REPRESENTED BY PAUL
22 FATA. WE ARE READY TO PROCEED. BRING THE JURY IN,
23 PLEASE.

24 (JURY IN AT 3:00 P.M.).

25 THE COURT: ALL RIGHT. THANK YOU VERY MUCH,

1 LADIES AND GENTLEMEN. YOU HEARD BEFORE WE TOOK THE
2 RECESS ANNOUNCE THAT THE STATE HAD RESTED. DOES THE
3 DEFENSE HAVE ANY TESTIMONY OR EVIDENCE THAT IT WISHES TO
4 PRESENT?

5 MR. WHEELER: NO, SIR, YOUR HONOR.

6 THE COURT: ALL RIGHT. THE DEFENSE RESTS.

7 LADIES AND GENTLEMEN, THAT MEANS THAT YOU HAVE NOW HEARD
8 ALL OF THE TESTIMONY THAT YOU WILL HEAR IN THIS CASE.

9 THERE ARE ONLY TWO THINGS THAT REMAIN TO BE DONE AND
10 BEFORE I GET INTO THOSE AND DO THE TWO THINGS THAT REMAIN
11 TO BE DONE I'M GOING TO ASK MS. TOWNES, MS. DOLORES
12 TOWNES, ARE YOU MS. TOWNES? I'M GOING TO ASK IF YOU'LL
13 STEP RIGHT DOWN HERE AND IF YOU'LL BE THE FORELADY IN
14 THIS JURY FOR ME. ALL RIGHT, THANK YOU. NOW, AS I SAID
15 WE HAVE HEARD ALL OF THE TESTIMONY IN THIS CASE. THE
16 ONLY TWO THINGS THAT REMAIN TO BE DONE ARE THE ARGUMENTS
17 OF COUNSEL AND THE INSTRUCTIONS ON THE LAW BY THE COURT.
18 THE ... AS I ... I'LL TELL YOU NOW AS I DID AT THE FIRST
19 OF THIS CASE, THE ARGUMENTS OF COUNSEL ARE NOT EVIDENCE
20 IN THIS MATTER. IT IS SIMPLY THE LAWYER'S VIEWS OF WHAT
21 THEY THINK THE EVIDENCE SHOWS. HOWEVER, THE LAWYERS DO
22 HAVE THE RIGHT NOT ONLY THE RIGHT BUT THE DUTY ON BEHALF
23 OF THEIR CLIENTS TO SPEAK TO YOU NOW AND TELL YOU WHAT
24 THEY THINK THE EVIDENCE SHOWS. BUT YOU SHOULD DECIDE
25 THIS CASE BASED NOT ON ... NOT BASED ON WHAT THE LAWYERS

1 SAY BUT BASED ON THE EVIDENCE THAT YOU HAVE HEARD FROM
2 THIS WITNESS STAND AND FROM ANY EXHIBITS THAT HAVE BEEN
3 INTRODUCED INTO EVIDENCE. AFTER YOU HAVE HEARD THE
4 ARGUMENTS OF COUNSEL I WILL THEN INSTRUCT YOU ON THE LAW
5 OF SOUTH CAROLINA AS IT APPLIES TO THE EVIDENCE ... TO
6 THE FACTS OF THIS CASE AS YOU MAY FIND THOSE FACTS TO BE.
7 AND THEN YOU'LL BE ALLOWED TO GO TO YOUR JURY ROOM TO
8 DELIBERATE YOUR VERDICT. YOU WILL HEAR FIRST FROM
9 COUNSEL FOR THE STATE, MR. FATA, AND THEN FROM COUNSEL
10 FOR THE DEFENDANT, MR. WHEELER. MR. FATA.

11 MR. FATA: THANK YOU, YOUR HONOR. MADAM
12 FORELADY AND LADIES AND GENTLEMEN OF THE JURY, I WANT TO
13 THANK YOU FOR YOUR ATTENTION TODAY. AND PART OF
14 YESTERDAY ... NOT YESTERDAY BUT THE OTHER DAY WHEN YOU
15 WERE SWORN. I WANT TO THANK YOU FOR THAT ATTENTION.
16 WE'VE SEEN YOU LISTEN TO THE WITNESSES, YOU WERE LOOKING
17 AT THE EXHIBITS WHEN WE PRESENT THEM TO YOU AND ... AND
18 THAT'S ALL I CAN ASK YOU TO DO. THAT'S ALL I GUESS THE
19 DEFENDANT CAN ASK YOU TO DO. BECAUSE YOU'RE GOING TO
20 MAKE A DECISION IN JUST A FEW MINUTES AS TO WHAT OCCURRED
21 ON JULY 22ND, 2004 IN LEE COUNTY AT THE FAMILY DOLLAR
22 STORE HERE IN BISHOPVILLE. OKAY? NOW, EVIDENCE ... THE
23 EVIDENCE THAT'S BEEN PRESENTED TO YOU TODAY REGARDS AN
24 ARMED ROBBERY. AND I TOLD YOU AND HIS HONOR IS GOING TO
25 TELL YOU WHAT AN ARMED ROBBERY IS. BUT AN ARMED ROBBERY

1 IS THE TAKING OF SOMETHING, SOME PROPERTY FROM ANOTHER
2 PERSON, SOMEONE ELSE BY THE MEANS OF A WEAPON AND THAT'S
3 AN ARMED ROBBERY. IT'S A VERY HEINOUS CRIME. ALSO THE
4 TESTIMONY THAT YOU HEARD APPLIES TO A CRIME OF USE OF A
5 WEAPON DURING A VIOLENT CRIME. IN THIS CASE THE
6 DEFENDANT WAS ARMED WITH A PISTOL WHICH HE USED TO
7 EXTRACT THIS MONEY, TO DEPRIVE THE FAMILY DOLLAR AND
8 THESE LADIES OF THEIR MONEY.

9 NOW, WHAT HAPPENED IN THIS CASE? AND I'M NOT GOING
10 TO BEAT THE FACT TO DEATH BUT AND YOU WERE HERE AND YOU
11 HEARD ... YOU HEARD EVERYTHING. ON JULY 22ND, 2004,
12 FAMILY DOLLAR WAS OPEN AND I BELIEVE ... FAMILY DOLLAR
13 WAS OPEN AT 9:00 O'CLOCK. AND THIS OCCURRED AROUND 9:45.
14 THE TESTIMONY WAS THAT THE FAMILY DOLLAR IS A BUSY LITTLE
15 STORE. PEOPLE ARE IN AND OUT EVERY DAY. THE STORE ...
16 AND THIS HAPPENED AT 9:45 AND THE STORE OPENED AT 9:00
17 AND IT ALREADY FIVE TO TEN CUSTOMERS IN THE STORE. WELL,
18 WHAT DO CUSTOMERS DO WHEN THEY GO IN THE STORE? THEY
19 HANDLE STUFF. I MEAN, YOU ... THINK ABOUT LOOKING AT ...
20 GOING TO BUY TOWELS OR ANYTHING YOU PICK IT UP AND LOOK
21 AT IT. DAY IN AND DAY OUT YOU HAVE PEOPLE HANDLING
22 THINGS AND PUSHING ON THE DOOR IN AND OUT OF THE STORE.
23 I'M GOING TO GET BACK TO THAT FACT IN JUST A MINUTE. THE
24 DEFENDANT IS IN THE STORE. DEFENDANT OVER HERE IS IN THE
25 STORE. AND WHAT ... WHAT ... WHAT IS THE TESTIMONY?

1 FIRST OF ALL, BETTY RUTH WHO IS THE MANAGER OF THE STORE
2 IS BACK HERE IN HER OFFICE, SITTING THERE DOING HER
3 REPORTS. SHE ALREADY HAD HER DEPOSIT WHEN SHE NOTICED
4 THE DEFENDANT LOOKING AT HER, JUST STARING AT HER.
5 UNUSUAL. UNUSUALLY STARING. KIND OF AN EERIE THING.
6 AND I GUESS EVERYONE HAS EXPERIENCED THAT BEFORE. BUT
7 SHE TESTIFIED THAT SHE'D BEEN TAUGHT AS A STORE MANAGER
8 TO OBSERVE CUSTOMERS AND LOOK AND SEE WHAT THEY WERE
9 DOING, TO LOOK FOR SHOPLIFTERS, PEOPLE WHO ARE GONNA ROB
10 YOU OR WHATEVER JUST SO YOU CAN BE ALERT, TO BE ALERT.
11 HE CONTINUED TO HANG AROUND AND ALL OF A SUDDEN HE SAYS
12 WELL, WHICH IS BIGGER, THIS TOTE OR THIS TOTE? THESE
13 PLASTIC TOTES, WHICH IS BIGGER. IT'S A STUPID QUESTION
14 BECAUSE THIS ONE IS OBVIOUSLY SMALLER THAN THIS OR THIS
15 IS OBVIOUSLY SMALLER ... BIGGER THAN THAT ONE. AND THIS
16 DREW HER ATTENTION TO HIM. HE NEXT GOES OVER HERE TOWARD
17 THE DOG FOOD AND PET FOOD ARE WHICH IS HERE AND WHAT DOES
18 SHE SAY SHE DID. I CAME OUT OF THE OFFICE. I CAME OUT
19 OF THE OFFICE. AND WATCHED HIM. HE'S OVER THERE
20 FUMBLING AROUND. SO HE GOES TO THE TOTE, ASKING STUPID
21 QUESTIONS. GOES OVER HERE TO THE PET FOOD, JUST FUMBLING
22 ON THE SHELF AND THEN HE DISAPPEARS SOMEWHERE ELSE, HE
23 GOES SOMEWHERE ELSE IN THE STORE. I SUBMIT TO YOU THAT
24 BETTY RUTH CONSIDERING THE TRAINING THAT SHE'S TESTIFIED
25 SHE HAD OBSERVING CUSTOMERS GOT A VERY GOOD LOOK AT HIM.

1 SHE WAS SUSPICIOUS. SHE LOOKED AT HIM, SHE STARED AT
2 HIM, SHE KNEW WHO THE DEFENDANT WAS. NEXT WE HAVE BACK
3 HERE IN THE STOCKROOM WE HAVE TREVOR MCDUFFIE AND ASHLEY
4 RUTH BACK IN HERE. AND THEY'RE ... TREVOR'S GETTING
5 READY FOR THE TRUCK TO COME, THE DELIVERY TRUCK. THE
6 DEFENDANT IS OVER IN THIS AREA OF THE STORE LOOKING AT
7 MERCHANDISE. AND WHAT DID HE DO AGAIN? HE'S STARING AT
8 THEM. HE ... ESPECIALLY ASHLEY. HE'S LOOKING, HE'S
9 STARING. WHY WOULD HE BE STARING? HE CATCHES THEIR
10 ATTENTION. HE'S STARING. HE'S CASING THE PLACE. HE'S
11 LOOKING TO SEE WHO'S THERE. WHO'S ... WHO'S HE GOING TO
12 HAVE TO DEAL WITH WHEN HE ... WHEN HE GETS ... WHEN HE
13 EXECUTES HIS ROBBERY. YOU KNOW, ARE THESE PEOPLE GOING
14 TO COME TO THE FRONT. WHERE ... WHERE IS BETTY GOING
15 WITH THIS BAG OF MONEY? THAT'S WHAT HE'S DOING. BUT HE
16 ALERTS THESE FOLKS BACK HERE. HE ALERTS ... HE ALERTS
17 ASHLEY AND TREVOR. HE ALERTS THEM TO THE EXTENT THEY
18 LOOK AT HIM, THEY FOCUS ON HIM AND IT'S NOT JUST A
19 PASSING ENCOUNTER.

20 WELL, BETTY DECIDES SHE'S GOING TO THE BANK AND SHE
21 COMES TO THE FRONT OF THE STORE AND RIGHT HERE AT THE
22 REGISTER IS SHIRLEY CLYBURN AND SHE'S THERE WORKING THAT
23 MORNING CHECKING PEOPLE OUT. AND NEAR THE FRONT DOOR.
24 THE IN DOOR AND OUT DOOR. BETTY COMES AROUND AND YOU'LL
25 SEE IT IN THESE PHOTOGRAPHS AND I DON'T WANT TO KEEP

1 PICKING UP THE PHOTOGRAPHS AND EVERYTHING. YOU'LL HAVE
2 THESE PHOTOGRAPHS IN THE BACK. BUT BETTY COMES AROUND
3 BACK HERE TO TELL SHIRLEY WELL HERE'S THE KEY AND IF
4 ANYBODY ... IF ANYBODY WANTS A REFUND OR WHATEVER YOU CAN
5 DO IT WHILE I'M GONE, I'M GOING TO THE BANK. WELL, THE
6 DEFENDANT COMES UP INTO THIS AREA. THROWS A LITTLE
7 PACKAGE OF TERRY TOWELS OR WHATEVER ON THE COUNTER. AND
8 THESE TWO LADIES LOOK AT HIM BECAUSE HE'S ACTING KIND OF
9 STRANGE. BETTY AND SHIRLEY LOOK AT HIM. HE COMES AROUND
10 AND SAYS SOMETHING. THEY SAY WELL, CAN I HELP YOU. HE
11 COMES OVER HERE AND THEN HE TELLS THEM, PULLS UP HIS
12 SHIRT AND PULLS OUT THE HANDGUN AND SAYS THIS IS A
13 ROBBERY. NOW, AND POINTS THE GUN AT HIM. SORT OF LIKE A
14 PHOTOGRAPH. SORT OF LIKE IT CLICKS SOMETHING IN YOUR
15 MIND CLICKING OFF. SOMEBODY POINTS A GUN AT SOMEONE,
16 THEY'RE GOING TO PAY A LOT OF ATTENTION TO THAT PERSON
17 HOLDING THAT GUN. REMEMBER, BETTY'S ALREADY SEEN HIM
18 BACK HERE AND WAS SUSPICIOUS OF HIM. SHE NOW SEES HIM UP
19 HERE WITH A GUN ROBBING HER. SHE COMES ... SHE GIVES HIM
20 THE BAG AND SAYS LOOK, TAKE THE BAG, DON'T HURT ANYBODY,
21 JUST TAKE IT AND GO. HE'S STANDING THERE, ASHLEY COMES
22 IN, SHE TURNS AROUND ... HE TURNS AROUND EYE TO EYE
23 CONTACT. SHE SEES THE GUN. SHE REMEMBERS THIS GUY FROM
24 BACK HERE. SHE REMEMBERS THE DEFENDANT FROM BACK HERE.
25 WHAT DOES HE TELL HER? THOSE THE GUN ON HER AND SAYS GET

1 TO THE BACK OF THE STORE. WHAT DOES SHE DO? SHE RUNS TO
2 THE BACK OF THE STORE. AGAIN, HOLDS THAT GUN, THAT GUN
3 ON HER. THAT WOULD FIXATE ... THAT WOULD FIX HER
4 ATTENTION ON HIM. YOU'RE JUST KIND OF HANGING IN THE
5 BALANCE AND HE'S GOT A GUN ON YOU YOU CAN IMAGINE THAT
6 YOU WOULD BE FIXATED ON THAT INDIVIDUAL. YOU WOULD
7 REMEMBER THAT GUY. SHE RUNS TO THE BACK. THE PEOPLE ...
8 ASHLEY RUNS TO THE BACK OF THE STORE. SHIRLEY AND BETTY
9 BEGIN TO GO THE BACK OF THE STORE. WHEN ASHLEY GETS BACK
10 SHE TELLS TREVOR THAT SOMEBODY ... HE'S STILL IN THE
11 STOCKROOM. SHE TELLS TREVOR THAT SOMEBODY ROBBED THE
12 STORE. SO TREVOR COMES TOWARDS THE FRONT. WHEN HE GETS
13 TO THE FRONT THERE'S THE DEFENDANT TURNED LIKE THIS, EYE
14 TO EYE CONTACT. HE HAS A GUN AND THE DEFENDANT RUNS OUT
15 THE DOOR. WE'RE TALKING ABOUT PEOPLE WHO LOOKED AT THIS
16 DEFENDANT AS CLOSE AS I AM TO YOU. WE'RE TALKING ABOUT
17 TWO PEOPLE WHO OBSERVED ... TALKING ABOUT BETTY AND
18 ASHLEY WHO OBSERVED HIM PRIOR TO THIS ROBBERY, PRIOR TO
19 THE ACTUAL ACT OF THE ROBBERY AND HAD AN OPPORTUNITY AND
20 WAS FIXATED ON HIM BECAUSE OF HIS CONDUCT. BECAUSE OF
21 HIS UNUSUAL CONDUCT. WE HAVE SHIRLEY CLYBURN WHO HAD THE
22 GUN PUT ON HER. AND SHE COULD REMEMBER HIM.
23 NOW, LET'S TALK ABOUT THE LINEUPS. YOU'LL HAVE
24 THESE BACK THERE. THERE WERE THREE LINEUPS. STATE'S
25 EXHIBIT THREE, STATE'S EXHIBIT FOUR, AND STATE'S EXHIBIT

1 FIVE. STATE'S EXHIBIT THREE AND FOUR WERE THE FIRST TWO.
2 AND DID NOT CONTAIN A PHOTOGRAPH OF THE DEFENDANT AT ALL.
3 THERE WAS ... THERE WAS ANOTHER SUSPECT IN THERE BUT IT
4 WASN'T HIM. IT WASN'T THIS DEFENDANT. NOBODY,
5 ABSOLUTELY NOBODY PICKED ANYONE OUT OF THESE TWO LINEUPS.
6 IT WASN'T UNTIL THE THIRD LINEUP, WHEN THE DEFENDANT WAS
7 PLACED IN THE LINEUP AND HE'S NUMBER TWO ... HE WAS THIS
8 ONE RIGHT HERE, NUMBER TWO ... WHEN HE WAS PLACED IN THE
9 LINEUP THAT HE WAS PICKED UP ... PICKED OUT. HE WAS
10 PICKED OUT BY BETTY RUTH. HE WAS PICKED OUT BY ASHLEY
11 RUTH. HE WAS PICKED OUT BY TREVOR MCDUFFIE. NOW, YOU'RE
12 GONNA SAY WELL AND THE DEFENSE IS GOING TO SAY WELL,
13 SHIRLEY CLYBURN DIDN'T PICK HIM OUT OF THE PHOTO. THAT'S
14 TRUE. SHIRLEY DIDN'T PICK HIM UP OUT OF A PHOTO. BUT
15 SHIRLEY SAID, LOOK, I WAS UPSET AND I COULD NOT RECOGNIZE
16 HIM FROM THE PHOTOGRAPH BUT I CAN RECOGNIZE HIM IN
17 PERSON. A LOT OF TIMES PEOPLE WILL LOOK ... THAT
18 HAPPENS, THAT OCCURS THAT YOU DO NOT PICK HIM UP FROM THE
19 LINEUP BUT YOU DO RECOGNIZE AND REMEMBER A PERSON IN
20 PERSON. THE LINEUP WAS CONDUCTED IN A NEUTRAL FASHION.
21 THERE WAS NO INFLUENCE AND MR. WHEELER DID A GOOD JOB.
22 HE TRIED TO SHOW THAT THERE WAS SOME UNDUE INFLUENCE,
23 THAT THE POLICE INFLUENCED THE ID'S OR THAT THE PEOPLE
24 INFLUENCED EACH OTHER WHEN THEY ... WHEN THEY PICKED THE
25 DEFENDANT OUT OF THE LINEUP. BUT HE WAS UNABLE TO DO

1 THAT. HE WAS UNABLE TO DO THAT. WHY? BECAUSE EVERYBODY
2 ... THE POLICE ... THE POLICE FOLLOWED PROCEDURE. THEY
3 WOULD BRING A PERSON IN, THEY WOULD TAKE THEM OFF.
4 SEPARATE, TAKE HER OFF SEPARATE BY THEMSELVES AND ASK
5 THEM AND SHOW THEM THE LINEUP. AWAY FROM EVERYBODY. SO
6 IT WOULDN'T BE UNDULY PREJUDICIAL. IT WOULDN'T BE UNDULY
7 PREJUDICIAL. I SUBMIT TO YOU THAT THIS IS THE MAN BASED
8 ON THE TESTIMONY THAT YOU'VE HEARD TODAY WHO IS THE
9 DEFENDANT THAT ROBBED THE FAMILY DOLLAR STORE ON JULY
10 22ND, 2004.

11 NOW, MR. WHEELER'S PROBABLY GOING TO SAY WELL, WHERE
12 ARE THE FINGERPRINTS. WHERE ARE THE FOOTPRINTS? WHERE
13 ARE THE OTHER FORENSIC STUFF? STUFF YOU SEE ON CSI.
14 AMAZINGLY IF YOU WATCH CSI THAT'S ON TONIGHT BY THE WAY.
15 YOU WATCH CSI YOU'LL HAVE A CRIME AND THEY'LL BE GOING
16 AROUND AND ALL OF A SUDDEN IN THE CORNER, YOU KNOW, THEY
17 WORK ON IT FOR DAYS AND ALL OF A SUDDEN IN THE CORNER
18 THERE IS A CRITICAL PIECE OF EVIDENCE THAT NOBODY ELSE
19 HAS SEEN AND ... AND IT CRACKS THE CASE. WELL, LADIES
20 AND GENTLEMEN, THAT'S NOT THE REAL WORLD. THE REAL WORLD
21 IS THAT YOU HAVE A CRIME SCENE LIKE THIS RIGHT HERE, YOU
22 HAVE A STORE WHERE PEOPLE ARE COMING IN AND OUT EVERYDAY.
23 HOW MANY HANDS DO YOU THINK PUSHED ON THIS DOOR AND THIS
24 DOOR DURING THE COURSE OF A WEEK OR DURING THE COURSE OF
25 THAT MORNING. FIVE OR TEN PEOPLE WERE OR HAD ALREADY

1 COME IN THE STORE PUSHING ON THE DOOR. EVERYBODY COMES
2 IN THE STORE SHOPPING AND PUTTING THEIR HANDS ALL OVER
3 EVERYTHING. WHAT GOOD IS DUSTING FOR FINGERPRINTS? AND
4 THE TOWELS THAT WERE THROWN DOWN ON THE REGISTER COUNTER
5 WERE TERRY TOWELS, CLOTH TOWELS. YOU'RE NOT GOING TO GET
6 FINGERPRINTS OFF OF THAT. THAT'S WHAT I CALL A CLASSIC
7 RED HERRING. A CLASSIC RED HERRING. WELL, YOU COULD
8 HAVE GOT FINGERPRINTS OR YOU COULD HAVE GOT FOOTPRINTS OR
9 YOU COULD HAVE DONE THIS OR YOU COULD ... IT JUST AIN'T
10 THERE A LOT OF TIMES. IT'S JUST NOT THERE. BUT WHAT DO
11 YOU HAVE IN THIS CASE? HIS HONOR IS GOING TO TALK TO YOU
12 ABOUT CREDIBILITY OF THE WITNESSES. AND CREDIBILITY OF A
13 WITNESS IS THE BELIEVABILITY OF A WITNESS. IS HE TELLING
14 ... IS THAT WITNESS TELLING THE TRUTH? THIS ... AND YOU
15 JUDGE THAT. YOU JUDGE IT BY DO THEY HAVE A GOOD GRASP OF
16 THE FACTS. DO THEY TESTIFY FROM A BASIS OF KNOWLEDGE?
17 DOES IT SOUND LIKE THEY KNOW WHAT THEY'RE TALKING ABOUT?
18 DO THEY STUTTER? DO THEY LOOK AT THEIR SHOES? LOOK AT
19 THE CEILING AND ALL THAT SORT OF THING. I SUBMIT TO YOU
20 THAT THESE LADIES AND ONE GENTLEMAN THAT TESTIFIED WERE
21 VERY, VERY CREDIBLE WITNESSES. THEY KNEW WHAT HAPPENED,
22 THEY KNEW THEY WERE ROBBED AND THEY KNEW WHO DID IT, THEY
23 KNOW WHO DID IT AND THAT'S THAT DEFENDANT SITTING RIGHT
24 THERE. SO DON'T BE SWAYED BY THE FACT THAT THERE ARE NO
25 FINGERPRINTS AND THERE SHOULD HAVE BEEN FINGERPRINTS. OR

1 THERE ARE NO FOOTPRINTS OR THEY COULDN'T DESCRIBE A GUN.
2 THEY COULDN'T SAY WHETHER IT WAS A REVOLVER OR AN
3 AUTOMATIC. THESE LADIES DON'T APPEAR TO BE THE TYPE OF
4 PEOPLE THAT HANDLE GUNS ALL THE TIME. AND IF YOU'RE NOT
5 A GUN EXPERT IT'S DIFFICULT TO TELL THE DIFFERENCE
6 BETWEEN AN AUTOMATIC AND A REVOLVER. AGAIN, THAT'S A RED
7 HERRING, LADIES AND GENTLEMEN. WHAT DID THEY DESCRIBE
8 ABOUT THAT GUN, THOUGH? WHAT DID EVERY ONE OF THEM
9 DESCRIBE ABOUT THAT GUN? IT HAD A WHITE HANDLE. IT HAD
10 A PEARL HANDLE. THE ONE IDENTIFYING FEATURE ABOUT THAT
11 GUN THAT EVERYBODY WOULD HAVE KNOWN ABOUT, SHOULD HAVE
12 KNOWN ABOUT WAS ... WAS THE HANDLE AND IT WAS A WHITE
13 PEARL HANDLED GUN. WHAT ELSE DID THEY TELL YOU ABOUT IT?
14 THEY SAID WHAT WAS HE WEARING. MR. WHEELER AGAIN TRYING
15 ... TRYING TO CHIP AWAY, RAISE RED HERRINGS, WHAT WERE
16 THEY WEARING? BLUE JEANS, WEARING A BLACK SHIRT, AND
17 WEARING A KHAKI HAT. ALL OF THEM TESTIFIED TO THAT.
18 AGAIN, ANOTHER THING THAT MR. WHEELER WOULD LEAD YOU TO
19 ... WOULD TRY TO CREATE A REASONABLE DOUBT IN YOUR MIND
20 WITH WAS FACIAL HAIR. FACIAL HAIR, YOU KNOW, THERE'S HIS
21 PHOTOGRAPH, NUMBER TWO THERE, YOU MAY SAY THAT THERE IS A
22 HINT OF A MUSTACHE THERE. OR YOU MAY SAY HE HASN'T
23 SHAVED IN A COUPLE OF DAYS. YOU KNOW. WHO KNOWS. BUT
24 THAT IS ... THAT IS ... THAT PHOTOGRAPH I THINK IF YOU
25 LOOK AT IT COULD YOU DESCRIBE AS A CLEAN SHAVEN PERSON OR

1 YOU MIGHT SAY WELL, HE MIGHT HAVE A HINT OF A MUSTACHE.
2 AND AGAIN, THAT IS A RED HERRING. I WILL TELL YOU WHAT
3 IS SO ... WHAT I LIKE ABOUT THE STATE'S CASE IS MR.
4 WHEELER DID HIS BEST TO UNDERCUT THE IDENTIFICATION OF
5 EACH OF THE STATE'S WITNESSES AND HE WAS NOT ABLE TO DO
6 THAT. THE STATE'S WITNESSES WERE SURE OF WHAT THEY SAW,
7 THEY KNEW THAT THEY WERE ROBBED AT GUNPOINT BY THIS
8 DEFENDANT. BY THIS DEFENDANT. AND AGAIN THEY WEREN'T
9 JUST PICKING SOME JOE BLOW OUT OF THE SKY. THIS ...
10 THAT'S 12 PEOPLE THAT THEY LOOKED AT THAT THEY SAID
11 WEREN'T HERE AND HERE IS ANOTHER ... ANOTHER FIVE, THAT'S
12 17 PEOPLE THAT THEY LOOKED AT SAID IT WASN'T ... ABLE TO
13 IDENTIFY THE DEFENDANT. SO THEY WEREN'T MAKING SNAP
14 JUDGEMENTS. THEY WEREN'T JUST WILLY NILLY IDENTIFYING
15 EVERYBODY. THEY LOOKED AT 17 PEOPLE ... THEY ACTUALLY
16 LOOKED AT 18 PEOPLE AND FOUND THE DEFENDANT OUT OF 18
17 PEOPLE.

18 NOW, YOU HAVE A VERY, VERY HEAVY BURDEN TODAY. VERY
19 HEAVY BURDEN. AND THAT BURDEN IS TO DECIDE THE FACTS,
20 YOU KNOW, WHAT HAPPENED ... WHAT HAPPENED ON JULY 22ND,
21 2004. AND YOU HAVE TO DO IT BASED ON WHAT YOU HEARD FROM
22 THAT WITNESS STAND. OKAY? WHAT YOU HEARD ON THAT
23 WITNESS STAND FROM AN ID FROM FOUR PEOPLE WHO HAD A GUN
24 STUCK IN THEIR FACE WHAT YOU HEARD FROM THAT WITNESS
25 STAND WAS THAT THIS DEFENDANT, STEVE MCCLAIN, CAME IN ON

1 JULY 22ND, POINTED A GUN AT THESE LADIES, AND GOT
2 \$2,000.00. THAT'S ARMED ROBBERY. THAT'S USE OF A WEAPON
3 DURING A VIOLENT CRIME. I WON'T BE ABLE TO TALK TO YOU
4 ANYMORE. BUT DON'T GET LOST ARGUING OVER THE RED
5 HERRINGS. ARGUE LOOK AT WHAT'S BEEN GIVEN TO YOU.
6 LOOK WHAT'S BEEN PRESENTED TO YOU. THANK YOU VERY MUCH.

7 THE COURT: MR. WHEELER?

8 MR. WHEELER: THANK YOU, YOUR HONOR. MAY IT
9 PLEASE THE COURT?

10 THE COURT: YES, SIR.

11 MR. WHEELER: MADAM FORELADY, LADIES AND
12 GENTLEMEN, I APPRECIATE IT. I AGREE WITH MR. FATA. YOU
13 ALL PROBABLY MORE SO THAN A LOT OF JURIES THAT I'VE HAD
14 THE OPPORTUNITY TO BE IN FRONT OF AND MY OBSERVATION WAS
15 THAT YOU PAID PARTICULAR ATTENTION IN THIS CASE AND
16 LISTENED CLOSELY. AND I DON'T THINK THAT YOU ALL HAVE
17 DONE THAT BECAUSE YOU WERE WORRIED ABOUT RED HERRINGS. I
18 THINK YOU ALL HAVE DONE THAT BECAUSE SOME THINGS HAVE
19 COME OUT DURING THE COURSE OF THIS TRIAL THAT HAVE BEEN
20 REAL PROBLEMS. I THINK YOU ALL HAVE TAKEN NOTE OF THEM
21 DURING THE COURSE OF THE TRIAL. SO WHEN I MENTION THEM
22 TO YOU IN MY CLOSING WHICH WILL BE THE LAST CHANCE THAT I
23 HAVE TO SPEAK WITH YOU I DON'T THINK YOU ALL ARE GOING TO
24 JUST DISREGARD THEM. I THINK THEY ARE CONSTANT. THIS IS
25 A SERIOUS CASE. THIS IS ARMED ROBBERY. IT'S NOT

1 JAYWALKING. IT'S NOT SPEEDING. IT'S A --- IT'S A SERIOUS
2 CASE BUT HAS IT BEEN TREATED SERIOUSLY BY THE POLICE IN
3 THIS PARTICULAR CASE? WHAT THEY ... WHAT IT APPEARS THAT
4 THEY DID IN THIS CASE, WHAT DID THEY DO? THEY GOT A
5 CALL, THEY WENT TO THE SCENE AND THEY DIDN'T CORDON IT
6 OFF. DIDN'T PUT UP ANY POLICE LINE DO NOT CROSS. A
7 SECURITY THING. ACCORDING TO THE TESTIMONY OF THE
8 WITNESSES THERE WERE BETWEEN FIVE AND TEN OTHER CUSTOMERS
9 IN THE STORE. WE DON'T KNOW WHAT THEIR NAMES ARE. WE
10 DON'T KNOW WHAT THEY SAW. WE DON'T KNOW WHO THEY ARE.
11 ADDITIONALLY, AND I BROUGHT THIS OUT TO YOU WHEN IT COMES
12 TO MAKING THE DETERMINATION ON THIS IDENTIFICATION AND
13 THIS IS ONE THING I'M GONNA COME BACK TO THIS A GOOD BIT
14 LATER. THESE FOUR PEOPLE ... AND LET ME TELL YOU THIS, I
15 DON'T THINK ANY OF THESE INDIVIDUALS HAVE LIED TO YOU. I
16 DON'T THINK THEY'RE BAD OR THEY WOULD DO ANYTHING WRONG
17 INTENTIONALLY. SO DON'T ... PLEASE DON'T THINK THAT I'M
18 SAYING THAT WHEN I COMMENT ON THEIR ABILITY TO MAKE AN
19 IDENTIFICATION. THAT'S NOW WHERE I'M COMING FROM. BUT
20 THEY TESTIFIED OR AT LEAST MS. BETTY RUTH AND MS. CLYBURN
21 THERE WERE FIVE TO TEN REGULAR CUSTOMERS, PEOPLE THEY
22 KNEW IN THE STORE. BUT THEY COULDN'T ... ESPECIALLY MS.
23 RUTH ... I REMEMBER ASKING THE QUESTION IN PARTICULAR ...
24 COULDN'T CALL ONE NAME TO YOU ALL TODAY AS TO WHO THE
25 PEOPLE THAT THEY KNEW WERE IN THE STORE AND YET THEY CAN

1 MAINTAIN A 100 PERCENT THAT THIS STRANGER THAT THEY HAD
2 NEVER SEEN BEFORE THEY FELT LIKE BEYOND A SHADOW OF A
3 DOUBT WAS THE MAN THAT ROBBED THEIR STORE. MS. RUTH
4 WOULDN'T ADMIT THAT A MUSTACHE IS FACIAL HAIR. NO, I
5 WOULDN'T SHAVE. NOW, YOU CAN INFER MORE THAN ONE THING
6 FROM THAT. YOU CAN INFER IF I ASKED IF IT WAS LIGHT
7 OUTSIDE SHE MIGHT NOT HAVE AGREED WITH ME ABOUT THAT
8 EITHER. AND YOU CAN TAKE THAT IN YOUR CALCULATIONS WHEN
9 YOU'RE TRYING TO DETERMINE WHETHER IT'S ... YOU KNOW,
10 SOMEBODY THAT'S UNDERSTANDABLY UPSET, WANTS TO GO WITH
11 THAT DETERMINATION AND NOT GOING TO BE SWAYED FROM IT OR
12 WHETHER IT'S SOMETHING THEY ACTUALLY HAD THE OPPORTUNITY
13 TO KNOW. SO GETTING BACK TO THE POLICE FOR A MOMENT.
14 THEY GO TO THE SCENE, THEY TALK TO THE WITNESSES OF
15 COURSE. AND THEY GET A PRETTY GENERAL DESCRIPTION. THE
16 ONLY DESCRIPTION THAT YOU ALL HEARD TODAY WAS WHAT? A
17 BLACK MALE APPROXIMATELY SIX FEET IN HEIGHT IN BLUE
18 JEANS, A BLACK SHIRT AND A HAT. SOME OF THE WITNESSES
19 TODAY SAID IT WAS A BROWN HAT. INTERESTINGLY ENOUGH I
20 DON'T KNOW IF YOU ALL PICKED UP ON THIS THE THREE
21 WITNESSES WHO WERE IN THE COURTROOM DURING THE ENTIRE
22 COURSE OF THE TRIAL SAID BROWN. THE ONLY WITNESS THAT
23 WAS WHAT WE CALL SEQUESTERED AND ASKED TO SIT OUTSIDE THE
24 COURTROOM AND DIDN'T HEAR WHAT EVERYBODY ELSE SAID SAID
25 IT WAS A KHAKI HAT. SOMETIMES THINGS LIKE THAT WILL

1 DEVELOP WHEN ONE PERSON DOESN'T GET TO HEAR WHAT
2 EVERYBODY ELSE HAS SAID. AND THAT'S WHY WITNESSES ARE
3 SEQUESTERED. SO THEY THEN ... AND BASED ON THIS PRETTY
4 GENERAL DESCRIPTION ... I MEAN I DON'T THINK ... AND AGE
5 25 TO 35. I THINK THAT WAS THE OTHER IDENTIFYING FACTOR.
6 THEY GO AND THE POLICE DEPARTMENT START SHOWING PICTURES.
7 LADIES AND GENTLEMEN, I SUBMIT TO YOU IF YOU ARRANGE ALL
8 THESE PICTURES TOGETHER IT'S MUCH DIFFERENT THAN LOOKING
9 THROUGH A HIGH SCHOOL YEAR BOOK AT AN ALL MENS SCHOOL. I
10 MEAN THERE'S NOT MUCH TO SEPARATE THEM AND OF COURSE THEY
11 ENDED UP PICKING OUT SOMEBODY. IT WAS MY CLIENT. WHAT
12 IN ADDITION TO PICKING OUT THIS PICTURE IS THERE TO LINK
13 MR. STEVEN MCCLAIN TO THIS CRIME? NOW, LADIES AND
14 GENTLEMEN, THIS FINGERPRINT ISSUE IS NOT A SERIOUS ISSUE,
15 FINGERPRINTS ARE ON MIAMI CSI. THEY'VE BEEN AROUND SINCE
16 ABOUT 1900. NOT REAL TRICKY. AND MR. FATA HAS MADE AN
17 ISSUE OF IT, SAID PEOPLE COME IN AND OUT THAT DOOR ALL
18 THE TIME, YOU CAN'T GET ANY FINGERPRINTS OFF OF THAT
19 DOOR. INVESTIGATOR MILLER SAID IT WAS MY DISCRETION AND
20 I CHOSE NOT TO TRY TO LIFT ANY FINGERPRINT SAMPLES FROM
21 THAT DOOR. LADIES AND GENTLEMEN, IT'S PRETTY COMMON
22 SENSE. THE FINGERPRINTS IF THERE WERE SOME ARE THE LAST
23 FINGERPRINTS TOUCHING. NOT MANY PEOPLE THAT CAME IN
24 THREE DAYS AGO. PEOPLE THAT JUST LEFT. THEY'RE DOWN
25 THERE WITHIN FIVE MINUTES OF THE ROBBERY. TOOK AND JUST

1 QUITE FRANKLY --- A CRIME THIS SERIOUS. YOU KNOW, WE
2 THINK OF IT AND WE PROBABLY DO WATCH TOO MUCH TELEVISION
3 BUT WE THINK ANYTHING HAPPENS THE POLICE SAY STAY AWAY
4 FROM HERE SO WE CAN DO OUR INVESTIGATION. INVESTIGATOR
5 MILLER SAID NO, WE'LL NEVER KNOW WHOSE FINGERPRINTS ARE
6 ON THERE. I DIDN'T ... DIDN'T CROSS MY MIND TO ...
7 ACTUALLY, YOU KNOW WHAT, IT DID CROSS HIS MIND. THAT'S
8 ... THAT'S PROBABLY A LITTLE MORE DISTURBING. HE SAID NO
9 AT MY DISCRETION I DECIDED IT WOULDN'T BE WORTHWHILE TO
10 TEST IT FOR THEM. NOW, SOMETHING I DIDN'T ASK HIM WHEN
11 HE WAS ON THE STAND BECAUSE FRANKLY I DIDN'T GO OVER IT
12 BECAUSE I TOLD YOU I WOULDN'T KNOW WHAT SOME OF THESE
13 WITNESSES WERE GOING TO SAY UNTIL THEY GOT UP. HE SAYS
14 THE ONE THING HE DID I THINK MAKE SOME ATTEMPT TO
15 FINGERPRINT ANALYSIS WAS SOME TERRY CLOTH. I THINK
16 PRETTY MUCH ALL OF US KNOW FINGERPRINTS ARE NOT GOING TO
17 STICK TO IT. BUT EVERY ONE OF THESE WITNESSES ALSO STOOD
18 UP AND SAID WELL, WE TOLD INVESTIGATOR MILLER ALSO ABOUT
19 SOME OTHER THINGS. WE TOLD HIM ABOUT PLASTIC THAT THE
20 MAN PICKED UP BY THE BACK OF THE STORE AND SHOWED MS.
21 RUTH. AND I ASKED MS. RUTH DID YOU TELL THE INVESTIGATOR
22 ABOUT THAT AND WHEN SHE SAID YES, SHE DID AND ALSO MS.
23 ASHLEY RUTH AND TREVOR MCDUFFIE SAID WHEN HE FIRST WAS
24 NEAR THEM OVER BY THE STOREROOM AND THEY THOUGHT AND THIS
25 WAS A DIFFERENT PACKAGE THAN THE TERRY CLOTH TOWELS THAT

1 WERE LEFT UP FRONT A PACKAGE OF BRAWNY TYPE TOWELS THAT
2 WE ALL KNOW AND THAT THEY DESCRIBED COMES WRAPPED IN
3 ESSENTIALLY SARAN WRAP. I MEAN, IT'S NOT SARAN WRAP BUT
4 A PLASTIC TYPE MATERIAL. INVESTIGATOR MILLER ADMITTED
5 THAT TYPE OF MATERIAL PLASTICS, GLASS, METAL WERE ALL
6 SUBJECT TO FINGERPRINT EVIDENCE. HOW MUCH WORK WOULD IT
7 HAVE TAKEN TO GO AND FIND THESE THINGS OUT. JUST TO DO
8 THIS STUFF. NONE OF THAT WAS DONE. IT FALLS IN YOUR LAP
9 TODAY, WHAT HAVE YOU GOT? FOUR NICE PEOPLE WHO BELIEVE
10 WHAT THEY SAW. THEY'RE CONSISTENT NOW ABOUT WHAT THEY
11 SAW. EVERY SINGLE ONE OF THEM SAYS BLUE JEANS, BLACK
12 SHIRT, HAT. ONE OF THEM'S DIFFERENT ON THE HAT. BUT IF
13 YOU'LL NOTICE THEY'RE ALL ALSO CONSISTENT WITH WHAT THEY
14 DON'T KNOW. NONE OF THEM SAW HIS SHOES. NONE OF THEM
15 SAW ANY BELT. NONE OF THEM SAW ANYTHING EXCEPT BLUE
16 JEANS, BLACK SHIRT AND A HAT. SOMETIMES YOU CAN JUDGE AS
17 MUCH THE OPPORTUNITY TO VIEW SOMEBODY BY WHAT THEY SAW AS
18 WHAT THEY ... YOU DON'T ... IT DOESN'T STRIKE ON ME AS A
19 BIT ODD THAT NOBODY NOTICED WHETHER THEY WERE TENNIS
20 SNEAKERS OR BROWN SUEDE SHOES. NOBODY PICKED UP ON THAT.
21 ALSO EVERYBODY SAYS ... AND KEEP IN MIND WHAT THIS
22 IDENTIFICATION IS MADE BASED UPON. THEY ALL TESTIFIED
23 THEY SPENT TIME OBSERVING HIM BLUE JEANS, BLACK SHIRT AND
24 A HAT. THAT'S NOT IN THE PHOTO. MY CLIENT'S NOT WEARING
25 IT TODAY. OBVIOUSLY BLUE JEANS, BLACK SHIRT AND HAT

1 DON'T HAVE ANYTHING AT THE IDENTIFICATION THAT THESE FEW
2 PEOPLE MADE. THIS IS IT. THAT'S WHAT THE IDENTIFICATION
3 IS BASED ON. AND THERE YOU HAVE IT. A STRANGER.
4 SOMEBODY EVERY ONE OF THEM SAID THEY'D NEVER SEEN IN
5 THEIR LIFE. IT'S A ... IT'S A LITTLE TROUBLING. IT'S
6 BEEN TROUBLING FOR A LONG TIME. SOMEBODY ONCE SAID THE
7 IDENTIFICATION OF STRANGERS IS PROVERBIALY
8 UNTRUSTWORTHY. THE PERSON THAT SAID THAT WAS A MAN NAMED
9 FELIX FRANKLIN WHO WAS AT THE TIME HE SAID IT A JUSTICE
10 ON THE UNITED STATES SUPREME COURT AND HE SAID IT IN A
11 CASE THAT'S NOT LAW AND I'M NOT QUOTING IT TO YOU AS LAW
12 JUST SOMETHING HE NOTED IN THE COURSE OF A CASE THAT THEY
13 DECIDED CALLED US V. WADE AND IT WAS BACK IN 1926. IT
14 WAS A GOOD WHILE. YOU KNOW, WE'VE HAD A LOT OF
15 TECHNOLOGICAL INNOVATIONS SINCE 1926. BUT THE WAY PEOPLE
16 SEE THINGS AND THE WAY THAT THEY MAKE IDENTIFICATIONS
17 HASN'T CHANGED. THE ABILITY TO CONFIRM THOSE
18 IDENTIFICATIONS MAY HAVE CHANGED. FINGERPRINT TECHNOLOGY
19 ALSO WAS AROUND IN 1926, IT'S PROBABLY BETTER THAN IT WAS
20 BACK THEN. BUT EVEN THEN A SUPREME COURT JUSTICE HE
21 WOULD SAY THAT THE IDENTIFICATION ... AND KEEP IN MIND
22 THAT'S A STRANGER. YOU MAY SEE SOMEBODY THAT YOU KIND OF
23 KNOW AND TRY AND PICK THEM OUT AND MAYBE YOU EVER ...
24 ESPECIALLY AROUND HERE WE HAVE A TENDENCY TO DO IT, THROW
25 YOUR HAND UP AND WAVE AT SOMEONE AND WHEN THEY PASS ON,

1 YOU KNOW, WAS THAT BOB LANIER OR WAS THAT SOMEBODY ELSE
2 SOMETIMES WE DO IT BASED ON CAR THEY WERE DRIVING OR
3 OTHER PERCEPTIONS WE CAN HAVE. IMAGINE TRYING TO PICK
4 OUT A STRANGER, SOMEBODY THAT YOU'VE NEVER SEEN IN YOUR
5 LIFE. THAT'S WHAT YOU ALL ARE LEFT WITH. WHETHER BEYOND
6 A REASONABLE DOUBT YOU ALL ARE ABLE TO TRUST EVEN THESE
7 GOOD PEOPLE IN IDENTIFICATION FROM HERE TO HERE SOMEBODY
8 THEY DON'T KNOW, NEVER KNEW BEFORE. LADIES AND
9 GENTLEMEN. IT'S NOT THE KIND OF THING THAT YOU TAKE A
10 GAMBLE ON. YOU CAN'T TAKE A GAMBLE ON SOMETHING LIKE
11 THAT. THE BURDEN IS TOO HIGH. ANYTHING THE JUDGE WILL
12 TELL YOU IN HIS CHARGE AND I THINK TOLD YOU EARLIER
13 ANYTHING THAT WOULD CAUSE YOU TO HESITATE TO ACT IS
14 REASONABLE DOUBT. MR. FATA CALLED THEM RED HERRINGS.
15 NOW, WE DO HAVE THOSE VARIOUS THINGS, THOSE ... WHAT
16 THOSE PEOPLE SAW AND WHETHER YOU CAN JUDGE THAT. ALSO I
17 WANT YOU TO THINK ABOUT THIS WHEN YOU THINK ABOUT WHAT
18 THEY SAW. HOW CERTAIN THEY TOLD YOU ALL THAT THEY WERE
19 TODAY. ESPECIALLY TWO OF THEM. MS. CLYBURN. AT THE
20 TIME SHE WAS SHOWN THE PHOTO LINEUP SHE SAID I CAN'T PICK
21 HIM OUT. NOW, THERE WAS SOME DISCREPANCY IN THE
22 TESTIMONY TODAY BETWEEN WHAT SHE TOLD THE DETECTIVE. THE
23 DETECTIVE SAID THAT SHE COULDN'T PICK HIM OUT, THAT SHE
24 TOLD HIM SHE DIDN'T CLEARLY SEE HIM. AND TODAY SHE SAID
25 THAT I COULDN'T PICK HIM OUT OF THE LINEUP BECAUSE I WAS

1 NERVOUS AND SCARED. BUT NOW WE COME IN HERE TODAY FOUR
2 MONTHS LATER AND SHE'S CERTAIN. IT'S ... IT'S JUST A
3 LITTLE TROUBLING. HER MANAGER SEES IT AND NOW SHE'S
4 CERTAIN. DO PEOPLE'S MEMORY OF STRANGER IMPROVE OVER THE
5 COURSE OF FOUR MONTHS? OR DOES IT GET HARDER TO PICK
6 SOMEBODY OUT? I MEAN, IT'S NOT LIKE THERE'S ANYTHING TO
7 REINFORCE. THERE'S NOTHING TO GO BACK TO. SHE'S NEVER
8 SEEN HIM. AND YOU MUST UNDERSTAND ALL THESE THINGS
9 BEYOND A REASONABLE DOUBT TO CONVICT.

10 NOW, LET ME TALK TO YOU ONE MORE TIME ABOUT ... NOT
11 ONE MORE TIME, ONE TIME ABOUT SOMETHING THE JUDGE WILL
12 TALK TO YOU A LITTLE BIT ABOUT. MR. MCCLAIN DIDN'T
13 TESTIFY. OKAY? HIS HONOR WILL TELL YOU THAT YOU CAN'T
14 HOLD THAT AGAINST HIM AND YOU CAN'T HOLD THAT AGAINST HIM
15 AND I TRUST THAT YOU WON'T. THE STATE IS THE ONLY PERSON
16 IN THIS CASE THAT HAD ANY BURDEN OF PROOF. THEY MUST
17 PRESENT PROOF BEYOND A REASONABLE DOUBT THAT MR. MCCLAIN
18 IS THE PERSON THAT COMMITTED THIS CRIME IN ORDER FOR YOU
19 ALL TO CONNECT HIM TO THIS. BUT LET ME TELL YOU THIS
20 HE'S TESTIFIED TO ABOUT ALL HE CAN SAY BY BEING HERE FOR
21 THE TRIAL. YOU ALL SAT DOWN IN THE POOL EARLIER IN THE
22 WEEK AT LEAST FOR A COUPLE DAYS AND YOU MIGHT HAVE HAD
23 ... YOU MAY NOT HAVE BEEN HERE AND YOU MAY AS PEOPLE CAME
24 FORWARD AND PLED GUILTY TO SOME THINGS AND I'D SAY A
25 FAIRLY LARGE PERCENTAGE OF THE CASES THAT COME UP IN THIS

1 COURT WIND UP IN PEOPLE STANDING THIS FAR THAN SITTING AT

2 THOSE TABLES AND PLEADING GUILTY. MR. MCCLAIN'S COME

3 BEFORE YOU ALL AND PLED NOT GUILTY AND ASKED FOR A TRIAL.

4 I MEAN WHAT ELSE CAN HE SAY OTHER THAN I PLEAD NOT

5 GUILTY. I DIDN'T DO IT. IT WASN'T ME.

6 MR. FATA: YOUR HONOR, I THINK THAT'S IMPROPER.

7 HE'S PLED NOT GUILTY. I DON'T THINK HE CAN COMMENT ON

8 WHAT ...

9 THE COURT: YOU'RE NOT COMMENTING ON WHAT HE

10 WOULD SAY, THAT'S CORRECT.

11 MR. WHEELER: THANK YOU. AT ANY RATE AND HIS

12 HONOR WILL INSTRUCT YOU FURTHER ON THAT AND THE LAW IS

13 THE LAW. I'M NOT GOING TO CONTINUE ABOUT THAT. AND SO

14 THAT'S WHAT WE'RE LEFT WITH IN THIS CASE. THESE FOUR

15 PEOPLE WHO MAYBE THAT'S WHAT THEY SAW, MAYBE IT'S NOT.

16 ARE YOU WILLING TO TAKE A GAMBLE BEYOND A REASONABLE

17 DOUBT WHEN THERE'S NOTHING ELSE TO BACK IT UP? AND

18 THERE'S A GOOD CHANCE THERE COULD HAVE BEEN SOMETHING

19 ELSE TO BACK IT UP. LADIES AND GENTLEMEN, I'M GOING TO

20 ASK YOU NOT TO TAKE THAT RISK. WHEN YOU LOOK IN THE

21 MIRROR TOMORROW OR A MONTH FROM NOW OR WATCH ONE OF THESE

22 TV SHOWS --- WE'VE GOT THEM OR WE CAUGHT THEM, THEIR

23 IDENTIFICATIONS OF PEOPLE, YOU DON'T WANT TO LOOK IN THE

24 MIRROR WHEN YOU'RE SHAVING OR BRUSHING YOUR TEETH AND SAY

25 OH, NO, WHAT IF I WAS WRONG. YOU WOULDN'T WANT THAT.

1 AND THERE'S NOBODY'S GONNA CHANGE AFTER THAT. HIS
2 HONOR'S TOLD YOU THAT AN ERROR OF LAW THAT HE MAY MAKE
3 WHICH JUDGE KING'S NOT INCLINED TO MAKE THERE'S SOMEBODY
4 ELSE TO CORRECT THAT. WHEN YOU ALL DECIDE FACTS IT'S
5 NEVER GOING TO BE CHANGED. YOU ALL ARE THE FINAL NO
6 COURT OF APPEALS, NO SUPREME COURT, NOBODY LOOKS BEHIND
7 THE FACTUAL DETERMINATIONS THAT YOU ALL MAKE. UNDERSTAND
8 THE SERIOUSNESS OF THAT. I DO ASK THAT YOU GO BACK TO
9 THE JURY ROOM AND AFTER YOU CONSIDER THIS FIND MR.
10 MCCLAIN NOT GUILTY. THANK YOU.

11 THE COURT: ALL RIGHT, MADAM FORELADY AND LADIES
12 AND GENTLEMEN OF THE JURY, IF YOU COULD JUST GIVE ME YOUR
13 ATTENTION. YOU HAVE FOLLOWED VERY PATIENTLY AND LISTENED
14 VERY ATTENTATIVELY TO THE PRESENTATION OF THE EVIDENCE IN
15 THIS CASE AND ALSO TO THE ABLE ARGUMENTS MADE BY THE
16 SOLICITOR, MR. FATA, ON BEHALF OF THE STATE AND MR.
17 WHEELER ON BEHALF OF THE DEFENDANT AND I THANK YOU FOR
18 THAT. IT NOW BECOMES THE DUTY OF THE TRIAL JUDGE UNDER
19 THE CONSTITUTION OF THIS STATE TO CHARGE AND INSTRUCT YOU
20 ON THE LAW APPLICABLE TO THIS CASE. AND IT IS YOUR DUTY
21 AS JURORS TO ACCEPT AND APPLY THE LAW AS THE COURT WILL
22 NOW STATE IT TO YOU. AND AS JURORS IT IS YOUR EXCLUSIVE
23 DUTY TO DECIDE ALL THE ISSUES OF FACT IN THIS CASE AND
24 FOR THAT PURPOSE DETERMINE IN EFFECT THE VALUE, THE
25 WEIGHT, AND THE TRUTH OF THE EVIDENCE. BOTH THE STATE

1 AND THE DEFENDANT HAVE RIGHT TO EXPECT THAT YOU WILL
2 CONSCIENTIOUSLY CONSIDER AND EVALUATE THE EVIDENCE AND
3 APPLY THE LAW OF THE CASE THERETO TO THE END THAT BOTH
4 THE STATE OF SOUTH CAROLINA AND THE DEFENDANT WILL
5 RECEIVE AND OBTAIN A FAIR AND IMPARTIAL TRIAL. NOW, WHEN
6 I USE THE WORD DEFENDANT IN THESE INSTRUCTIONS I REFER OF
7 COURSE TO MR. STEVEN MCCLAIN. THE STATE OF SOUTH
8 CAROLINA BY A BILL OF INDICTMENT IN THIS CASE CHARGES THE
9 DEFENDANT, MR. MCCLAIN, WITH TWO OFFENSES. THE FIRST IS
10 THE OFFENSE KNOWN IN THE LAW AS ARMED ROBBERY AND THE
11 SECOND IS THE OFFENSE KNOWN IN THE LAW AS THE POSSESSION
12 OF A WEAPON DURING THE COMMISSION OF A CRIME OF VIOLENCE.
13 AND I'M GOING TO SUMMARIZE WHAT THE CHARGES ARE IN THE
14 INDICTMENT. IN COUNT ONE THE STATE CHARGES THAT STEVEN
15 MCCLAIN DID IN LEE COUNTY ON OR ABOUT JULY 22ND, 2004,
16 VIOLATE SOUTH CAROLINA LAW IN THAT WHILE ARMED WITH A
17 DEADLY WEAPON, SPECIFICALLY A HANDGUN, HE DID FELONIOUSLY
18 TAKE FROM THE PERSON AND PRESENCE OF TREVOR TREMAINE
19 MCDUFFIE, ASHLEY RUTH, SHIRLEY CLYBURN AND BETTY ANN RUTH
20 BY MEANS OF FORCE OR INTIMIDATIONS GOODS OR MONIES OF THE
21 FAMILY DOLLAR STORE IN BISHOPVILLE. THE GOODS AND MONIES
22 BEING DESCRIBED AS \$2,000.00. AND THAT IS THE CHARGE OF
23 ARMED ROBBERY. THE SECOND CHARGE OF THE INDICTMENT OR
24 COUNT TWO IS THAT STEVEN MCCLAIN DID IN LEE COUNTY ON OR
25 ABOUT JULY THE 22ND, 2004, THAT HE WAS IN POSSESSION OF

1 AND DID DISPLAY A FIREARM DURING THE COMMISSION OF A
2 CRIME OF VIOLENCE SPECIFICALLY THE CRIME OF ARMED
3 ROBBERY. TO THESE CHARGES AND TO THIS INDICTMENT THE
4 DEFENDANT HAS ENTERED A PLEA OF NOT GUILTY. THIS PLEA OF
5 NOT GUILTY BY THE DEFENDANT PLACES THE BURDEN OF PROOF ON
6 THE STATE TO PROVE BY EVIDENCE THE GUILT OF THE DEFENDANT
7 BEYOND A REASONABLE DOUBT BEFORE YOU THE JURY CAN FIND
8 HIM GUILTY. THE DEFENDANT, MR. MCCLAIN, IS PRESUMED
9 UNDER THE LAW INNOCENT OF THE CHARGE CONTAINED IN THE
10 INDICTMENT. IT IS A CARDINAL AND FUNDAMENTAL RULE OF THE
11 LAW OF EVIDENCE THAT A DEFENDANT IRRESPECTIVE OF THE
12 ENORMITY OF THE CHARGES AGAINST HIM WILL ALWAYS BE
13 PRESUMED INNOCENT OF THE CRIME FOR WHICH HE IS INDICTED
14 UNLESS AND UNTIL THE GUILT OF THE DEFENDANT HAS BEEN
15 PROVEN BY EVIDENCE WHICH SATISFIES YOU THE JURY OF HIS
16 GUILT BEYOND A REASONABLE DOUBT. THE PRESUMPTION OF
17 INNOCENCE IS NOT A MERE LEGAL THEORY. IT IS NOT JUST A
18 LEGAL PHRASE. THE PRESUMPTION OF INNOCENCE IS A
19 SUBSTANTIAL RIGHT TO WHICH EVERY ACCUSED IS ENTITLED.
20 OUR SUPREME COURT HAS DECLARED THAT THE PRESUMPTION OF
21 INNOCENCE IS LIKE A ROBE OF RIGHTEOUSNESS PLACED ABOUT
22 THE SHOULDERS OF THE DEFENDANT AND IT REMAINS WITH HIM
23 AND ASSIGNS TO HIM THAT PHRASE THE INNOCENT UNTIL THAT
24 PRESUMPTIVE ROBE OF RIGHTEOUSNESS HAS BEEN STRIPPED FROM
25 HIS PERSON BY EVIDENCE SATISFYING YOU, THE JURY, OF THE

1 ~~GUILT OF THE DEFENDANT BEYOND A REASONABLE DOUBT. THE~~
2 PRESUMPTION OF INNOCENCE ACCOMPANIES THE DEFENDANT FROM
3 THE TIME OF HIS ARRAIGNMENT AND APPEARANCE IN THIS COURT
4 AND CONTINUES WITH THE DEFENDANT AFTER YOU RETIRE TO THE
5 JURY ROOM TO DELIBERATE YOUR VERDICT. THE PRESUMPTION OF
6 INNOCENCE CONTINUES IN EXISTENCE TO THE BENEFIT OF THE
7 DEFENDANT UNTIL YOU, THE JURY, REACH THE CONCLUSION THAT
8 THE STATE HAS PROVEN THE GUILT OF THE DEFENDANT BEYOND A
9 REASONABLE DOUBT.

10 THE STATE IS NOT REQUIRED TO PROVE THE GUILT OF THE
11 DEFENDANT BEYOND ALL DOUBT OR BEYOND EVERY DOUBT. BUT
12 BEYOND A REASONABLE DOUBT. A REASONABLE DOUBT IS THE
13 KIND OF DOUBT THAT WOULD CAUSE A REASONABLE PERSON TO
14 HESITATE TO ACT. I CHARGE YOU THAT THE DEFENDANT IS
15 ENTITLED TO EVERY REASONABLE DOUBT RISING IN THE WHOLE
16 CASE OR RISING IN ANY DEFENSES ASSERTED BY THE DEFENDANT.
17 IF ON ANY ISSUE OF FACT ESSENTIAL TO CONVICTION AND A
18 VERDICT OF GUILTY YOU HAVE A REASONABLE DOUBT AS TO HOW
19 THAT ISSUE SHOULD BE RESOLVED IT WOULD BE YOUR DUTY TO
20 RESOLVE THAT DOUBT IN FAVOR OF THE DEFENDANT.

21 A DEFENDANT, LADIES AND GENTLEMEN, IS NOT REQUIRED
22 TO PROVE HIS INNOCENCE BUT THE STATE IS REQUIRED BY THE
23 LAW TO PROVE EVERY ESSENTIAL ELEMENT OF THE OFFENSE
24 CHARGED AGAINST THE DEFENDANT BY EVIDENCE THAT WOULD
25 SATISFY YOU, THE JURY, OF THE GUILT OF THE DEFENDANT

1 BEYOND A REASONABLE DOUBT BEFORE YOU CAN CONVICT HIM AND
2 FIND HIM GUILTY. IF THEN, UPON THE WHOLE CASE YOU HAVE A
3 REASONABLE DOUBT AS TO THE GUILT OR INNOCENCE OF THE
4 DEFENDANT HE IS ENTITLED TO THAT REASONABLE DOUBT AND
5 WOULD BE ENTITLED TO AN ACQUITTAL AND A VERDICT OF NOT
6 GUILTY. BUT ON THE OTHER HAND, IF UPON THE WHOLE CASE
7 YOU FIND THAT THE STATE HAS PROVEN BY EVIDENCE WHICH
8 SATISFIES YOU, THE JURY, OF THE GUILT OF THE DEFENDANT
9 BEYOND A REASONABLE DOUBT THEN IN THAT CIRCUMSTANCE IT
10 WOULD BE EQUALLY YOUR DUTY TO CONVICT THE DEFENDANT AND
11 FIND HIM GUILTY.

12 NOW, I INSTRUCT YOU AS I DID AT THE FIRST OF THIS
13 CASE THAT THE INDICTMENT WHICH I HOLD IN MY HAND IS NOT
14 EVIDENCE AND CANNOT BE CONSIDERED BY YOU AS EVIDENCE IN
15 THIS CASE. THE INDICTMENT IS SIMPLY THE FORMALLY WRITTEN
16 INSTRUMENT WHICH CONTAINS THE CHARGES AGAINST THE
17 DEFENDANT AND IT SERVES AS A FORMAL DOCUMENT BY WHICH
18 THIS CASE WAS BROUGHT TO COURT.

19 NOW, LADIES AND GENTLEMEN, DURING THIS TRIAL EACH OF
20 US, YOU AND I HAD CERTAIN DUTIES TO PERFORM. AS THE
21 TRIAL JUDGE IT IS MY RESPONSIBILITY TO PRESIDE OVER THE
22 TRIAL OF THE CASE AND I ALSO HAVE THE DUTY TO RULE UPON
23 THE ADMISSIBILITY OF EVIDENCE OFFERED DURING THE PROGRESS
24 OF THE TRIAL. YOU ARE TO CONSIDER ONLY THE COMPETENT
25 EVIDENCE BEFORE YOU AND DISREGARD AND DISABUSE FROM YOUR

~~MIND ANY TESTIMONY ORDERED STRICKEN FROM THE RECORD OF~~

2 THIS CASE DURING THE PROCESS OF THE TRIAL IF THERE BE ANY
3 AND YOU ARE TO CONSIDER ONLY THE TESTIMONY WHICH HAS BEEN
4 PRESENTED FROM THE WITNESS STAND AND FROM ANY EXHIBITS
5 ADMITTED INTO THE RECORD OF THIS CASE. I HAVE THE
6 ADDITIONAL DUTY TO CHARGE YOU IN THE APPLICABLE LAW OF
7 THE CASE. AS THE PRESIDING JUDGE I AM THE SOLE JUDGE OF
8 THE LAW. AND IT IS YOUR DUTY TO APPLY AND ACCEPT THE LAW
9 AS I HAVE STATED TO YOU. IF YOU HAVE A PRECONCEIVED IDEA
10 AS TO WHAT THE LAW IS OR WHAT THE LAW OUGHT TO BE AND IT
11 DOESN'T AGREE WITH WHAT I TELL YOU THE LAW IS YOU ARE
12 OBLIGATED UNDER YOUR OATH TO ABANDON THIS PRECONCEPTION
13 ON YOUR PART BECAUSE YOU ARE SWORN TO ACCEPT THE LAW
14 PRECISELY AS I STATE IT TO YOU. IN ANY CASE TRIAL OF
15 THIS ORDER BEFORE A JURY THE JURY BECOMES THE SOLE AND
16 EXCLUSIVE JUDGE OF THE FACTS OF THE CASE. YOU, THE JURY,
17 ARE THE JUDGE OF THE FACTS IN THIS CASE. THE COURT IS
18 THE JUDGE OF THE LAW. THE CONSTITUTION OF THE STATE ...
19 OF THIS STATE HAS DECLARED THAT THE TRIAL JUDGE SHALL NOT
20 INTIMATE, STATE, COMMENT UPON OR MAKE ANY STATEMENTS OR
21 COMMENTARY ABOUT THE FACTS OF THE CASE. SINCE YOU ARE
22 THE SOLE JUDGE OF THE FACTS YOU ARE NOT TO INFER FROM
23 ANYTHING THAT I HAVE SAID DURING THE COURSE OF THIS TRIAL
24 IN RULING UPON THE ADMISSIBILITY OF EVIDENCE OR OTHERWISE
25 OR ANYTHING THAT I SAY TO YOU NOW DURING THE COURSE OF

1 THIS CHARGE TO YOU THAT I HAVE ANY OPINION ABOUT THE
2 FACTS OF THE CASE. I DO NOT. THE LAW DOES NOT PERMIT ME
3 TO HAVE AN OPINION ABOUT THE FACTS. THAT IS A MATTER
4 SOLELY FOR YOU, THE JURY TO DETERMINE. IT IS YOUR DUTY
5 THEN AS JURORS TO DETERMINE AS I HAVE STATED THE EFFECT,
6 THE VALUE, THE WEIGHT AND THE TRUTH OF THE EVIDENCE
7 PRESENTED DURING THE COURSE OF THIS TRIAL. NECESSARILY
8 AND YOU MUST ASSESS THE CREDIBILITY OF THE WITNESSES WHO
9 HAVE TESTIFIED IN THIS CASE. CREDIBILITY IS SIMPLY A
10 LEGALISTIC TERM WHICH MEANS BELIEVABILITY. IT BECOMES
11 YOUR DUTY THEN TO ANALYZE AND EVALUATE THE EVIDENCE AND
12 TO DETERMINE THAT EVIDENCE WHICH CONVINCES YOU OF ITS
13 TRUTH. I CHARGE YOU THAT IN DETERMINING THE QUESTION OF
14 CREDIBILITY OR BELIEVABILITY OF THE WITNESSES YOU CAN
15 BELIEVE ONE WITNESS AS AGAINST SEVERAL WITNESSES OR
16 SEVERAL WITNESSES AS AGAINST ONE WITNESS. YOU MAY
17 BELIEVE A PART OF THE TESTIMONY OF A WITNESS AND REJECT
18 THE REMAINING PART OF THE TESTIMONY OF THAT SAME WITNESS.
19 YOU MAY BELIEVE THE TESTIMONY OF A WITNESS IN ITS
20 ENTIRETY OR REJECT THE TESTIMONY OF A WITNESS IN ITS
21 ENTIRETY. YOU MAY CONSIDER WHETHER ANY WITNESS HAS
22 EXHIBITED ANY INTEREST, ANY BIAS OR ANY PREJUDICE IN THE
23 CASE. AND YOU MAY CONSIDER THE DEemeanor OF THE WITNESS.
24 THAT IS THE APPEARANCE OF A WITNESS FROM THE WITNESS
25 STAND. AND YOU MAY CONSIDER THE OPPORTUNITY FOR

1 KNOWLEDGE CONCERNING THOSE THINGS ABOUT THE WITNESS WHEN
2 THE WITNESS TESTIFIED. THESE CONSIDERATIONS YOU DO NOT
3 EXERCISE ARBITRARILY BUT IF IN YOUR GOOD JUDGEMENT THERE
4 IS SOME REASON IN THE RECORD FOR SO DOING. BECAUSE YOUR
5 OBJECTIVE, LADIES AND GENTLEMEN, IS TO FIND THE TRUTH
6 WHETHER IT COMES FROM ONE OR MORE WITNESSES IN MAKING
7 THAT DETERMINATION. AND IN DOING SO, IN EXERCISING YOUR
8 MENTAL PROCESSES AND IN DETERMINING WHAT YOU CONSIDER TO
9 BE TRUTH THE LAW SIMPLY REQUIRES THAT YOU EXERCISE YOUR
10 GOOD JUDGEMENT, YOUR COMMON SENSE, YOUR SENSE OF LOGIC
11 AND REASONING AND YOUR EXPERIENCES IN LIFE. YOU THEN
12 APPLY THOSE ATTRIBUTES AND ABILITY TO THE EVIDENCE AND
13 DETERMINE WHAT YOU CONSIDER TO BE THE TRUTHFUL EVIDENCE.
14 AND TO THESE TRUE STATE OF FACTS AS DETERMINED BY YOU,
15 THE JURY, YOU TAKE AND APPLY THE LAW AS I WILL NOW GIVE
16 IT TO YOU AND ARRIVE AT A VERDICT IN THIS CASE.

17 NOW, AS I SAID THE DEFENDANT IN THIS INDICTMENT IS
18 CHARGED WITH TWO OFFENSES. ONE IS ARMED ROBBERY AND THE
19 OTHER IS POSSESSION OF A WEAPON DURING THE COMMISSION OF
20 A CRIME OF VIOLENCE AND I'M GOING TO DEFINE THESE
21 OFFENSES FOR YOU. IN ORDER TO PROVE THE OFFENSE OF ARMED
22 ROBBERY THE STATE MUST FIRST PROVE BEYOND A REASONABLE
23 DOUBT THE DEFENDANT TOOK PERSONAL PROPERTY FROM THE
24 PERSON OR PRESENCE OF ANOTHER. PROPERTY IS IN THE
25 PRESENCE OF A PERSON IF IT IS WITHIN THAT PERSON'S REACH,

1 INSPECTION, OBSERVATION, OR CONTROL SO THAT THE PERSON
2 WHO COULD IF NOT OVERCOME WITH VIOLENCE OR PREVENTED BY
3 FEAR KEEP POSSESSION OF THE PROPERTY. THE STATE MUST
4 ALSO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT
5 CARRIED THE PROPERTY AWAY AND CONTINUED TO PERMANENTLY
6 DEPRIVE THAT OWNER OF THE PROPERTY. AND TO KEEP THE
7 PROPERTY FOR THE DEFENDANT'S OWN USE. THE SLIGHTEST
8 REMOVAL OF PROPERTY OR THE COMPLETE POSSESSION OF THE
9 PROPERTY EVEN FOR AN INSTANT BY THE DEFENDANT IS
10 SUFFICIENT TO SHOW A TAKING AND CARRYING AWAY OF THE
11 PROPERTY. THE TAKING AND CARRYING AWAY OF THE PROPERTY
12 MUST HAVE BEEN DONE WITH VIOLENCE OR BY PUTTING THE OWNER
13 OF THE PROPERTY IN FEAR OF VIOLENCE. FINALLY, THE STATE
14 MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT
15 WAS ARMED WITH A DEADLY WEAPON DURING THE ROBBERY. A
16 DEADLY WEAPON IS ANY ARMED INSTRUMENT OR SUBSTANCE WHICH
17 IS LIKELY TO CAUSE DEATH OR GREAT BODILY HARM. WHETHER
18 AN INSTRUMENT HAS BEEN USED AS A DEADLY WEAPON DEPENDS ON
19 THE FACTS AND CIRCUMSTANCES OF THE CASE. THE FOLLOWING
20 ARE EXAMPLES OF INSTRUMENTS WHICH MAY BE DEADLY WEAPONS:
21 PISTOL, SHOTGUN, RIFLE, DIRK, DAGGER, OR KNIFE.

22 NOW, THE SECOND CHARGE AGAINST THE DEFENDANT IS
23 POSSESSION OF A WEAPON DURING THE COMMISSION OR ATTEMPT
24 TO COMMIT A VIOLENT CRIME. THE STATE MUST PROVE BEYOND A
25 REASONABLE DOUBT THAT THE DEFENDANT WAS IN POSSESSION OF

1 ~~A FIREARM OR VISIBLY DISPLAYING WHAT APPEARED TO BE A~~
2 FIREARM DURING THE COMMISSION OF A VIOLENT CRIME. A
3 FIREARM MEANS ANY MACHINE GUN, AUTOMATIC RIFLE, REVOLVER,
4 PISTOL OR ANY WEAPON WHICH IS DESIGNED TO OR MAY BE
5 READILY CONVERTED TO EXPEL A PROJECTILE. IN ORDER TO
6 FIND THE DEFENDANT GUILTY OF THE POSSESSION OF A WEAPON
7 DURING THE COMMISSION OF VIOLENT CRIME YOU MUST FIRST
8 FIND THE DEFENDANT GUILTY OF EITHER COMMITTING A VIOLENT
9 CRIME OR ATTEMPTING TO COMMIT A VIOLENT CRIME. AND I
10 WILL CHARGE YOU THAT ARMED ROBBERY IS UNDER SECTION 16-1-
11 60 OF THE CODE OF LAW OF SOUTH CAROLINA A VIOLENT CRIME.

12 NOW, LADIES AND GENTLEMEN, ONE OF THE ISSUES IN THIS
13 CASE IS THE IDENTIFICATION OF THE DEFENDANT AS THE
14 PERPETRATOR OF THE CRIME. THE STATE HAS THE BURDEN OF
15 PROVING THE IDENTIFICATION BEYOND A REASONABLE DOUBT. IT
16 IS NOT ESSENTIAL THAT A WITNESS HIMSELF OR HERSELF BE
17 FREE FROM DOUBT AS TO THE CORRECTNESS OF THE ... OF HIS
18 STATEMENT. HOWEVER, YOU, THE JURY, MUST BE SATISFIED AND
19 BEYOND A REASONABLE DOUBT OF THE ACCURACY OF
20 IDENTIFICATION OF THE DEFENDANT BEFORE YOU MAKE MAY
21 CONVICT HIM. IF YOU'RE NOT CONVINCED BEYOND A REASONABLE
22 DOUBT THAT THE DEFENDANT WAS THE PERSON WHO COMMITTED THE
23 CRIME YOU WOULD FIND THE DEFENDANT NOT GUILTY. ON THE
24 OTHER HAND, IF YOU ARE CONVINCED BEYOND A REASONABLE
25 DOUBT THAT THE DEFENDANT WAS THE PERSON WHO COMMITTED THE

1 CRIME YOU WOULD LOOK AT THE OTHER ELEMENTS AND SEE THE
2 CRIME WAS COMMITTED. IDENTIFICATION TESTIMONY IS AN
3 EXPRESSION OF BELIEF OR IMPRESSION OF THE WITNESS. IT'S
4 VALUE DEPENDS ON THE OPPORTUNITY THE WITNESS HAD TO
5 OBSERVE THE OFFENDER AT THE TIME OF THE OFFENSE AND TO
6 MAKE A RELIABLE IDENTIFICATION OF HIM. IN APPRAISING THE
7 IDENTIFICATION TESTIMONY OF A WITNESS YOU SHOULD CONSIDER
8 THE FOLLOWING: ARE YOU CONVINCED THAT THE WITNESS HAD A
9 CAPACITY AND AN ADEQUATE OPPORTUNITY TO OBSERVE THE
10 OFFENDER. WHETHER THE WITNESS HAD AN AMPLE OPPORTUNITY
11 TO OBSERVE THE OFFENDER AT THE TIME OF THE OFFENSE WOULD
12 BE AFFECTED BY SUCH A MATTER AS HOW LONG OR HOW SHORT A
13 TIME WAS AVAILABLE. HOW FAR, HOW CLOSE HE WAS THE
14 PERPETRATOR. HOW GOOD WERE THE LIGHTING CONDITIONS.
15 WHETHER THE WITNESS HAD ... HAD OCCASION TO SEE OR KNOW
16 THE PERSON IN THE PAST. ALSO ARE YOU SATISFIED THAT THE
17 IDENTIFICATION MADE BY A WITNESS AFTER THE OFFENSE WAS
18 THE PROPERTY OF HIS OWN RECOLLECTION. HIS OR HER
19 RECOLLECTION. YOU MAY TAKE INTO ACCOUNT THE STRENGTH OF
20 THE IDENTIFICATION AND THE CIRCUMSTANCES UNDER WHICH THE
21 IDENTIFICATION WAS MADE. THIRD YOU MAY TAKE INTO ACCOUNT
22 ANY OCCASIONS THE WITNESS FAILED TO MAKE AN
23 IDENTIFICATION OF THE DEFENDANT OR MADE AN IDENTIFICATION
24 THAT WAS INCONSISTENT WITH THE IDENTIFICATION AT TRIAL.
25 AND FINALLY YOU MUST CONSIDER THE CREDIBILITY OF EACH

1 IDENTIFICATION WITNESS IN THE SAME WAY AS ANY OTHER

2 WITNESS, CONSIDERING WHETHER HE OR SHE IS TRUTHFUL AND
3 WHETHER HE OR SHE HAD THE CAPACITY OR OPPORTUNITY TO MAKE
4 A RELIABLE OBSERVATION OF THE MATTERS COVERED IN HIS OR
5 HER TESTIMONY. I WOULD AGAIN EMPHASIZE TO YOU THAT THE
6 BURDEN OF PROOF IS ON THE STATE TO EVERY ELEMENT OF THE
7 CRIME CHARGED AND THIS SPECIFICALLY INCLUDES THE BURDEN
8 OF SHOWING BEYOND A REASONABLE DOUBT THE IDENTITY OF THE
9 DEFENDANT AS THE PERPETRATOR OF THE CRIME FOR WHICH HE
10 STANDS CHARGED. IF AFTER EXAMINING THE TESTIMONY YOU
11 HAVE A REASONABLE DOUBT AS TO THE ACCURACY OF THE
12 IDENTIFICATION YOU WOULD FIND THE DEFENDANT NOT GUILTY.
13 ON THE OTHER HAND, IF YOU HAVE NO REASONABLE DOUBT AS TO
14 THE ACCURACY OF THE IDENTIFICATION YOU WOULD LOOK AND SEE
15 IF THE OTHER ELEMENTS OF THE CRIME ARE PRESENT AND MAKE A
16 DETERMINATION OF GUILT.

17 NOW, LADIES AND GENTLEMEN, I WOULD INSTRUCT YOU NOW
18 AND EMPHASIZE TO YOU THAT THE ELECTION OF THE DEFENDANT
19 IN THE TRIAL OF A CRIMINAL CASE NOT TO TESTIFY IN HIS OWN
20 BEHALF IS NOT A FACT TO BE CONSIDERED BY YOU IN ANY WAY
21 IN YOUR DELIBERATIONS AND IN YOUR CONSIDERATION ON THE
22 QUESTION OF THE GUILT OR INNOCENCE OF THE ACCUSED. IT
23 MUST NOT BE CONSIDERED BY YOU IN ANY MANNER WHATSOEVER
24 AGAINST THE DEFENDANT OR MITIGATED AGAINST HIM IN ANY
25 RESPECT WHATSOEVER. A DEFENDANT HAS THE CONSTITUTIONAL

1 RIGHT TO REMAIN SILENT AND THE ASSERTION OF SUCH RIGHT
2 CANNOT AND MUST NOT BE CONSIDERED BY YOU IN YOUR
3 DELIBERATIONS. UNDER YOUR OATH THEN YOU ARE TO REACH NO
4 INFERENCE OR DRAW NO CONCLUSIONS WHATSOEVER FROM THE FACT
5 THAT THE DEFENDANT IN THIS CASE DID NOT THEMSELF TESTIFY.
6 THE ELECTION OF THE DEFENDANT NOT TO TESTIFY SHOULD NOT
7 EVEN BE DISCUSSED IN YOUR JURY ROOM. THE BURDEN OF PROOF
8 AS I HAVE STATED TO YOU IS UPON THE STATE. IT IS NOT
9 INCUMBENT UPON THE ACCUSED TO PROVE HIS INNOCENCE. THE
10 BURDEN OF PROOF REMAINS UPON THE STATE TO PROVE THE GUILT
11 OF THE DEFENDANT BEYOND A REASONABLE DOUBT AND THE
12 ELECTION OF THE DEFENDANT NOT TO TESTIFY IS NOT A FACTOR
13 TO BE CONSIDERED BY YOU IN DETERMINING THE GUILT OR
14 INNOCENCE OF THE DEFENDANT.

15 NOW, LADIES AND GENTLEMEN, I HAVE NOT FINISHED MY
16 INSTRUCTIONS TO YOU BUT I WILL TELL YOU THAT YOU ARE NOT
17 ADVOCATES FOR THE STATE OF SOUTH CAROLINA OR FOR THIS
18 DEFENDANT. YOU HAVE NO FRIENDS TO REWARD AND NO ENEMIES
19 TO PUNISH. OBVIOUSLY SUCH A PERVERTED SYSTEM OF JUSTICE
20 WOULD BE INTOLERABLE. YOU HAVE BEEN SELECTED BY BOTH THE
21 STATE AND THIS DEFENDANT AS FAIR AND IMPARTIAL JURORS.
22 IT IS YOUR DUTY THEN BY YOUR JURY DELIBERATIONS TO
23 DETERMINE THE TRUTH IN THIS CASE GIVING TO THE DEFENDANT
24 THE BENEFIT OF EVERY REASONABLE DOUBT ON EACH AND EVERY
25 ISSUE. AND THEN TO THE FACTS THAT YOU DETERMINE TO BE

1 ~~TRUE YOU THEN TAKE AND APPLY THE LAW WHICH HAS BEEN GIVEN~~

2 TO YOU BY THE COURT AND ARRIVE AT A VERDICT WHICH DOES
3 SPEAK THE TRUTH. FOR THE WORD VERDICT, LADIES AND
4 GENTLEMEN, HAS A LATIN DERIVATIVE. IT COMES FROM THE
5 LATIN VERB VERIDICTO MEANING TO SPEAK THE TRUTH OR TRUTH
6 SAYING. AND WHEN YOU HAVE ACCOMPLISHED THESE
7 RESPONSIBILITIES YOU WOULD HAVE SATISFIED YOUR OATH AS
8 JURORS AND YOU WILL HAVE DISCHARGED YOUR DUTY TO THE
9 COURT.

10 I'M NOT GOING TO INSTRUCT YOU ON THE FORMS OF
11 VERDICT IN THIS CASE. IF THE STATE HAS FAILED TO PROVE
12 THE GUILT OF THE DEFENDANT BEYOND REASONABLE DOUBT YOUR
13 VERDICT WOULD BE TWO WORDS, NOT GUILTY. IF THE STATE HAS
14 PROVEN THE GUILT OF THE DEFENDANT BEYOND A REASONABLE
15 DOUBT YOUR VERDICT WOULD BE ONE WORD, GUILTY. AND I WILL
16 CHARGE YOU, MADAM FORELADY AND LADIES AND GENTLEMEN OF
17 THE JURY, THAT THE VERDICT OF THE JURY MUST BE YOUR
18 UNANIMOUS VERDICT. IT MUST BE THE VERDICT OF ALL 12
19 JURORS. ALL OF YOU MUST AGREE ON THE VERDICT THAT YOU
20 AUTHORIZE THE FORELADY TO WRITE.

21 NOW, MADAM FORELADY, I HAVE PREPARED A SHEET OF
22 PAPER THAT HAS THE VERDICT FORMS ON IT AND I WILL TELL
23 YOU THAT THE ORDER IN WHICH I HAVE PUT THE POSSIBLE
24 VERDICTS ON THIS SHEET HAS NO SIGNIFICANCE WHATSOEVER AND
25 YOU SHOULD NOT INFER FROM THE ORDER IN WHICH I HAVE PUT

1 THE POTENTIAL VERDICTS ON THIS PAPER ... THAT I HAVE ANY
2 VIEW AS TO WHAT YOUR VERDICT SHOULD BE. I DO NOT. BUT
3 OBVIOUSLY IN SETTING UP THIS FORM I HAD TO PUT SOMETHING
4 FIRST AND PUT SOMETHING SECOND. BUT ACROSS THE TOP UP
5 HERE IS SIMPLY THE FORMALITIES OF THE CASE, STATE OF
6 SOUTH CAROLINA, COUNTY LEE, COURT OF GENERAL SESSIONS,
7 STATE OF SOUTH CAROLINA VS. STEVEN MCCLAIN VERDICT FORM.
8 WE, THE JURY, BY UNANIMOUS CONSENT FIND THE DEFENDANT,
9 STEVEN MCCLAIN IN COUNT ONE GUILTY OF ARMED ROBBERY OR
10 NOT GUILTY OF ARMED ROBBERY. YOU'D INDICATE BY A CHECK
11 OR AN X ON THAT AS FAR AS COUNT ONE OF THE INDICTMENT.
12 IF YOU FIND THE DEFENDANT, STEVEN MCCLAIN GUILTY OF ARMED
13 ROBBERY YOU WILL CONSIDER AND DECIDE COUNT TWO,
14 POSSESSION OF A FIREARM DURING A CRIME OF VIOLENCE. IF
15 YOU FIND HIM NOT GUILTY OF ARMED ROBBERY YOU WILL NOT
16 CONSIDER COUNT TWO. BUT IF YOU FIND HIM GUILTY THEN YOU
17 ... OF ARMED ROBBERY THEN YOU MAY GO TO COUNT TWO AND YOU
18 CAN FIND HIM GUILTY OF POSSESSION OF A FIREARM DURING A
19 CRIME OF VIOLENCE OR NOT GUILTY AND SIGN YOUR NAME HERE;
20 MADAM FORELADY AND WE WILL RETURN YOU TO THE COURTROOM AS
21 SOON AS WE CAN.
22 NOW, I AM GOING TO SEND YOU TO YOUR JURY ROOM THOUGH
23 I ASK YOU NOT TO BEGIN YOUR DELIBERATIONS JUST YET. THE
24 LAW DOES REQUIRE THAT I TAKE UP CERTAIN MATTERS WITH THE
25 LAWYERS BEFORE I DO SO AND THAT BEFORE I ALLOW YOU TO

~~BEGIN DELIBERATION OF A VERDICT BUT I WILL TELL YOU~~

1
2 THINK THAT'S WHERE I'M GONNA STOP RIGHT NOW. I'VE GOT
3 ONE OTHER MATTER THAT I DO NEED TO TEND TO BUT I'LL DO
4 THAT IN JUST A MINUTE. BUT I AM GOING TO ASK YOU TO GO
5 TO YOUR JURY ROOM, PLEASE DO NOT BEGIN YOUR DELIBERATIONS
6 JUST YET AND WE'LL SEND FOR YOU AND WE WILL ... THE
7 BAILIFF WILL BRING YOU YOUR VERDICT FORM ALONG WITH THE
8 EXHIBITS AND TELL YOU TO BEGIN YOUR DELIBERATIONS WHEN IT
9 IS APPROPRIATE FOR YOU TO BEGIN YOUR DELIBERATIONS.
10 THANK YOU. PLEASE GO TO YOUR JURY ROOM.

11 (JURY OUT)

12 THE COURT: MR. WAZNEY, I'M GOING TO ASK YOU TO
13 STAY WITH ME JUST A MINUTE, PLEASE, SIR. ANY ADDITIONS
14 OR EXCEPTIONS ON BEHALF OF THE STATE, MR. FATA?

15 MR. FATA: NONE, YOUR HONOR.

16 THE COURT: MR. WHEELER?

17 MR. WHEELER: NONE.

18 THE COURT: ALL RIGHT. MR. WAZNEY, PREVIOUSLY
19 YOU EXPLAINED TO ME A PERSONAL PROBLEM THAT YOU HAD. IN
20 ORDER TO ACCOMMODATE THAT AND WITH THE PERMISSION OF THE
21 LAWYERS I HAVE ... I AM GOING TO BE ABLE TO DO THAT.
22 THAT'S THE PURPOSE OF OUR DRAWING AN ALTERNATE. SO I AM
23 GOING TO BE ABLE TO EXCUSE YOU SO YOU CAN TAKE CARE OF
24 THAT PROBLEM THAT YOU HAVE AND WON'T BE IN A SITUATION
25 AND I'M GOING TO SUBSTITUTE THE ALTERNATE IN YOUR PLACE.

1 SO YOU ARE FREE TO GO. I WOULD TELL YOU THAT ONCE YOU'VE

2 BEEN EXCUSED THERE'S NOTHING ILLEGAL ABOUT YOUR TALKING

3 TO ANYBODY ABOUT YOUR SERVICE ON THIS CASE ...

4 MR. WAZNEY: JUST WAIT TIL IT'S FINAL?

5 THE COURT: ... BUT I WANT YOU TO WAIT UNTIL

6 AFTER THIS JURY HAS MADE A DECISION.

7 MR. WAZNEY: WHAT IF THEY COME BACK TOMORROW?

8 THE COURT: YOU DON'T NEED TO COME BACK. YOU'RE

9 EXCUSED.

10 MR. WAZNEY: THANK YOU.

11 (MR. WAZNEY EXCUSED AT 4:02 P.M.).

12 THE COURT: ALL RIGHT, SIR. THANK YOU. AS THE

13 FORELADY AND THE ALTERNATE TO COME IN, PLEASE, MR.

14 MCDUFFIE. JUST THE FORELADY AND THE ALTERNATE. FOR

15 REASONS THAT HAVE BEEN EXPLAINED TO THE COURT IT WAS

16 NECESSARY AND IT WAS GOING TO BE ... POSSIBLY BE

17 NECESSARY THAT I EXCUSED ONE OF THE MEMBERS OF THE JURY

18 AND I HAVE EXCUSED MR. WAZNEY FOR A PERSONAL PROBLEM AND

19 THAT'S THE REASON WE DRAW AN ALTERNATE SO YOU ARE GOING

20 TO BECOME A PRINCIPLE MEMBER OF THIS JURY AND PARTICIPATE

21 IN THE DELIBERATIONS AND HE IS TO TAKE MR. WAZNEY'S PLACE

22 AND THAT'S WHY MR. WAZNEY'S NOT HERE. OKAY. WITH THAT

23 WE'LL GIVE YOU, MADAM FORELADY, THE VERDICT FORM, YOU ALL

24 MAY BEGIN YOUR DELIBERATIONS. THE BAILIFFS WILL BRING

25 YOU THE EXHIBITS IN JUST A FEW MINUTES AND YOU MAY BEGIN

1 YOUR DELIBERATIONS. THANK YOU.

2 THE COURT: ALL RIGHT, THIS JURY CAN BEGIN THEIR
3 DELIBERATIONS. WE WILL BE AT EASE UNTIL WE HEAR FROM THE
4 JURY.

5 (JURY BEGINS DELIBERATIONS AT 4:04 P.M.).

6 (WHEREUPON THERE WAS A PAUSE).

7 THE COURT: ALL RIGHT. BACK ON THE RECORD WITH
8 REGARD TO THE MATTER OF THE STATE OF SOUTH CAROLINA VS.
9 STEVEN MCCLAIN, GS 04-GS-31-137. LET THE RECORD
10 REFLECT THAT THE DEFENDANT IS PRESENT IN COURT WITH HIS
11 ATTORNEY, MR. WHEELER. THE STATE IS REPRESENTED BY MR.
12 FATA. COUNSEL, I UNDERSTAND THE JURY HAS REACHED A
13 VERDICT OR AT LEAST THE SIGNAL IS THAT THEY HAVE REACHED
14 A VERDICT. ANYTHING BEFORE WE BRING THE JURY IN, MR.
15 FATA?

16 MR. FATA: NOTHING FROM THE STATE.

17 THE COURT: MR. WHEELER?

18 MR. WHEELER: NOTHING FROM THE DEFENSE.

19 THE COURT: ALL RIGHT. BRING THE JURY IN.

20 (JURY IN AT 5:07 P.M.).

21 THE COURT: ALL RIGHT. MADAM FORELADY, HAVE YOU
22 REACHED A VERDICT?

23 MS. TOWNES: YES, WE HAVE.

24 THE COURT: WOULD YOU HAND IT UP, PLEASE? ALL
25 RIGHT. FROM THE STANDPOINT OF THE FORM THE VERDICT

1 APPEARS TO BE CORRECT. MR. CLERK, WILL YOU PUBLISH THE
2 VERDICT, PLEASE? MR. WHEELER, WOULD YOU HAVE THE
3 DEFENDANT STAND, PLEASE?

4 MR. DAVIS: THE STATE OF SOUTH CAROLINA VS.
5 STEVEN MCCLAIN, CASE NUMBER 2004-GS-31-137. WE, THE
6 JURY, BY UNANIMOUS CONSENT FIND THE DEFENDANT, STEVEN
7 MCCLAIN, COUNT ONE GUILTY OF ARMED ROBBERY, COUNT TWO,
8 GUILTY OF POSSESSION OF A FIREARM DURING A CRIME OF
9 VIOLENCE. FOREPERSON'S SIGNATURE.

10 THE COURT: THANK YOU. YOU MAY BE SEATED. IS
11 THIS YOUR VERDICT SO SAY YOU ALL? PLEASE SIGNIFY BY
12 RAISING YOUR RIGHT HAND. THANK YOU. ANYTHING BEFORE THE
13 JURY IS DISCHARGED, MR. WHEELER?

14 MR. WHEELER? NO, SIR.

15 THE COURT: ALL RIGHT.

16 (JURY DISMISSED AT 5:10 P.M.).

17 THE COURT: MOTIONS ON BEHALF OF THE DEFENDANT,
18 MR. WHEELER?

19 MR. WHEELER: YOUR HONOR, AT THIS TIME WE WOULD
20 RESPECTFULLY MOVE FOR A NEW TRIAL BASED UPON THE SAME
21 TYPES OF ARGUMENTS MADE IN SUPPORT OF OUR ADDITIONAL
22 MOTIONS AT THE DIRECTED VERDICT STAGE.

23 THE COURT: ALL RIGHT. I WILL RESPECTFULLY DENY
24 THAT MOTION. I DON'T THINK THAT THE MOTION FOR A NEW
25 TRIAL, THE MOTION FOR A JUDGEMENT AND ARRESTED VERDICT IS

1 NOT APPROPRIATE. I THINK THAT IT WAS A FACTUAL QUESTION

2 AND THE JURY'S DETERMINATION AND IF I WERE TO GRANT THAT
3 MOTION I WOULD BE SUBSTITUTING MY JUDGEMENT FOR THAT OF
4 THE JURY WHICH I FEEL THAT I CANNOT DO. SO I WILL
5 RESPECTFULLY DENY THE MOTIONS. ARE YOU READY TO GO
6 FORWARD WITH THE SENTENCING, MR. WHEELER? IF SO, PLEASE
7 COME AROUND.

8 MR. FATA: DO YOU HAVE THE INDICTMENT, YOUR
9 HONOR?

10 THE COURT: I DO.

11 MR. FATA: OKAY. HERE ARE THE SENTENCING
12 SHEETS. THIS IS THE ARMED ROBBERY AND THIS IS THE USE OF
13 A WEAPON. I PASS UP THE NOTICE OF INTENT TO SEEK
14 MANDATORY LIFETIME WITHOUT PAROLE. I'VE GIVEN TO MR.
15 WHEELER. AND THE CERTIFIED COPY OF MR. MCCLAIN'S PRIOR
16 CONVICTION FOR ARMED ROBBERY AND THAT WAS ... I THINK
17 THAT'S JUDGE COTTINGHAM, I'M NOT SURE BUT IT LOOKS LIKE
18 HIS SIGNATURE. ON APRIL THE 8TH, 1987, IT WAS TWO COUNTS
19 OF ARMED ROBBERY AND ONE COUNT OF COMMON LAW ROBBERY.
20 THIS IS A CERTIFIED COPY OF THAT AND IT WAS IN DARLINGTON
21 COUNTY.

22 THE COURT: ALL RIGHT. FIRST OF ALL, MR.
23 WHEELER, I HAVE FOUND THE COPY I HAD A COPY OF THE
24 STATE'S NOTICE DATED NOVEMBER 29TH, 2004, WHICH IS TO
25 SEEK A MANDATORY LIFE IMPRISONMENT AND I ASSUME THAT THIS

1 WAS SERVED ON YOU OR YOUR CLIENT AND YOU HAD NOTICE, A
2 TEN DAY NOTICE REQUIRED IN THE STATUTE.

3 MR. WHEELER: IT WAS SERVED ON ME, YOUR HONOR.

4 THE COURT: ALL RIGHT. ALL RIGHT, WE'LL MAKE
5 THIS A PART OF THE RECORD AS COURT'S EXHIBIT NUMBER TWO.
6 IT WOULD BE THE NOTICE TO SEEK MANDATORY LIFE
7 IMPRISONMENT THAT WAS ISSUED BY THE SOLICITOR'S OFFICE
8 AND SERVED ON THE COUNSEL FOR THE DEFENSE. THE COURT
9 ALSO HAS A COPY, A CERTIFIED COPY OF A SENTENCING SHEET,
10 A CERTIFIED COPY OF THE RECORDS OF DARLINGTON COUNTY
11 WHICH INDICATES THAT THE DEFENDANT WAS SENTENCED FOR
12 ARMED ROBBERY IN CASE NUMBER 87-GS-15-382, ALSO FOR 87-
13 GS-15-383 FOR A COMMON LAW ROBBERY AND 87-GS-15-384 FOR
14 ARMED ROBBERY BY JUDGE COTTINGHAM IN DARLINGTON COUNTY. ON
15 APRIL THE 8TH OF 1987. AT THAT TIME HE WAS GIVEN A
16 YOUTHFUL OFFENDER SENTENCE NOT TO EXCEED SIX YEARS. IT
17 DOES APPEAR THAT BASED UPON THESE CERTIFIED RECORDS WHICH
18 WILL ALSO BE MADE A PART OF THE RECORD OF THIS COURT AS
19 COURT'S EXHIBIT NUMBER THREE, BE THE CERTIFIED COPY OF
20 DARLINGTON COUNTY RECORDS THAT HE DID HAVE A PRIOR ARMED
21 ROBBERY THAT WOULD BE A FIRST MOST SERIOUS OFFENSE AND
22 THAT WOULD MAKE THIS A SECOND MOST SERIOUS OFFENSE. IS
23 THERE ANY DISAGREEMENT WITH THAT, MR. WHEELER?

24 MR. WHEELER: NO, SIR, YOUR HONOR.

25 THE COURT: ALL RIGHT. THAT BEING THE CASE, THE

HEARING

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1 COURT HAS NO DISCRETION ABOUT THE SENTENCING TO BE
2 IMPOSED. IS THERE ANYTHING FURTHER FROM THE STATE BEFORE
3 WE GO FORWARD?

4 MR. FATA: NO, SIR, YOUR HONOR, EXCEPT THAT YOU
5 HAVE PREVIOUSLY SEEN AND GONE OVER HIS OTHER CHARGES
6 WHICH WERE ... WHEN WE DISCUSSED IT ABOUT WHETHER OR NOT
7 HE WAS GOING TO TESTIFY WHAT COULD BE USED TO IMPEACH
8 HIM. I DON'T KNOW IF YOU WANT ME TO READ THOSE AGAIN BUT

9
10 THE COURT: LIKE I SAID, IT REALLY DOESN'T
11 MATTER BECAUSE THE COURT DOESN'T HAVE ANY DISCRETION AT
12 ALL.

13 MR. FATA: WE WOULDN'T HAVE ANYTHING ELSE.

14 THE COURT: ANYTHING FURTHER FROM THE DEFENSE,
15 MR. WHEELER?

16 MR. WHEELER: YOUR HONOR, I APPRECIATE THE
17 OPPORTUNITY BUT THERE'S REALLY NOTHING I CAN ADD, YOUR
18 HONOR. JUST RESPECTFULLY NOTE THAT I DON'T SAY ANYTHING
19 KNOWING THAT YOU DON'T HAVE ANY DISCRETION.

20 THE COURT: ALL RIGHT. UNDER OUR LAW WHEN THERE
21 ARE TWO MOST SERIOUS OFFENSES AND THE STATE GIVES AN
22 APPROPRIATE NOTICE AND THE DEFENDANT IS FOUND GUILTY OF
23 THE SECOND MOST SERIOUS OFFENSE THE COURT HAS NO
24 DISCRETION IN THE MATTER, HAS NO ALTERNATIVE BUT TO
25 IMPOSE THE SENTENCE REQUIRED BY LAW. THEREFORE, THE

HEARING

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1 SENTENCE OF THE DEFENDANT IN THIS CASE, MR. STEVEN
2 MCCLAIN, IS THAT HE IS COMMITTED TO THE STATE DEPARTMENT
3 OF CORRECTIONS FOR A TERM OF LIFE WITHOUT PAROLE. ALL
4 RIGHT.

5 MR. FATA: THANK YOU, YOUR HONOR.

6 THE COURT: WE ARE ADJOURNED.

7 MR. WHEELER: THANK YOU, YOUR HONOR.

8 THE COURT: WAIT A SECOND. LET'S GO BACK ON THE
9 RECORD JUST A MOMENT, MR. WHEELER. I DIDN'T DO ANYTHING
10 ... I'VE GOT TO GET THE FIVE YEARS ABOUT THE ... THE
11 POSSESSION OF A WEAPON. I FORGOT ABOUT THAT SENTENCING
12 SHEET. ON THE OTHER CHARGE WHICH I NEGLECTED TO SENTENCE
13 HIM ON, THE SENTENCE OF THE COURT IS ON THE USE OF A
14 WEAPON DURING THE COMMISSION OF A VIOLENT CRIME THE
15 SENTENCE OF THE COURT IS THE DEFENDANT IS COMMITTED TO
16 STATE DEPARTMENT OF CORRECTIONS FOR A PERIOD OF FIVE
17 YEARS TO RUN CONCURRENT WITH THE OTHER CHARGE. ALL
18 RIGHT. THAT'LL TAKE CARE OF IT. THANK YOU.

19 MR. FATA: THANK YOU, YOUR HONOR.

20 (WHEREUPON THERE WAS A PAUSE).

21

22

23

24

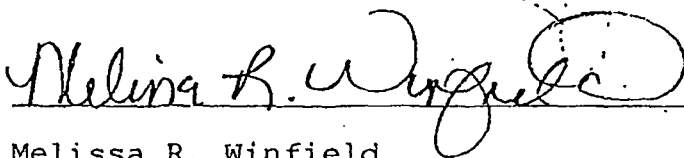
25

CERTIFICATE

This is to certify that the hearing in State of South Carolina vs. Steven McClain, consisting of Two Hundred Forty-Eight (248) pages is a true and correct transcript of the testimony given after being duly sworn; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am not employed by any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 7th day of May, 2005.



Melissa R. Winfield
Certified Court Reporter

Notary Public for South Carolina
My Commission Expires: 3-5-2014

STATE OF SOUTH CAROLINA)

COUNTY OF LEE)

COURT OF COMMON PLEAS

THE STATE,)

PLAINTIFF,)

v.)

STEVEN MCCLAIN,)

DEFENDANT.)

TRANSCRIPT OF RECORD
C/A #: 2004-GS-31-0137

BISHOPVILLE, SOUTH CAROLINA
DECEMBER 6, 2004

BEFORE:

HONORABLE HOWARD P. KING, PRESIDING JUDGE.

APPEARANCES:

Paul Fata, Esquire
Assistant Solicitor
Lee County
Bishopville, South Carolina
Attorney for State of South Carolina

Will Wheeler, Esquire
Jennings & Jennings
One Courthouse Square
Bishopville, South Carolina
Attorney for Steven McClain

TAKEN BY MELISSA R. WINFIELD
CERTIFIED VERBATIM REPORTER

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EXHIBITS

(There were no exhibits marked at this hearing)

1 THE COURT: Mr. Fata, what's the first matter this
2 afternoon?

3 MR. FATA: Your Honor, the State calls Indictment
4 Number 2004-GS-31-0137. The State vs. Steven McClain.
5 Mr. McClain is indicted for Armed Robbery and Possession
6 of a Firearm during a violent crime. The State is ready
7 for trial.

8 THE COURT: All right. Thank you, sir. All right.
9 Ladies and Gentlemen of the jury panel, if you will give
10 me your attention. The State has called the case of
11 State of South Carolina versus Steven McClain. What I'm
12 going to tell you now is not evidence in this case it is
13 simply allegations of the indictment. And I tell you
14 this so that you can determine if you know anything about
15 the case but it is in no way to be considered by you as
16 any evidence in the case but the State does allege in the
17 indictment that the Defendant McClain did in Lee County
18 on or about July 22 of 2004 violate South Carolina law in
19 that while armed with a deadly weapon specifically a
20 handgun that he did feloniously take from the person and
21 the presence of Trevor McDuffie, Ashley Ruth, Shirley
22 CLYBURN and Betty Ann Ruth by means of force or
23 intimidation certain monies of the Family Dollar Store in
24 Bishopville. So, the crime charged is the one for armed
25 robbery. The second count of the indictment charges that

1 he did on that same date July 22, 2004 possess and
2 physically display a firearm during the commission of a
3 violent crime. Now, those are the allegations of the
4 indictment. Through these allegations the Defendant has
5 pled not guilty and is receiving a trial. The Defendant,
6 Mr. McClain is represented by Mr. Wheeler. Mr. Wheeler,
7 would you stand and introduce yourself and introduce the
8 defendant and give the names of any lawyers with whom you
9 practice with.

10 MR. WHEELER: THANK YOU, YOUR HONOR. MY NAME IS WILL
11 WHEELER. THIS IS MY CLIENT STEVEN MCCLAIN AND MY LAW
12 PARTNER JACOB JENNINGS, BRYAN DOBY AND ROBERT JENNINGS.

13 THE COURT: THANK YOU. THE STATE OF SOUTH CAROLINA
14 IS REPRESENTED BY ASSISTANT SOLICITOR PAUL FATA. MR.
15 FATA, WOULD YOU STAND AND INTRODUCE YOURSELF AND GIVE THE
16 NAMES OF ANY OTHER LAWYERS WITH WHOM YOU WORK, PLEASE?

17 MR. FATA: YES. I'M PAUL FATA AND I PRACTICE LAW
18 WITH MY PARTNER PAT SEVERANCE.

19 THE COURT: BEFORE WE SELECT THE JURY IT IS NECESSARY
20 THAT I ASK YOU SOME QUESTIONS. PLEASE GIVE YOUR
21 ATTENTION TO THESE QUESTIONS AND IF ANY OF THEM APPLY TO
22 YOU, THEN PLEASE RESPOND ACCORDINGLY.

23 IS ANY MEMBER OF THE JURY PANEL RELATED BY BLOOD OR
24 CONNECTED BY MARRIAGE TO THE DEFENDANT STEVEN MCCLAIN?
25 IF SO, PLEASE STAND.

1 (NO RESPONSE)

2 THE FOLLOWING INDIVIDUALS MAY APPEAR AS WITNESSES IN
3 THIS CASE AND I WILL ASK THAT IF THE WITNESSES ARE
4 PRESENCE IN COURT THAT THEY WOULD STAND AND FACE THE JURY
5 WHEN THEIR NAME IS CALLED.

6 CAPTAIN THOMAS BURKE, INVESTIGATOR J. D. MILLER,
7 BETTY RUTH, ASHLEY RUTH, TREVOR MCDUFFIE AND SHIRLEY
8 CLYBURN. IS ANY MEMBER OF THE JURY PANEL RELATED BY
9 BLOOD OR CONNECTED BY MARRIAGE TO ANY OF THE PROPOSED
10 WITNESSES? IF SO, PLEASE STAND.

11 (NO RESPONSE)

12 IS ANY MEMBER OF THE JURY PANEL REPRESENTED NOW OR
13 BEEN REPRESENTED IN THE LAST FIVE (5) YEARS BY ANY OF THE
14 LAWYERS FOR THE STATE OR THE LAWYERS FOR THE DEFENDANT AS
15 THEY HAVE BEEN IDENTIFIED TO YOU? IF SO, PLEASE STAND.

16 (NO RESPONSE)

17 IS ANY MEMBER OF THE JURY PANEL CLOSE PERSONAL
18 FRIENDS OF ANY OF THE PARTIES, THEIR LAWYERS OR ANY OF
19 THE WITNESSES WHOM I HAVE READ OFF TO YOU, PLEASE STAND.

20 (JUROR STANDS)

21 YES, MA'AM. TELL ME YOUR NAME, PLEASE?

22 JUROR: I'M JUROR 106.

23 THE COURT: ALL RIGHT. ALL RIGHT. MS. SCARBOROUGH,
24 WHO DO YOU KNOW OR WHAT IS YOUR CONNECTION WITH ANY OF
25 THESE PARTIES?

1 JUROR: WELL, I KNOW EVERY ONE OF THE WITNESSES.

2 THE COURT: YOU KNOW ALL OF THEM. ARE YOU SOCIAL
3 FRIENDS WITH THEM. DO YOU ALL DO ANYTHING SOCIALLY OR
4 WHAT'S YOUR STATUS WITH THEM. HOW WELL DO YOU KNOW THEM?

5 JUROR: I HAVE A PART-TIME JOB AT CITI TREND AND

6 THE COURT: ALL RIGHT. THANK YOU, MA'AM. YES, SIR.

7 JUROR: I WORKED WITH Steven MCCLAIN FOR A WHILE.

8 THE COURT: ALL RIGHT. WAIT JUST A MINUTE, LET ME

9 GET YOUR NAME FIRST OF ALL.

10 JUROR: JONATHAN H. HOPKINS.

11 THE COURT: DO YOU RECALL YOUR NUMBER?

12 JUROR: #52.

13 THE COURT: #52. WHO DO YOU WORK WITH MR. HOPKINS?

14 JUROR: Steven ...

15 THE COURT: THE DEFENDANT IN THIS CASE?

16 JUROR: YES, SIR.

17 THE COURT: ARE YOU STILL WORKING TOGETHER?

18 JUROR: No, SIR.

19 THE COURT: HOW LONG AGO WAS THAT?

20 JUROR: BACK IN THE SPRING.

21 THE COURT: BACK IN THE SPRING, ALL RIGHT. HAVE YOU
22 HAD ANY CONTACT WITH HIM SINCE THAT TIME?

23 JUROR: NO, SIR.

24 THE COURT: WOULD THE FACT THAT YOU HAD PREVIOUSLY

25 WORKED WITH HIM PREVENT YOU FROM GIVING TO THE STATE AND

1 THE DEFENDANT A FAIR AND IMPARTIAL TRIAL BASED ON THE
2 EVIDENCE?

3 JUROR: SAY THAT AGAIN?

4 THE COURT: WOULD THE FACT THAT YOU HAD WORKED WITH
5 HIM IN THE PAST AND HAD THIS SITUATION THAT YOU'VE TOLD
6 ME ABOUT, WOULD THAT PREVENT YOU FROM GIVING TO THE STATE
7 AND THE DEFENDANT A FAIR TRIAL BASED ON THE EVIDENCE?

8 JUROR: YES, SIR.

9 THE COURT: YOU THINK IT WOULD?

10 JUROR: YES, SIR.

11 THE COURT: IN YOUR OPINION, YOU DON'T THINK YOU
12 WOULD BE ABLE TO PUT THAT ASIDE AND DECIDE THE CASE BASED
13 ON THE EVIDENCE IN THIS CASE?

14 JUROR: NO, SIR. I LIKE Steven.

15 THE COURT: ALL RIGHT. THANK YOU, SIR. ALL RIGHT.
16 THANK YOU LADIES AND GENTLEMEN. NOW, DOES ANY MEMBER OF
17 THE JURY PANEL KNOW ANYTHING ABOUT THE FACTS OF THIS CASE
18 AS I HAVE BRIEFLY RECITED THEM TO YOU? IF SO, PLEASE
19 STAND.

20 HAS ANY MEMBER OF THE JURY PANEL FORMED OR EXPRESSED
21 AN OPINION AS TO ... I'M SORRY.

22 JUROR: JUROR NUMBER 13, CHERYL BOWMAN.

23 THE COURT: YES, MA'AM.

24 JUROR: I WORK ACROSS THE STREET FROM FAMILY DOLLAR
25 AND NEXT STORE TO SUPER TEN AND ALL OF THE EMPLOYEES AT

1 BOTH PLACES AND WE DISCUSSED THIS A LOT.

2 THE COURT: SO, THE FACT THAT THIS CASE HAS BEEN
3 DISCUSSED AMONG YOU AND OTHER PEOPLE?

4 JUROR: YES, SIR.

5 THE COURT: ALL RIGHT. THANK YOU, MA'AM. MS. BOWMAN
6 LET ME GO BACK AND ASK YOU. WOULD THE FACT THAT YOU HAVE
7 DISCUSSED THE FACTS OF THIS CASE WITH MEMBERS OF THE
8 STORE AMONG YOURSELVES, WOULD THAT PREVENT YOU FROM
9 GIVING TO BOTH SIDES A FAIR AND IMPARTIAL TRIAL OR DO YOU
10 FEEL LIKE IT WOULD INFLUENCE YOUR DECISION?

11 JUROR: I'LL BE HONEST WITH YOU. I DON'T THINK I CAN
12 BE FAIR.

13 THE COURT: ALL RIGHT. THAT'S ALL I NEED TO KNOW.
14 THANK YOU, MA'AM.

15 HAS ANY MEMBER OF THE JURY PANEL FORMED OR EXPRESSED
16 AN OPINION AS TO THE GUILT OR INNOCENCE OF THE DEFENDANT
17 Steven MCCLAIN, IF SO, PLEASE STAND.

18 (NO RESPONSE)

19 OTHER THAN WHAT HAS BEEN DISCLOSED TO ME, IS ANY
20 MEMBER OF THE JURY PANEL AWARE OF ANY INTEREST, ANY BIAS
21 OR ANY PREJUDICE FOR OR AGAINST THE DEFENDANT, IF SO,
22 PLEASE STAND.

23 (NO RESPONSE)

24 CAN EACH MEMBER OF THE JURY PANEL GIVE TO THE STATE
25 AND THE DEFENDANT A FAIR AND IMPARTIAL TRIAL, IF NOT,

1 PLEASE STAND.

2 OTHER THAN WHAT HAS ALREADY BEEN DISCLOSED TO ME,
3 DOES ANY MEMBER OF THE JURY PANEL KNOW OF ANY REASON
4 WHATSOEVER WHY HE OR SHE SHOULD NOT SERVE AS A JUROR IN
5 THIS CASE? IF SO, PLEASE STAND.

6 (JUROR STANDS)

7 COME FORWARD, PLEASE. COUNSEL COME UP.

8 (JUROR ALONG WITH COUNSEL APPROACH BENCH)

9 THE COURT: ANY FURTHER QUESTIONS ON BEHALF OF THE
10 STATE, MR. FATA?

11 MR. FATA: NONE, YOUR HONOR.

12 THE COURT: ON BEHALF OF THE DEFENDANT, MR. WHEELER?

13 MR. WHEELER: NO, SIR, YOUR HONOR.

14 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN OF THE
15 JURY IF YOU WOULD GIVE ME YOUR ATTENTION. WE ARE NOW
16 READY TO BEGIN THE SELECTION OF THE JURY IN THE CASE.
17 MS. WATKINS WILL PUT THE NAMES OF THE QUALIFIED JURORS IN
18 A BIN HERE AND THEY WILL BE DRAWN OUT IN AN INDIVIDUAL
19 BASIS. WHEN YOUR NAME IS CALLED, PLEASE COME TO THE
20 FRONT OF THE COURTROOM, TURN AROUND AND FACE THE BACK OF
21 THE COURTROOM AND WE WILL GO THROUGH THE SELECTION
22 PROCESS. ALL RIGHT. MS. WATKINS, GIVE US THE JURY,
23 PLEASE.

24 CLERK: JUROR NUMBER 136, EDNA WILSON.

25 MR. FATA: PLEASE PRESENT THE JUROR.

1 MR. WHEELER: SEAT MS. WILSON, PLEASE.

2 CLERK: PLEASE HAVE A SEAT IN THE JURY BOX. JUROR

3 NUMBER 123, PATRICIA TONEY.

4 MR. FATA: PLEASE PRESENT MS. TONEY.

5 MR. WHEELER: SEAT MS. TONEY, PLEASE.

6 CLERK: JUROR NUMBER 80, MICHELE MOSES.

7 MR. FATA: PLEASE PRESENT MS. MOSES.

8 MR. WHEELER: PLEASE EXCUSE MS. MOSES FROM THE TRIAL

9 OF THIS CASE.

10 CLERK: JUROR NUMBER 17, DONALD CAYLOR.

11 MR. FATA: PLEASE PRESENT MR. CAYLOR.

12 MR. WHEELER: PLEASE EXCUSE MR. CAYLOR FROM THE TRIAL

13 OF THIS CASE.

14 CLERK: JUROR NUMBER 72, FUGUAN MCDUFFIE.

15 MR. FATA: PLEASE EXCUSE THIS JUROR FOR THIS CASE.

16 CLERK: HAVE A SEAT BACK WITH THE JURY PANEL. JUROR

17 NUMBER 42, CHARLES HAYES.

18 MR. FATA: PLEASE PRESENT MR. HAYES.

19 MR. WHEELER: PLEASE SEAT MR. HAYES.

20 CLERK: HAVE A SEAT IN THE JURY BOX. JUROR NUMBER

21 111, ROBIN SMITH.

22 MR. FATA: PLEASE PRESENT MS. SMITH.

23 MR. WHEELER: PLEASE EXCUSE MS. SMITH FROM THE TRIAL

24 OF THIS CASE.

25 CLERK: JUROR NUMBER 115, DONALD Stevens.

1 MR. FATA: PLEASE EXCUSE THE JUROR FROM THE TRIAL OF
2 THIS CASE.

3 CLERK: HAVE A SEAT BACK WITH THE JURY PANEL. JUROR
4 NUMBER 125, DELORES TOWNES.

5 MR. FATA: PLEASE PRESENT MS. TOWNES.

6 MR. WHEELER: PLEASE SEAT MS. TOWNES.

7 CLERK: HAVE A SEAT IN THE JURY BOX. JUROR NUMBER
8 48, DAVID HILL.

9 MR. FATA: PLEASE EXCUSE MR. HILL FROM THE TRIAL OF
10 THIS CASE.

11 CLERK: HAVE A SEAT WITH THE JURY PANEL. JUROR
12 NUMBER 130, LOUIS WAZNEY.

13 MR. FATA: PLEASE PRESENT THE JUROR.

14 MR. WHEELER: PLEASE SEAT MR. WAZNEY.

15 CLERK: JUROR NUMBER 52, JONATHAN HOPKINS. I'M
16 SORRY. JUROR NUMBER 8, KAY ARRANTS.

17 MR. FATA: PLEASE PRESENT THE JUROR.

18 MR. WHEELER: PLEASE EXCUSE THE JUROR FROM THE TRIAL
19 OF THIS CASE.

20 CLERK: JUROR NUMBER 65, ROBERT LAW, III.

21 MR. FATA: PLEASE PRESENT MR. LAW.

22 MR. WHEELER: PLEASE SEAT MR. LAW.

23 CLERK: HAVE A SEAT IN THE JURY BOX. JUROR NUMBER
24 102, VASHTI RUBEN.

25 MR. FATA: PLEASE PRESENT MS. RUBEN.

1 MR. WHEELER: PLEASE EXCUSE THE JUROR FROM THE TRIAL
2 OF THIS CASE.

3 CLERK: JUROR NUMBER 99, ALTON ROGERS.

4 MR. FATA: PLEASE PRESENT MR. ROGERS.

5 MR. WHEELER: SEAT MR. ROGERS, PLEASE.

6 CLERK: HAVE A SEAT IN THE JURY BOX. JUROR NUMBER
7 101.

8 MR. FATA: PLEASE PRESENT MR. ROUSE.

9 MR. WHEELER: PLEASE SEAT MR. ROUSE.

10 CLERK: HAVE A SEAT IN THE JURY BOX. JUROR NUMBER 30,
11 SANDRA FRAZIER. JUROR NUMBER 30, SANDRA FRAZIER?

12 THE COURT: WE STRUCK HER THIS MORNING.

13 CLERK: JUROR NUMBER 90, MARIE PLAYER.

14 MR. FATA: PLEASE PRESENT THE JUROR.

15 MR. WHEELER: PLEASE SEAT MS. PLAYER.

16 CLERK: HAVE A SEAT IN THE JURY BOX. JUROR NUMBER
17 129, MICHAEL WALTERS.

18 MR. FATA: PLEASE PRESENT THE JUROR.

19 MR. WHEELER: PLEASE SEAT MR. WALTERS.

20 CLERK: HAVE A SEAT IN THE JUROR BOX. JUROR NUMBER
21 6, GAINES ANTHONY.

22 MR. FATA: PLEASE EXCUSE THE JUROR FROM THE TRIAL OF
23 THIS CASE.

24 CLERK: JUROR NUMBER 50, MICHELE HOLMES.

25 MR. FATA: PLEASE PRESENT THE JUROR.

1 MR. WHEELER: PLEASE EXCUSE MS. HOLMES FROM THE TRIAL
2 OF THIS CASE.

3 CLERK: JUROR NUMBER 58, WILLIAM JENKINS.

4 MR. FATA: PLEASE PRESENT THE JUROR.

5 MR. WHEELER: PLEASE SEAT MR. JENKINS.

6 CLERK: JUROR NUMBER 87, MARY PARNELL.

7 MR. FATA: PLEASE PRESENT THE JUROR.

8 MR. WHEELER: PLEASE EXCUSE MS. PARNELL FROM THE
9 TRIAL OF THIS CASE.

10 CLERK: JUROR NUMBER 108, JAMES SHIRLEY.

11 MR. FATA: PLEASE PRESENT THE JUROR.

12 MR. WHEELER: PLEASE SEAT MR. SHIRLEY.

13 THE COURT: ALTERNATES, PLEASE COUNSEL, ONE AND TWO.

14 CLERK: JUROR NUMBER 10, CRUES BELL.

15 MR. FATA: PLEASE PRESENT THE JUROR.

16 MR. WHEELER: PLEASE SEAT MR. BELL.

17 THE COURT: ALL RIGHT. ANYTHING WITH REGARD TO THE
18 STRIKING OF THE JURY ON BEHALF OF THE STATE, MR. FATA?

19 MR. FATA: NONE FROM THE STATE, YOUR HONOR.

20 THE COURT: ON BEHALF OF THE DEFENDANT?

21 MR. WHEELER: NO, SIR, YOUR HONOR.

22 THE COURT: ALL RIGHT. COUNSEL APPROACH JUST A
23 MOMENT, PLEASE.

24 (COUNSEL APPROACHES BENCH)

25 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN SELECTED

1 IN THE TRIAL OF THIS CASE WE ARE NOT GOING TO BE ABLE TO
2 START THIS CASE THIS AFTERNOON OR IN FACT WE'RE NOT GOING
3 TO BE ABLE TO START IT TOMORROW MORNING. WHAT I'M GOING
4 TO ASK THAT YOU DO THOUGH, A LOT OF TIMES IT IS VERY
5 DIFFICULT TO TELL EXACTLY HOW LONG A MATTER IS GOING TO
6 TAKE. IT IS ALSO VERY DIFFICULT TO KNOW EXACTLY WHAT IS
7 GOING TO HAPPEN. SO, I'M GOING TO EXCUSE YOU NOW AND I'M
8 GOING TO ASK THAT YOU CALL THE NUMBER THAT YOU HAVE AFTER
9 6:00 TOMORROW EVENING. ALL THE COURTHOUSES HAVE GONE TO
10 THIS CALL IN SERVICE. WHEN YOU CALL THAT NUMBER YOUR
11 REPORTING INSTRUCTIONS WILL BE ON THERE. MORE THAN
12 LIKELY WE WILL HAVE YOU REPORT BACK WEDNESDAY MORNING BUT
13 WE DON'T KNOW WHAT'S GOING TO BE EXACTLY THE SITUATION.
14 I KNOW THAT YOU WILL NOT HAVE TO REPORT BACK TOMORROW.
15 SO, I'M GOING TO ASK THAT YOU CALL THAT NUMBER THAT YOU
16 HAVE AFTER 6:00 TOMORROW. YOU CAN CALL IT ANYTIME, ALL
17 NIGHT LONG. IT IS JUST AN ANSWERING MACHINE. I'M ALSO
18 GOING TO EXCUSE YOU TO GO WITH THE BAILIFF AND HE'S GOING
19 TO SHOW YOU WHERE THE JURY ROOM IS. SO, YOU WILL REPORT
20 BACK TO THE JURY ROOM AND NOT TO THE COURTROOM. SO,
21 WHATEVER TIME THE INSTRUCTIONS ARE ABOUT REPORTING BACK
22 AND YOU WILL BE, ON THE ANSWERING MACHINE, YOU WILL BE
23 IDENTIFIED AS THE JURY THAT HAS BEEN DRAWN. SO, THE
24 INSTRUCTIONS TO THE JURY THAT HAS BEEN DRAWN TO REPORT
25 BACK AT A CERTAIN TIME. THAT'S YOU. THERE MAY BE SOME

1 ADDITIONAL MESSAGES ON THE ANSWERING MACHINE FOR THE
2 REMAINDER OF THE JURY PANEL, BUT IF THE MESSAGE IS ON THE
3 JURY THAT HAS BEEN DRAWN TO REPORT BACK AT A CERTAIN TIME
4 THAT'S YOU. YOU COME BACK AT THAT TIME AND COME TO THE
5 JURY ROOM AND THE BAILIFF WILL SHOW YOU WHERE TO GO. I
6 WILL TELL YOU ALSO THAT IN YOUR ABSENCE AND WHILE YOU'RE
7 AWAY FROM THE COURTROOM, DO NOT TALK TO ANYBODY ABOUT
8 THIS CASE. I KNOW THAT YOU HAVE NOT HEARD ANY EVIDENCE
9 IN THIS CASE AND ONLY A BRIEF SUMMARY OF THE FACTS OF THE
10 ALLEGATIONS OF THE INDICTMENT. IT WOULD BE IMPROPER FOR
11 YOU TO DISCUSS THIS CASE WITH ANYONE. THAT MEANS DON'T
12 DISCUSS IT WITH YOUR FAMILY OR YOUR FRIENDS OR ANYONE
13 ELSE WHILE YOU ARE AWAY FROM THE COURTHOUSE. THE REASON
14 FOR THAT IS PRETTY APPARENT. YOU'VE GOT TO DECIDE THIS
15 CASE BASED UPON WHAT YOU HEAR IN THE COURTROOM AND NOT ON
16 THE BASIS OF WHAT ANYBODY ELSE MIGHT SAY. DO NOT DISCUSS
17 IT WITH ANYONE AND DO NOT ALLOW ANYONE TO DISCUSS IT WITH
18 YOU. IF ANYONE SHOULD APPROACH YOU OR TRY TO TALK WITH
19 YOU ABOUT THIS CASE GET THEIR NAME OR THEIR DESCRIPTION
20 AND REPORT IT TO THE BAILIFFS WHEN YOU COME BACK AND THEY
21 WILL REPORT IT TO ME AND I WILL DEAL WITH THEM. ALSO,
22 WHEN YOU ARE ASSEMBLING IN THE JURY ROOM DO NOT DISCUSS
23 THE CASE AMONG YOURSELVES. IT WOULD BE IMPROPER FOR YOU
24 TO BEGIN ANY DELIBERATIONS AND DISCUSSIONS ABOUT THE CASE
25 IN THE JURY ROOM UNTIL I TELL YOU IT IS TIME TO BEGIN

1 YOUR DELIBERATIONS. UP UNTIL THAT TIME YOU CAN TALK
2 ABOUT ANYTHING IN THE JURY ROOM WITH YOUR FELLOW JURORS
3 THAT YOU WANT TO. SPORTS, WEATHER, GRANDCHILDREN,
4 ANYTHING AT ALL BUT DON'T TALK ABOUT THIS CASE UNTIL I
5 TELL YOU IT IS APPROPRIATE TO DO SO. SO, WITH THOSE
6 ADMONITIONS MAKE SURE YOU HAVE THE NUMBER FOR THE CALL IN
7 SYSTEM. I'M GOING TO EXCUSE YOU NOW AND ASK YOU TO GO
8 WITH THE BAILIFFS AND THEY WILL SHOW YOU WHERE THE JURY
9 ROOM IS AND THEN CALL THAT NUMBER THAT YOU HAVE AFTER SIX
10 TOMORROW NIGHT AND WE WILL LET YOU KNOW ABOUT YOUR
11 REPORTING INSTRUCTIONS FOR WEDNESDAY. THANK YOU. HAVE A
12 PLEASANT DAY TOMORROW.

13 (JURY PANEL EXCUSED)

14 THE COURT: COUNSEL, WE WILL BE AT EASE ON THIS
15 MATTER UNTIL POSSIBLY AS EARLY AS WEDNESDAY MORNING
16 DEPENDING ON WHAT MR. WHEELER WILL DECIDE ON THAT. WE
17 WILL BE ON EASE ON THIS MATTER FOR THE REST OF THE
18 AFTERNOON AND ALL DAY TOMORROW. YOU ALL KEEP ME INFORMED
19 ON WHERE YOU ARE AND WHAT YOU WANT TO DO. I KNOW THAT
20 MR. WHEELER WILL NEED TO TALK TO SOME OF THE WITNESSES AT
21 THIS TIME. SO, WE'LL BE AT EASE ON THIS MATTER UNTIL AT
22 LEAST WEDNESDAY.

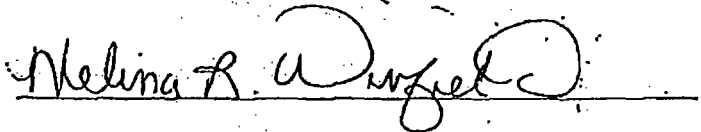
23 THANK YOU.
24
25

CERTIFICATE

This is to certify that the hearing in The State vs. Steven McClain, consisting of Sixteen (16) pages is a true and correct transcript of the testimony given after being duly sworn; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am not employed by any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 3rd day of October, 2005.



Melissa R. Winfield
Certified Court Reporter

Notary Public for South Carolina
My Commission Expires: 3-5-2014

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEE) POSSESSION OF A FIREARM DURING A CRIME OF VIOLENCE
 INDICTMENT FOR
 ARMED ROBBERY

At a Court of General Sessions, convened on September 30, 2004
 the Grand Jurors of LEE County present upon their oath:

COUNT ONE - ARMED ROBBERY

That STEVEN MCCLAIN did in Lee County on or about July 22, 2004, violate Section 16-11-330 (A) of the Code of Laws of South Carolina (1976), as amended, while armed with a deadly weapon, to-wit: a hand gun, did feloniously take from the person in the presence of TREVOR TREMAINE MCDUFFIE, ASHLEY RUTH, SHIRLEY CLYBURN, AND BETTY ANN RUTH by means of force or intimidation goods or monies of the said FAMILY DOLLAR in Bishopville, South Carolina, such goods or monies being described: two thousand (\$2,000.00) dollars.

COUNT TWO - POSSESSION OF A FIREARM DURING A CRIME OF VIOLENCE

That STEVEN MCCLAIN did in Lee County on or about July 22, 2004, was in possession of and did visibly display a firearm during the commission of violent crimes, to-wit: Armed Robbery, in violation of Section 16-23-490, Code of Laws of South Carolina (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

C. Kelly Jackson
 SOLICITOR

WITNESSES

BISHOPVILLE POLICE DEPARTMENT

Investigator J. D. Miller

ARREST WARRANT NO. H772043 (1);No Warrant (2)D/A: 07/22/04

ACTION OF GRAND JURY

*True Bill**Sept 30, 2004**William R. [Signature]*

Foreman of Grand Jury

VERDICT

DOCKET NO. _____

The State of South Carolina,

County of LEE

COURT OF GENERAL SESSIONS

OCTOBER TERM 2004

THE STATE

VS.

STEVEN MCCLAIN

Indictment for

ARMED ROBBERY

POSSESSION OF A FIREARM
DURING A CRIME OF VIOLENCE

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

November 8th, 2006



Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT.

STATE OF SOUTH CAROLINA

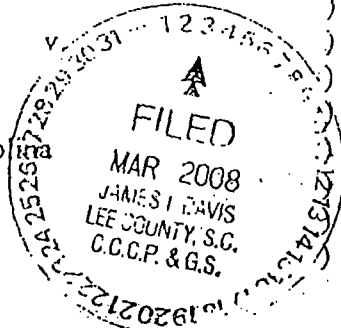
County of LeeSteven L. McClain #140830

Full name and prison number (if any) of Applicant

IN THE COURT OF COMMON PLEAS

08-CP-31-S4

State of South Carolina



APPLICATION FOR

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 Lee Correctional Institution, 990 Wisacky Highway, Bishopville, South Carolina 29010
2. Name and location of Court which imposed sentence Court of General Session, In the Third Circuit, In the County of Lee, Bishopville, SC
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) # 2004-GS-31-0137
 - (b) _____

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) None
 (b) _____
 (c) _____

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

(a) your arraignment and plea? None
 (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? None
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
None

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. William Wheeler III, Jennings + Jennings, P.A.,
Attorney At Law, 1 Courthouse Square, P.O. Box 106, Bishopville, S.C. 29010

ii. _____

 iii. _____

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

i. Trial and sentencing

 ii. _____

 iii. _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Counsel
 - (b) Sentence Unlawfully Imposed / S.C. Code 17-25-45
 - (c) Violation of Due Process / Unduly Suggestive Identification Procedure
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Strickland v. Washington 466 U.S. 668, 688. 104 S.Ct 2052
 - (b) Solicitor Failure to Serve Intent / 17-25-45 (H)
 - (c) Abused Discretion, allowing in witness in court Identification
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? None
 - (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? None
 - (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? None
 - (d) any other petitions, motions or applications in this or any other Court? None
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. None
 - ii. _____
 - iii. _____
 - iv. _____
 - (b) the name and location of the Court in which each was filed:
 - i. None
 - ii. _____
 - iii. _____
 - iv. _____

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

I, Steven McClain # 140830, 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.

Steven McClain
Applicant

SWORN or affirmed to and subscribed before me this
4 day of FEBRUARY, 2008.

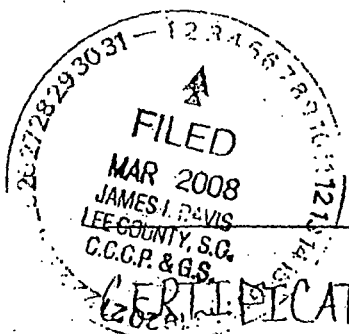
George Sims
Notary Public

My Commission Expires: 12-20-2011 (135)

Steven L. McClain Petitioner

-VS-

State of South Carolina Respondent



CERTIFICATE OF SERVICE

The undersigned Petitioner hereby certifies that an Application Post Conviction Relief has been served upon Mike I. Davis, Clerk Court for Lee County, by depositing in the United States Mail Lee Correctional Institution in Bishopville, South Carolina this 26th day of February 2008.

Mike I. Davis, Clerk
 County Clerk of Court
 P.O. Box 387
 Bishopville, South Carolina 29010

Steven L. McClain

Lee Correctional Institution
 990 Wisacky Highway
 Bishopville, South Carolina 29010

My. Mc Masters
 Office of Attorney General
 State of South Carolina
 P.O. Box 11549
 Columbia, South Carolina 29211

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF LEE

2008-CP-31-54

Steven L. McClain, 140830,

Applicant,

vs

State of South Carolina,

Respondent.

) AFFIDAVIT OF SERVICE BY MAIL

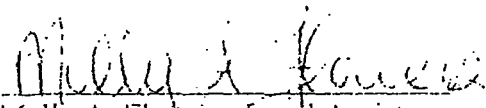
1. I am an employee of the Respondent in the above-captioned action.

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 and Motion to Dismiss Without Prejudice in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Steven L. McClain, 140830
 Lee Correctional Institution
 990 Wisacky Highway
 Bishopville, SC 29010

DATED this 21st day of July, 2008.

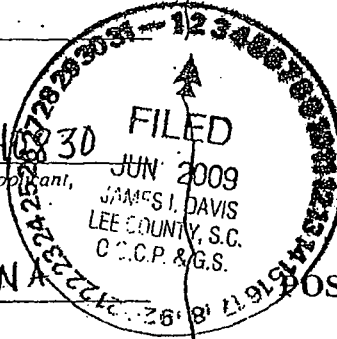

 Molly A. Flowers, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA

In the Court of Common Pleas

County of LEESTEVEN L. McCHAIN # 140830
Full name and prison number (if any) of Applicant,

vs.

STATE OF SOUTH CAROLINA
Name of Respondent.APPLICATION FOR
POST-CONVICTION RELIEFINSTRUCTIONS — READ CAREFULLY

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

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. 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 applicant was convicted.

1. Place of detention LEE CORRECTIONAL INSTITUTION, 990 WISACKY HIGHWAY, BISHOPVILLE, SOUTH CAROLINA 29010
2. Name and location of Court which imposed sentence COURT OF GENERAL SESSIONS, THIRD CIRCUIT, COUNTY OF LEE, BISHOPVILLE, SOUTH CAROLINA.
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 04-GS-31-0137 / ARMED ROBBERY, POSSESSION OF FIREARM
 - (b) _____
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) DECEMBER 09, 2004 / LIFE WITHOUT PAROLE 5 years Concurrent
 - (b) _____
 - (c) _____

5. 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 _____

6. Did you appeal from the judgment of conviction or the imposition of sentence?

YES

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. THE SOUTH CAROLINA COURT OF APPEALS

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. DISMISSED

ii. _____

iii. _____

(c) the date of each such result:

i. Submitted September 2, 2008 - Filed September 11, 2008

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Unpublished Opinion No. 2008-UP-529

ii. _____

iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) —

(b) —

(c) —

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective Assistance of Counsel

(b) Statutory Violation S.C. Code Ann. 17-25-45

(c) Violation of Due Process

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

(a) Strickland v. Washington 466 US 668, 688, 104 S.Ct 2052

(b) South Carolina Code Annotated 17-25-45 Section (H)

(c) United States Constitution, 5th, 6th, 8th and 14th amendment

11. Prior to this application have you filed with respect to this conviction

- (a) any petition in a State Court under South Carolina Law? _____
- (b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? Yes
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____

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

(a) the specific nature thereof:

i. Post Conviction Relief Application

ii. _____

iii. _____

iv. _____

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

i. The Court of Common Pleas / Bishopville, South Carolina

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. Summarily dismissed without prejudice until Direct Appeal is resolved

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. July 21, 2008

ii. _____

iii. _____

iv. _____

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

i. 2008 - CP - 31 - 54

ii. _____

iii. _____

iv. _____

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

No

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

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

i. N/A

ii. _____

iii. _____

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

(a) N/A

(b) _____

(c) _____

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

(a) your arraignment and plea? _____

(b) your trial, if any? yes

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

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

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

i. William W. Wheeler III, Jenning + Jennings P.A.,
Attorneys At Law, 1 Courthouse Square, P.O. Box 106, Bishopville, S.C. 290

ii. Robert Dudek, Division of Appellate Defense,
P.O. Box 11589, Columbia, South Carolina. 29211

iii. _____

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

i. Trial and Sentencing

ii. Direct Appeal

iii. _____

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

Sentence Vacated, or reverse and remand

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

N/A

STATE OF SOUTH CAROLINA

VERIFICATION

County of Lee

I, Steven L. McClain # 140830, 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.

Steven L. McClain

SWORN to and subscribed before me this 3day of April, 2009

Debra J. [Signature] (L.S.)
Notary Public

My Commission Expires: 11-4-2015

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

I, Steven L. McClain # 140830, 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 therefor.

Steven L. McClain
Applicant

SWORN or affirmed to and subscribed before me this

3 day of April, 2009

Debra J. [Signature]
Notary Public

My Commission Expires 11-4-2015

STATE OF SOUTH CAROLINA)

) IN THE COURT OF COMMON PLEAS

COUNTY OF LEE)

) 2009-CP-31-0116

Steven L. McClain, #140830,)

Applicant,)

v.)

RETURN

State of South Carolina,)

Respondent.)

In response to the post-conviction relief application filed June 2, 2009, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Lee County Clerk of Court's orders of commitment. The Lee County Grand Jury indicted the Applicant at the October 2004 term of General Sessions for Armed Robbery and Possession of a Firearm during a Violent Crime (2004-GS-31-0137). The Applicant was represented by William Wheeler, Esquire. Applicant proceeded to a jury trial and was found guilty. The Honorable Howard P. King sentenced the Applicant to life without parole for Armed Robbery and to a concurrent term of five (5) years imprisonment for Possession of a Firearm during a Violent Crime.

A Notice of Appeal was filed and an Anders brief submitted. The South Carolina Court of Appeals dismissed the appeal. State v. McClain, Op. No. 2008-UP-529 (S.C. Ct. App. filed September 11, 2008). The Remittitur was sent on September 29, 2008.

Applicant filed a PCR application on March 3, 2008, (2008-CP-31-0054) and the State moved for summary dismissal without prejudice due to Applicant's pending appeal.

Applicant's appeal was subsequently decided, and Applicant filed the present PCR application on June 2, 2009 (2009-CP-3-0116). The applications were merged by order of the Honorable R. Ferrell Cothran, Jr., dated September 28, 2009, with the present case being the surviving case number and the previous application referred to as an amendment.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
2. "Statutory violation S.C. Code §17-25-45."
3. "Violation of Due Process."

Applicant has failed to set forth with specificity the grounds upon which the application is based and facts in support thereof. S.C. Code §17-27-50. Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRPC.

III.

For purposes of this Return, Respondent interprets Applicant's first two allegations as allegations of 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, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that

the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

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

IV.

The Applicant further alleges denial of due process of law. However, the Applicant fails to set forth with specificity the grounds upon which these violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must "... specifically set forth the grounds upon which the application is based." S.C. Code § 17-27-50. In an application for post-conviction relief, it is incumbent upon the Applicant to make at least a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Since the Applicant has failed to make even a *prima facie* showing, the Respondent would submit that these allegations should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. These allegations are so vague that it is impossible for the State to respond.

V.

WHEREFORE, having made its Return, the Respondent requests that an evidentiary hearing be held.

[Signatures on next page.]

Respectfully submitted,

HENRY DARGAN MCMASTER
Attorney General

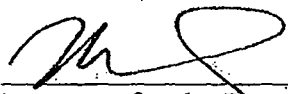
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Columbia, S.C. 29211

By:


Attorneys for the Respondents

Columbia, South Carolina

11/2, 20 10

STATE OF SOUTH CAROLINA
COUNTY OF LEE

IN THE COURT OF COMMON PLEAS

2009-CP-31-0116

STEVEN L. MCCLAIN, 140830

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,

Respondent.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Charles T. Brooks, Esquire
Law Office of Charles T. Brooks, III
309 Broad St.
Sumter, SC 29150

DATED this 2nd day of November, 2010.

Lauren Meara
Lauren Meara, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF LEE

IN THE COURT OF COMMON PLEAS

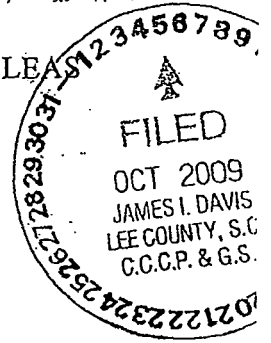
2008-CP-31-0054
2009-CP-31-0116

Steven L. McClain, #140830,
Applicant,

vs.

State of South Carolina,
Respondent.

ORDER OF MERGER



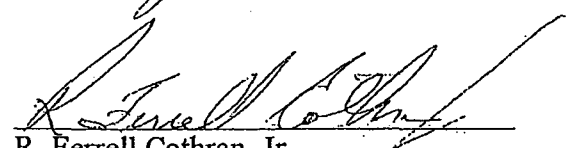
The applicant in the above-captioned matters has filed two applications for post conviction relief, one which was filed March 3, 2008 (2008-CP-31-0054) and another filed June 2, 2009 (2009-CP-31-0116).¹ Since an applicant is not generally allowed to have two post-conviction relief proceedings in regard to the same conviction (See, Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); S.C. Code Ann. §17-27-90), this Court hereby orders that the two proceedings be merged. The application for post-conviction relief filed March 3, 2008 (2008-CP-31-0054) will be considered an amendment to the application for post conviction relief filed June 2, 2009 (2009-CP-31-0116).

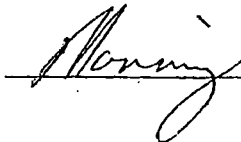
The Clerk of Court is therefore ordered to merge the two cases, with docket number 2009-CP-31-0116 being the surviving case. Hereafter, the word "Application" will refer to docket number 2009-CP-31-0116; the word "Amendment" will refer to docket number 2008-CP-31-0054, which will be considered as an amendment to the application for post conviction relief.

¹ 2008-CP-31-0054 was filed prior to the resolution of Applicant's direct appeal. The direct appeal has since been resolved.

IT IS THEREFORE ORDERED that the Lee County Clerk of Court merge docket number 2008-CP-31-0054 into docket number 2009-CP-31-0116, with file 2009-CP-31-0116 being the surviving file and all future pleadings bearing docket number 2009-CP-31-0116. Docket number 2008-CP-31-0054 will be dismissed upon the merger.

AND IT IS SO ORDERED this 28 day of Sept, 2009.


R. Ferrell Cothran, Jr.
Administrative Judge
Third Judicial Circuit

, South Carolina.

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF SUMTER	)	
Steven McClain,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 09-CP-31-0116
	)	
State of South Carolina,	)	
	)	
Defendant.	)	

TRANSCRIPT OF HEARING

The within post-conviction relief Hearing was held in the above-captioned case on April 25, 2011, before The Honorable W. Jeffrey Young in the Court of Common Pleas for Sumter County, South Carolina; attended by Counsel, as follows:

APPEARANCES:

Charles T. Brooks, III
Appearing for Applicant

Mary S. Williams, Esq.
OFFICE OF ATTORNEY GENERAL
P O Box 11549
Columbia, SC 29211-1549
Appearing for State of South Carolina

DEBORAH GARRISON
Transcribed for Margaret Watson, Court Reporter
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dgarrison@sccourts.org

Steven McClain v. State of South Carolina
Case No. 09-CP-31-0116
Hearing of April 25, 2011
before The Honorable W. Jeffrey Young

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Steven McClain v. State of South Carolina
Case No. 09-CP-31-0116
Hearing of April 25, 2011
before The Honorable W. Jeffrey Young

1 THE COURT: This is the case of
2 Stephen McClain versus the State of South
3 Carolina, Docket Number 09-CP-31-116.

4 Mr. McClain is represented by Mr.
5 Charles Brooks of the Sumter Bar. The State
6 is represented by Ms. Mary S. Williams.
7 You may call your first witness.

8 CHARLES BROOKS: Yes, sir, we would
9 call Mr. McClain to the stand.

10 (WITNESS TAKES STAND)

11 STEVEN McCLAIN, being duly sworn to
12 tell the truth, the whole truth and nothing but
13 the truth, testified, as follows:

14 DIRECT EXAMINATION

15 BY CHARLES BROOKS:

16 Q. Very good. Mr. McClain, you had Mr.
17 Wheeler as your lawyer?

18 A. Yes, sir.

19 Q. Was he court-appointed?

20 A. Yes, sir.

21 Q. Okay. And you brought this allegations,
22 this PCR as a result of your trial; is that
23 correct?

24 A. Yes, sir.

25 Q. Okay. You're serving a life sentence?

Steven McClain v. State of South Carolina
Case No. 09-CP-31-0116
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4

1 A. Yes, sir.

2 Q. That's because of the two-strike, three-
3 strike law?

4 A. That's what I understand.

5 Q. Okay. Now, one of the allegations that you
6 made is that you didn't get served or never
7 received notice of life without parole; is that
8 correct?

9 A. Yes, sir.

10 Q. And your lawyer got it, but you told me
11 that you had never been served with it; is that
12 right?

13 A. Well, I wasn't served with it. During the
14 trial the judge mentioned it and the solicitor
15 popped up and said that I had been served with
16 notice. At that time, Mr. Wheeler told them
17 that he'd gotten it. I didn't get that notice
18 until the same day.

19 Q. But you had never actually been served?

20 A. I wasn't actually served.

21 Q. Per the statute?

22 A. Per the statute.

23 Q. Okay. And -- well, basically that is your
24 issue, that your lawyer should have objected to
25 that; is that correct?

1 A. My position is that -- I understand that
2 under that statute that the solicitor has to
3 serve notice on an individual; however, I was
4 never given notice until at my trial when Mr.
5 Wheeler told me. The trial was -- it was dated
6 November the 29th, 2004, and during that time --
7 the trial came on December the 6th, and there was
8 a ten-day requirement that I have notice by
9 statute.

10 Q. Okay.

11 A. Once the trial started, then I was told.
12 I didn't have it until December the 9th. I
13 should have had ten days notice that ---

14 Q. Per the statute?

15 A. Right.

16 Q. That's the issue that you have, that ---

17 A. That's the whole issue that I have, that
18 Mr. Wheeler never informed me that he was being
19 served with any notice.

20 Q. And you had never been personally served?

21 A. And I had never been personally served.
22 The only time I knew about the notice was on the
23 third day at trial.

24 Q. And you were in jail the whole time, is
25 that right?

Steven McClain v. State of South Carolina
Case No. 09-CP-31-0116
Hearing of April 25, 2011
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6

1 A. Right.

2 Q. And that's basically your issue here today,
3 is that correct?

4 A. That's my issue here today, that the first
5 time that I'd heard about it -- and the statute
6 provided that I should have been notified that
7 the solicitor was going to seek life without
8 parole and I was never told.

9 CHARLES BROOKS: All right, answer
10 any questions that Ms. Williams has.

11 THE COURT: Ms. Williams?

12 MARY S. WILLIAMS: I don't have any
13 questions for him.

14 THE COURT: Thank you. You may step
15 down.

16 (WITNESS STEPS DOWN)

17 CHARLES BROOKS: We call Mr. Wheeler
18 to the stand.

19 (WITNESS TAKES STAND)

20 WILLIAM WHEELER, being duly sworn to
21 tell the truth, the whole truth and nothing but
22 the truth, testified, as follows:

23 DIRECT EXAMINATION

24 BY CHARLES BROOKS:

25 Q. Mr. Wheeler, you represented Mr. McClain?

1 A. Yes, sir, I did.

2 Q. Okay. And, uh, -- you are familiar with
3 that the State has to give ten days notice on a
4 case where they are trying to seek life without
5 parole; is that correct?

6 A. Yes, sir.

7 Q. To your knowledge was Mr. McClain served
8 with that notice?

9 A. I believe that he's correct that he was not
10 served with that notice. I was, but he
11 personally never was.

12 Q. Okay. He had talked about that you all
13 tried the case on December 6th and then said on
14 December 9th -- can you elaborate on that?

15 A. I don't remember but the transcript says
16 the 9th. I just don't remember the date, but --
17 the transcript would tell us whether it was the
18 9th.

19 Q. So you would pretty much rely on the
20 transcript?

21 A. That's correct.

22 Q. Do you correct whether the jury was sworn
23 on the 6th?

24 A. I don't remember. The jury selection is in
25 the transcript, but I don't remember.

Steven McClain v. State of South Carolina
Case No. 09-CP-31-0116
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8

1 Q. Okay. All right. You don't recall raising
2 any objections or defenses about his not
3 receiving notice of life without parole?

4 A. No, sir. I am sure I told the court and
5 also told Mr. McClain that I had received
6 notice, but I don't think that there is any
7 question by the solicitor or the court or
8 anybody that Mr. McClain did not receive notice.
9 I think that was it, that I received notice on
10 his behalf but that he never received notice;
11 that there was no question about that.

12 CHARLES BROOKS: That's all.

13 THE COURT: Cross?

14 CROSS EXAMINATION

15 BY MARY S. WILLIAMS:

16 Q. Mr. Wheeler, when did you receive the
17 notice regarding life without parole?

18 A. It would be in the transcript --
19 (reviewing). Not before the 29th.

20 Q. Were you aware of his prior convictions
21 prior to that date?

22 A. For Mr. McClain?

23 Q. Yes.

24 A. Yeah, he had convictions.

25 Q. Was it a surprise that the State wanted to

Steven McClain v. State of South Carolina
Case No. 09-CP-31-0116
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9

1 notice him for life without parole?

2 A. I don't recall being surprised.

3 Q. Tell us a little bit about how you came to
4 represent Mr. McClain.

5 A. I was appointed to represent Mr. McClain.

6 I was appointed around October 11th, maybe a
7 couple of days around that, and case came up
8 pretty fast because we tried the case in early
9 December. We tried -- he was also charged with
10 three different charges, indicted separately, as
11 I recall. This one was tried by itself. I
12 think part of it was that by trying them by
13 themselves that each charge that he had would
14 have qualified for a life sentence.

15 Q. Did you discuss this with him prior to
16 trial?

17 A. I would think that I did. I don't have any
18 specific recollection of it and I don't have a
19 note of it. I talked to him several times, told
20 him that it was going to be tough because they
21 were going to have to prove all three charges.

22 Q. At this time it would be mandatory and the
23 solicitor didn't have a choice, is that correct?

24 A. I think that was the solicitor's position
25 on it. They wouldn't negotiate.

1 Q. But there was no plea offer?

2 A. No.

3 Q. Had you spoken with the witnesses -- the
4 witnesses in this case. In the transcript, I
5 think it mentions that you'd talked to witnesses
6 the Monday before. Do you recall anything about
7 that?

8 A. I think that I'd talked with the witnesses
9 that had been in the store. It was a Family
10 Dollar store, general merchandise store. I
11 think the witnesses were two or three persons
12 who worked in the store and then the police
13 officer who investigated.

14 MARY S. WILLIAMS: I believe that's
15 all.

16 THE COURT: Any redirect?

17 CHARLES BROOKS: No questions.

18 THE COURT: All right. Mr. Wheeler,
19 you said that you brought it to the Court's
20 attention, and of course to the solicitor's,
21 that he had not been served -- the possibility
22 that notice had not been served on Mr. McClain?
23 Is that correct?

24 THE WITNESS: Yes, sir, Your
25 Honor, I did.

Steven McClain v. State of South Carolina

11

Case No. 09-CP-31-0116

Hearing of April 25, 2011

before The Honorable W. Jeffrey Young

1 THE COURT: So the court at that time
2 knew that you had been served with the notice
3 but that Mr. McClain had not been served?

4 THE WITNESS: Yes, sir.

5 THE COURT: Do you know of anything
6 else that you could have done in that situation?

7 THE WITNESS: No, sir, not -- the
8 court was advised of the fact that he was not
9 given notice. It was a fact that the court was
10 not aware of, and the court -- the court elected
11 to proceed.

12 THE COURT: Any questions based on
13 the court's inquiry?

14 CHARLES BROOKS: No, sir.

15 MARY S. WILLIAMS: Nothing further.

16 THE COURT: I will take this matter
17 under advisement. I'll let you know.

18 (HEARING CONCLUDED)

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Steven McClain v. State of South Carolina
Case No. 09-CP-31-0116
Hearing of April 25, 2011
before The Honorable W. Jeffrey Young

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CERTIFICATE OF REPORTER

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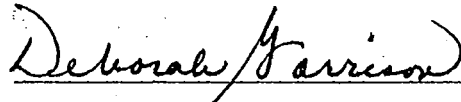
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I, the undersigned, Deborah Garrison,
official court reporter for the 9th Judicial
Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true,
accurate and complete transcript of the hearing
held before The Honorable W. Jeffrey Young on
April 25, 2011, as prepared from the audio notes
of Margaret Sullivan, assigned court reporter;

I further certify that I am neither kin nor
counsel to any of the parties and have no
interest in the outcome of this action.



Deborah Garrison

Circuit Court Reporter

9th Judicial Circuit

Charleston, South Carolina

April 10, 2012

STATE OF SOUTH CAROLINA
COUNTY OF LEE

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

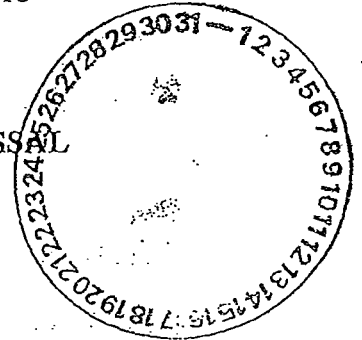
2009-CP-31-0116

Steven L. McClain, #140830,
Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,
Respondent.



This matter comes before the Court by way of an Application for Post-Conviction Relief filed June 2, 2009. The Respondent made its Return on or about October 26, 2010. An evidentiary hearing into the matter was convened on April 25, 2011, at the Sumter County Courthouse. The Applicant was present at the hearing and was represented by Charles T. Brooks, III, Esquire. The Respondent was represented by Mary S. Williams of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying was William Wheeler, Esquire ("Counsel"). This Court had before it the records of the Lee County Clerk of Court, the guilty plea transcript, and the Applicant's records from the South Carolina Department of Corrections.

PROCEDURAL HISTORY

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lee County Clerk of Court. The Applicant was indicted at the October 2004 term of General Sessions for Armed Robbery and Possession of a Firearm during a Violent Crime (2004-GS-31-0137). The Applicant

was represented by William Wheeler, Esquire. Applicant proceeded to a jury trial and was found guilty. The Honorable Howard P. King sentenced the Applicant to life without parole for Armed Robbery and to a concurrent term of five (5) years imprisonment for Possession of a Firearm during a Violent Crime.

A Notice of Appeal was filed and an Anders brief submitted. The South Carolina Court of Appeals dismissed the appeal. State v. McClain, Op. No. 2008-UP-529 (S.C. Ct. App. filed September 11, 2008). The Remittitur was sent on September 29, 2008.

Applicant filed a PCR application on March 3, 2008, (2008-CP-31-0054) and the State moved for summary dismissal without prejudice due to Applicant's pending appeal. Applicant's appeal was subsequently decided, and Applicant filed the present PCR application on June 2, 2009 (2009-CP-3-0116). The applications were merged by order of the Honorable R. Ferrell Cothran, Jr., dated September 28, 2009, with the present case being the surviving case number and the previous application referred to as an amendment.

In his current Application, the Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
2. "Statutory violation S.C. Code §17-25-45."
3. "Violation of Due Process."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony

accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80.

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a post-conviction relief action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCF). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18; 386 S.E.2d at 625.

Failure to Object to Stat's Failure to Serve Notice of Intent to Seek Life Without Parole

First, Applicant asserts that counsel failed to object based on the state's failure to serve Applicant with its Notice of Intent to Seek Life Without Parole under the S.C. Code Section 17-25-45(H). Under that section, "[w]here the solicitor...determines to seek sentencing of a defendant under this section, written notice must be given by the solicitor to the defendant and defendant's counsel not less than ten (10) days before trial."

At the PCR hearing, Applicant testified that although he was aware that counsel was served with the state's Notice of Intent to Seek Life Without Parole, he was never personally served with such notice and attorney's failure to object to that rendered his representation ineffective. Counsel testified that Applicant was, in fact, never personally served with the Notice of Intent, however, counsel was served with Notice time stamped by the Clerk of Court on November 29, 2004, ten (10) days before the start of trial. Counsel stated that Applicant was facing three (3) separate robbery charges, each of which the state could have had separately to get Applicant sentenced to life without parole. Further, counsel went on to articulate that the state's plan to seek life without parole on these charges was not a surprise to Applicant and in fact was a common topic of discussion between the two leading up to the trial. Counsel also testified that the state's failure to serve Applicant, personally, with the Notice was an issue raised on direct appeal, which the Court of Appeals dismissed after a thorough review of the record. State v. McClain, Op. No. 2008-UP-0529 (S.C. Ct. App. filed September 11, 2008).

I find that Applicant has failed to establish that counsel was deficient in not objecting to the State's failure to serve Applicant, personally, with its Notice of Intent to Seek Life Without Parole, where his counsel was served as mandated by S.C. Code Section 17-25-45(H), and Applicant had actual knowledge of the state's intentions to seek such at least ten (10) days before the start of trial. Further, I find that even if counsel was deficient in failing to object to the service of the Notice of Intent, Applicant cannot prove he suffered any prejudice as a result of that alleged deficiency. A full appeal was filed on Applicant's behalf, including a review of the service of the Notice of Intent, after which the Court of Appeals dismissed the appeal. Therefore, Applicant cannot prove any prejudice resulted from any alleged deficiency on counsel's part in this regard.

For that reason, Applicant has failed to carry his burden and, therefore, this action must be denied and dismissed with prejudice.

Other Allegations

No other allegations were raised at the PCR hearing. Therefore, any additional allegations are deemed waived because no evidence was presented at the hearing to support them.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

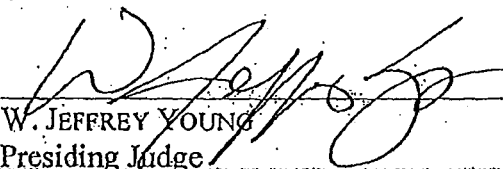
This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. His attention is also

directed to Rule 243, SCACR, for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be DENIED AND DISMISSED WITH PREJUDICE; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 18 day of Sept, 20 11


W. JEFFREY YOUNG
Presiding Judge
Third Judicial Circuit

Sumter, South Carolina.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lee County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEVEN MCCLAIN,

APPELLANT

FINAL ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Deputy Chief Attorney for Capital Appeals

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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<u>State v. Moore</u> , 343 S.C. 282, 540 S.E.2d 445 (2000).....	7
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Statutes

S.C. Code § 16-3-26(A).....	7
S.C. Code § 17-25-45(A).....	7

STATEMENT OF ISSUE ON APPEAL

Whether the judge erred by sentencing appellant to life imprisonment without parole pursuant to S.C. Code § 17-25-45 where the state only served appellant's attorney with the LWOP notice, and the recidivist statute mandated service upon appellant as well?

STATEMENT OF THE CASE

Appellant was indicted by the Lee County grand jury for the offense of armed robbery and possession with firearm during a crime of violence. R. 267. His case was called to trial on Thursday, December 9, 2004 before the Honorable Howard P. King, and a jury. William Wheeler represented appellant. Paul S. Fata was the solicitor. R. 1.

At the conclusion of the trial the jury found appellant guilty on both counts. R. 244, ll. 4 - 9. Judge King sentenced appellant to life imprisonment without parole pursuant to the recidivist statute. R. 245, l. 11 - 248, l. 19.

This appeal follows.

ARGUMENT

S.C. Code § 17-25-45 requires the solicitor to serve written notice of mandatory or discretionary life without parole sentences. The statute provides that both the defendant and the defendant's counsel be served with notice not less than ten days before trial. In this case both the solicitor and defense counsel stated the notice was only served upon defense counsel. There was not any evidence appellant was ever served a notice of the life without parole notice, it is further apparent the trial judge thought service upon either was sufficient and appellant's LWOP sentence therefore should be vacated.

Relevant Facts

A Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 774 (1964), hearing was held prior to trial. Sergeant Dean Miller of the Bishopville Police Department was the lead investigator in the armed robbery of the Family Dollar Store in Bishopville on July 22, 2004. R. 4, l. 21 – 5, l. 3.

Based on information he received, Miller put together two different photographic arrays for the three store employees and one lay witness who witnessed the robbery. However, none of the four witnesses could identify a suspect from these photographic arrays. Miller maintained that appellant's photograph was not in these photo arrays. R. 7, l. 7 – 9, l. 12.

Miller said in the meantime appellant became a suspect in the Family Dollar robbery. Miller therefore compiled a third photographic array which included appellant. R. 9, ll. 13 – 22.

Miller testified that Betty Ruth, the store manager, and her daughter Ashley Ruth, who was in the Family Dollar at the time of the robbery, "both indicated immediately

upon seeing the line-up again [but] separately [seeing the array] but immediately upon each one of them viewing it pick out number two [appellant] positively." R. 10, ll. 5–13.

Trevor McDuffie, a stockroom employee did not make identification acceptable to Miller. McDuffie said: "that guy [appellant] looks just like him." R. 12, l. 20–13, l. 12.

The cashier, Shirley Clyburn "was very upset, very nervous. She . . . she just could not identify him." R. 12, ll. 2–9.

Sergeant Miller later acknowledged that Betty Ruth and Ashley Ruth identified appellant from the third photographic array within one minute of each other. Miller claimed that they were separated during this sixty seconds, and each did not know of the other person's identification. R. 98, l. 16–99, l. 17. Miller admitted he could not say he was "100%" certain that they did not hear the other person's identification. R. 99, ll. 18–22.

Defense counsel argued that Clyburn and McDuffie were unable to pick out the suspect from the photographic line-up just seven days after the crime. Counsel further argued none of the witnesses knew appellant who was a "stranger to them." Counsel also stated that the line-up was suggestive, and that the in court identifications, and the out-of-court identifications should not be allowed before the jury.¹ The judge ruled he would allow the identifications. He ruled the procedures were not unduly suggestive. See Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972); State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447 (2000); State v. Mansfield, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct. App. 2000). R. 22, l. 12–28, l. 23; R. 52, l. 19–56, l. 15.

Sentencing

After appellant was convicted, the solicitor told the judge: "I pass up the notice of intent to seek mandatory lifetime without parole. I've given it to Mr. Wheeler." The judge then addressed defense counsel: "I assume that this was served on you or your client and you've had notice, a ten day notice required in the statute." Defense counsel Wheeler responded: "it was served on me, Your Honor." R. 245, l. 22 - 246, l. 3. (emphasis added).

The judge then stated that the notice of a sentence of life without parole "was issued by the solicitor's office and served on the counsel for the defense." R. 236, ll. 4 - 8. The judge then noted appellant's prior armed robbery made this a second most serious offense under the statute. R. 246, ll. 4 - 23. Defense counsel declined to address the court further: "I don't say anything knowing you don't have any discretion." R. 247, ll. 16 - 19.

The judge then sentenced appellant to a term of life imprisonment without parole. R. 247, l. 20 - 248, l. 5.

Discussion

S.C. Code § 17-25-45(A) provides that when the solicitor is required to seek or determines to seek sentencing of a defendant under this life without parole section, written notice must be given by the solicitor to the defendant and defendant's counsel not less than ten days before trial.

This case is controlled by State v. Johnson, 247 S.C. 67, 552 S.E.2d 339 (Ct. App. 2001) wherein this Court held the fact the defendant had actual notice of the state's

¹ Defense counsel also moved for a directed verdict, and he made a hearsay objection as

intention to seek a life sentence was not sufficient notice to meet the notice mandates of the recidivist statute, S.C. Code § 17-25-45. This Court held that "written notice must be given by the solicitor to the defendant and defendant's counsel not less than ten days before trial." (emphasis added). State v. Johnson, 552 S.E.2d at 334.

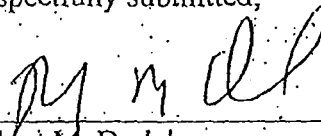
This Court in State v. Johnson distinguished State v. Washington 338 S.C. 392, 526 S.E.2d 709 (2000), on the grounds that the defendant in Washington had received written notice of the state's intention to seek a sentence of life without parole after he was indicted but not after he was re-indicted. Consequently the defendant in Washington had at least received written notice once as required by the statute.

Further, the death penalty statute only required that notice be given to the defense attorney. See S.C. Code § 16-3-26(A). See also State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996) (actual notice all that was required under the death penalty statute, S.C. Code § 16-3-26(A), and counsel could not claim he should have been served again after re-indictment).

Since it is clear here that the solicitor, defense counsel, and the judge all erroneously thought that service upon defense counsel was sufficient to impose a sentence of life without parole, appellant's sentence of life without parole should be vacated, and this case remanded for re-sentencing. Cf. State v. Johnston, 33 S.C. 459, 510 S.E.2d 423, 425 (1999) (remand for re-sentencing where the state admitted before the Supreme Court that the sentence was flawed, and the defendant may have been incarcerated in excess of her sentence if post-conviction relief was deemed her sole

remedy). See, also, Frazier v. South Carolina, 430 S.E.2d 696 (4th Cir. 2005) (duty to appeal a guilty plea where a meritorious issue may exist).

Respectfully submitted,



Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

ATTORNEY FOR APPELLANT

November 28, 2006

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Steven McClain, Appellant.

Appeal From Lee County
Howard P. King, Circuit Court Judge

Unpublished Opinion No. 2008-UP-529
Submitted September 2, 2008 – Filed September 11, 2008

APPEAL DISMISSED

Deputy Chief Attorney for Capital Appeals Robert M.
Dudek, South Carolina Commission on Indigent Defense,
of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy
Attorney General John W. McIntosh, Assistant Deputy
Attorney General Salley W. Elliott, all of Columbia; and
Solicitor Cecil Kelly Jackson, of Sumter, for Respondent.

PER CURIAM: A jury found Steven McClain guilty of armed robbery and possession of a firearm during the commission of a violent crime. McClain argues the trial judge erred in sentencing him to life without parole because the State failed to comply with statutory written notice requirements. After a thorough review of the record and counsel's brief pursuant to Anders v. California, 386 U.S. 738 (1967), and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), we dismiss McClain's appeal and grant counsel's motion to be relieved.[1]

APPEAL DISMISSED.

ANDERSON, WILLIAMS, and KONDUROS, JJ., concur.

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

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF

LEE

STATE

VS.

KA:

Race:

M

Sex:

B

Age:

34

SS#:

Address:

City, State, Zip

L#

SID#

AW#:

Date of Offense:

S.C. Code §:

CDR Code #:

INDICTMENT/CASE#:

GS-

None

2-22-04

16-23-490

015141

☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALDisposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTo: Viol of Weapons during Violationviolation of 16-23-490 of the S.C. Code of Laws, bearing CDR Code # 0151419☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45The charge is: ☒ As Indicted; ☐ Lesser Included Offense; ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation; ☐ Negotiated Sentence; ☐ Recommendation by the State.

TEST:

Solicitor

Defendant

Attorney for Defendant

HEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 1 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

\$ _____; 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: other charge

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.

SPECIAL CONDITIONS:

RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

set by SCDPPPS

Recipient:

Name:

1-1-206 (Assessments 107.5%)

1-1-211(A)(1) (Conv. Surcharge)

1-1-211(A)(2) (DUI Surcharge)

1-5-2995 (DUI Assessment)

1-5-13 (Public Def/Prob)

1-3, 1B TP (Law Enforce. Funding)

1-7, 1B TP (Drug Court Surcharge)

1-21-114(BUI Breath Test Fee)

1-5-2942(J) (Vehicle Assessment)

to County (if paid in installments)

TOTAL

	\$
	\$
\$100	\$100.00
\$100	\$
\$12	\$
\$500	\$
\$25	\$25.00
\$100	\$
\$50	\$
\$40/ea	\$
	\$3.75
TOTAL	\$128.75

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

Clerk of Court/Deputy Clerk

Court Reporter:

WITNESSES

HOPVILLE POLICE DEPARTMENT

Investigator J. D. Miller

WARRANT NO. H772043 (1);

Warrant (2)

07/22/04

ACTION OF GRAND JURY

TRUE BILL

Sept 30, 2004

William R. [Signature]
Chairman of Grand Jury

VERDICT

The State of South Carolina,

County of LEE

COURT OF GENERAL SESSIONS

OCTOBER TERM 2004

THE STATE

vs.

STEVEN MCCLAIN

Indictment for

ARMED ROBBERY

POSSESSION OF A FIREARM
DURING A CRIME OF VIOLENCE

STATE OF SOUTH CAROLINA)

INDICTMENT FOR

COUNTY OF LEE)

ARMED ROBBERY.

) POSSESSION OF A FIREARM DURING A CRIME OF VIOLENCE

At a Court of General Sessions, convened on September 30, 2004the Grand Jurors of LEE County present upon their oath:COUNT ONE - ARMED ROBBERY

That STEVEN MCCLAIN did in Lee County on or about July 22, 2004, violate Section 16-11-330 (A) of the Code of Laws of South Carolina (1976), as amended, while armed with a deadly weapon, to-wit: a hand gun, did feloniously take from the person in the presence of TREVOR TREMAINE MCDUFFIE, ASHLEY RUTH, SHIRLEY CLYBURN, AND BETTY ANN RUTH by means of force or intimidation goods or monies of the said FAMILY DOLLAR in Bishopville, South Carolina, such goods or monies being described: two thousand (\$2,000.00) dollars.

COUNT TWO - POSSESSION OF A FIREARM DURING A CRIME OF VIOLENCE

That STEVEN MCCLAIN did in Lee County on or about July 22, 2004, was in possession of and did visibly display a firearm during the commission of violent crimes, to-wit: Armed Robbery, in violation of Section 16-23-490, Code of Laws of South Carolina (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

C. Kelly Jackson
SOLICITOR