

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

G. Thomas Cooper, Circuit Court Judge

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S.C. Supreme Court

ALONDA DESAUSSURE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000137

APPENDIX

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STATE OF SOUTH CAROLINA COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON 2011-GS-10-2047
 2011-GS-10-2048

STATE OF SOUTH CAROLINA)
) TRANSCRIPT OF RECORD
)
) July 8-10, 2013.
ALONDA BARRON DESAUSSURE,)
) Charleston, South Carolina
) Defendant.)

B E F O R E:

The Honorable Stephanie P. McDonald, Judge.

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

Meg Haley, Assistant Solicitor
Spencer Compton, Assistant Solicitor
Attorneys for the State

Aaron Mayer, Esquire
Attorney for the Defendant

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS,
Daniel Cobiella	82 102	91 118	92 132	-- 133
Adam Corbin	134	137	141	144
Jonathan Burns	154	165	190	--
Stephen Silcott	193	205	210	--
Kelly Stone	213 305	218 309	221 --	230 --
Richard Burckhardt	249	255	264	--
Roger Jenkins	283	290	--	--

E X H I B I T S

NO.	DESCRIPTION	ID.	EV.
State's 1	Photograph of Gilroy's	108	100
State's 2	Photograph of tip jar	112	112
State's 3	Photograph of victim	115	115
State's 5	Photograph of bicycle	159	159
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1 (July 8, 2013.)

2 THE COURT: So we have two charges?

3 MS. COMPTON: Yes, Your Honor.

4 THE COURT: Armed robbery and assault and
5 battery first? And y'all ready to go or what's the issue
6 or tell me what we need to know before we pick a jury?

7 MS. HALEY: Your Honor, the only thing is I
8 know Mr. Mayer did mention I think we would want to do a
9 Neil vs. Biggers hearing in this case, out of an
10 abundance of caution. We're prepared to go forward with
11 the Biggers hearing.

12 THE COURT: All right. We can do that this
13 afternoon. I've got to pick the grand jury, or qualify
14 them at 2:00. I don't think that will take more than
15 about an hour. So what we can do is get our jury
16 selected this morning. I'll do that. We'll do the
17 Biggers and get started in the morning. How does that
18 sound?

19 MS. HALEY: That would be perfect. The only
20 other issue the State would have is Mr. Mayer has
21 mentioned alibi witnesses; however, the State would
22 object to those because, you know, the information wasn't
23 provided with these witnesses. We don't have their full
24 names. We've never been able to speak with them. He
25 wasn't given a proper amount of time under Rule 5.

1 THE COURT: Well, I saw some e-mails to that
2 effect earlier, and I think we're going to need to
3 discuss all that at greater length so why don't we -- I'm
4 going to go ahead and read the witnesses' names when we
5 qualify the jury, just to see if the jury knows them. Do
6 I have them on any witness list anywhere? Have you seen
7 the State's witness list and requested voir dire?

8 MR. MAYER: I have, Your Honor.

9 THE COURT: Do you want to go ahead and write
10 in any witnesses?

11 MR. MAYER: I e-mailed it Friday. It was --

12 THE COURT: We got the voir dire. Thank
13 y'all for the evidence list. That's very helpful. I've
14 got a motion to sequester. We'll have the Biggers
15 issue --

16 MR. MAYER: And, Your Honor, Ms. Haley and I
17 haven't discussed the Biggers issue, but I don't think
18 there was a police identification in this case.

19 THE COURT: And that's fine, but y'all can
20 tell me what I need to know when we come back at 3:00
21 after I qualify the grand jury. I have got everything I
22 think that you sent except the witness list, so -- wait a
23 minute. It might be in the e-mails. It's in the body of
24 the e-mail? That's why I can't find it. Patrick Rivers,
25 Eddie Nelson, Richard Jenkins, and Big Hamp?

1 MR. MAYER: Yes, Your Honor. Those are the
2 alibi witnesses.

3 THE COURT: Well, I'll read everybody except
4 for Big Hamp.

5 MR. MAYER: There should be some additional
6 witnesses on there, Joanne Desaussure, Eva Desaussure,
7 Charles Desaussure. I can get you another copy.

8 THE COURT: All I need is to have a list.
9 You can handwrite it so that I can read it to the jury
10 when we bring them in. I don't see anything else that
11 says that.

12 MR. MAYER: I'm going to handwrite that right
13 now.

14 THE COURT: Okay. Thank you. I will ask
15 under the proposed voir dire is anybody on the jury panel
16 related by blood or marriage or a close personal friend
17 of the various questions. I'm not going to say
18 acquaintance because everybody is going to stand up every
19 time. Likewise, Ms. Haley, do you really want me to ask
20 if people watch CSI and Law and Order? It comes on 17
21 times a day. You can't avoid it if you're channel
22 surfing.

23 MS. HALEY: In this case it's not necessary.
24 Thank you.

25 THE COURT: Okay. I'll strike number eight.

1 All right. Any objections to the State's requested voir
2 dire?

3 MR. MAYER: None, Your Honor.

4 THE COURT: Okay. Any objections to the voir
5 dire proposed by the defense?

6 MS. HALEY: No, Your Honor.

7 THE COURT: Okay. These questions all look
8 pretty standard to me. I think y'all have done voir dire
9 with me before. Come on up. Thank you. I appreciate
10 it.

11 I will start by reading the indictments,
12 obviously, seeing if anybody knows of anything or has
13 heard of anything about the case. I always tell them the
14 indictments aren't evidence, the defendant has pled not
15 guilty to all of the charges set forth in the indictments
16 and the burden is on the State. Then I will ask if
17 anybody has heard anything about it, knows anything about
18 it. Usually the indictment, unless it's a very
19 sensational case, is not enough for them to know
20 anything.

21 I do not require y'all to stand when the jury
22 comes in and out. It confuses them and makes them
23 uncomfortable and it wastes time, in my humble opinion.
24 I realize there is a split on that. Then I will ask the
25 folks at the State's table to introduce themselves and

1 turn around. I think that's an easier way for me to then
2 ask the jurors if they know of the attorneys or ever been
3 represented by them.

4 I'll then do that with you, and you can
5 introduce yourself and your client, and then we'll go
6 down the witness list. If I forget to read anybody's
7 name on the witness list, I'll ask y'all at the end, did
8 I leave anybody out? If I forget to do that, bring them
9 to my attention, and then we'll go do the voir dire.

10 Anything else we need to take up before we
11 bring in the jury?

12 MS. HALEY: No, Your Honor.

13 THE COURT: Anything else anybody needs to
14 take up before we get started? Okay.

15 (Recess taken.)

16 (In open court, jury panel present.)

17 THE COURT: We'll be trying the case of the
18 State of South Carolina have Alonda Barron Desaussure.
19 This involves two indictments. I'm going to read those
20 to you to give you an idea of what the facts of the case
21 are and ask you to listen up and see if you know anything
22 about it.

23 The indictments are not evidence. They are
24 merely allegations that the State has set forth against
25 this particular defendant. Mr. Desaussure has pled not

1 guilty to the allegations in this indictment, so he is
2 innocent throughout the entire process, and that only
3 changes if 12 jurors unanimously agree that the State has
4 met its burden of proof.

5 The defendant never has to prove anything in
6 the State of South Carolina in General Sessions Court.
7 The burden remains on the State to attempt to prove what
8 it sets forth in the indictments beyond a reasonable
9 doubt, and that will be what the jury in this case, also
10 called the fact finder, will determine.

11 The first indictment in this case is
12 2011-2047. It alleges that on or about October 3 of 2010
13 in Charleston County, at 353 King Street by use of force,
14 threats, or intimidation and while armed with a knife,
15 the defendant, Alonda Barron Desaussure, did carry away
16 the goods or moneys from the personal presence of Daniel
17 Cobiella with the intent to permanently deprive him of
18 possession thereof in violation of South Carolina law.

19 Ladies and gentlemen: This is an indictment
20 for armed robbery. Again, the indictment is not
21 evidence. It is merely the document that brings the case
22 to court. Is there any member of the panel who's heard
23 about this incident or has any knowledge whatsoever about
24 it? If so, please stand. Okay. Thank you.

25 Ladies and gentlemen: We also have

1 indictment 2011-2048 which alleges that in Charleston on
2 or about October 3 of 2012 Mr. Desaussure committed an
3 assault and battery in the first degree against Daniel
4 Cobiella.

5 Again, the defendant has pled not guilty to
6 this indictment, and the indictment itself is not
7 evidence. It is just the vehicle that brings the case to
8 court for consideration. Is there any member of the
9 panel who is aware of anything related to the allegations
10 set forth in this particular indictment, 2048? If so,
11 please stand. Okay. Thank you.

12 Ladies and gentlemen: We're going to go
13 through a question and answer process. We call it voir
14 dire, somewhat similar to what we did in the
15 qualification this morning. I'm going to ask you these
16 questions that have been presented by the State and the
17 defendant. You'll be answering them if they apply to you
18 pursuant to the oath that you took this morning as jurors
19 to provide full and honest information so that these
20 attorneys can strike the most impartial and fair jury
21 possible in their particular case.

22 Again, most of the questions are pretty
23 general and pretty innocuous, but there might be one or
24 two that applies to you that you don't want to answer in
25 front of everyone, and we'll have a time at the end, just

1 as we did this morning, where y'all come forward. I'll
2 bring the lawyers up, and we'll address those one by one
3 with the court reporter, so I'll ask y'all to keep in
4 mind, as we go through this list of questions, if you
5 have one you need to discuss with us personally and bring
6 that up during the catchall period.

7 I'm going to ask the attorneys for the State
8 to go ahead and introduce themselves to you, and we'll do
9 the same for defense.

10 MS. HALEY: Good morning. My name is Meg
11 Haley. I'm an assistant solicitor with the Ninth
12 Judicial Circuit. Sitting with me on this case is
13 Spencer Compton. She is also an assistant solicitor for
14 the State. Also in the courtroom with us is Tasha
15 Lafayette. She's an investigator with our office, and
16 you might see other investigators from our office from
17 time to time.

18 THE COURT: Is any member related by blood or
19 marriage or are you close personal friend of or have you
20 ever been represented by Ms. Meg Haley or Spencer Compton
21 of the Ninth Circuit Solicitor's Office? If so, please
22 stand.

23 Is there any member of the panel who is
24 related to by blood or marriage or a close personal
25 friend of any employee with the Charleston County

1 solicitor's office? If so, please stand. Okay. Thank
2 you. Mr. Mayer?

3 MR. MAYER: My name is Aaron Mayer. I'm a
4 private defense lawyer here in Charleston. This is my
5 client, Alonda Desaussure.

6 THE COURT: Thank you, sir. Is any member of
7 the jury panel related to by blood or marriage, a close
8 personal friend of, or have you ever been represented by
9 Mr. Aaron Mayer or the Mayer Law Firm? If so, please
10 stand.

11 Is any member of the panel related by blood
12 or marriage or a close personal friend of Mr. Alonda
13 Barron Desaussure who Mr. Mayer just introduced to you?
14 If so, please stand. Okay. Thank you.

15 Ladies and gentlemen: There are a number of
16 potential witnesses in this case. I'm going to read you
17 a list of names. These are just potential witnesses. It
18 doesn't mean that each and every one of them is going to
19 testify, but please listen to the list, and if you know
20 anyone on the list, I'm going to ask you to stand, give
21 us your name and juror number, and tell us how you know
22 them.

23 Potential witnesses are Sergeant Kelly Stone
24 of Charleston Police Department, investigator Richard
25 Burckhardt of the Charleston Police Department,

1 investigator Jonathan Burns of the Charleston Police
2 Department, Officer Matthew Gaskins of the Charleston
3 County Police Department, Daniel Cobiella, Stephen
4 Silcott, Kenneth Giorno, Adam Corbin, Henry Middleton,
5 Dr. David Dalu of MUSC, Charles Desaussure, Eva
6 Desaussure, Roger Jenkins, Eddie Nelson, Patrick Rivers,
7 Joanne Yates, and a fellow named Big Hamp, who we don't
8 have a last name for.

9 If anyone is related by blood or marriage or
10 close personal friends of any of these witnesses, please
11 stand. Yes, ma'am?

12 A PROSPECTIVE JUROR: I'm not a close
13 personal friend. but Officer Burckhardt is a
14 neighborhood.

15 THE COURT: What is your name and juror
16 number?

17 A PROSPECTIVE JUROR: 51.

18 THE COURT: And, ma'am, would that
19 relationship, the fact that he is a neighbor, in any way
20 interfere with your ability to be fair and impartial in
21 this case?

22 A PROSPECTIVE JUROR: No.

23 THE COURT: Thank you, ma'am. Yes, ma'am?

24 A PROSPECTIVE JUROR: I taught in the high
25 school here, and I am familiar with several of those

1 names.

2 THE COURT: Where did you teach?

3 A PROSPECTIVE JUROR: Burke High School.

4 THE COURT: What is your juror number,
5 please, ma'am?

6 A PROSPECTIVE JUROR: 67.

7 THE COURT: And, ma'am, would any of your
8 knowledge of these folks or your relationship with them
9 interfere with your ability to be fair and impartial?

10 A PROSPECTIVE JUROR: I would have to say
11 yes.

12 THE COURT: You think it might?

13 A PROSPECTIVE JUROR: I think it would.

14 THE COURT: Okay. Then we're not going to
15 select you as a juror on this particular case. I'm going
16 to ask you to stay with us -- or, actually, should we
17 just get her to call back after 6:00? You don't need to
18 stay for this whole -- we're just getting started, and I
19 hate to make you sit here. Call back after 6:00 tonight.
20 I think we'll be picking another jury in the morning, but
21 you'll have more instructions then.

22 All right. Juror number 67 will not be
23 selected on this particular case. Okay.

24 Is any member of the panel related by blood
25 or marriage or a close personal friend of a member of any

1 law enforcement agency? If so, please stand. Yes,
2 ma'am?

3 A PROSPECTIVE JUROR: My ex-husband is a
4 North Charleston police officer.

5 THE COURT: What is your juror number, ma'am?

6 A PROSPECTIVE JUROR: 148.

7 THE COURT: Okay. Thank you. Anyone else?
8 Yes, ma'am.

9 A PROSPECTIVE JUROR: Al Canon.

10 THE COURT: Is a close personal friend?

11 A PROSPECTIVE JUROR: (Nods head.)

12 THE COURT: What is your juror number?

13 A PROSPECTIVE JUROR: 1569.

14 THE COURT: Yes, ma'am?

15 A PROSPECTIVE JUROR: Ex-husband with SLED.

16 THE COURT: What is your juror number?

17 A PROSPECTIVE JUROR: 216.

18 THE COURT: Okay. Thank you.

19 A PROSPECTIVE JUROR: My brother is with
20 Columbia, South Carolina.

21 THE COURT: What is your juror number?

22 A PROSPECTIVE JUROR: 108.

23 THE COURT: Okay. Yes, sir?

24 A PROSPECTIVE JUROR: My brother is spokesman
25 for the North Charleston Police Department.

1 THE COURT: A spokesman?

2 A PROSPECTIVE JUROR: Yes.

3 THE COURT: What's your juror number?

4 A PROSPECTIVE JUROR: 204.

5 THE COURT: All right. Yes, sir?

6 A PROSPECTIVE JUROR: Juror 261. My cousin
7 is a South Carolina highway patrolman.

8 THE COURT: Okay. Thank you. Yes, ma'am?

9 A PROSPECTIVE JUROR: My close friend is a
10 retired detective with Montgomery County, Maryland.

11 THE COURT: What is your juror number?

12 A PROSPECTIVE JUROR: 151.

13 THE COURT: Yes, ma'am?

14 A PROSPECTIVE JUROR: Juror 57. All of my
15 previous employment has been with the EMS system, in
16 South Carolina and the state of Virginia.

17 THE COURT: So you come in contact with law
18 enforcement all the time. Okay. Thank you. And you are
19 57?

20 A PROSPECTIVE JUROR: Yes.

21 THE COURT: Yes?

22 A PROSPECTIVE JUROR: Juror number 56. I
23 work for an insurance company that insures bail bonding
24 companies so I've had to deal with law enforcement in
25 several cases.

1 THE COURT: Yes, ma'am?

2 A PROSPECTIVE JUROR: Juror 44. I worked for
3 the Dorchester County Sheriff's Office for many years.

4 THE COURT: Okay. All right. Is any member
5 of the jury panel related by blood or marriage or a close
6 personal friend of or have you ever been employed by the
7 South Carolina Attorney General's office or any
8 prosecuting agency? If so, please stand.

9 Have you ever worked for a prosecuting agency
10 or you're close personal friends with someone that does
11 or you are related by blood or marriage to anyone that is
12 employed with a prosecuting agency. Yes, ma'am?

13 A PROSPECTIVE JUROR: I am a close personal
14 friend of Sean Catrell, who is a U.S. attorney.

15 THE COURT: What's your juror number?

16 A PROSPECTIVE JUROR: 169.

17 THE COURT: Okay. Thank you, ma'am. I'm
18 sorry. I didn't see you.

19 A PROSPECTIVE JUROR: My father has been an
20 attorney for 30 years.

21 THE COURT: Who is your father?

22 A PROSPECTIVE JUROR: His name is Brian
23 Crawford. He's actually in Louisiana.

24 THE COURT: And he's a prosecutor?

25 A PROSPECTIVE JUROR: Yes.

1 THE COURT: What is your juror number?

2 A PROSPECTIVE JUROR: 56.

3 THE COURT: Okay. Thank you. Has any member
4 of the panel ever been employed by any civilian or
5 military law enforcement agency? If so, please stand.

6 A PROSPECTIVE JUROR: 44, Dorchester County
7 Sheriff's Office.

8 THE COURT: Thank you, ma'am. Has any member
9 of the panel -- I'm sorry. Moving forward, I'm going to
10 get everybody to stand at the very beginning.

11 A PROSPECTIVE JUROR: It just dawned on me,
12 Your Honor. I was employed by Navy Family Services for a
13 time.

14 THE COURT: What is juror number, ma'am?

15 A PROSPECTIVE JUROR: 200.

16 THE COURT: Thank you. All right. Has any
17 member of the panel or any member of your immediate
18 family ever been the victim of a property crime? If so,
19 please stand, or come see me shortly.

20 Okay. Yes, sir?

21 A PROSPECTIVE JUROR: My home has been
22 burglarized a couple of times in my lifetime.

23 THE COURT: What is your juror number,
24 please, sir?

25 A PROSPECTIVE JUROR: 249.

1 THE COURT: Okay. Thank you, sir. Yes,
2 ma'am?

3 A PROSPECTIVE JUROR: Juror number 200. I
4 was robbed in my 20's.

5 THE COURT: Thank you ma'am. Yes, sir?

6 A PROSPECTIVE JUROR: 248. My house was
7 broken into.

8 THE COURT: Thank you, sir. Yes, ma'am?

9 A PROSPECTIVE JUROR: 274. I had a home
10 burglary also.

11 THE COURT: Thank you, ma'am. Yes, ma'am?

12 A PROSPECTIVE JUROR: 242. My car was
13 vandalized.

14 THE COURT: Okay. Yes, ma'am?

15 A PROSPECTIVE JUROR: 169. My brother was
16 mugged and his computer was stolen.

17 THE COURT: Thank you, ma'am.

18 A PROSPECTIVE JUROR: Juror 260. We had
19 items stolen from my husband's car parked at our house.

20 THE COURT: Thank you. Yes, ma'am?

21 A PROSPECTIVE JUROR: 155. My daughter's
22 house was vandalized, and her car was broken into.

23 A PROSPECTIVE JUROR: 151. My sister was
24 mugged and my car was broken into.

25 THE COURT: Okay. Thank you. Yes, ma'am?

1 A PROSPECTIVE JUROR: 148. I had items
2 stolen from my house.

3 THE COURT: Yes, ma'am?

4 A PROSPECTIVE JUROR: 120, and I've had
5 property stolen from me.

6 THE COURT: Thank you, ma'am.

7 Y'all come up real quick. Attorneys, I have
8 a question for you.

9 (The following discussion was held at
10 sidebar.)

11 THE COURT: Was this a home invasion?

12 MR. MAYER: No.

13 THE COURT: So what is the relevance to that,
14 number seven?

15 MR. MAYER: Just trying to figure out victims
16 of crime. You don't have to ask it.

17 THE COURT: I'm going to skip that one.
18 Thank you. All right.

19 (End of sidebar.)

20 THE COURT: Has any member of the panel ever
21 participated on a jury before? If so, please stand.
22 Yes, ma'am?

23 A PROSPECTIVE JUROR: Magistrate jury? Is
24 that what you're asking?

25 THE COURT: Any jury.

1 A PROSPECTIVE JUROR: Yes.

2 THE COURT: And what kind of case was it?

3 A PROSPECTIVE JUROR: It was a drowning in a
4 city pool.

5 THE COURT: Okay.

6 A PROSPECTIVE JUROR: And someone was run
7 over in North Charleston by somebody who had three DUIs.

8 THE COURT: In magistrate's court?
9 Interesting.

10 A PROSPECTIVE JUROR: Oh, in magistrate's
11 court? Oh, I thought you said just in general.

12 THE COURT: Oh, I thought you said this
13 happened in magistrate court. What's your juror number?

14 A PROSPECTIVE JUROR: 159.

15 THE COURT: All right. Ma'am, would anything
16 about those experiences in any way interfere with your
17 ability to be fair in this case?

18 A PROSPECTIVE JUROR: I don't think so.

19 THE COURT: Thank you ma'am. Yes, sir?

20 A PROSPECTIVE JUROR: 261, and I don't
21 remember how many years ago. I think I was like 19 at
22 the time. General Sessions Court on the civil side, I
23 believe it was, and then magistrate's court for city of
24 Charleston last year.

25 THE COURT: All right. Thank you, sir.

1 A PROSPECTIVE JUROR: 285. It was a car
2 accident.

3 THE COURT: Thank you. Yes, sir?

4 A PROSPECTIVE JUROR: 292, civil court.

5 THE COURT: Thank you, sir. Is that it?
6 Thank you. Has any member of the panel ever received
7 assistance from the Victims' Advocacy Program? If so,
8 please stand or come see me shortly.

9 Yes, ma'am?

10 A PROSPECTIVE JUROR: My son was killed in an
11 automobile accident. He was a passenger.

12 THE COURT: What is your juror number?

13 A PROSPECTIVE JUROR: 223.

14 THE COURT: Thank you, ma'am.

15 A PROSPECTIVE JUROR: 108. I have received
16 services.

17 THE COURT: What is your number?

18 MR. MAYER: Juror 108.

19 THE COURT: Would anything about anything you
20 experienced interfere with your ability to be fair in
21 this case?

22 A PROSPECTIVE JUROR: No.

23 THE COURT: Thank you, ma'am. Anybody else?
24 Okay. Has any member of the panel or a member of your
25 immediate family ever been a victim of a violent crime?

1 If so please stand, or come see me.

2 Yes, ma'am?

3 A PROSPECTIVE JUROR: My brother who was
4 mugged was beaten up pretty severely.

5 THE COURT: What's your number?

6 A PROSPECTIVE JUROR: 169.

7 THE COURT: Ma'am, would anything about that
8 experience interfere with your ability to be fair in this
9 case?

10 A PROSPECTIVE JUROR: I don't think so.

11 THE COURT: Well, I need -- listening to the
12 evidence in this particular case, will you be able to be
13 fair?

14 A PROSPECTIVE JUROR: Yes.

15 THE COURT: Thank you, ma'am. Appreciate
16 that. Yes, ma'am?

17 A PROSPECTIVE JUROR: 108, personal victim.

18 THE COURT: And I've already asked you if you
19 could be fair?

20 A PROSPECTIVE JUROR: Yes.

21 THE COURT: Could you be fair in this case?

22 A PROSPECTIVE JUROR: Yes, ma'am.

23 THE COURT: Thank you, ma'am. Yes, ma'am?

24 A PROSPECTIVE JUROR: 151, my sister was
25 mugged.

1 THE COURT: Would anything about that
2 experience interfere with your ability to be fair and
3 impartial?

4 A PROSPECTIVE JUROR: No.

5 THE COURT: Okay. Thank you. Yes, ma'am?

6 A PROSPECTIVE JUROR: Juror 57. I was a
7 battered spouse.

8 THE COURT: Would anything about that
9 interfere with your ability to be fair in this case?

10 A PROSPECTIVE JUROR: I'm afraid I do have
11 some

12 THE COURT: I understand. I'm going to
13 excuse you from the trial of this particular case. If
14 you'll call back after 6:00 tonight, we'll go forward
15 from there.

16 Yes, sir?

17 A PROSPECTIVE JUROR: 292. An elder brother
18 shot to death.

19 THE COURT: I'm sorry, sir. Would that --
20 let me ask it this way: Can you be fair and impartial in
21 the trial of this particular case?

22 A PROSPECTIVE JUROR: Yes, ma'am.

23 THE COURT: Thank you, sir. I appreciate
24 that.

25 Is any member of the panel or any member of

1 your immediate family a member of MADD, Mothers Against
2 Drunk Driving, SADD, Students Against Drunk Driving,
3 CAVC, Citizens Against Violent Crime, or any similar such
4 organization or any neighborhood watch program? If so,
5 please stand. Okay. Thank you.

6 This case may involve some testimony
7 regarding the use of alcohol or drugs. Is there any
8 member of the panel who has a moral or religious
9 opposition to the use of alcohol or drugs such that it
10 would interfere with your ability to be fair and
11 impartial in this case? If so, please stand or come see
12 me shortly. Okay. I find none at this time.

13 Has any member of your immediate family or
14 any close personal friend of yours ever had any criminal
15 charge adjudicated by the Charleston County solicitor's
16 office or any prosecuting agency? If so, please stand or
17 come see me shortly.

18 Yes, ma'am.

19 A PROSPECTIVE JUROR: I have family members.

20 THE COURT: Okay. You're number 108?

21 A PROSPECTIVE JUROR: 108.

22 THE COURT: Sometimes I can remember,
23 sometimes I can't. Would that in any way interfere with
24 your ability to be fair in this case?

25 A PROSPECTIVE JUROR: No ma'am.

1 THE COURT: Yes, ma'am?

2 A PROSPECTIVE JUROR: 148. I have a close
3 personal friend who is in jail right now.

4 THE COURT: 148?

5 A PROSPECTIVE JUROR: Yes.

6 THE COURT: Would that in any way interfere
7 with your ability to be fair?

8 A PROSPECTIVE JUROR: No.

9 THE COURT: Yes, ma'am?

10 A PROSPECTIVE JUROR: Adjudicated means --

11 THE COURT: Charged or tried or handled by.

12 A PROSPECTIVE JUROR: Yes, my son.

13 THE COURT: What is your juror number,
14 please?

15 A PROSPECTIVE JUROR: 223.

16 THE COURT: Would that in any way interfere
17 with your ability to be fair in this case?

18 A PROSPECTIVE JUROR: No.

19 THE COURT: Thank you, ma'am.

20 A PROSPECTIVE JUROR: 44, my son. No, it
21 would not interfere.

22 THE COURT: Thank you, ma'am. Has any member
23 of the panel or any member of your immediate family ever
24 been represented by the Charleston County public
25 defender's office? If so, please stand or come see me

1 shortly. Yes, ma'am?

2 A PROSPECTIVE JUROR: My son.

3 THE COURT: Same thing, I would imagine.

4 And, again, could you be fair?

5 A PROSPECTIVE JUROR: Yes.

6 THE COURT: Yes, ma'am?

7 A PROSPECTIVE JUROR: 104, my nephew.

8 THE COURT: Would that in any way interfere
9 with your ability to be fair?

10 A PROSPECTIVE JUROR: No.

11 THE COURT: Thank you.

12 A PROSPECTIVE JUROR: 44, my son.

13 THE COURT: Thank you, ma'am.

14 Has any member of the panel ever previously
15 been a witness in a civil or criminal case? If so,
16 please stand. Yes, ma'am?

17 A PROSPECTIVE JUROR: Juror number 56, in a
18 civil case I have been.

19 THE COURT: Thank you, ma'am. All right.

20 Has any member of the panel or any member of
21 your immediate family ever been arrested by the
22 Charleston County police department? If so, please stand
23 or come see me shortly. Yes, ma'am?

24 A PROSPECTIVE JUROR: Juror 44, my son.

25 THE COURT: Thank you. Yes?

1 A PROSPECTIVE JUROR: 104, my nephew.

2 THE COURT: Thank you.

3 A PROSPECTIVE JUROR: 107, my brother.

4 THE COURT: Thank you.

5 A PROSPECTIVE JUROR: 51.

6 THE COURT: A family member?

7 A PROSPECTIVE JUROR: Yes, family member.

8 THE COURT: Thank you, ma'am.

9 A PROSPECTIVE JUROR: 249, I was arrested by
10 Charleston city police for driving under suspension.

11 THE COURT: Okay. Thank you.

12 A PROSPECTIVE JUROR: 223. My son.

13 THE COURT: 223?

14 A PROSPECTIVE JUROR: Yes.

15 THE COURT: Thank you. Has any member of the
16 panel or any member of your immediate family ever had an
17 unpleasant experience with law enforcement, other than
18 maybe just getting pulled for speeding, which is
19 unpleasant, but a specific unpleasant experience with law
20 enforcement. Yes, ma'am?

21 A PROSPECTIVE JUROR: Family member.

22 THE COURT: Same family member? Another
23 family member? What I need to find out, and I think I
24 know the answer, can you be fair and impartial in this
25 case? Thank you. Yes, ma'am?

1 A PROSPECTIVE JUROR: 51.

2 THE COURT: Thank you.

3 A PROSPECTIVE JUROR: 104.

4 THE COURT: Okay. Would anything about those
5 experiences in any way interfere with your ability -- and
6 by your, I mean anyone in your family -- ability to be
7 fair in this particular case which may involve testimony
8 from members of the Charleston Police Department? If so,
9 please stand, if you think you cannot be fair in a case
10 in which there are witnesses from the Charleston Police
11 Department. Okay. Thank you.

12 Does any member of the panel know of any
13 reason why he or she could not give this defendant a fair
14 and impartial trial? If so, please stand or come see me
15 shortly. Is there any member of the panel who would have
16 a problem following the law as the Court gives it to you,
17 even if you believe that the law is inappropriate or
18 unfair? If so, please stand.

19 Is there any member of the panel who holds
20 social, ethnic, racial, or religious views that would
21 render you incapable of being fair and impartial in this
22 particular case? If so, please stand or come see me
23 shortly.

24 Does any member of the panel have religious
25 convictions, philosophical or moral beliefs that would

1 make it difficult or impossible for you to sit in
2 judgment of another person? If so, please stand.

3 Based on the limited information you've been
4 given this morning and the questions that we've asked, is
5 there any member of the panel who knows of any reason
6 whatsoever why he or she should not serve as a juror on
7 this case or could not be fair to both the State and the
8 defense? Any reason whatsoever why you shouldn't be put
9 on this particular jury in this type of case? If so,
10 please stand or come see me shortly.

11 We're going to do that right now. If y'all
12 have a previous question that you need to give us
13 information about or if you have some reason why you
14 shouldn't be on this particular case, why you can't be
15 fair here today in this case, I'm going to get y'all to
16 come up and see me. Okay? Anybody that needs to come
17 forward, come on up.

18 (The following discussion was held at
19 sidebar.)

20 THE BAILIFF: Juror number 44.

21 THE COURT: Yes, ma'am, come on up.

22 A PROSPECTIVE JUROR: I'm actually a pre-law
23 student at the College of Charleston. I'm more
24 interested in the prosecution side of things. I don't
25 know how that would affect toward the defense side.

1 THE COURT: You think it might make you lean
2 one way?

3 A PROSPECTIVE JUROR: I am more ambivalent to
4 that side of the court than the other.

5 THE COURT: I understand. We'll get you put
6 in a panel maybe with the civil jurors, but we won't pick
7 you on this particular case.

8 A PROSPECTIVE JUROR: Thank you.

9 THE COURT: All right? Thank you.

10 Juror number 44, we're going to move her to
11 the civil panel. Okay?

12 THE BAILIFF: Juror number 249.

13 THE COURT: Hi there.

14 A PROSPECTIVE JUROR: One of your prior
15 questions, adjudication by Charleston County, about 30
16 years ago, I had a bad check that I didn't cover, and I
17 had a warrant and had to go take care of it. I just
18 didn't want it to come up or cause problems.

19 THE COURT: Would that in any way interfere
20 with your ability to be fair in this case?

21 A PROSPECTIVE JUROR: No.

22 THE COURT: All right. Juror number 249 will
23 remain with us.

24 THE BAILIFF: Juror number 120.

25 A PROSPECTIVE JUROR: In my younger years I

1 was convicted.

2 THE COURT: We'll put you on a different
3 case, or put your on a panel, but we won't put you on
4 this particular case. All right?

5 Juror number 120 will not be seated in this
6 particular case.

7 While I've got you all up here, anything
8 further from the State or the defense?

9 MR. MAYER: No.

10 MS. HALEY: No.

11 THE COURT: Anybody we need to address for
12 cause or issues? None from the defense?

13 MS. COMPTON: 104 indicated she wasn't
14 experienced with law enforcement just based on the number
15 of times that she stood.

16 THE COURT: Has anybody ever granted that?
17 That's denied, unless you give me a specific reason. I
18 mean, what in particular?

19 MS. COMPTON: Just had any experience with
20 law enforcement.

21 THE COURT: I don't remember anybody making a
22 big deal of that. Okay? Anything further?

23 MS. HALEY: No.

24 THE COURT: All right. Anything else?

25 MS. HALEY: No.

1 THE COURT: All right. Those are denied.
2 Thank you very much.

3 All right. Anything further from the State
4 or the defense?

5 MS. HALEY: Nothing from the State.

6 MR. MAYER: Nothing from the defense, Your
7 Honor.

8 THE COURT: Okay. Then we are ready to
9 strike.

10 THE CLERK: Juror number 22, Barbara Burger.
11 (The juror, a white female, approaches.)
12 What say you for the State?

13 MS. HALEY: Please present this juror.

14 THE CLERK: What say you for the defendant?

15 MR. MAYER: Please excuse this juror.

16 THE CLERK: Please have a seat back in the
17 audience. You've been excused from the trial of this
18 case.

19 Juror 127, David Igoe. What say you for the
20 State?

21 (The juror, a white male, approaches.)

22 MS. HALEY: Please present this juror.

23 THE CLERK: What say you for the defendant?

24 MR. MAYER: Please present the juror.

25 THE CLERK: Have a seat in the jury box.

1 You've been select as a juror in this case.

2 Juror number 5, Robert Baker.

3 (The juror, a white male, approaches.)

4 What say you for the State?

5 MS. HALEY: Please present the juror.

6 THE CLERK: What say you for the defendant?

7 MR. MAYER: Please excuse the juror.

8 THE CLERK: Please have a seat back in the
9 audience. You've been excused from the trial of this
10 case.

11 Juror 251, Tyler Stasky.

12 (The juror, a white male, approaches.)

13 What say you for the State?

14 MS. HALEY: Please present the juror.

15 THE CLERK: What say you for the defendant?

16 MR. MAYER: Please excuse the juror.

17 THE CLERK: Please have a seat back in the
18 audience. You've been excused from the trial of this
19 case.

20 Juror number 253, Lisa Stephenson.

21 (The juror, a white female, approaches.)

22 THE CLERK: What say you for the State?

23 MS. COMPTON: Please present the juror.

24 THE CLERK: What say you for the defendant?

25 MR. MAYER: Please present this juror.

1 THE CLERK: Ms. Stephenson, have a seat in
2 the jury box. You've been selected as a juror in this
3 case.

4 Juror number 148, Sherri Kramer.

5 (The juror, a white female, approaches.)

6 What say you for the State?

7 MS. HALEY: Please present the juror.

8 THE CLERK: What say you for the defendant?

9 MR. MAYER: One moment. Please present the
10 juror.

11 THE CLERK: Please have a seat in the jury
12 box. You've been selected as a juror in this case.

13 Juror number 38, Latidra Creel.

14 (The juror, a black female, approaches.)

15 What say you for the defendant?

16 MS. HALEY: Please present the juror.

17 THE CLERK: What say you for the defendant?

18 MR. MAYER: Please present the juror.

19 THE CLERK: Please have a seat in the jury
20 box. You've been selected as a juror in this case.

21 Juror number 16, Attallah Bright.

22 (The juror, a black female, approaches.)

23 What say you for the defendant?

24 MS. HALEY: Please present the juror.

25 THE CLERK: What say you for the defendant?

1 MR. MAYER: Please present this juror.

2 THE CLERK: Please have a seat in the jury
3 box. You've been selected as juror in this case.

4 Juror number 279, Andrew Washington.

5 (The juror, a black male, approaches.)

6 What say you for the State?

7 MS. HALEY: Please present the juror.

8 THE CLERK: What say you for the defendant?

9 MR. MAYER: Please present the juror.

10 THE CLERK: Mr. Washington, please have a
11 seat in the jury box. You've been selected as a juror in
12 this case.

13 Juror number 102, James Green.

14 (The juror, a black male, approaches.)

15 What say you for the State?

16 MS. HALEY: Court's indulgence. Please
17 present the juror.

18 THE CLERK: What say you for the State?

19 MR. MAYER: Please present the juror.

20 THE CLERK: Mr. Green, please have a seat in
21 the jury box. You've been selected as a juror in this
22 case.

23 Juror number 177, Megan Morganfinne.

24 (The juror, a white female, approaches.)

25 What say you for the State?

1 MS. HALEY: Court's indulgence. Please
2 present this juror.

3 THE CLERK: What say you for the defendant?

4 MR. MAYER: Please excuse the juror.

5 THE CLERK: Please have a seat back in the
6 audience. You've been excused from the trial of this
7 case. That's four strikes for the defendant.

8 Juror number 261, Robert Tidmore.

9 (The juror, a white male, approaches.)

10 What say you for the State?

11 MS. HALEY: Please present juror.

12 THE CLERK: What say you for the defendant?

13 MR. MAYER: Please excuse the juror.

14 THE CLERK: Please have a seat back in the
15 audience. You've been excused from the trial of this
16 case.

17 Juror number 254, Latonya Stewart.

18 (The juror, a black female, approaches.)

19 What say you for the State?

20 MS. HALEY: Please present this juror.

21 THE COURT: What say you for the defendant?

22 MR. MAYER: Please present this juror.

23 THE CLERK: Ms. Stewart, please have a seat
24 in the jury box. You've been selected as a juror in this
25 case.

1 Juror number 194, Jill Piers.

2 (The juror, a white female, approaches.)

3 What say you for the State?

4 MS. HALEY: Please present the juror.

5 THE CLERK: What say you for the defendant?

6 MR. MAYER: Please present the juror.

7 THE CLERK: Have a seat in the jury box.

8 You've been selected as a juror in this case.

9 Juror number 246, Michelle Smith Sanders.

10 (The juror, a black female, approaches.)

11 What say you for the State?

12 MS. HALEY: Please present this juror.

13 THE COURT: What say you for the defendant?

14 MR. MAYER: Please excuse this juror.

15 THE CLERK: Please have a seat back in the

16 audience. You've been excused from the trial of this

17 case.

18 Juror number 60, James Edahl.

19 (The juror, a white male, approaches.)

20 What say you for the State?

21 MS. HALEY: Please present the juror.

22 THE CLERK: What say you for the defendant?

23 MR. MAYER: Please present the juror.

24 THE CLERK: Mr. Edahl please have a seat in

25 the jury box. You've been selected as a juror in this

1 case.

2 Juror number 276, Margo Wallace.

3 (The juror, a white female, approaches.)

4 What say you for the State?

5 MS. HALEY: Please present the juror.

6 THE CLERK: What say you for the defendant?

7 MR. MAYER: Please present the juror.

8 THE CLERK: Ms. Wallace, please have a seat
9 in the jury box. You've been selected as a juror in this
10 case.

11 Juror number 56, Corinne Duffey.

12 (The juror, a white female, approaches.)

13 What say you for the State?

14 MS. HALEY: Please excuse the juror.

15 THE CLERK: Please have a seat back in the
16 audience. You've been excused from the trial of this
17 case.

18 Juror number 272, Anna Vining.

19 (The juror, a Hispanic female, approaches.)

20 What say you for the State?

21 MS. HALEY: Please present the juror.

22 THE CLERK: What say you for the defendant?

23 MR. MAYER: Please present the juror.

24 THE CLERK: Please have a seat in the jury
25 box. You've been selected as a juror in this case.

1 Now picking for the first alternate, juror
2 number 198, Richard Porter.

3 (The juror, a white male, approaches.)

4 What say you for the State?

5 MS. HALEY: Please excuse the juror.

6 THE CLERK: Mr. Porter, please have a seat
7 back in the audience. You've been excused from the trial
8 of this case.

9 Juror number 155, Joanna Lau.

10 (The juror, a white female, approaches.)

11 Any challenge from the State?

12 MS. HALEY: No challenge.

13 THE CLERK: What say you for the defendant?

14 MR. MAYER: Please seat Ms. Lau.

15 THE CLERK: Please have a seat in the jury
16 box. You've been selected as juror in this case.

17 Juror number 223, Cheryl Salter.

18 (The juror, a white female, approaches.)

19 What say you for the State?

20 MS. HALEY: Please present the juror.

21 THE CLERK: What say you for the defendant?

22 MR. MAYER: Please present this juror.

23 THE CLERK: Please have a seat in the jury
24 box. You've been selected for the trial of this case.

25 THE COURT: All right. Thank you. Are there

1 any matters of law regarding seating and selection of the
2 jury from either the State or the defense?

3 MS. HALEY: Not from the State, Your Honor.

4 THE COURT: Okay.

5 MR. MAYER: Nor the defense.

6 THE COURT: All right. Thank you. Ladies
7 and gentlemen: You will be our jurors in the trial of
8 this case. I'll get y'all to remain just for one minute.

9 Ladies and gentlemen: You have not been
10 selected as jurors in the trial of this case, so are they
11 done for the day, Mike? Wait one second.

12 I'm going to excuse y'all for the day, but
13 please call back after 6:00 tonight. I'm not sure if
14 we'll be selecting a jury tomorrow, but I believe that we
15 do have one courtroom that will be selecting a jury in
16 the morning, so if y'all will call back after 6:00
17 tonight, they'll tell you what time to report, whether at
18 9:30, 10:00, or it will tell you to come back the next
19 day. So follow whatever instructions you hear tonight
20 and call after 6:00.

21 Thank you so much for your time. I
22 appreciate it. You're excused.

23 Ladies and gentlemen: You have been selected
24 as our jurors and our two very important alternate jurors
25 for the trial of this particular case, which we think

1 will last about two to three days, I believe. Today is
2 the first Tuesday for the term for the six-month period,
3 and I'm the administrative judge for General Sessions
4 matters, so I've got to qualify the grand jury this
5 afternoon, which means we'll be going through a process
6 with them similar to what we went through with y'all this
7 morning, but they'll be serving two to three days a month
8 for the next six months. So y'all just have this week to
9 serve, but what that means is we're not going to start
10 this particular trial until tomorrow morning, and I
11 apologize for the inconvenience.

12 It's just kind of way the schedule worked out
13 this week, so I'm going to ask y'all to be back tomorrow
14 morning at 9:30. Generally, we start court, if we can,
15 about 9:30, and try to go till about 5:00 or 5:30.
16 Sometimes there are issues of law that come up, and I'll
17 have the lawyers here before y'all get here and after
18 y'all go, and we try to work on those at lunch to avoid
19 sending y'all in and out while we discuss matters of law.

20 And I'll give you more information about that
21 tomorrow as well, but I've got some matters to work on
22 with them, assuming we have time after we finish the
23 grand jury. We normally break for lunch around 12:30,
24 but I do try to get to a logical point in the testimony.
25 If we're about finished with a witness, we might go a

1 little longer or break a little earlier.

2 We usually go about an hour and a half at a
3 time, take a morning break and afternoon break. If
4 anybody has a particular issue they need to bring to my
5 attention regarding inability to sit, please let us know.
6 We want y'all to be able to give your full attention and
7 not be uncomfortable, and this goes for the lawyers and
8 parties as well.

9 If at any time I seem to have lost track of
10 some time or somebody needs to take a break other than
11 our announced break, if you just raise your hand, I'm not
12 real good at catching that because I'm watching
13 everything else that's going on, but Sarah and our clerks
14 are very good. This is my law clerk, Sarah Woodward.
15 She's my right-hand person, but she'll catch that
16 definitely and let me know if we need to take a break at
17 other than our appointed time.

18 I'm going to excuse y'all for this afternoon,
19 but I'm going to ask you not to do any independent
20 research or try to Google anything or look anything up.
21 I'll give you more detail on this tomorrow when we swear
22 you and charge you on the law, but you're limited to
23 consideration of the evidence that comes in in this
24 courtroom, either from the witness stand or documents,
25 exhibits that get put into evidence. No outside

1 influences are permissible.

2 I don't know if we'll have any media coverage
3 or not. I haven't gotten any requests. They usually let
4 me know, but if there were to be any media stories, I
5 would ask that you disregard those and not watch them or
6 not read them. Again, you're limited to consideration of
7 the evidence that comes in here in court.

8 Likewise, you're not allowed to talk about
9 the case at all. You don't know enough yet to talk about
10 it with anybody, but once you start hearing a little bit,
11 you're not allowed to talk about it with anyone, even
12 each other, because you will only have heard a part of
13 the story, or a part of the picture at that point.

14 You're not allowed to begin deliberating or
15 discussing it with each other, or you're not allowed to
16 discuss it with anyone until it's over, until the case is
17 given to you for deliberation; that is, once you've heard
18 all the evidence, have the charge on the law, and the
19 bailiff comes with the verdict form that will be ready at
20 the end of the trial and any exhibits, that will be your
21 signal that you can begin to talk about it.

22 So y'all just need to get to know each other
23 and talk about other things before we get to that point.
24 I will ask y'all to pick a foreperson sometime tomorrow
25 after y'all have had a chance to meet each other and get

1 to know each other a little bit better, but in the
2 meantime, I think that's about it for the day.

3 Anything further from the State or the
4 defense we need to go over before I let the jurors go?

5 MS. HALEY: Nothing from the State, Your
6 Honor.

7 MR. MAYER: Nothing from the defense, Your
8 Honor.

9 THE COURT: All right. I'll excuse y'all for
10 the day. You'll leave through this door. Just so you
11 know, like I said, we try to go until about 5:00 or 5:30,
12 unless there is a reason I need to break, something with
13 the lawyer. If somebody has an issue like a child care
14 issue, you got to be on the other side of Johns Island or
15 Mount Pleasant by 6:00 or they start charging you \$10 a
16 minute, make sure we know those kind of things.

17 I can't always accommodate you, but we do try
18 to do that, or at least give you a chance to make
19 arrangements to get those kind of things taken care of.
20 Okay?

21 So any other questions? My bailiffs will be
22 happy to help you, or we'll deal with those tomorrow.
23 Thank you for your patience. I'll see y'all at 9:30.

24 (Jury excused.)

25 THE COURT: All right. I'll see y'all back

1 here -- I think we're going to do the grand jury at 2:00.
2 I'm going to meet with Greg and Andrew right at 3:00, but
3 then we'll go into y'all's identification and alibi
4 issues and anything else you need to cover when we come
5 back. Y'all just be back around close to 3:00 so we can
6 get going.

7 Anything we need to do before we break for
8 lunch?

9 MS. HALEY: No, Your Honor.

10 THE COURT: All right. I look forward to
11 working with y'all, and I'll see you this afternoon.

12 (Recess taken.)

13 A F T E R N O O N S E S S I O N

14 THE COURT: We are back to Mr. -- I
15 understand we've got some motions. Is anybody else here
16 waiting for me to sign something or do anything? All
17 right.

18 Happy to hear from you.

19 MS. HALEY: Thank you, Your Honor. We spoke
20 with Mr. Mayer after everything this morning, and it
21 seems that he has agreed to waive a Biggers hearing in
22 this case.

23 THE COURT: Okay.

24 MS. HALEY: So we have released our witnesses
25 for that. They're obviously prepared to testify

1 tomorrow. The State would -- I mentioned in an e-mail,
2 back in June that, I guess, Mr. Mayer is presenting alibi
3 witnesses. We were not notified of these witnesses in
4 accordance with Rule 5, and we have not been able to find
5 these people.

6 Also, one of them is Big Hamp, which is all
7 we know him by, so we don't know how to find him or who
8 he is, so basically we are here to object to that
9 testimony.

10 THE COURT: Read to me the portion from Rule
11 5 regarding the alibi notice. I'm concerned -- you know,
12 if there is a prejudice issue that I think is relevant,
13 but just because something procedurally didn't happen,
14 I'm not going to bar him presenting the alibi witnesses.
15 Now, you know, if they catch some evidence from you,
16 that's different, but y'all give me a little more detail
17 on this, if you don't mind.

18 MS. HALEY: Under Rule 5(e)1, the notice just
19 says, Upon written request, the prosecution which we
20 provided whenever we provide discovery to the defense
21 that they have ten days to provide us with the names of
22 those witnesses and all that information, along with a
23 precise place as to where the defendant was at the time
24 of the crime, which we still don't have.

25 We do not -- all we were told there were

1 these four witnesses, or -- yeah, four witnesses who can
2 testify that the defendant was drinking with them in the
3 area of Congress Street until approximately 9 p.m. on
4 that day in question.

5 On the one hand -- and we don't have dates of
6 birth. We don't even have full names. We were unable to
7 locate these witnesses, so since he did not comply with
8 Rule 5, you know, we just, if nothing else, would like to
9 have an opportunity to speak with these witnesses.

10 We're not asking for a continuance by any
11 means, we just don't think it's proper, and this case is
12 three years old, and with the defendant's previous
13 attorney, I was never aware of any --

14 THE COURT: Who was his previous attorney?

15 MS. HALEY: Mary Ford.

16 THE COURT: I'm looking at 5(e)4. If either
17 party fails to comply with the requirements of the rule,
18 the Court may the testimony of any undisclosed witness
19 offered by any party nothing in this rule should limit
20 the right of the defendant to testify in his own behalf,
21 obviously.

22 Let me hear from Mr. Mayer about what he
23 provided and when.

24 MR. MAYER: Thank you, Your Honor, and I
25 think I can make this easier too. When I came to

1 represent Mr. Desaussure, we talked about this initially,
2 and he was unable to provide me with an exact address or
3 last names, and in the case of Big Hamp, I still have not
4 got a real name. I have never talked to Big Hamp.

5 THE COURT: I guess you don't have a subpoena
6 on Big Hamp.

7 MR. MAYER: I don't have a subpoena on Big
8 Hamp, and it was only in the middle part of May through
9 talking with his family -- and I should preface this by
10 saying Mr. Desaussure grew up in the area of Congress
11 Street, and a lot of us, where we grew up, he didn't know
12 house numbers and this kind of stuff, he just knew how to
13 get to a place, so he would tell me, you know, It's the
14 big blue house, wherever.

15 So I tried that approach for a while and was
16 unsuccessful at it, and then I was able to get in touch
17 with his sister, Eva Desaussure, who is actually here in
18 court today, and I picked her up at her house, and she
19 and I drove the streets until she recognized the houses
20 where these folks lived.

21 At that point I was able to get their last
22 names, their street addresses.

23 THE COURT: And you provided that in writing
24 to the solicitor's office?

25 MR. MAYER: I provided that to the

1 solicitor's office about a week after that.

2 THE COURT: When was that that you provided
3 that?

4 MR. MAYER: I provided it by e-mail.

5 MS. HALEY: It was on Thursday June 20;
6 however, only one was confirmed.

7 THE COURT: By whom? I mean the firm --

8 MS. HALEY: By Mr. Mayer.

9 THE COURT: But he gave you what he had.

10 MR. MAYER: Right, and at that point I had
11 spoken with only the one witness, Patrick, whose address
12 I think is the one I did confirm, and then I did speak
13 with Eddie Nelson and I did later -- most recently I was
14 able to speak with Roger Jenkins, and all three of them
15 have been subpoenaed, and I'm happy -- I have no
16 objection to having Meg speak with him beforehand or
17 anything like that.

18 These guys were tough for me to track down.
19 I'm not trying to make it hard for anybody. They were
20 there when Mr. Desaussure was around that night, having a
21 beer in the neighborhood, and I think it's really
22 important that the jury hear from them. I had -- you
23 know, I had my own difficulties speaking with her
24 witnesses. There is one who I have been calling him for
25 a month and a half. He finally let me speak with him

1 yesterday.

2 THE COURT: Here is the thing: They have
3 some investigators at the solicitor's office who can run
4 people down as well. Anybody that you did not provide
5 the State notice of the name and the best address that
6 you had in writing is not going to testify, absent some
7 showing that you tried to do so. Right, Big Hamp, we
8 don't even know his name yet. I don't think you found
9 it, so I don't think there is any prejudice to your
10 client because we don't know who he is and you've never
11 talked to him.

12 MR. MAYER: Correct.

13 THE COURT: But the folks he's named and
14 given to you and the addresses, just because they didn't
15 happen to be where they perhaps said they would be before
16 doesn't mean to me that the rule has been violated. So
17 I'm going to find that the defense has complied with Rule
18 5(e) to the best that they could and that if he wants to
19 present alibi witnesses under Rule 4, subsection 4, (e)4,
20 I'm not going to exclude the witness testimony, but I'm
21 certainly going to give y'all -- and by y'all, I mean Ms.
22 Haley and Ms. Compton -- time to talk with them.

23 Now, whether they want to talk to you, I
24 don't know, and I can't really force them to do so, but
25 I'll certainly break and give you the opportunity.

1 This is pretty much your week. Our second
2 trial got continued, and our third one, we've now got the
3 issue with the possibility with the third lawyer on, so
4 if we get to the point where they're here and y'all need
5 to talk to them, that's fine, but other than that, I'm
6 going to let him present that defense.

7 | Anything else on that?

8 MS. HALEY: The only thing we would ask for
9 is just their dates of birth for rap sheet purposes.

10 THE COURT: If he has them. I mean, these
11 people -- I seriously doubt that if the defendant didn't
12 know where they lived and what their address is that he's
13 got their date of birth and social, but that's just my
14 best guess. Do you have their dates of birth?

15 MR. MAYER: I've given the solicitor
16 everything I have. I don't have those.

17 THE COURT: Where are the rules that require
18 that?

19 MS. HALEY: I'm not saying that the rule
20 requires that. We would just ask for enough time to
21 figure that out so we could pull rap sheets if they do
22 testify. That's all.

23 THE COURT: That's fine. Okay? Sure, if
24 y'all can get it, I'll give you time to run a rap.

25 All right. Talk to me about the Neil vs.

1 Biggers issue. My understanding was there may or may not
2 even have been an identification issue. I need to know
3 exactly what it is you're waiving.

4 MR. MAYER: And so basically the facts of
5 this case are that a guy, one of the main witnesses,
6 Stephen Silcott, who is the only person who identifies or
7 purports to identify Mr. Desaussure as the perpetrator of
8 this crime, made an identification to a police officer as
9 he was riding by on a bicycle. so Mr. Silcott was riding
10 by on a bicycle and says, basically, to paraphrase,
11 Arrest that guy.

12 Mr. Desaussure had been detained by the
13 officer, and then the officer, to my understanding, waved
14 Mr. Silcott down and said, Hey, what did you say?

15 And Mr. Silcott said either, That looks like
16 the guy who did this crime earlier, or, That is the guy
17 who did this crime earlier, depending on which version
18 you believe.

19 But either way, I think it's enough for
20 him -- I think it's enough for him to testify. I don't
21 think him getting up there and telling you what he told
22 me on the phone yesterday is going to compel you to say,
23 No, you can't testify.

24 THE COURT: Okay. I appreciate that.

25 MR. MAYER: So I'm fine with that.

1 THE COURT: Okay. Thank you.

2 MR. MAYER: I have questions about his
3 veracity, but I can bring that out on the stand.

4 THE COURT: All right. I understand.
5 Sometimes you want to save your cross-examination for the
6 first time the witness is up there. I understand that.

7 Anything further on that from the State?

8 MS. HALEY: Nothing, Your Honor.

9 THE COURT: I'm going to grant the motion to
10 sequester. Obviously, you can keep your case agent or
11 whoever you want to at the table, but we're going to keep
12 everyone else out. What else?

13 MS. HALEY: Could we have the victim in here?

14 THE COURT: Yes. The victim can be here.
15 What else?

16 MR. MAYER: Your Honor, I don't know if it's
17 appropriate now, but as Mr. Silcott is the only person
18 who made an identification of any record of
19 Mr. Desaussure, I would move to prevent the other
20 witnesses from now looking across the courtroom, having
21 never identified him before, and pointing to him and
22 saying, That's the guy.

23 I feel like it would be extremely
24 prejudicial. I feel like it's extreme leading in this
25 situation. I mean, it's worse, of course, than any kind

1 of line-up you could imagine in terms of suggestibility.
2 The police had the opportunity to have these witnesses do
3 a correct line-up back two-and-a-half years ago. If they
4 had done that, they would have had a better case, but I
5 don't think they should be allowed to artificially
6 bolster their case when, to use Mr. Voigt's term, he's
7 got the fish in a barrel now that they can shoot at. So
8 that's my only request.

9 THE COURT: Anything about that, if there is
10 an in court identification, if there wasn't one
11 previously?

12 MS. HALEY: Your Honor, I just don't
13 understand how it could be suppressed at this point. The
14 only case law that I have come across discusses in court
15 identification when improper identifications were done
16 previously.

17 As Mr. Mayer said, no identification was done
18 previously. The victim is the one who was assaulted
19 while working at Gilroy's.

20 THE COURT: They didn't bring the victim in
21 to do a line-up after they arrested him?

22 MS. HALEY: They did not. No, they did not.

23 THE COURT: I have a feeling I can find some
24 law on that. I'm happy to read anything that y'all want
25 to give me.

1 MS. HALEY: I have State v. McCord where the
2 defense tried to keep an in court identification out.
3 May I approach, Your Honor?

4 THE COURT: Sure. Come on up. Is this my
5 copy to keep?

6 MS. HALEY: Yes. Basically, what happened
7 there is the victim chose not to pick the defendant out
8 of a photo line-up that she was presented with
9 previously.

10 So, in that case, she was presented with a
11 prior line-up of some sort. She chose not to identify
12 anyone, and they were still allowed to --

13 THE COURT: Chose not to or couldn't?

14 MS. COMPTON: Chose not to. Those were her
15 words. She said she would have preferred a physical
16 line-up. There was never one done, and she did make an
17 in court identification.

18 THE COURT: Unable to make the selection?
19 Obviously, she chose not to select a suspect from the
20 photographic line-up, preferring a physical line-up, but
21 it was never conducted.

22 All right. I'm going to take a look at this
23 and see if I can find something else that's more on
24 point. But even at times, Mr. Mayer, I'm finding law, if
25 it's cited in this particular case, State v. McCord, it

1 says, The fact that a witness is unable to make a
2 positive identification from a photo array does not
3 negate the reliability of their positive in court
4 identification.

5 Was this at night? Was it dark? Was it on
6 King Street? Where was it?

7 MR. MAYER: Yes, Your Honor, all of the
8 above.

9 THE COURT: All right. Well, here in the
10 McCord case, the victim described the scene as well-lit
11 and that both she and perpetrator turned on various
12 lights as they moved through several rooms of the
13 building. She described the incident in great detail and
14 was with the perpetrator for some 15 minutes.

15 How long did this take to happen?

16 MS. COMPTON: Well, Your Honor, if I may, it
17 began inside of Gilroy's on King Street and proceeded out
18 onto the street. And our witnesses and victim will
19 testify it was well-lit, a clear night, about 9 p.m., so
20 it would have been dark outside.

21 THE COURT: Well, let me take a look at this.
22 I certainly see situations where the totality of the
23 circumstances would enable the identification to go
24 forward, but it appears to be a discretionary issue, so
25 let me find some law. Mr. McCord is very helpful, but

1 thank you, and I'll take a look at that.

2 Mr. Mayer, why don't you take a look at that
3 and see how you could possibly distinguish it? But I do
4 understand the argument. We've never fully required
5 somebody to do a six pack or a five pack or have certain
6 issues of suggestibility negated in a physical line-up,
7 to not do one at all, then have the one person seated at
8 the table -- you know, that's kind of like taking
9 somebody up to the police car where the person is
10 handcuffed and all their guns are lying on top of the car
11 and saying, Is this the one that did the armed robbery?

12 So let me look at some law tonight. Anything
13 else y'all need to look at tonight?

14 MR. MAYER: Nothing from the defense.

15 THE COURT: Any housekeeping matters or
16 anything we can deal with? Thank y'all for the evidence
17 list and witness list.

18 MS. HALEY: Your Honor, if I may, I was
19 actually going to update the evidence list, and I didn't
20 have all the photographs on there.

21 THE COURT: Okay.

22 MS. HALEY: I don't believe there is anything
23 else from the State.

24 THE COURT: Okay. All right. Great. Well,
25 then I guess I'll see y'all -- we do have one status

1 conference we have to do. Sarah moved it. I told the
2 jury be back at 9:30, but they're going to come at 9:30.
3 We've moved it back. I don't think that will take long.

4 (Recess taken.)

5 (July 9, 2013.)

6 (In open court, jury not present.)

7 THE COURT: Good morning. Could y'all give
8 us your names for the record? This lady is typing
9 everything down that we're taking here.

10 THE WITNESS: Roger Jenkins.

11 THE WITNESS: Eddie Nelson.

12 THE COURT: Thank y'all so much for being
13 here. We are trying to get the lay of the land for the
14 trial to figure out who is going to testify, and I
15 certainly don't want to keep y'all waiting around all day
16 if have you jobs and family and just your everyday life
17 to go to. We probably are not going to reach y'all until
18 tomorrow, so we need y'all to be back here at 9:30 in the
19 morning tomorrow, but you do not have to stay here today.
20 Do you understand that?

21 THE WITNESSES: Yes.

22 THE COURT: Y'all will be here tomorrow at
23 9:30. Do we have contact information for them Mr. Mayer?

24 MR. MAYER: I have the phone number for
25 Mr. Nelson. Don't have anything for Mr. Jenkins.

1 THE COURT: If y'all could give both your
2 numbers to Mr. Mayer and Ms. Haley. Make sure we have
3 contact information for you, but unless you hear from me,
4 you need to be here tomorrow morning at 9:30.

5 Do you understand that?

6 MR. NELSON: Yes.

7 THE COURT: Yes, do you understand?

8 MR. JENKINS: Ma'am, yes.

9 THE COURT: All right. We'll see y'all back
10 tomorrow morning at 9:30. Thank you so much.

11 All right. Anything else we need to take up
12 before we bring the jury in?

13 MS. HALEY: Nothing from the State, Your
14 Honor.

15 MR. MAYER: Nothing from the defense.

16 (In open court, jury present.)

17 THE COURT: All right. Thank you, sir.

18 Thank you, ladies and gentlemen. I hope
19 y'all had a nice evening.

20 (Whereupon, the jury was duly sworn.)

21 THE COURT: Thank you, and thank you, ladies
22 and gentlemen. As we discussed yesterday, the case we
23 are about to try is the case of the State of South
24 Carolina versus Alonda Desaussure, the defendant.

25 Before we begin the trial, I want to tell

1 y'all it probably will be different than what you might
2 expect or might have seen elsewhere, and you probably
3 have figured that out already from the jury selection
4 process yesterday. Most people don't have the chance to
5 ever attend actual court sessions and participate in a
6 trial, and you may think from watching television or
7 movies or reading books that trials are always full of
8 high drama and intense action.

9 While certainly that may be true at times, a
10 trial is not for our entertainment. It's a fundamental
11 part of our democracy and a search for the truth in an
12 effort to make sure justice is done for all of the
13 parties involved.

14 This defendant is charged by indictments
15 filed in court with the crimes of armed robbery and
16 assault and battery in the first degree. I'll explain
17 the specific elements of those to you when I give you the
18 specific charge on the law, and I imagine the lawyers
19 will talk to you about the elements as well.

20 As we talked about in the jury selection
21 process, the indictments are simply the documents that
22 bring the evidence to Court. They are not in any sense
23 evidence of the allegations they contain, and the
24 defendant has pled not guilty to the indictments. That
25 puts the burden then on the State of South Carolina to

1 prove the elements of those indictments, each and every
2 one, beyond a reasonable doubt.

3 It will be your duty, ladies and gentlemen,
4 to determine whether the State has met its burden. Your
5 purpose as jurors, I'll also call y'all the fact finder
6 or the judges of the law, is to determine the facts, that
7 is, the truth of the case. You are the sole judge of the
8 facts.

9 If at any time I make any comment or
10 suggestion regarding the facts, you must disregard it
11 because I would be invading your territory and your
12 province as the judges of the fact. As we discussed
13 yesterday, you determine those facts only from the
14 testimony that you hear here in court and from other
15 evidence that is introduced in court free of any outside
16 influences. It is up to you to determine the inferences
17 that you draw and that you may feel are properly drawn
18 from the evidence that's presented.

19 On the other hand, the law that makes y'all
20 the judge of the facts makes me the sole judge of the law
21 today. The law the Court gives you is the only law that
22 you may consider when you are deliberating after you're
23 given the case to discuss, and you must accept that law
24 even if you disagree with it. Just like I cannot tell
25 y'all what the facts are, you cannot tell the Court what

1 the law is, and I promise, if I get it wrong, there are a
2 bunch of people in Columbia that can fix it, and these
3 are all good lawyers that can make sure and steer the
4 case in that direction if need be, but your job is to
5 take the law that the Court gives to you and apply it to
6 the facts and the inferences that you find from the
7 testimony of the witnesses and the other evidence.

8 After doing that, you'll render your just and
9 true verdict, pursuant to the solemn oath that you just
10 took as jurors to serve in this case. I'm going to go
11 over a little bit of what we went over yesterday, but
12 it's very important.

13 Until you're given the case for deliberation,
14 you're not allowed to discuss anything about the case
15 with anyone, even each other, and that includes face to
16 face discussions, telephone, e-mail, blog, tweet,
17 messages any of the various forms of media that we have
18 now. In fact, you may not use a computer or cell phone
19 at any time in your jury room or in here, and I know the
20 bailiffs have explained that to y'all.

21 During the breaks, you're certainly welcome
22 to use your phone, but you may not use them at any time
23 to communicate information about the case, any party, the
24 Court, or anything having to do with the trial. During
25 the trial, again, if there are any news reports, and I

1 don't know if there will be, do not listen to them, do
2 not read them, do not try to find out what they are
3 saying. Again that, would be allowing outside influences
4 to come in to your thought process, and then once the
5 case is submitted to you, you may discuss it only in your
6 jury room and with your fellow jurors.

7 One thing I always like to remind everybody,
8 because this was hard for me when I was a lawyer, if you
9 run into any of these lawyers or parties in the hallway
10 and they scurry off in the other direction, they're not
11 being rude to you. They know they're not allowed to talk
12 to y'all. Normally we say hello and speak in this part
13 of the world, but they're not allowed to say much more
14 than hi and go their own way, so please don't hold that
15 against them. I promise they're not being intentionally
16 rude.

17 Likewise, when parties object to issues
18 during the trial, that's one of my functions as the judge
19 of the law is to be kind of a referee to rule on the
20 objections as they come. Don't hold that against them
21 either. They're not doing their job if they don't object
22 when they think there's a matter of law that they need to
23 bring to my attention. I don't keep a tally of who
24 objected the most or how I ruled one way or the other, I
25 just call them as I see them, one by one, so I would ask

1 you not to hold that against these lawyer either.
2 They're doing their job when they stand up and object.

3 Some of this we talked about yesterday, and I
4 don't want to go back over it. I think, as you know, the
5 evidence is going to be presented through the testimony
6 of sworn witnesses. You'll first heard the opening
7 statements of the attorneys. Those are not evidence.
8 Those are simply a road map for you -- do we need
9 anything?

10 THE BAILIFF: Yes. I need to get the
11 foreperson right.

12 THE COURT: Okay. Y'all are already ahead of
13 the game. I appreciate it. Perfect.

14 Our foreperson is juror number 148, Ms.
15 Sherri Kramer, so thank you for being our foreperson, and
16 she will always sit in that same chair. And if there are
17 any communications y'all need to have the Court, any kind
18 of emergency or problem, you'll write that down or let
19 Ms. Kramer write that down, and she'll get that to me.

20 Likewise, when you reach your verdict at the
21 end of the trial, the foreperson will sign the verdict
22 form, and I'll explain that all to you at the end of the
23 case. That will led me to the next point.

24 We try to break for lunch around 12:30 or any
25 logical place. I know we're going to have to take one

1 quick break after the lawyers open to work on a couple
2 witness issues we have, so I will send y'all back after
3 we hear the opening statements, but hopefully that won't
4 take very long, but if at any time you need a break
5 during the time that's not our normal break time or you
6 can sense that we're not getting ready to stop any time
7 soon, please raise your hand, as I said yesterday, and my
8 law clerk or someone in the court will bring that to my
9 attention. Same for the attorneys.

10 Couple reasons for that: One, we don't want
11 anybody to be uncomfortable, and if you need to be
12 excused for a minute, I certainly understand, mainly
13 because I don't want y'all to be any more miserable than
14 you already are having to be here voluntarily, but more
15 important than that, even if you're distracted by an
16 emergent situation, you can't give these parties your
17 full attention, and they're counting on y'all to do that
18 so that you can make an informed decision at the end of
19 the trial.

20 I think we all know about how to gauge the
21 credibility of the witnesses. As part of your fact
22 finding process, that will be part of your job. I don't
23 determine credibility. I don't know what the witnesses
24 are going to say. That is solely for you as the judges
25 of the facts. You may want to watch body language,

1 attitude, consider the general logic of whether someone
2 was in a position to see, hear, or experience what
3 they're testifying that they saw, heard, or experienced,
4 and although I've given y'all the notebooks, those are a
5 tool for you to use. I think it's helpful to be able to
6 write things down. Please don't be so intent on note
7 taking that it keeps you from watching the witness in the
8 box. I think we all know from daily life that sometimes
9 the way somebody says something can be every bit or
10 sometimes even more important than what they are actually
11 saying.

12 So please make sure and take the time to
13 observe any demeanor issues that might be relevant to
14 your inquiry. It is so critical for you to consider all
15 of the evidence at the end of this trial and not to make
16 any preliminary decisions or snap judgments after you've
17 heard parts of it. These are all pieces of puzzle that
18 you're going to hear or see, and it really would be
19 improper to start formulating any kind of opinion until
20 you've heard everything.

21 As I said before, the burden is upon the
22 State. The defendant has no burden whatsoever. They
23 don't even have to stand up. They can sit and not talk.
24 I don't imagine that will happen. I've never seen that
25 happen, but that is certainly their right to do. The

1 burden remains on the State to prove their case beyond a
2 reasonable doubt, and I will instruct you more about that
3 at the end of the trial.

4 Before we get started is there any objection
5 to these preliminary comments?

6 MS. HALEY: None from the State, Your Honor.

7 MR. MAYER: None from the defense, Your
8 Honor, just one sidebar matter.

9 THE COURT: Come on up.

10 (Discussion held at sidebar.)

11 MR. MAYER: I made a motion to sequester the
12 State's witnesses. I don't know when that begins.

13 MS. HALEY: Just our case agent.

14 THE COURT: No problem at all.

15 (End of sidebar.)

16 THE COURT: That motion was granted. I think
17 we got that covered. Thank you, though. All right.

18 Well, that being said, I will go ahead and
19 either call on Ms. Haley or Ms. Compton to give the
20 opening remarks of the State.

21 MS. HALEY: Thank you, Your Honor. May it
22 please the Court:

23 THE COURT: Yes, ma'am.

24 MS. HALEY: I apologize, ladies and
25 gentlemen. This happens in every trial. I thought we

1 had everything synced up.

2 Good morning, ladies and gentlemen. Thank
3 you for your patience. October 3, 2010. That day
4 probably doesn't stand out in any of your minds. I know
5 it doesn't stand out in mine, but it stands out in Daniel
6 Cobiella's mind. On that night, it was a slow Sunday
7 night. He was working at Gilroy's pizza public on King
8 Street, alone. It was a slow night. He hadn't had a
9 customer in hours, so he was doing some work in the back
10 of the store, trying to clean up things before he could
11 go home for the night.

12 Before he went back there, he was a little
13 bit discouraged. He noticed that there was only about \$7
14 in the tip jar, no one likes to see on a typical night
15 working at Gilroy's by himself when he works primarily on
16 cash tips. Around 9 p.m., he heard someone enter the
17 store. Then he heard rustling in the tip jar. It was a
18 plastic jar on the counter. He could hear money moving
19 around in there, so he looked around the pizza oven to
20 what see what was going on, and he saw a man inside the
21 store.

22 So he walked to the front, and he happened to
23 notice there was nothing in the tip jar except for the
24 credit card receipts. He also noticed that the
25 defendant, this man, Alonda Desaussure, was standing in

1 the middle of the restaurant, not at the counter, like
2 most people would do if they were there to order, and he
3 said, Hey, man. Give me back the tips. I know you took
4 them. Just give them back to me. We won't call the
5 police. I just want them back.

6 He denied, denied, denied, said, I didn't
7 take any tips. I don't know what you're talking about,
8 got very defensive.

9 Daniel continued to just ask for the money
10 back. He said, I just want the money, that's all. It
11 doesn't need to be a big deal.

12 He got discouraged; he got annoyed; he wanted
13 his money. He had worked hard for the few tips that he
14 had in that jar that night, so he got in between the
15 defendant and the door to try to keep him from leaving
16 the restaurant. They continued to argue. They went back
17 and forth about the tips, and the argument went out on to
18 King Street. It was about 9:00 at night on a Sunday.

19 There were a few people around. They continued to argue.

20 Daniel said to an innocent bystander who had
21 been just been working at Mellow Mushroom and getting
22 ready to go to the Upper Deck to have some drinks with a
23 friend. He said, Call 911. He could tell that this was
24 going to go somewhere. He didn't know it was going to
25 go, but he started to see that the argument was

1 escalating.

2 He kept saying, Give me the money back. Give
3 me the tips back. I wasn't going to call the police, but
4 you wouldn't give them back.

5 The next thing he knows, the defendant hits
6 him on the side of the head. He thought he had just been
7 punched, but he said it felt like his eyelids split open.
8 He didn't know what had hit him. You will hear testimony
9 from Daniel that night that he didn't want anything to
10 happen. He just wanted the \$7 in change back from the
11 tip jar. You will also hear testimony from the person
12 who called 911, Adam Corbin. While he's on the phone
13 with the 911 operator, he says that it turns into a fight
14 and that Daniel just got assaulted.

15 That night, Daniel immediately after he got
16 assaulted says that he walked right back into the store,
17 put a towel on his head, and waited for EMS to arrive
18 because he knew they would. He saw the defendant leave.
19 Everyone saw him leave. They saw him walk up north on
20 King Streets towards Calhoun Street. A few people
21 testified that they saw him get on a bicycle, and that
22 bicycle had a white plastic bag on the front of it, and
23 then he rode north on King Street. They didn't know
24 where he went.

25 You will hear testimony from this witnesses

1 who will say that this defendant was an older gentleman.
2 He was tall. He was thin. He had close shaved salt and
3 pepper hair, and they all thought they was pretty
4 distinctive looking. They will also testify that he got
5 on that bike, and that bike was parked up King Street, a
6 few businesses down.

7 Finally, you will hear testimony from a
8 witness who was working at Five Guys that night. His
9 name is Stephen Silcott. He happened to be on his break
10 from Five Guys, eating what he called lunch, at 9 p.m.,
11 and he was coming back from Marion Square. The next
12 thing he knows, he sees some sort of an argument on King
13 Street, and he thinks it's odd because he saw that same
14 man that was in the argument on his way to work that
15 night around 5 p.m., and that man, Alonda Desaussure, was
16 asking people for money on King Street, and he asked him
17 for money.

18 So he realized he had already seen this man
19 once that night. Then he saw him again, arguing with
20 Daniel Cobiella. The next thing he knows, Daniel was
21 assaulted, and he just goes back to work. He didn't want
22 to get involved with anything at that time. He was
23 already -- he said he had taken too long of a break at
24 Five Guys, so he just went back inside.

25 He will also testify that after work that

1 night, a little after midnight, he was riding his own
2 bicycle home and he rode north on King Street, flying up
3 the street, just trying to go home. It was pretty late,
4 and he sees that an officer has stopped Mr. Desaussure,
5 and he sort of passively says, Oh, hey, good job. You
6 got that guy.

7 And the officer said, Wait, what do you mean?

8 You'll hear testimony from this officer,
9 Officer Burns, who will say, Hey, come over here. What
10 are you talking about?

11 And he'll say, Yeah. I know who that guy is.
12 I saw him earlier tonight. He assaulted that kid at
13 Gilroy's, and he does an identification right there.

14 He gives a statement, he talks to the
15 officers, and he will admit he didn't talk to him earlier
16 because he just didn't want to get involved, but when he
17 saw him that night, he was genuinely surprised they had
18 found him, three hours later, so he stayed and stuck
19 around to help.

20 You will hear testimony from all of these
21 witnesses, from Officer Burns, from Sergeant Stone who
22 was present at both scenes at the scene at Gilroy's and
23 later, when the defendant was stopped at King and Morris
24 Streets, you will hear testimony from Daniel Cobiella.

25 You will also hear testimony from Adam Corbin

1 and Stephen Silcott who identified the defendant later
2 that night.

3 After you have heard all of that testimony,
4 the State will ask you to come back and consider all of
5 the evidence and find the defendant guilty of armed
6 robbery and assault and battery in the first degree, the
7 only reasonable verdict in this case.

8 Thank you.

9 MR. MAYER: Thank you, Your Honor. May it
10 please the Court:

11 THE COURT: Certainly.

12 MR. MAYER: Science does not lie. You just
13 heard the prosecutor's theory about what happened in this
14 case. That's all it is. It's a theory. In her theory
15 about what happened, she left out a couple significant
16 facts: She made some other errors that we'll talk about
17 in a minute, but the significant facts, and I want you
18 guys to be aware of as we move forward in this case, are
19 that there were no fingerprints that were recovered from
20 the scene from my client, Mr. Desaussure.

21 The police properly tried to recover
22 fingerprints from Gilroy's Pizza, and there were none.
23 That happened pretty quickly after the crime. The other
24 thing that took a while, which I personally think is why
25 we're here, is DNA. The prosecutor didn't mention this,

1 but about 18 months after this crime, the police finally
2 thought, Hey, we should run DNA on this, and they did.

3 They sent DNA. They swabbed my client and
4 collected his DNA. They collected the victim's DNA,
5 Mr. Cobiella. They swabbed the knife that they found on
6 my client three hours later after this incident when he
7 happened to be speaking with a police officer. They took
8 DNA samples from all of those things, and that DNA came
9 back and it showed that my client had no DNA on any of
10 that stuff.

11 It's a pretty significant fact. I just
12 wanted you guys to be aware of that.

13 Now, as I mentioned, those DNA results didn't
14 come back until later. In the meantime, as you heard
15 from the prosecutor's synopsis, the investigation went in
16 a different direction.

17 Police kind of connected the wrong dots.
18 Afterwards, I guess it was too late to reconsider it when
19 the DNA came, but that's why we're here today, and that's
20 why I picked you guys as my jury. You guys are the
21 A team. You guys are the ones that myself and my client
22 are counting on not to buy the sales pitch the prosecutor
23 is trying to sell to you, not to buy this theory.

24 Of course, I don't know you guys personally.
25 I don't know anything more about you than the little bit

1 you revealed to us so far between yesterday and --
2 really, yesterday, but I'm reminded of a speech that I
3 heard at my law school graduation some years ago.

4 It was Joe Biden who spoke, and as you may
5 know, he's well-known for kind of putting his foot in his
6 mouth here and there, and he did at my graduation as
7 well. He said, I have great faith in you guys. Not you
8 guys in particular, but in your generation.

9 And that's kind of how I feel about you guys
10 on my jury here. I don't know y'all personally. I know
11 we have a doctor, I know we have some scientists,
12 mathematician, some teachers. I know we have some
13 salespeople, businessman, some folks with life
14 experience.

15 I'm counting on each one of you guys to draw
16 on your personal experiences to contribute what you can
17 to this case, to analyze this evidence, okay, to call the
18 solicitor's bluff, to tell them this product is not one
19 that we're going to buy. I know what you're selling, but
20 we don't want it.

21 There are some young folks on the jury, and I
22 feel like that's a good thing. It's okay. We've got
23 some wisdom, but the most important thing that even the
24 young folks can participate in is this is an exercise in
25 logic. Okay? If the science doesn't fit, this isn't the

1 guy. Science does not lie. That's all that this case
2 comes down to.

3 Some of y'all have some inside knowledge
4 about how police investigation might work. That may or
5 may not be useful here. It may or may not be relevant
6 here. Okay? So I don't know what happened at Gilroy's
7 Pizza that night. I'm a defense attorney, it's true, but
8 I never like to see a guilty person go free, and I feel
9 like that's what happened in this case, because we don't
10 have the person from Gilroy's here in this courtroom
11 today.

12 Now, what I know is what happened is what my
13 client, Mr. Desaussure, was up to, okay? You'll hear
14 testimony that he was on the corner of Rutledge and
15 Congress Street, well north of Gilroy's, in a
16 neighborhood that he grew up in.

17 He was hanging out with a couple guys that he
18 knew from his childhood. His whole family had grown up
19 in that area. I think he's one of seven or eleven
20 siblings, depending on how you calculate that, and he
21 knew lots of folks in the area, and that's where he was.
22 He was drinking a beer on the corner, sitting on a guy's
23 porch. It wasn't him in Gilroy's Pizza. And the science
24 doesn't lie.

25 Now, the prosecutor mentioned that they've

1 got an identification, and they do, of sort. They have
2 an identification that was made by a witness whose
3 credibility I hope you will carefully scrutinize. This
4 was a witness who will claim to have been present at the
5 scene of a crime. He will claim to be awfully close, yet
6 he didn't stick around and tell the police who robbed,
7 moments later, what he had seen, no.

8 No, his statement comes later, about three
9 hours later, when he's riding home, and as Ms. Haley
10 said, casually, sarcastically, says something to an
11 officer who had stopped a black guy on a bicycle, who was
12 arresting him, all right? Cop didn't let him get away
13 with that comment, called him back.

14 And that's how this case against
15 Mr. Desaussure cropped up. The victim in this case has
16 never identified Mr. Desaussure, two-and-a-half years
17 later. The witness who called 911 has never identified
18 Mr. Desaussure. Neither has the science.

19 At some point in the evening, when
20 Mr. Desaussure ran out of beer. He went to the store on
21 the corner of Caroline and King Street to buy himself
22 another beer. He was out. He said, I would like one of
23 those hot dogs.

24 I don't know if y'all know the guy on King
25 Street that sells hot dogs. He's from New York. He

1 said, I'm going to ride my bike down and get one of those
2 hot dogs. It was on the way to that hot dog stand that
3 he encountered this officer. He was carrying a beer.
4 The police officer stopped him.

5 The identifications that we have in this case
6 are significant, and what we don't have is significant
7 too. I want you to pay attention to what these witnesses
8 are going to tell us about what they saw. The
9 perpetrator was six-foot-two, six-foot-three. He was
10 wearing a black or dark navy long sleeved T-shirt,
11 long-sleeved shirt, had some stripes on the elbows,
12 pretty specific description, but he was also a black male
13 between the ages of 25 and 50, on a bicycle, downtown.

14 Some of y'all live downtown. At least one of
15 y'all live downtown. Some of y'all live places where
16 people ride their bicycles. There are lots of different
17 types of bicycles that run around downtown.

18 You'll see a picture of Mr. Desaussure's
19 bicycle. It's a pretty distinctive bicycle. Yet there is
20 no description of that, none at all.

21 The clothes that Mr. Desaussure was wearing
22 do not match the description of the person who robbed
23 Gilroy's Pizza. He was wearing when he was apprehended,
24 when he was stopped by the officer, a very colorful shirt
25 that he put on to impress his friends with and some shoes

1 that matched. Underneath, he was wearing a black
2 T-shirt, a short sleeved T-shirt, which I expect you'll
3 see a photograph of. You'll see that it's not a long
4 sleeved black T-shirt. You'll see that it's not got
5 stripes on the elbows. You'll see some other shirts that
6 he had in his possession did not match anything from the
7 crime.

8 There's a lot of stuff that doesn't fit here,
9 including science. As you analyze the evidence, and I do
10 hope that you will analyze the evidence, scrutinize the
11 evidence, not just swallow the solicitor's story, you'll
12 see that science does not lie, and you'll see it wasn't
13 my guy that did this crime.

14 Thank you.

15 THE COURT: Okay. Thank you. All right.

16 Ladies and gentlemen: I have some issues I need to take
17 up with the attorneys before we start presenting
18 testimony, so I'm going to ask you to return to your jury
19 room. Please do not discuss anything about the case yet
20 until it is given to you for deliberation.

21 Thank you.

22 (In open court jury not present.)

23 THE COURT: I'm happy to hear you from. It's
24 my understanding you have one or two witnesses who can
25 testify as to the identification? I know you have

1 Mr. Silcott, correct?

2 MS. HALEY: Yes, Your Honor.

3 THE COURT: And you mentioned another fellow
4 who identified the defendant pretrial in the opening, is
5 that correct, or did I mishear?

6 MS. HALEY: No, I didn't.

7 THE COURT: Mr. Silcott? Who else are you
8 proposing would like to identify him in court?

9 MS. HALEY: The victim.

10 THE COURT: And I've read your briefs. I
11 understand the defense objects to that. I think the
12 safest thing probably would be for us to do a little in
13 camera hearing for me to determine whether that would be
14 proper or not.

15 I've got the case law. I certainly
16 understand that there are times when Courts exercise
17 their discretion to allow such in court identifications.
18 Normally, and what happened in McCord, the fact that a
19 witness is unable to make a positive identification from,
20 for example, a photo array doesn't negate the reliability
21 of the positive in-court identification later.

22 This, I don't know the witness was
23 necessarily unable to, but she chose not to, and they,
24 the police, never followed up with the actual line-up for
25 her to do, but they at least made an attempt at an out of

1 court pretrial identification in that situation.

2 Here, my concern is the fact that there was
3 no attempt made whatsoever to do a line-up or a five-pack
4 or a six-pack with the victim and the identification of
5 the perpetrator is at issue, so I think we need to look
6 at it a little more closely. Where no attempt at all was
7 made pre-trial, not to encourage such lapses in the
8 future, so why don't we go ahead and put on what you need
9 me to hear, briefly, and we'll go from there.

10 MS. HALEY: The State calls Daniel Cobiella.

11 DANIEL COBIELLA,

12 having been first duly sworn,
13 was examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MS. HALEY:

16 Q. Good morning, Mr. Cobiella.

17 A. Good morning.

18 Q. Where do you currently reside?

19 A. In West Ashley, 1584 Stanford Road.

20 Q. And where are you presently employed?

21 A. Charleston County EMS.

22 Q. How long have you been employed there?

23 A. About 14 months now.

24 Q. What is your current position at Charleston County
25 EMS?

1 A. I'm a paramedic.

2 Q. What does that position entail, exactly?

3 A. There's a lot to it. We respond to any incident
4 you can think of that would affect an individual's
5 health, so anything from trauma to medical to labor and
6 delivery, everything.

7 Q. Please tell us a little bit about your education
8 and training.

9 A. I had to go through -- well, my education started
10 at College of Charleston in 2004, bachelor's degree in
11 communications. That's when I started working at the
12 pizza place was at the end of that.

13 I ended up sticking with that job as I went to
14 school again for EMT. I did a three-month program to get
15 my certification as an EMT, and then I did two years at
16 Trident for an associate's degree in applied science,
17 emergency medical, which is my paramedic.

18 Q. You just mentioned where you were employed in
19 October of 2010. Where was that?

20 A. Gilroy's.

21 Q. What kind of place is Gilroy's?

22 A. Gilroy's is a late night pizza pub. It's Irish
23 style pizza. It's usually open from 10 a.m. till 4 a.m.

24 Q. How long were you employed at Gilroy's?

25 A. Approximately four years.

1 Q. Were you familiar with the area and people in the
2 area?

3 A. Yes, ma'am. I was very familiar with the locals
4 in that area.

5 Q. What was your position at Gilroy's?

6 A. I was a cook and a manager.

7 Q. What did those entail?

8 A. I did late night and I did weekends, so it was
9 usually Thursday, Friday, Saturday, Sunday, and I was
10 working from 10:00 to 4:00 in the morning, and as a cook,
11 obviously I'm cooking, I'm cleaning, I'm preparing for
12 the day, making pizza sauce, making dough, things of that
13 nature, taking orders.

14 As a manager, you're obviously making the
15 schedule. You're taking deposits to the bank late night,
16 you're counting down the register, all those sorts of
17 things.

18 Q. And when you worked at Gilroy's, were you involved
19 in an incident that occurred there on October 3, 2010?

20 A. Yes, ma'am.

21 Q. And what occurred that night?

22 A. I was assaulted after someone had taken the money
23 out of my tip jar.

24 Q. Would you please walk us through that evening.

25 A. Okay. It was a really slow night, and I was

1 cleaning because there was nothing else to do. So I was
2 in the back, behind the conveyor oven, cleaning the
3 grill. I almost finished cleaning the grill when I heard
4 someone walk in.

5 I kind of looked over the oven to see who it was.
6 The person who was in the lobby was kind of half covered
7 by the post, but could I tell that he wasn't at the
8 counter so he wasn't ready to order.

9 I finished cleaning the grill. It only took me a
10 few seconds, and as I was doing that, I heard the tip jar
11 rattling because there was change in the bottom of it and
12 I could hear it and you could also hear the plastic
13 against the tile counter.

14 When I heard that, I came out from behind the
15 oven. I waked up to the counter, and I realized he had
16 turned his back and started walking out of the
17 restaurant. I came around the counter, confronted him,
18 told him I wanted him to give the money back, that I
19 didn't want to involve the police. I just wanted the
20 money back.

21 It started to escalate because he refused to give
22 the money back. He denied taking the money, but he had
23 been the only person in there in hours. So the argument
24 started toward the door. I tried to put myself in
25 between the door and the individual, and it just kept

1 pushing out. I didn't want to get too close. I didn't
2 want there to be any sort of violent activity going on.
3 I just wanted to slow him down.

4 We get outside. Same things are being said; you
5 know, give me the money, you know, leave me alone is what
6 he was saying, or get away from me, and eventually
7 started to notice that it was getting heated and it was
8 going -- it was going to turn into a violent situation,
9 so I told an individual who was outside to call 911.

10 At that time, the individual started swinging at
11 me. I don't believe I was hit initially. I was dodging
12 punches for a little bit, and then I came up for one --
13 from just one of my ducks, and I came up and I was struck
14 over my eye, and it felt as though when you're watching
15 boxing and someone gets punched and their eyebrow splits
16 open, and I could feel the blood rushing down my face.

17 And at that time, the only thing I could think
18 about was I was getting married five days later, so I
19 didn't pursue the individual any further. I turned
20 around. I walked back to the pizza parlor, and I put a
21 rag on my face.

22 Q. I'm going to back up to when you heard him enter
23 the store. Before that -- do you know how much money was
24 in the tip jar, approximately?

25 A. There was cash and credit card receipts. That's

1 usually how we did it, just so then you can count all the
2 tips at once rather than trying to get your cash and get
3 your receipts, so there is probably about two or three
4 credit card receipts in there and then probably around \$7
5 in cash. So it wasn't a lot of money, but it's more
6 based on the principle, is the only reason that I allowed
7 it to go that far, that I stopped him and I confronted
8 him is because I'm not going to allow someone to steal
9 \$100 or \$1 from me.

10 Q. When you came out from behind the kitchen, about
11 how far were you from the suspect?

12 A. Initially, at the back of kitchen, behind the oven
13 when I saw him. He entered the store. By the time I saw
14 him, he was halfway through the lobby, so he must have
15 been 40 feet away from me at the back of the kitchen.

16 By the time I got to the counter, he was probably
17 10, 15 feet away because he was already heading back
18 towards the door, and then the entire confrontation, the
19 argument as to whether or not he had my money, we were
20 about two feet apart from that entire thing until it
21 became physical.

22 Q. About how long did that argument last?

23 A. When you're in that sort of situation, it's kind
24 of hard to tell time. It couldn't have been more than a
25 few minutes. Probably less than a few minutes.

1 Q. What were you focussing on during that situation?

2 A. I was just focussing on the individual. I
3 realized by the time we were outside that it was going to
4 become violent. That's why I told the person outside to
5 call 911, and at that point I just started focussing on
6 him because I didn't want to get hit or anything.

7 Q. Do you see that individual in the courtroom today?

8 A. Yes, ma'am.

9 Q. Can you point him out?

10 A. The defendant.

11 Q. Describe where he's sitting?

12 A. In the red shirt.

13 Q. After you asked someone to call 911, what
14 happened -- I know you went back in the store. Do you
15 remember what the suspect did?

16 A. The suspect went to a bicycle nearby. I can't
17 really describe the bicycle in detail. The only thing I
18 noticed different about the bicycle was that it had a
19 white bag on it.

20 Q. When you were in the argument, did you notice if
21 the defendant was holding anything?

22 A. No. He never said he was holding anything. He
23 never threatened with a weapon. I just was hit and I
24 walked inside.

25 Q. Do you know what you were hit or cut with?

1 A. At the time I did not, at the time I was hit. I
2 found it peculiar because I had been hit before, and I
3 never had my eye split open, my skin split open before.
4 So when the first person that came around to see my face
5 saw it, they told me that I was cut with a knife, and
6 that's when I realized -- I went and looked at the wound
7 and realized it was not a wound from a fist.

8 Q. Based on your training and experience as a
9 paramedic, do you have an opinion as to what you were hit
10 with?

11 A. Based on what I've seen, probably non-serrated
12 blade. It was a straight, clean cut, deep at the top,
13 and as it came down my face, it became more of a shallow
14 laceration.

15 Q. How did you feel throughout the altercation?

16 A. I think as anyone would feel when they're being
17 attacked at first, just frustrated that someone would
18 take the little amount that I had, and then it escalated
19 into more of a defensive feeling, but I wasn't about to
20 just let him walk away with what I had.

21 Q. What injuries did you sustain?

22 A. A laceration starting -- you can actually see the
23 scar here, started up here above my eye, came down and
24 caught my bottom eyelid and came down my face to the
25 jawline.

1 Q. Were you treated for those injuries?

2 A. Yes, ma'am.

3 THE COURT: I don't think I need to get into
4 that.

5 MS. HALEY: Okay. I can go back to the
6 incident a little bit more.

7 THE COURT: That's okay.

8 BY MS. HALEY:

9 Q. Going back to it, did you give a statement that
10 night?

11 A. I gave a statement to, I think -- it may have been
12 a detective or officer who met me at the ER.

13 Q. And did you describe the suspect in your
14 statement?

15 A. Yes, ma'am.

16 Q. How did you describe him?

17 A. A tall black male, approximately -- I think I said
18 50 years old, approximately 50 years old, approximately
19 six-foot-three with salt and pepper hair and facial hair.

20 Q. What were the conditions like that evening, do you
21 remember?

22 A. It was a normal Sunday, not normal in how slow it
23 was, but outside it was clear. Inside the store there
24 was nothing to hinder me visualizing anybody.

25 Q. Is Gilroy's well lit?

1 A. It's very well lit, especially in the lobby.

2 Q. Is the street outside of Gilroy's very well lit?

3 A. That street tends to be. There are businesses
4 around. All the streetlights are on in that area, so we
5 usually can see what's going on outside.

6 Q. What was your line of sight throughout the
7 altercation with the suspect? Was there anything
8 blocking it?

9 A. We were face to face the entire time, unless he
10 would turn around and try to leave.

11 Q. Did anything block your view?

12 A. Only initially when he first walked into the
13 store.

14 MS. HALEY: Court's indulgence.

15 THE COURT: Certainly.

16 MS. HALEY: Nothing further from the State.
17 Please answer any questions Mr. Mayer may have.

18 MR. MAYER: Thank you, Your Honor.

19 THE COURT: Certainly.

20 CROSS-EXAMINATION

21 BY MR. MAYER:

22 Q. Good morning, Mr. Cobiella.

23 A. Good morning.

24 Q. I'm very sorry for what you went through.

25 A. It's fine.

1 Q. I've not been through that, anything like that.

2 THE COURT: All right. Let's save the
3 editorial comments and just question him, okay?

4 BY MR. MAYER:

5 Q. I imagine that you want to catch the person who
6 did this.

7 A. I would like the person that did it to have
8 justice, yes.

9 Q. When the police came, after this incident, you
10 gave them a statement.

11 A. Yes, sir.

12 Q. At any point in the next two years after that, did
13 any police officer come to you with a line-up of any sort
14 and have you identify Mr. Desaussure?

15 A. No, sir.

16 MR. MAYER: That's all I have, Your Honor.

17 THE COURT: Okay. Thank you. All right.
18 Any redirect?

19 REDIRECT EXAMINATION

20 BY MS. HALEY:

21 Q. Briefly. Did you ever have the opportunity to
22 make an identification of the suspect before today?

23 A. No, ma'am.

24 MS. HALEY: Nothing further.

25 THE COURT: All right, sir. You may step

1 down. Thank you.

2 THE WITNESS: Okay. Thank you.

3 THE COURT: All right. Anything further?

4 MS. HALEY: Not from that witness, Your
5 Honor.

6 THE COURT: Okay. All right.

7 MS. HALEY: State calls Stephen Silcott.

8 THE COURT: If you want, to that's fine. I'm
9 ready to hear y'all argue.

10 MS. HALEY: Then that's fine.

11 THE COURT: Mr. Mayer, do you have anybody
12 you want to put up, pretrial?

13 MR. MAYER: No, Your Honor.

14 THE COURT: All right. Then I've got all of
15 your -- I've read your cases, Ms. Haley. I've read the
16 briefs that you both submitted, and I'm happy to hear
17 from y'all if there is anything further.

18 MS. HALEY: Thank you, Your Honor. I think
19 based on the case law and Mr. Cobiella's testimony, he
20 was simply not given the opportunity to make an
21 identification of the defendant in this case.

22 He has conveyed to us that he is 100 percent
23 sure about this, that he remembers that man because of
24 the incident that night, and while I understand that an
25 out-of-court identification was not done and the Court is

1 worried that somehow this setting will taint his
2 identification in court, I think State v. Lewis and State
3 v. Rice both point out that Mr. Mayer can cross-examine,
4 he can let the jury decide the victim's credibility in
5 this case.

6 They can be the fact finders and determine
7 whether or not he is credible, basically, and I think
8 State v. Lewis puts it well -- I think it was State v.
9 Lewis that says it's just like any other evidence -- I
10 think that was State v. Rice. It's just like any other
11 evidence, and we can address it with cross-examination
12 and argument.

13 I think based on the victim's experiences and
14 observations, I think they're very relevant in this case,
15 and the fact he can point out the defendant just makes
16 his experiences and observations that much more credible.

17 We would not have him point out the defendant
18 if he were not able to identify him in this case, but he
19 can. He remembers him. This was a big deal to him. As
20 he said, he got married five days later. We also think
21 this is different because this isn't a show up. This
22 isn't suggestive. This isn't ex parte. This is in the
23 presence of everyone in this courtroom.

24 We're all here to make sure nothing is
25 suggestive about it and to, you know -- this isn't secret

1 police work. It's not suggestive in any way. If he
2 knows who he is, he knows who he is, and I don't think
3 the victim should be, frankly, penalized because he was
4 not given the opportunity to identify the defendant
5 before today.

6 Also, I think if we were using the Neil v.
7 Biggers factors that he would be able to identify the
8 defendant in this case. He says that this lasted for
9 several minutes. He was in a well-lit area the entire
10 time. He was very close to the defendant throughout that
11 experience, and he described him, basically, to a T. He
12 said he was a tall black male in his 50's, salt and
13 pepper, close cut hair. He described the clothing he had
14 on at the time, yes, that would have changed in three
15 hours, and he knew that he left on a bicycle with a white
16 bag on it.

17 He was not impaired at the time, and he even
18 said that he was focussed only on the assailant at the
19 time of this altercation. Therefore, I think we should
20 allow him to make an in-court identification in this
21 case.

22 THE COURT: Okay. Thank you, ma'am.
23 Anything further from the defense?

24 MR. MAYER: Just briefly, Your Honor, and his
25 testimony was he saw him for a few minutes. I think it's

1 really unfortunate the police didn't have Mr. Cobiella
2 identify the perpetrator back at the time. You know, at
3 this point, with two-and-a-half years -- two-and-a-half
4 years having elapsed after this three- to four- to
5 five-minute viewing in a very tense, emotional situation
6 where, as Mr. Cobiella himself testified, you don't
7 really know about time, you're not really -- your mind is
8 not in the right place where it normally is, and I have
9 serious concerns about the suggestibility -- I mean, my
10 opinion differs greatly from Ms. Haley's.

11 I feel like there couldn't be a more
12 suggestive situation in the courtroom where the one
13 person who is the defendant gets pointed to. There is
14 not another option, and so that's my big concern, Your
15 Honor, and I share the Court's -- I share the Court's
16 concern about what kind of precedent this would set.

17 You know, any time that an officer going from
18 here forwards wants to say, oh, well, you know, let's
19 strengthen our case up a little bit, they're going to
20 cite to this case. I just don't think it's appropriate,
21 but, of course, I appreciate the Court entertaining our
22 motion.

23 THE COURT: Okay. Anything --

24 MS. HALEY: One more thing, if I may. I
25 think it's also worth pointing out that in this case

1 Officer Burns had the defendant stopped. He thought he
2 matched the description that was put out earlier that
3 night. Then Stephen Silcott is 100 percent sure when he
4 rides up, and Officer Burns at that point said, Well, I
5 thought at the time he had a knife on him.

6 Then this kid rides up and says that that is
7 the guy, that is definitely the guy, and Mr. Mayer
8 talking about precedent, I think the precedent has been
9 set, in State vs. Lewis, when it says the judge is
10 present and can adequately address relevant problems.
11 The jury is present to witness the identification, rather
12 than merely hearing testimony about it, and
13 cross-examination offers defendants an adequate safeguard
14 or remedy against suggestive examinations.

15 THE COURT: And I think Ms. Haley is correct,
16 they're not going to cite this case for precedent,
17 they're going to cite State v. Lewis, State v. Rice,
18 State v. McCord, and the litany of other cases that are
19 cited within -- I read some law last night and looked at
20 some more cases. Truly, you know, there was one in Maine
21 that expressed discomfort with an in-court identification
22 where there had been no prior identification beforehand,
23 and it is clearly in the minority and has been
24 distinguished numerous times, but I believe we've gone
25 through the analysis, and I appreciate all of your

1 arguments.

2 You both did an excellent job. It's the
3 victim's testimony that is helpful to me. He gave us the
4 chronology of his experience with the individual who he
5 has identified as the defendant 40 feet away,
6 approximately while halfway blocked by the oven, 20 feet
7 away or less while at the counter in the well-lit
8 restaurant, very well-lit restaurant, empty restaurant.

9 It was quiet. There was nothing else going
10 on. It was a slow night. There was nothing else going
11 on, and then two feet away or less from each other when
12 they had the confrontation over the tip jar and the money
13 and close enough for Mr. Cobiella to be injured and
14 actually to have a conversation.

15 So there was more of an encounter than I
16 understood when we first started arguing about this, and
17 appreciate y'all bringing that out and eliciting that
18 testimony. So the fact of the matter is in State v.
19 Lewis and State v. Rice our Court has explained that you
20 do not have to conduct a Neil v. Biggers analysis. It
21 does not apply to in-court identifications and the
22 suggestiveness problem with pretrial identifications, but
23 even under a Biggers analysis here, four of the five
24 factors are solidly satisfied; the opportunity for the
25 witness to view the accused, the degree of attention,

1 which was clearly acute and direct, the accuracy of the
2 description I'm impressed by, and the witness certainly
3 expressed a great level of certainty regarding his
4 identification.

5 There are a number of strength cites in the
6 Lewis case particularly and parenthetical cites,
7 particularly People v. Rodriguez explains that where a
8 witness first identifies a defendant at trial, defense
9 counsel may test perceptions, memory, bias, and
10 contemporaneously exposed weaknesses and add additional
11 perspective to lessen the hazards of undue weight and any
12 mistake that there might be.

13 I certainly am confident that that can be
14 done here, and based on the totality of the
15 circumstances, I am comfortable with the in-court
16 identification, although it certainly would have been
17 helpful and give me a greater comfort level had there
18 been a proper pretrial six-pack, five-pack, or line-up
19 done. But as we've seen from a number of other cases,
20 even when someone picks the wrong person in a pretrial
21 line-up or photo array situation, an in-court
22 identification can still come in if the Court in its
23 discretion is comfortable with the reliability of the
24 in-court identification.

25 So I'm going to allow it at this time based

1 on the case law, and thank you, Ms. Haley for giving me
2 that. There is a lot of case law on that, so in these
3 particular circumstances, I will allow that in-court
4 identification, and then I believe we have the one other
5 that wasn't contested.

6 All right. Anything further before we -- why
7 don't I give y'all five minutes? Okay. We'll be at
8 ease.

9 (Recess taken.)

10 (In open court, jury not present.)

11 THE COURT: All right. Mr. Mayer, what is
12 your question.

13 MR. MAYER: My understanding is the State is
14 intending to call Mr. Cobiella first and then Mr. Corbin,
15 and Mr. Corbin will be the one that authenticated the 911
16 call, but I would like Mr. Cobiella to hear that during
17 his testimony and have the benefit of him telling us if
18 that's his voice in the background.

19 THE COURT: If you want to cross-examine him
20 and play it --

21 MR. MAYER: That would be fine. It won't be
22 in evidence at that point.

23 THE COURT: The State is putting it in
24 evidence, right?

25 MS. COMPTON: Your Honor, I intend to put it

1 in evidence with the second witness I call. If Mr. Mayer
2 would like to introduce it in cross-examination of Mr. --

3 THE COURT: You can put it in with the victim
4 and ask him if that's his voice if you want to. If they
5 object, then fine, but I doubt they will since they want
6 it in.

7 MS. HALEY: We have a stipulation we wanted
8 to read. We have it marked as a Court's exhibit right
9 now.

10 THE COURT: Is this the stipulation about the
11 recovery of the chain of custody?

12 MS. HALEY: Yes.

13 THE COURT: Let's see. I mean, y'all have
14 signed off and put the other one in evidence. It's
15 unsigned. This is the one y'all e-mailed me. If you
16 want to read the stipulation at the end of the case or
17 whenever in your case you want to read it, and then I can
18 instruct the jury what a stipulation is right before
19 y'all do that, or however you want to do that. Doesn't
20 matter to me.

21 MS. HALEY: I think after Officer Burns
22 testifies.

23 THE COURT: Okay. All right. Any comments
24 on the stipulation?

25 MR. MAYER: No, Your Honor.

1 THE COURT: All right. Anything else?

2 MS. HALEY: No, Your Honor.

3 THE COURT: All right. Thank you.

4 (In open court, jury present.)

5 THE COURT: Okay. Ms. Haley?

6 MS. HALEY: State calls Daniel Cobiella.

7 DANIEL COBIELLA,

8 having been first duly sworn,

9 was examined and testified as follows:

10 DIRECT EXAMINATION

11 BY MS. HALEY:

12 Q. Good morning, Daniel.

13 A. Good morning.

14 Q. Where do you currently reside?

15 A. West Ashley, 1584 Stanford Road.

16 Q. Please tell the jury where you're presently
17 employed.

18 A. Charleston County EMS.

19 Q. How long have you been employed with Charleston
20 County EMS?

21 A. About 14 months.

22 Q. What is your current position there?

23 A. I'm a paramedic.

24 Q. Please briefly describe what that position
25 entails.

1 A. A paramedic is someone who can treat either
2 traumatic injuries, medical situations; we also stand by
3 for firefighters if they have to go into a burning
4 building, we do vital signs on them, anything that --
5 where an individual would need health care in the field.
6 That's what we do.

7 Q. Please tell us a little bit about your education
8 and training.

9 A. My education started in 2004, College of
10 Charleston. I graduated in 2008 with a bachelor's degree
11 in communications. I waited a few years, decided I
12 wanted to be an EMT, so I went to a three-month
13 certification for EMT basic. I decided that I liked
14 doing that, so I did the two-year associate's degree at
15 Trident Technical College, which was applied science,
16 emergency medical, and that's how I became a paramedic.

17 Q. Where were you employed in October of 2010?

18 A. October 2010 was Gilroy's Pizza Pub.

19 Q. What kind of a place is Gilroy's Pizza Pub?

20 A. Gilroy's is a predominantly late night business.
21 They're open during the day, but they're also open until
22 4:00 in the morning, and I worked the weekend night
23 shift, so Thursday, Friday, Saturday, Sunday, from 6 p.m.
24 till 4 a.m.

25 Q. And how long did you work there?

1 A. Four years.

2 Q. Were you familiar with the area and the people in
3 that area?

4 A. Very familiar with the locals in that area.

5 Q. And what was your position when you worked at
6 Gilroy's?

7 A. I was a cook and a manager. We didn't have many
8 people on staff, so we usually had multiple jobs, so I
9 not only cooked the pizza and took people's orders, took
10 phone orders, I also prepared the dough and made the
11 sauce, and the manager perspective, I made the schedule.
12 I took the deposit to the bank after work, you know, made
13 sure that everything was running accordingly.

14 Q. And were you involved in an incident that occurred
15 at Gilroy's on October 3rd, 2010?

16 A. Yes, ma'am.

17 Q. Would you please briefly describe to the jury what
18 happened that night.

19 A. I was working, it was a Sunday night, and it was
20 very slow. There wasn't much going on. No one had been
21 in the store in hours, and so I took that opportunity to
22 clean. So I went behind the convection oven and the
23 grills are there, so I was cleaning the grill, and I was
24 almost done when I heard someone walk in.

25 I noticed the person wasn't at the counter, so

1 that usually tells me they weren't ready to order, so I
2 finished last few scrubs on the grill, wiped it down. By
3 the time I had gotten close to finishing, I heard the tip
4 jar rattling on the counter, and there wasn't much money
5 in it, but it's the principle of somebody taking
6 something that's not theirs.

7 So I walk over, and I see that the money isn't
8 there. The only thing left is the credit card receipt.
9 We usually kept them in the tip jar so then at the end of
10 the night you could count everything together rather than
11 separately.

12 So I realized that the cash wasn't there. The
13 receipts were there. The person that was in the lobby
14 had started to turn around and walk out the door. I
15 confronted the person, telling them to return the money,
16 that I didn't want to involve the police. All I wanted
17 was to get my money back, just give me back what they had
18 taken.

19 The person denied taking anything, told me to get
20 away from him. I came around the counter and tried to
21 slow his exit out and also tried to convince him to give
22 me back whatever he had taken. The confrontation began
23 to escalate as it went out the door, and I was still kind
24 of trying to block -- slow his escape, and as we got
25 outside, there were a couple people standing there, and I

1 realized that this was going to get out of hand.

2 I told those couple people to call 911. I kept
3 talking to the individual, telling him to give me the
4 money. He kept refusing, denying that he had the money,
5 and he started swinging at me.

6 I ducked most of those blows. I didn't take any
7 until I came out from one of my ducks and I felt him
8 strike the side of my face. At that time, it felt like
9 my eyebrow had split open. When you watch a boxing match
10 and someone gets punched in the eye, sometimes their
11 eyebrow splits, and that is kind what it felt like.

12 I felt the blood pouring down my face, and I
13 stopped at that moment because I was getting married five
14 days later, and I was, like, I can't get beat up right
15 now.

16 So I stopped at that moment. I turned around,
17 started walking back in, put a rag on my face and waited
18 for the police to show up.

19 Q. I'm going to back up to the beginning of that
20 incident.

21 You said there hadn't been people in there for
22 hours. Had you checked the tip jar? Did you know there
23 were tips in that tip jar?

24 A. Yes. I had just recently begun to clean the
25 grill. Most of the time when it's slow and you don't

1 have anything else to do in there, there's -- you will
2 usually just sit at the counter and wait for people and
3 the tip jar is on the counter, so --

4 Q. Your Honor, may I approach?

5 THE COURT: You may.

6 BY MS. HALEY:

7 Q. I'm going to show you what has been marked as
8 State's Exhibit 1. If you can point to the board in
9 front of you, does this look like a fair and accurate
10 representation of Gilroy's?

11 A. Yes. I'm not going to point because the board is
12 not on, but yes, it's a very fair and accurate
13 description what it looks like from the perspective of
14 the lobby towards the kitchen.

15 Q. And is this a fair and accurate representation of
16 what it looked like on October 3, 2010?

17 A. Yes.

18 MS. HALEY: At this time, the State moves to
19 admit State's 1 into evidence.

20 THE COURT: Okay.

21 MR. MAYER: No objection.

22 THE COURT: State's 1 is admitted without
23 objection.

24 (State's Exhibit No. 1 was marked for
25 identification and admitted into evidence.)

1 BY MS. HALEY:

2 Q. Could you please point out to the jury, once
3 that's turned on, where you were standing when you heard
4 someone enter Gilroy's?

5 A. So this is the oven, and directly behind that is
6 the grill, and you can see his head -- this is billy
7 here, and his head pokes over the oven. The oven is only
8 about five-foot-five, so behind the oven is the grill,
9 and I was behind this oven and I could actually see over
10 it, right about there.

11 Q. And where is -- where was the suspect standing, if
12 you were looking --

13 A. This is almost -- he was probably two feet to the
14 left of what this is, maybe three feet back, maybe even
15 where this is, but he was blocked by this a little bit.
16 I could see his shoulder and the side of his head. When
17 he moved, I could see him a little bit more, so he must
18 have been somewhere in that angle.

19 Q. And where did you come -- so once you heard
20 someone come in, what did you do again?

21 A. Okay. I heard someone again, so I looked over the
22 oven, and I realized he was standing over here, which is
23 not where someone stands if they want to order or
24 anything, from an establishment. Usually they'll stand
25 here, which is the counter, and since I noticed he wasn't

1 ready to order, I just finished what I was doing, and
2 when I was doing that, I heard the tip jar rattle, and
3 this is the tip jar here.

4 Q. And did you happen to know approximately how much
5 money was in the tip jar before?

6 A. There was probably about three paper credit card
7 receipts, and then on top of that probably about \$7 in
8 cash, and then some change in the bottom.

9 Q. So after you came around the counter, please
10 describe about how far you were from the suspect at that
11 time.

12 A. Well, I came around the oven, and then by the time
13 you make it halfway through the kitchen, which is about
14 where this cook is here, I was probably 25 feet away, 20,
15 25 feet away there, and then, once I had seen the tip jar
16 was empty, I came around, which is this is the doorway
17 here, so I came around, and that's when he kind of saw me
18 come around.

19 And he turned around and started to try to walk,
20 and at that point I was about ten to fifteen feet away
21 from the individual, and it only began closer. By the
22 time we were arguing about whether or not he had taken
23 the money, we were about two feet apart.

24 Q. And do you see that suspect that was in Gilroy's
25 that night in the courtroom today?

1 A. Yes, ma'am.

2 Q. Can you point him out to the jury?

3 A. It's the defendant, red shirt.

4 Q. Can you say where he's sitting?

5 A. He's sitting over there at that table.

6 Q. Thank you. During this altercation, did you
7 happen to notice if he was holding anything?

8 A. No, I did not notice that he was holding anything.
9 And he never threatened that he had a weapon.

10 Q. Do you know what you were hit or cut with?

11 A. At the time of the incident, no, I did not. All I
12 felt was my skin break open and I turned around. There
13 was no visualization of a weapon at that time.

14 Q. And based on your experience as a paramedic, do
15 you have an opinion as to what type --

16 MR. MAYER: Objection. Not qualified.

17 MS. HALEY: Your Honor, I can qualify him as
18 an expert if you allow it.

19 THE COURT: Objection sustained.

20 MS. HALEY: Strike that, please. I'll move
21 on.

22 BY MS. HALEY:

23 Q. How did you feel during the altercation?

24 A. Well, at first I was just frustrated. You know,
25 it's hard to see someone just take something that's not

1 theirs. As it progressed, obviously, you start to feel
2 as though this is going to become out of hand, so you
3 kind of have that fight or flight situation going on.
4 Your heart starts to race, but I was very focussed on him
5 because I knew as the situation progressed he had a
6 higher and higher chance of lashing out at me physically,
7 so I was paying attention to him the whole time as we
8 made it outside and started going north on to King
9 Street.

10 Q. And when you made it outside, what happened after
11 you asked someone to call 911?

12 A. Well, same thing that was happening in the store.
13 We kept moving, because I didn't want to get too close to
14 him. I didn't want him to feel threatened by me, and I
15 didn't want him to start lashing out at me, so I kept my
16 two-foot distance.

17 I didn't get too close to him, and we just kept
18 walking down the street, really, kept asking him to give
19 me the money back, kept trying to slow him down a little
20 bit, kept trying to get in front of him, and then it
21 became physical.

22 THE COURT: I don't think we can get it to
23 print. Let's move on.

24 MS. HALEY: Your Honor, may I approach?

25 THE COURT: You may.

1 BY MS. HALEY:

2 Q. Now I'm going to show you what's been marked as
3 State's 2.

4 A. Okay.

5 MR. MAYER: Your Honor, before that is
6 published to the jury, could we have it entered into
7 evidence?

8 THE COURT: Yes.

9 BY MS. HALEY:

10 Q. Is this a fair and accurate representation --

11 A. Yes.

12 Q. -- of the tip jar at Gilroy's?

13 MS. HALEY: At this time, the State moves to
14 admit State's Exhibit 2.

15 THE COURT: Any objection?

16 MR. MAYER: None.

17 THE COURT: State's 2 is admitted without
18 objection.

19 (State's Exhibit No. 2 was marked for
20 identification and admitted into evidence.)

21 BY MS. HALEY:

22 Q. Is this the tip jar that was at Gilroy's that day?

23 A. The tip jar that's there every day.

24 Q. And can you just describe briefly how you knew
25 that someone was messing with this tip jar.

1 A. Well, as you can see, the counter is tile. The
2 tip jar is hollow plastic, usually with change in the
3 bottom of it, so if someone is messing with it, you can
4 hear it. You can hear the rattling of the change. You
5 can hear the hollow noise of the tip jar rattling on a
6 tile counter. That's how I knew that someone was messing
7 with it. It's not the first time that it's happened.

8 Q. And do you know if this was the tip jar -- if this
9 picture was taken that night?

10 A. I do not know if that picture was taken that
11 night.

12 Q. You see there is money there, that's why.

13 THE COURT: Okay.

14 MS. HALEY: Withdrawn.

15 BY MS. HALEY:

16 Q. At this time -- can you switch -- at this time I
17 would like to refer to the map we're going to use for
18 demonstrative purposes here.

19 Does this look like Gilroy's on an average day?

20 A. Yeah, during the daytime.

21 Q. What is different about it at night?

22 A. On a Sunday night, it's just darker. On a Friday
23 or Saturday night, there's a lot of people, but other
24 than that, it's the same.

25 Q. Are the streets well lit there?

1 A. There is a streetlight right there.

2 Q. And can you just kind of describe where the
3 altercation went once you went outside of Gilroy's.

4 A. Well, here's the entrance. This is the door, and
5 I believe that the people were right outside the door and
6 the altercation went this way, all the way and down here.

7 Q. And after you asked someone to call 911, what
8 happened after that? Do you know where the defendant
9 went at that point?

10 A. All I saw was that the defendant walked towards a
11 bicycle with a white bag on it.

12 Q. Do you happen to remember what that bicycle looked
13 like?

14 A. No, ma'am.

15 Q. Did you sustain any injuries during the incident?

16 A. Yes, ma'am.

17 Q. Do you know what injuries you sustained?

18 A. I sustained a laceration from the top of my eye.
19 It came down, caught my bottom eyelid, and then all the
20 way down my face to my jawline.

21 MS. HALEY: Your Honor, may I approach?

22 THE COURT: You may.

23 BY MS. HALEY:

24 Q. Showing you what's been marked as State's Exhibit
25 3, is that a fair and accurate representation of you on

1 that night?

2 A. Yes, ma'am.

3 MS. HALEY: At this time, the State moves to
4 admit State's Exhibit 3 into evidence.

5 MR. MAYER: No objection.

6 THE COURT: State's 3 is admitted without
7 objection.

8 (State's Exhibit No. 3 was marked for
9 identification and admitted into evidence.)

10 BY MS. HALEY:

11 Q. Can you please describe the injury to your face
12 there, just briefly.

13 A. The laceration at the top, not only in the skin,
14 but into the muscle. The bottom laceration here is a
15 little smaller, which is under the eyelid, and then you
16 have the mark down the face, and then it went into my
17 beard down into my jawline.

18 Q. And were you treated for those injuries that
19 night?

20 A. Yes, ma'am.

21 Q. Did anyone take a statement from you at that time?

22 A. Yes. There was an officer that met me at the ER.

23 Q. Did you describe the defendant in your statement?

24 A. Yes, ma'am.

25 Q. And how did you describe him?

1 A. I described him as a black male, approximately
2 six-foot-three in height, age, approximately 50 years
3 old, salt and pepper, close beard, close hair.

4 Q. And what were the conditions like outside that
5 evening?

6 A. It was quiet. There weren't many people out. I
7 told the only two people I saw to call 911. It was
8 clear. It was a regular night. There wasn't any rain.
9 There wasn't any fog or anything like that.

10 Q. And what is it like inside Gilroy's? Is Gilroy's
11 well lit?

12 A. Gilroy's is well lit. It's also clear, no smoke,
13 no -- nothing to take away from my view of the individual
14 who attacked me.

15 Q. And what was your line of sight during the
16 altercation?

17 A. Well, as you can assume, you're in an altercation
18 that's only two feet away, you're looking at them in the
19 face most of the time, looking, you know, their body
20 language, just trying to make sure that they're not going
21 to swing at you, but, you know, it was very focussed on
22 the individual. That's about it.

23 Q. Did anything block your view?

24 A. Only initially when I noticed that there was
25 someone in the store, that post that I showed you that

1 blocked my view of the individual at first, and when I
2 walked around the oven and came to the counter, I had a
3 clear view of the individual until the end of the
4 altercation.

5 Q. And one more time, what was the distance between
6 you and the suspect?

7 A. Initially it was --

8 MS. HALEY: Your Honor, may I approach?

9 THE COURT: You may.

10 THE WITNESS: It was a decent distance from
11 the back of the kitchen to the middle of the lobby --

12 BY MS. HALEY:

13 Q. Again, I'll show you. I didn't mean to put you
14 off what's marked as State's Exhibit 1.

15 A. So you're talking 40 feet there almost, and,
16 obviously, that narrowed down when I got to the counter
17 and narrowed even more to about two feet when I
18 confronted the individual.

19 Q. And since that time, how has your recovery been?

20 A. We had some unexpected complications with the
21 recovery. The hospital didn't do a two-layer stitch, so
22 I had a hematoma underneath that stitch. I had to put
23 pressure bandages on it for five days before the wedding,
24 but it came down. Other than that, the only thing I
25 suffered is neurological damage to where this side of my

1 head is numb, and then the obvious scar.

2 Q. Do you happen to know what treatment you received?

3 A. The only treatment I received was the stitches at
4 the ER, which were, I think, eight stitches. Most of
5 them were up top, and I think I had one or two on the
6 eyelid.

7 Q. And are you confident that the suspect is the man
8 in the courtroom today?

9 A. Yes, ma'am.

10 MS. HALEY: Court's indulgence?

11 THE COURT: Certainly.

12 MS. HALEY: Nothing further from the State.
13 Please answer any questions the defense may have.

14 THE COURT: Okay. Cross-examination.

15 MR. MAYER: Thank you, Your Honor.

16 THE COURT: You're welcome.

17 CROSS-EXAMINATION

18 BY MR. MAYER:

19 Q. As I mentioned earlier, I'm very sorry for what
20 you went through.

21 Now, you said Gilroy's is kind of a late night
22 pizza joint?

23 A. Yes, sir.

24 Q. Let's talk about the tip jar. You said there was
25 about \$7 in there, last you looked.

1 A. Yeah.

2 Q. And credit card receipts?

3 A. Yes, sir.

4 Q. And change as well?

5 A. Yes.

6 Q. Okay. And was everything removed from the tip
7 jar?

8 A. Anything that wasn't credit card receipts.

9 Q. So any paper money or change was removed from the
10 tip jar?

11 A. Yes. I don't -- yes.

12 Q. Go ahead.

13 A. I was going to say, I don't think he has any use
14 for credit card receipts.

15 Q. In terms of seeing this incident with the tip jar,
16 the money getting taken out, did you see that happen, or
17 you heard that happen?

18 A. I did not see it happen, no.

19 Q. Okay.

20 A. I heard it happen.

21 Q. How long had you been in the back cleaning the
22 grill?

23 A. Not very long. Like I said, it was a slow night,
24 so I may have made, like, one sandwich on it. So all I
25 had to do was pour some water on it, use a grill brick

1 and wipe it down, so that only takes five minutes at the
2 most.

3 Q. Okay. So you're in the back and you heard the tip
4 jar jingle.

5 A. Yes.

6 Q. Is that how you knew someone was in there?

7 A. No.

8 Q. How did you know someone was in there?

9 A. I heard someone enter.

10 Q. How did you hear them do that?

11 A. The door opened. It's probably the main thing
12 that I heard was the door open and close. The door has a
13 hydraulic closer on it, so you can hear it hissing and
14 then snapping shut, like at the end.

15 Q. So you were standing at a grill behind an oven 40
16 feet away from a door that had a hydraulic closer on it?

17 A. Yes.

18 Q. If I could direct your attention to that door back
19 there, is that -- is that hydraulic closer also similar
20 to what you had at Gilroy's?

21 A. That is a hydraulic closer. The one at Gilroy's
22 is probably a little more outdated.

23 Q. Does the one at Gilroy's buzz or ding or flash
24 lights or something?

25 A. It tends to close harder than a normal door, and

1 the door is metal, on a metal frame, so when it closes,
2 it tends to kind of bounce off the door so you can hear
3 it when someone comes in.

4 Q. Okay. And that's you what heard?

5 A. That's what I heard.

6 Q. So you heard the actual door hitting the doorjamb?

7 A. Yes.

8 Q. You didn't hear the hydraulic thing hissing shut?

9 A. No.

10 Q. Okay. All right. At some point, you had
11 determined that the person who was in there when you saw
12 them had been the person to take the money out of the tip
13 jar, right?

14 A. Yes.

15 Q. And you confronted that person --

16 A. Yes.

17 Q. -- who you believe to be my client,
18 Mr. Desaussure?

19 A. Yes.

20 Q. And your recollection -- did you write down what
21 you remembered at the time when this happened?

22 A. The only thing that was written down was at the
23 ER, by the officer.

24 Q. When he took a statement from him?

25 A. When he took a statement.

1 Q. Did you review that statement to make sure it was
2 accurate?

3 A. Yes.

4 Q. But you didn't keep an independent journal or
5 anything?

6 A. I do not keep a diary.

7 Q. So your testimony today is based on your
8 recollection of events, and have you also reviewed your
9 statement?

10 A. I have reviewed my statement.

11 Q. Okay. So you confronted this guy who was in there
12 who you believe had taken the money. You hadn't seen him
13 take the money, but you surmised, and you blocked his
14 exit.

15 A. Yes.

16 Q. You were trying not to let him leave?

17 A. Yes. I wasn't holding the door shut or putting my
18 hands on the person. I was standing in front of the
19 door, or between him and the door, would be a better
20 description.

21 Q. And that's the only exit that someone who doesn't
22 work there would have known about?

23 A. Yes.

24 Q. Is that the only exit to the place?

25 A. No. There is an exit in the back.

1 Q. And did you -- did you say before that whoever you
2 confronted said get away from him?

3 A. Yes. He told me to get away, that he didn't have
4 the money.

5 Q. Did it ever occur to you that you had wrongly
6 accused someone of stealing the money?

7 A. Nobody had been in the store in hour. He was the
8 only person in there. Ten minutes earlier I was sitting
9 at that counter, and there was money in the tip jar.

10 Q. With regard to the fight, you guys at some point
11 got outside of Gilroy's?

12 A. Yes. That was before it became a physical
13 altercation, is when we left Gilrov's.

14 Q. Okay. And when you got outside of Gilroy's, you
15 testified earlier there was someone standing just outside
16 the door?

17 A. Yes. There were people standing outside the door.

18 Q. And you asked them to call 911.

19 A. Yes, sir.

20 Q. Not because a fight had occurred yet?

21 A. No, because I sensed that it would become an
22 altercation due to the situation.

23 Q. How did the altercation get physical?

24 A. I guess he just got tired of being blocked. He
25 wanted to get out of that situation, and I think his way

1 of doing it was attacking me.

2 Q. Well, if you would, without speculating on what
3 someone else did, just remember from the actual
4 confrontation, who swung first? Who pushed who?

5 A. All I remember is him swinging, me ducking, coming
6 up from a duck, and being hit.

7 Q. Okay. Were there multiple swings?

8 A. There were multiple swings.

9 Q. Okay. And were there multiple hits that landed?

10 A. No. There was one hit that landed.

11 Q. Did you swing?

12 A. Not to my recollection.

13 Q. You wouldn't remember if you swung at someone?

14 A. I didn't swing at that person, no.

15 Q. You mentioned you were about two feet away from
16 that person?

17 A. Yes, about the whole time. He may have gotten
18 closer once it became physical, but --

19 Q. And you mentioned it wasn't very crowded out
20 there.

21 A. No. I think there were only a few people out
22 there.

23 Q. And you turned -- not you turned, but you guys
24 together turned away from the people who you had asked to
25 call 911?

1 A. My back was towards the people I had asked to call
2 911 at the time.

3 Q. Okay. So you testified earlier, as we're looking
4 at this photograph here, you guys did the equivalent of
5 coming out of Gilroy's and going right towards Firehouse
6 Subs?

7 A. Would you like me to draw it?

8 Q. Just answer the question is fine.

9 A. Yeah, we went toward Firehouse Subs.

10 Q. And so to the left side of the photograph is where
11 the person was standing who you asked to call 911.

12 A. Yes. I believe they were at the Upper Deck
13 Tavern, which is that door in between the two red
14 awnings.

15 Q. And you testified that you walked toward Firehouse
16 Subs. Did you get all the way past Firehouse Subs to
17 Subway?

18 A. I believe that I was probably towards the distal
19 end, probably right outside the view of this where it
20 occurred.

21 Q. Okay. All right. Was your back to the person who
22 called 911?

23 A. Yeah. The person was here. We kind of -- by this
24 time -- I was the other way up until Firehouse Subs when
25 I was attacked.

1 Q. Feel free to draw on that, it it will help your
2 testimony.

3 A. ,Well, we walked this way (indicating), and I was
4 mostly blocking his way, so I was in front of him going
5 north, kind of walking backwards and talking to him.

6 Q. Okay.

7 A. It escalated as we moved, and as we moved, my
8 positioning changed because I realized this wasn't going
9 to end well. So I ended up giving him an opening there,
10 once it started to become physical. I turned around and
11 had my back towards the people that were here.

12 Q. Okay. So when it was physical, when you sustained
13 this blow --

14 A. Yes.

15 Q. your back was towards the person who had been
16 standing kind of where that person is outside of Gilroy's
17 in this photograph?

18 A. Yeah, probably, right around there, at least when
19 told them to call 911. We made it all the way down to
20 here, so I don't know they were exactly at the point that
21 it was happening.

22 Q. Sure.

23 A. But by the time I was walking back, they were
24 still in the general area, in front of Gilroy's Pizza
25 Pub.

1 Q. OKAY. AND YOUR BACK WAS STILL TURNED TO THAT

2 general area when you sustained the blow?

3 A. When I sustained the blow, my back was against the
4 people who were watching.

5 Q. Okay. Was the person who assaulted you facing you
6 when they struck that blow or -- what was the position?

7 A. Yeah, they were facing me.

8 Q. Okay. So their front was facing both you and
9 behind you, whoever was behind Gilroy's when you walked
10 out.

11 A. I'm sorry. Could you repeat the question.

12 Q. Yes. That is confusing. So when you were hit,
13 the person who hit you was facing you?

14 A. Yes.

15 Q. And your back was facing about where that person
16 whose back was facing that way?

17 A. Yes, yes.

18 Q. All right. Sorry about that. You testified the
19 person who did this to you was about six-foot-three; is
20 that right?

21 A. Yes, sir. We don't have one of those measuring
22 things on the inside of the door so --

23 Q. But you were two feet away from him?

24 A. Yeah. He was taller than me.

25 Q. Okay. You testified earlier how you felt about

1 this. I imagine you wanted to catch the person who did
2 this to you right after it happened.

3 A. At the time I was just frustrated. I'm not a very
4 vengeful person, so it wasn't anything like that.

5 Q. But in terms of cooperating with the police
6 investigation?

7 A. Yeah. I cooperated with the police investigation
8 to help catch whoever had done it.

9 Q. Okay. You testified earlier that when you were
10 struck, you compared it to, like, a boxer getting hit in
11 the ring and a cut appearing on their eyebrow.

12 A. Yeah.

13 Q. Did you sustain black eyes from this?

14 A. Only after the pressure dressing on the hematoma
15 that developed underneath the stitching did I develop two
16 black eyes from the blood draining down into the orbits
17 so immediately? No, to answer your question.

18 Q. Okay. So when did the black eyes come up?

19 A. During the healing process. So what happened was
20 is that the laceration was deep enough to cut the muscle,
21 and they only stitched the skin. So the muscle kept
22 bleeding and creating that goose egg when people hit
23 their head. I had to pressure wrap that to stop the
24 bleeding underneath, and by pressure wrap, you're forcing
25 the blood that's inside to move downward with gravity and

1 the closest thing to that is your eyes, so when people
2 sustain lacerations to their head and they have to be
3 pressure wrapped or there's hematomas a few days later,
4 they'll develop black eyes from the blood draining into
5 the orbits of the eye.

6 Q. Now, you're talking EMT language, but you weren't
7 an EMT when this happened?

8 A. I was an EMT when this happened. I was not a
9 paramedic. I wasn't working as an EMT because I was
10 working at Gilroy's. I was in school.

11 Q. Did you treat yourself?

12 A. I did not.

13 Q. You had a doctor treat you?

14 A. My mother was in town. She's a pediatric
15 ER doctor. She actually -- I called her. She came in
16 after the EMTs visited me, and she took me to the ER to
17 get stitches.

18 Q. Okay.

19 A. But I knew it wasn't anything I needed an
20 ambulance ride to the ER for.

21 Q. Sure. You have 20/20 vision?

22 A. Yes, sir. Thanks to LASIK.

23 Q. Yeah. When did you have that?

24 A. December of 2000 -- I think it was after the
25 incident, so December of 2010 or 2011, December 2011.

1 Q. And what was your vision like before you had that?

2 A. Well, I wore contacts. It was pretty bad.

3 Negative 650 was my prescription in both eyes.

4 Q. Okay.

5 A. But I was wearing my contacts that night. I can't
6 get around without my contacts, so --

7 Q. So when you spoke with the police and they took
8 your statement, you wanted them to solve this crime,
9 right?

10 A. Naturally.

11 Q. And you would have given them all the information
12 that you could to describe this guy.

13 A. Yes.

14 Q. And you described him as -- well, the description
15 we've already got, in addition to that, you described him
16 as having a beard?

17 A. Yes.

18 Q. You described him as wearing a long navy or black
19 top?

20 A. The clothing was -- the description of clothing
21 was vague. In my description, that was the least -- that
22 is what I knew least about, was the clothing. I knew
23 that it was dark and it was long, but that's all I knew
24 when I gave that description.

25 Q. So you knew most about his face.

1 A. Yeah. I knew most about his face and his stature.

2 Q. Okay. You mentioned you did not see a weapon.

3 A. No, never saw a weapon.

4 Q. You testified earlier that you saw him -- saw the
5 perpetrator get on a bicycle.

6 A. I saw him walk towards a bicycle. It had a white
7 bag on it, and I saw him messing with it, as I was
8 turning around to go back into the store.

9 Q. Okay.

10 MR. MAYER: May I approach, Your Honor?

11 THE COURT: You may.

12 MR. MAYER: So could we just mark that?

13 (Defendant's Exhibit No. 1 was marked for
14 identification.)

15 BY MR. MAYER:

16 Q. I'm showing you what has been marked for
17 identification purposes only as Exhibit 1 for the
18 defense, if you take a look at that and tell me what it
19 is.

20 A. This was the statement I gave at the ER.

21 Q. This was given as part of the investigation in
22 which you wanted to apprehend the person who assaulted
23 you, correct?

24 A. Yes.

25 Q. Take a minute and look through there. You wanted

1 to give a thorough description, right?

2 A. As thorough as I could.

3 Q. Take a minute and look through there and tell me
4 where you mentioned that there was some sort of white bag
5 on this bicycle.

6 A. I was not asked to describe the bicycle. I was
7 asked to describe the individual. Never was I asked
8 about the mode of transportation.

9 Q. So there's no description there of a bicycle or a
10 white bag; is that right?

11 A. That is correct.

12 Q. Thank you.

13 MR. MAYER: Nothing further for this witness
14 at this time.

15 THE COURT: Okay. Redirect?

16 MS. HALEY: Briefly.

17 REDIRECT EXAMINATION

18 BY MS. HALEY:

19 Q. Just a few more questions. Did the defendant try
20 to place an order that night?

21 A. No.

22 Q. How did you determine the defendant was the one
23 who took the money?

24 A. Deduction. There had been no one in the store.
25 He was the only one in there. The last time I had seen

1 the tip jar, which was only a few minutes earlier, the
2 money was in there. There also was no one working at the
3 store, so I knew that no one had picked it up to go buy
4 something from the store across the street or anything
5 like that. It was only me and the delivery driver who
6 was not there at the time of the incident working that
7 night.

8 Q. What were you focussing on during the altercation?

9 A. The individual.

10 Q. And where were you when you gave that statement to
11 the two officers that night?

12 A. I was laying in bed about to get stitches at Roper
13 emergency room.

14 Q. What was your state of mind at that time?

15 A. By that time I was fairly calm. I just knew that
16 I had been injured and was trying to get it fixed. is
17 really all I was thinking about at the time. I didn't
18 really have much else on my mind.

19 MS. HALEY: Court's indulgence. Nothing
20 further.

21 THE COURT: Okay. Sure.

22 RECROSS-EXAMINATION

23 BY MR. MAYER:

24 Q. One question.

25 At any time before today, did you ever identify my

1 client, Mr. Desaussure, as the person who assaulted you?

2 A. No, sir. I was never given an opportunity.

3 MR. MAYER: Thank you.

4 THE COURT: Okay. Sir, you may step down.

5 Thank you.

6 THE WITNESS: Thank you.

7 THE COURT: So y'all have a relatively brief
8 witness we can put up?

9 Okay. Thank you.

10 MS. COMPTON: I think it's fairly brief, Your
11 Honor. The State calls Adam Corbin.

12 ADAM CORBIN,

13 having been first duly sworn,

14 was examined and testified as follows:

15 DIRECT EXAMINATION

16 BY MS. COMPTON:

17 Q. Hey Adam, how are you? I moved all the way back
18 here just in case I need to clear this screen off.

19 Adam, tell the jury where you're from.

20 A. Originally I'm from Massachusetts, right outside
21 of Springfield, a town called Green Hills. Now I live in
22 West Ashley.

23 Q. What do you do for a living?

24 A. I'm a server and bartender at Mellow Mushroom.

25 Q. Is that what you were doing back in October of

1 2010?

2 A. Yes.

3 Q. Where were you the night of October 3, 2010?

4 A. I was outside of Upper Deck Tavern, which is also
5 outside Gilroy's.

6 Q. Is that on King Street?

7 A. Yes.

8 Q. Tell me about the night.

9 A. What would you like to know?

10 Q. Had you -- so you were just standing in the
11 street. Had you --

12 A. I was outside smoking a cigarette.

13 Q. Okay. Did you notice anything in particular
14 happen that night?

15 A. Yes. As we were standing outside, an African
16 American male went inside Gilroy's and proceeded to take
17 money from the tip jar, and then he came out and was
18 followed by the clerk, or whatever you will call him, and
19 I was told to call the cops, so I did.

20 Q. All right.

21 MS. COMPTON: And, Your Honor, do I have
22 permission to approach of the witness?

23 THE COURT: You may.

24 BY MS. COMPTON:

25 Q. I'm showing for identification purposes what is

1 marked as State's Exhibit 8. Do you recognize the disk?

2 A. Yes.

3 Q. How do you recognize it?

4 A. It was played to me today and a few months ago
5 with the recording of me calling in.

6 Q. How do you know it was this disk that we played
7 for you?

8 A. I signed it and dated it.

9 Q. And when you listened to the recording of this
10 disk, were the contents of it accurate? Did you
11 recognize them to be your voice?

12 A. Absolutely.

13 Q. And did you recognize it to be an accurate
14 reporting of what you did that night?

15 A. Yes.

16 MS. COMPTON: I would move to admit State's
17 Exhibit 8, which is the 911 call.

18 THE COURT: You may. State's 8 is admitted
19 without objection.

20 (State's Exhibit No. 8 was marked for
21 identification and admitted into evidence.)

22 MS. COMPTON: Permission to publish to the
23 jury at this time?

24 THE COURT: Yes.

25 (Whereupon, the disk containing the 911 call

1 was played for the jury.)

2 MS. COMPTON: Nothing further from the State
3 at this time.

4 THE COURT: Okay. Cross-examination?

5 MR. MAYER: Yes. Thank you very much.

6 CROSS-EXAMINATION

7 BY MR. MAYER:

8 Q. Good afternoon, Mr. Corbin. How are you?

9 A. Doing well.

10 Q. You were standing outside of Gilroy's when the
11 employee and the assailant exited?

12 A. Yes.

13 Q. Where had your attention been before they came
14 out?

15 A. In the store, actually. We were just glancing in.

16 Q. Go ahead.

17 A. I believe he had asked my friend that I was
18 outside with for money before he entered the store, so we
19 were just kind of wondering where he was going in. If he
20 had no money, and he took the money from the tip jar and
21 came outside.

22 Q. So you saw the money get taken out of the tip jar?

23 A. Yes, sir.

24 Q. How close were you to the tip jar when the money
25 got taken out of it?

1 A. I was outside. You could see through the window.

2 Q. Right.

3 A. So I'm not sure how far he was.

4 Q. When they came out of the restaurant, what
5 happened then?

6 A. They went up King, about probably 30, 40 feet away
7 from me, and then they stopped and pushed each other.

8 Q. When you called 911, what you just heard there,
9 did you hear the yelling in the background at the
10 beginning of that recording?

11 A. I didn't -- I'm not sure whose end that was on.

12 Q. Was there other yelling going on out there behind
13 you other than this confrontation that was going on?

14 A. Not that I recall.

15 Q. Do you recall if the employee from Gilroy's was
16 yelling at the person who he believed took his money?

17 A. Yeah, I believe he was.

18 Q. Was he cursing at him?

19 A. I'm not sure.

20 Q. When you saw this fight occur, were you actually
21 on the phone with 911 when the first hits were struck?

22 A. Yes.

23 Q. Okay. Were the hits going back and forth for a
24 little while or --

25 A. I only saw one hit. That was the only hit, I

1 believe.

2 Q. And you didn't see a weapon?

3 A. I did not.

4 Q. And you say this was 30, 40 feet away from you?

5 A. Yeah, it was pretty easy to see.

6 Q. Okay. You gave the police a statement after this?

7 A. Yes, sir.

8 Q. The 911 operator you just heard asked you to stick
9 around and talk to the cops?

10 A. Yeah.

11 Q. And you did that?

12 A. Yes.

13 Q. Did you provide them with information that you
14 thought would help solve the crime?

15 A. Yes, sir.

16 Q. Did you hold anything back from them?

17 A. Not that I know of.

18 Q. And in your description to police, you described
19 the suspect as six-two to six-three, six-foot-two or
20 six-foot-three?

21 A. Yes, sir.

22 Q. With a beard?

23 A. If that's what it says.

24 Q. A long sleeved black T-shirt. Is that how you
25 described his clothing?

1 A. Yeah, I believe with a stripe around the elbow.

2 Q. It's not in your statement, but I just heard you
3 describe to the 911 operator that he was between 25 and
4 30 years old.

5 A. Using my terrible judgment, maybe.

6 Q. Sure. But that was your impression at the time?

7 A. Yes, sir.

8 Q. Did you see the suspect get on a bike and ride
9 north?

10 A. Yes, sir.

11 Q. But you didn't provide a description of what type
12 of bike or anything like that?

13 A. He was too far away.

14 Q. And the police have never asked you to identify
15 the suspect in this case?

16 A. No, sir.

17 Q. And you never have identified a suspect in this
18 case?

19 A. No, sir.

20 MR. MAYER: No further questions.

21 THE COURT: Thank you. Redirect?

22 MS. COMPTON: Very briefly, Your Honor.

23 THE COURT: Okay.

24 MS. COMPTON: Permission to approach the
25 witness, Your Honor?

1 THE COURT: You may.

2 REDIRECT EXAMINATION

3 BY MS. COMPTON:

4 Q. Adam you're a pretty casual guy, it seems like
5 today; is that fair?

6 A. Yes.

7 Q. Now, were you extremely excited at the time of the
8 911 call?

9 A. Not exactly.

10 Q. Okay. And that -- the voice -- that was your
11 voice then, pretty similar to now?

12 A. Yes.

13 Q. Okay. Now, you spoke with Mr. Mayer about giving
14 a statement that night, right?

15 A. Uh-huh.

16 Q. And do you recognize these two pages here?

17 A. Yep.

18 Q. Okay. And with a little latitude here, can you
19 kind of describe generally the statement here, first what
20 happened here and then what happens here.

21 MR. MAYER: Objection.

22 THE COURT: What's the basis of your
23 objection?

24 MR. MAYER: Facts not in evidence. He's
25 reading his statement.

1 THE COURT: Don't have him read the
2 statement. You can ask him some questions, so objection
3 sustained.

4 BY MS. COMPTON:

5 Q. Does -- the beginning part of this statement is
6 just like a narrative what happened?

7 A. Pretty much, yes.

8 Q. And the second part of the statement is more like
9 a question and answer portion, right?

10 A. Yes.

11 Q. You were asked a question, did you see a weapon;
12 is that --

13 A. That is correct.

14 Q. And will you tell us, if you remember, or if you
15 need the statement to refresh your recollection, what you
16 said.

17 A. I believe he reached into his pocket, and I did
18 not see an actual weapon. I was too far away. I didn't
19 see that far.

20 Q. Okay. And make sure you keep speaking up for the
21 reporter here. And then were you also asked to describe
22 the suspect?

23 A. Yes.

24 Q. And were you confident in the description that you
25 gave of his clothing?

1 A. Yes.

2 Q. Okay. Can you read for the jury here -- or what
3 you said in your answer about the suspect's description.

4 A. A black male with a scruffy beard, about six-two,
5 six-three with jeans and a long-sleeved, possibly black
6 T-shirt with striped bands around his arms at his elbows.

7 Q. And did you write the word possibly?

8 A. Black with a question mark in parentheses.

9 Q. So that night you indicated you had a question
10 mark?

11 A. It was a dark shirt.

12 Q. Thank you. Did you know Daniel before this
13 incident?

14 A. No, not really. I had seen him before.

15 Q. Okay. And you indicated on cross that you saw the
16 money taken from the tip jar?

17 A. Yes.

18 Q. And how many hits did you see?

19 A. Hits?

20 Q. How many times did you witness contact between
21 Daniel and --

22 A. Just one.

23 Q. And what was that?

24 A. Him hitting Daniel.

25 Q. Okay. And were you aware that night that Daniel

1 had been cut?

2 A. Yes.

3 Q. Okay.

4 MS. COMPTON: Nothing further, Your Honor.

5 THE COURT: Thank you. Anything further?

6 MR. MAYER: Just real briefly, Your Honor.

7 If I may approach the witness.

8 THE COURT: You may.

9 RECROSS-EXAMINATION

10 BY MR. MAYER:

11 Q. I'm handing you the second page of the statement
12 you were just looking at. Where that question mark is in
13 your statement, what's your question mark referring to
14 there?

15 A. The color.

16 Q. The color of what?

17 A. The T-shirt.

18 Q. 'Cause you said the in your statement it's a
19 long-sleeved black question mark T-shirt.

20 A. Yeah.

21 Q. Or black shirt?

22 A. Yeah, shirt, T-shirt.

23 Q. To indicate that it was a long-sleeved dark
24 colored T-shirt?

25 A. Yes.

1 Q. Your only question in your mind was whether it was
2 maybe black or navy blue?

3 A. Yes.

4 Q. Thank you. You didn't have a question in your
5 mind it was a long-sleeved T-shirt?

6 A. Definitely long-sleeved shirt.

7 MR. MAYER: No further questions.

8 THE COURT: All right. Thank you, sir. You
9 may step down.

10 THE WITNESS: Thanks.

11 THE COURT: Can this witness be excused?

12 MS. COMPTON: No objection to from the State.

13 THE COURT: You may being excused. Thank
14 you.

15 Okay, ladies and gentlemen: We are going to
16 break now for lunch. I'm going to ask y'all to be back
17 in the jury room at 2:00. It sometimes takes a little
18 longer to get lunch in this area than in normal parts of
19 the tri-county area because we have a lot of visitors at
20 this time of year, so have a nice lunch. Please do not
21 discuss the case or do any outside research.

22 Thank you.

23 (Jury recessed.)

24 We'll come back about 2:00. I have to meet
25 with Ashley Pennington and Chad Simpson at 2:00 real

1 quickly about a appointment issue, but I don't think that
2 will take more than five minutes, so if y'all will plan
3 on being back at 2:00.

4 Do y'all want to go ahead and put the plea
5 offer and rejection on the record now so we can take that
6 taken care of? I just want to make sure the defendant
7 understands and we have a knowing, intelligent, and
8 voluntary rejection. Okay?

9 MS. HALEY: Your Honor, the State had
10 extended an offer initially to Mary Ford for a plea to
11 armed robbery and assault and battery, second degree,
12 along with another pending charge the defendant has for a
13 negotiated sentence of 18 years.

14 The plea offer was reextended to Mr. Mayer.
15 It was still armed robbery, but it was assault and
16 battery first at that point, and we had never actually
17 discussed an amount of years at that point. We had
18 talked about the 18 plus range. We had made it clear
19 that because this was now almost three years old I would
20 need to get approval from my bosses to reextend that 18
21 year offer, but we had said at that time that we could
22 probably get that offer back if the defendant was
23 interested in pleading guilty.

24 Both times that offer was rejected, both when
25 he was represented by Ms. Ford and Mr. Mayer.

1 THE COURT: Okay. Yes, sir? Happy to hear
2 from y'all.

3 MR. MAYER: Your Honor, that's accurate, as
4 far as my personal knowledge goes. Ms. Haley and I did
5 discuss a potential plea in this case, and the number
6 that I had spoken with my client about was also 18 years,
7 based on the representations that Ms. Haley had made and
8 my understanding of her perspective on the case.

9 Mr. Desaussure and I discussed that in great
10 detail over the course of probably a week or two, and I
11 emphasized to him that that deal was going to be off the
12 table permanently if he did not accept it at that time.
13 He did tell me at the time that he wanted to reject that
14 offer, and I relayed that information to Ms. Haley.

15 THE COURT: Okay. Thank you, sir.

16 Mr. Desaussure; is that correct?

17 THE DEFENDANT: Yes, ma'am.

18 THE COURT: Were both of those -- both times,
19 with both of your attorneys that you talked with and
20 understood that plea offer that the State made to you?

21 THE DEFENDANT: Yes, ma'am.

22 THE COURT: Okay. And the offer, as I
23 understand it, was for a package deal, around 18 years,
24 correct?

25 MS. HALEY: Yes, Your Honor.

1 THE COURT: And you understand the potential
2 sentences you're facing, including any mandatory minimums
3 if the jury comes back with a guilty verdict on these
4 charges?

5 THE DEFENDANT: No, ma'am.

6 THE COURT: You want to tell him what the
7 potential sentences are?

8 MS. HALEY: When I re-extended that offer to
9 Mr. Mayer, Timmy Finch was actually in that meeting with
10 both of us, and we discussed the fact that we would be
11 serving the defendant with notice to seek life without
12 parole, so we have served him with that notice because at
13 that time we had not heard whether he was accepting or
14 reject that offer.

15 I extended e-mails to Mr. Mayer, and so now
16 he is facing life without parole.

17 THE COURT: Because of his prior serious or
18 most serious offenses.

19 MS. COMPTON: Yes, Your Honor.

20 THE COURT: Sir, you understand you have been
21 served with the life without parole notice?

22 THE DEFENDANT: Yeah. Now that I know.

23 THE COURT: Now you know. Okay. Well, when
24 you have certain prior convictions on your record, and we
25 sometimes call them strikes, I think that's an easier way

1 to think of them -- if you have two strikes for most
2 serious offenses or three strikes for serious offenses,
3 once you get those, if you're recharged with a subsequent
4 such offense, the State can seek life without parole, so
5 if they find you guilty on the armed robbery, that is
6 what the State is going to ask for. What about assault
7 and battery first? Is that a serious or most serious?

8 MS. HALEY: No.

9 THE COURT: What is the range on that?

10 MS. HALEY: Zero to ten.

11 THE COURT: Okay. So, sir, you're facing a
12 possible sentence of life without parole, and the
13 original plea offer was 18 years. Do you understand
14 that?

15 THE DEFENDANT: Yes, ma'am.

16 THE COURT: And you still want to reject
17 that? I don't know if it's still on the table.

18 MS. HALEY: I would have to speak to Scarlett
19 about that.

20 THE COURT: Is it your desire to reject any
21 kind of plea offer and keep going with the trial?

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT: Okay. We just needed to make
24 sure.

25 MR. MAYER: Just for the record, I did

1 discuss the solicitor's notification to me orally, that
2 she intended to serve life without parole notice. I did
3 discuss that with my client. I told him that's what that
4 meant. We were considering that 18-year offer. I
5 also -- once that was served on me, I also did describe
6 that to him and what that meant after it was served.

7 THE COURT: Okay. I appreciate that. I know
8 y'all did, just out of an abundance of caution, and I
9 also like to make sure the defendant does understand

10 So anything else we need to discuss before we
11 break for lunch?

12 MS. HALEY: Nothing from the State, Your
13 Honor. Just -- I think accidentally one of the State's
14 exhibits or Defense's exhibits was put in Mr. Mayer's
15 files.

16 THE COURT: We'll check our exhibits.
17 Whatever we've got, let's leave it up here with Ms.
18 Amanda, and we'll go from there. All right?

19 (Recess taken.)

20 A F T E R N O O N S E S S I O N

21 (In open court, jury not present.)

22 MS. HALEY: Ms. Compton and I were speaking
23 out in the hall, we and we were speaking to Tasha
24 Lafayette, the investigator in our office, and we were
25 talking about the case, and we happened to notice the

1 second alternate was sitting right there. We don't know
2 if he heard anything. We weren't talking about it as we
3 got next to her or near her, but out of an abundance of
4 caution, we wanted to let the Court know immediately and
5 proceed as you see fit.

6 THE COURT: Well, you know, they've been
7 instructed they're not allowed to talk about the case
8 whatsoever, and I doubt there was an issue, but we've got
9 two alternates. My proposal would be to just let her go
10 and keep the other one, but is there anything the defense
11 wants to be heard on?

12 MR. MAYER: No. That's fair, Your Honor.

13 THE COURT: Any objection to that?

14 MS. HALEY: No, Your Honor.

15 THE COURT: Let's bring our second alternate
16 in.

17 (In open court, alternates present.)

18 As you know, we have two alternates in our
19 trial who are so important to the functioning that we
20 almost always in a trial of any length have to substitute
21 at least one in, but parties have been so efficient, I
22 think we may wrap this up even tomorrow. So I don't need
23 to keep both of y'all here, so I'm getting ready to let
24 you go, but I also -- the main reason is I instructed
25 y'all, you're not allowed to talk to the attorneys, and

1 two of the attorneys brought it to my attention that they
2 were talking about the case and didn't realize that you
3 were nearby.

4 And you probably didn't even hear anything
5 because you don't know what I'm talking about, but out of
6 an abundance of caution, we're going to go ahead and let
7 you go home and not take up your time anymore today. You
8 don't have to call in tonight. Call in Wednesday after
9 6:00, but you're free after that, and you probably
10 wouldn't be picked after 6:00 on Wednesday, but just out
11 of an abundance of caution, just give us a call back
12 after 6:00.

13 If you don't mind leaving the notepad, we'll
14 take it, and the kind bailiff will get anything of yours
15 out of the jury room that we need to get, so thank you.

16 All right. Any objection from anyone
17 regarding what I said to the juror?

18 MR. MAYER: No, Your Honor.

19 MS. HALEY: No, Your Honor.

20 THE COURT: Okay. Great. Thank you. All
21 right. Anything else we need to take up before we bring
22 in our crew?

23 MS. HALEY: There is just one more thing we
24 wanted to clarify. Mr. Mayer had made a motion to
25 sequester our witnesses, and we were under the impression

1 that would have been a reciprocal sequestration, but we
2 just wanted to --

3 THE COURT: Yeah, it generally is. If
4 anybody he's planning on calling, we'll sequester them as
5 well, or that he thinks he might call. Is that an issue?

6 MR. MAYER: I don't think so, Your Honor.
7 One of people on my witness list, Ms. Eva Desaussure, has
8 been here. My motion, you know, was made specifically to
9 the State's witnesses. We hadn't talked about it --

10 THE COURT: She can go on outside from now
11 on.

12 MR. MAYER: And I was going to say with the
13 Court's indulgence, I think it's probably more important
14 to her -- it's her brother who is on trial here. I think
15 it's more important for her to hear the trial than to
16 testify in it.

17 THE COURT: Is she going to be a witness or
18 not?

19 MR. MAYER: No, Your Honor.

20 THE COURT: Then she can stay.

21 MR. MAYER: Thank you.

22 THE COURT: All right. Anything else?

23 MS. HALEY: Nothing from the State, Your
24 Honor.

25 THE COURT: All right.

1 Andrew, I'm signing this right now.

2 (In open court, jury present.)

3 All right, sir. I appreciate it. Thank you,
4 ladies and gentlemen. I hope y'all had a nice lunch. We
5 are ready to continue with the trial, so I will call on
6 Ms. Haley and Ms. Compton to call their next witness.

7 MS. HALEY: Thank you, Your Honor. The State
8 calls officer Jonathan Burns.

9 JONATHAN BURNS,
10 having been first duly sworn,
11 was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MS. HALEY:

14 Q. Good afternoon, Officer Burns. Where are you
15 currently employed?

16 A. City of Charleston Police Department.

17 Q. How long have you been with CPD?

18 A. Almost five years.

19 Q. Please tell the jury a little bit more about your
20 education and training background.

21 A. I have a bachelor's degree in communications. I
22 worked at Columbia Police Department for three years, and
23 I worked at CPD, Charleston Police Department, for almost
24 five years.

25 Q. And what kind of training have you done as a

1 police officer?

2 A. I'm a field training officer. I've taken classes
3 on radar, LIDAR, drug recognition courses -- that's about
4 it.

5 Q. In what capacity are you currently employed with
6 CPD?

7 A. I'm a team one flexion officer.

8 Q. What are your duties?

9 A. I pretty much patrol, answer calls for service, do
10 proactive traffic stops and person stops; just pretty
11 much to serve and protect the citizens of Charleston.

12 Q. And you said you were with team one?

13 A. Yes, ma'am.

14 Q. Where is that?

15 A. It's everything from Calhoun Street north, to
16 North Charleston.

17 Q. Would you say you're pretty familiar with your
18 patrol area?

19 A. Very familiar.

20 Q. Are you familiar with the people in that area?

21 A. Yes, ma'am.

22 Q. Were you employed in the same capacity in October
23 2010?

24 A. I was actually assigned to the King Street
25 corridor, so I guess the entertainment district where all

1 the bars and restaurants are. It's pretty much
2 everything from Calhoun on King Street, from Calhoun to
3 Spring Street.

4 Q. And did you have the occasion to become involved
5 in an investigation of a crime involving the defendant,
6 Alonda Desaussure?

7 A. Yes, ma'am.

8 Q. And how did you become involved in that
9 investigation?

10 A. The original call was put out -- I guess it was
11 actually three hours prior to when I stopped
12 Mr. Desaussure. It was an armed robbery and assault that
13 happened at Gilroy's Pizza. It was actually in team two,
14 so I was the team two respondent to the initial call, and
15 I, you know, patrolled the area, attempting to locate the
16 party who had committed the crime, but at that time I did
17 not.

18 Later on in the evening, 12:30 a.m., I was on
19 patrol on King Street, I guess around the intersection of
20 King and Morris, 525 King Street, at which time I
21 observed Mr. Desaussure with his bicycle on the sidewalk,
22 and the description that was given out when the crime
23 originally occurred was a black male, six-two, slender
24 build, with a very low hair cut and he had a bicycle with
25 a plastic grocery bag tied to the front of it.

1 It was pretty detailed, and when I observed
2 Mr. Desaussure at 12:30 a.m., walking on King Street, he
3 had a bike with a plastic bag tied to the front. He had
4 blue jeans. He didn't have a dark colored shirt, which
5 they had also put out in the description. He had, I
6 believe, a multicolored shirt on at the time.

7 I made contact with him and immediately stopped my
8 patrol car. In getting out, before I even said a word to
9 him, he immediately became defensive, started yelling at
10 me, wanted to know why I was stopping him. He didn't do
11 anything wrong.

12 And that kind of raised my suspicion a little bit,
13 and I told him why I was stopping him and asked him if he
14 had any weapons on him, at which time he said that he had
15 a large knife in his waistband.

16 And, again, the assault had happened at Gilroy's
17 to the victim, he was cut in the face, so that again
18 raised my suspicion. I took the knife from him and
19 secured it, and while I was continuing my investigation,
20 a subject came by, I believe Mr. Silcott, came by on a
21 bicycle, and I was actually on -- all my attention was
22 focused on Mr. Desaussure. I didn't even see him until
23 he started yelling at me.

24 He was, like, Good job. You got him. That's the
25 guy from Gilroy's, and he stopped his bicycle and came up

1 to us and identified Mr. Desaussure, saying he was the
2 one that committed the crime at Gilroy's Pizza.

3 Q. Okay. I'm going to take you back through that a
4 little bit. First of all, did all this occur in
5 Charleston County?

6 A. It did.

7 MS. HALEY: Your Honor, may I approach?

8 THE COURT: You may.

9 BY MS. HALEY:

10 Q. I'm going to show you what's been marked as
11 State's Exhibit 6. Does that fairly and accurately
12 represent the bike that you saw Mr. Desaussure with on
13 the night in question?

14 A. Yes, ma'am. There was a plastic bag on the front
15 of it that night.

16 MS. HALEY: Your Honor, at this time the
17 State moves to admit Exhibit 6 into evidence and would
18 ask permission to publish to the jury.

19 THE COURT: Anything from the defense?

20 MR. MAYER: No objection.

21 THE COURT: State's 6 is admitted without
22 objection, may be published.

23 (State's Exhibit No. 6 marked for
24 identification and admitted into evidence.)

25 BY MS. HALEY:

1 Q. So you saw the defendant had that bike at the
2 time?

3 A. Yes, ma'am.

4 Q. Next I'm going to show you what's been marked as
5 State's Exhibit 5. Does that picture fairly and
6 accurately represent the bag you saw on that bicycle?

7 A. Yes, ma'am.

8 MS. HALEY: Your Honor, at this time the
9 State moves to admit State's Exhibit 5 into evidence.

10 MR. MAYER: No objection.

11 THE COURT: State's 5 is admitted without
12 objection.

13 MS. HALEY: And would ask permission to
14 publish to the jury.

15 THE COURT: Certainly.

16 (State's Exhibit No. 5 was marked for
17 identification and admitted into evidence.)

18 BY MS. HALEY:

19 Q. Where was this bag?

20 A. It was tied to the front of the bike, around the
21 handlebar area.

22 Q. And where was the defendant when you were driving
23 your patrol car around that night?

24 A. Yes, ma'am.

25 Q. Where was he exactly?

1 A. He was to my right side, I believe on the
2 sidewalk.

3 Q. Which way were you traveling?

4 A. I was traveling southbound on King Street, and he
5 was also traveling southbound on King Street. He would
6 have been on the west side of the street.

7 Q. And you saw a man matching what description again?

8 A. The description that was given out that was
9 broadcast over our radios from the initial call. It was
10 six-two black male, slender build, low haircut, and it
11 said he had a black shirt on with blue jeans, and he had
12 left the scene on a bicycle with a plastic bag tied to
13 the front.

14 Q. When you saw the defendant, you did a person stop,
15 what was the first thing you said, do you remember?

16 A. I don't remember.

17 Q. When you stopped the defendant, how was he acting?

18 A. He immediately became very defensive before I said
19 anything to him. I believe I was exiting my patrol
20 vehicle and he became defensive, wanted to know why he
21 was being stopped, and told me he didn't do anything.

22 Q. Do you know about how long you had stopped the
23 defendant when Mr. Silcott rode up?

24 A. Couldn't have been more than a minute.

25 Q. And what time was this again?

1 A. 12:30 a.m.

2 Q. And what -- do you remember how you were
3 interacting with the defendant at the time when
4 Mr. Silcott rode up?

5 A. I don't.

6 Q. Had you already collected any evidence?

7 A. I had already taken the knife from his waistband.

8 MS. HALEY: Your Honor, permission to
9 approach?

10 THE COURT: You may.

11 BY MS. HALEY:

12 Q. I'm going to show you what's been marked as
13 State's Exhibit 9. I'm going to give you gloves. Do you
14 recognize this item?

15 A. Yes.

16 Q. How do you recognize that?

17 A. It's the knife that he had in his waistband.

18 Q. And what did you do once you collected that?

19 A. I took it and secured it, I believe, in my patrol
20 vehicle until our crime scene technician came.

21 MS. HALEY: Your Honor, at this time the
22 State moves to move admit State's Exhibit 9 into
23 evidence.

24 MR. MAYER: No objection.

25 THE COURT: All right. State's 9 is admitted

1 without objection.

2 (State's Exhibit No. 9 was marked for
3 identification and admitted into evidence.)

4 BY MS. HALEY:

5 Q. Once Mr. Silcott rode up, what did he say to you?

6 A. I don't remember his exact words, but it was
7 something to the effect of, You got him. He's the guy.
8 Good job. I remember him saying good job.

9 Q. What was he doing when he said that?

10 A. He was actually riding northbound on King Street.
11 He was going pretty quickly by us, so he actually went up
12 and turned around, but as he came by the first time,
13 that's when he noticed and he started yelling at us, Good
14 job. You got the guy.

15 Q. Did that make you more or less sure --

16 A. Yeah. It made me pretty sure that I had the right
17 person.

18 Q. How long after the incident was that again?

19 A. Three hours, I think.

20 Q. Was Mr. Silcott taken to the suspect?

21 A. No.

22 Q. And where did that identification take place?

23 A. Right where I stopped him, on -- right at the
24 intersection of King and Morris.

25 Q. Do you know about how far that is from Gilroy's

1 Pizza?

2 A. I would say six or seven blocks.

3 Q. Was anyone else present at that time?

4 A. No, ma'am.

5 Q. Was anything said -- did you say anything to
6 Mr. Silcott at that time?

7 A. Not that I recall.

8 Q. Before he spoke to you?

9 A. No, no, no.

10 Q. Did anyone else say anything to him at that time?

11 A. No, ma'am. He was riding by on his bicycle. I
12 wasn't really having a conversation with him. He was
13 going by pretty quickly.

14 Q. Was anyone with him?

15 A. No he was by himself.

16 Q. Did you tell Mr. Silcott he was a suspect at the
17 time?

18 A. No. I didn't say anything, he initiated
19 everything by yelling at him when he came by on his
20 bicycle.

21 Q. Did you tell him who the defendant was?

22 A. No.

23 Q. Did you in any way reveal to Mr. Silcott the
24 defendant's identity?

25 A. No.

1 Q. And he made a positive ID of the defendant?

2 A. Yes, ma'am.

3 Q. After he stopped on his bicycle, how did the
4 exchange go after that, between you and Mr. Silcott?

5 A. I believe I went ahead and detained
6 Mr. Desaussure, and he just pretty much told me, That's
7 the guy. Good job. That's was the person that committed
8 the crime at Gilroy's.

9 Q. Did he go into any more detail about that, about
10 the crime at Gilroy's?

11 A. I don't recall.

12 Q. How long -- about how long did it take him to make
13 a positive identification?

14 A. A second.

15 Q. Did you have him do any type of formal
16 identification?

17 A. I didn't -- he pretty much initiated it himself.

18 MS. HALEY: Court's indulgence.

19 BY MS. HALEY:

20 Q. Back to State's Exhibit 5, what did you find in
21 that bag, do you remember?

22 A. No, ma'am.

23 MS. HALEY: Nothing further at this time.
24 Please answer any questions the defense may have.

25 THE COURT: Cross-examination.

1 MR. MAYER: Thank you, Your Honor.

2 CROSS-EXAMINATION

3 BY MR. MAYER:

4 Q. You testified that there was a description that
5 went out of the suspect from the Gilroy's incident,
6 six-two, black male, on a bicycle, black shirt, blue
7 jeans, and this was the first time that I've heard a
8 description about a white bag that went out. Do you have
9 some evidence about that, about a white bag, when that
10 was put out?

11 A. All I have is my supplemental in front of me. I
12 believe the initial report also says it.

13 MR. MAYER: May I approach the witness, Your
14 Honor?

15 THE COURT: You may.

16 (Defendant's Exhibit No. 2 was marked for
17 identification.)

18 BY MR. MAYER:

19 Q. I'm handing you what's been marked for
20 identification only as Defense Exhibit 2. It's the
21 initial report. Can you identify that for us? Take a
22 minute and look at that.

23 MS. HALEY: Objection, Your Honor. I don't
24 believe it's his report.

25 THE COURT: It is not his report?

1 MS. HALEY: No.

2 THE COURT: Why don't y'all let me take a
3 look at the report.

4 (Discussion held at sidebar.)

5 You just want to ask him about that
6 particular incident report?

7 MR. MAYER: I just want to ask him where the
8 bag is in it.

9 THE COURT: I assume y'all have an objection,
10 so, ladies and gentlemen, I'm going to have to have the
11 attorneys take up a legal argument with me. This will
12 not take long. I'm going to ask you to return to your
13 jury room briefly. Thank you.

14 (Recess taken.)

15 (In open court jury not present.)

16 THE COURT: Where is his supplemental? Do
17 you have that as well?

18 MR. MAYER: I do have his supplemental. The
19 initial report that he referred to is the only one that I
20 can figure out -- the only report that was closed before
21 they actually apprehended Mr. Desaussure. His
22 supplemental report does say something about white
23 plastic bag, but it was also written, like, the next day,
24 afterwards, and what I'm trying to establish is that this
25 white plastic bag thing came up only after they stopped

1 Mr. Desaussure, and they put it like bookends in the
2 case, so the officer that went to Gilroy's has in his
3 supplemental report written a day or two later that there
4 was this white bag, and this officer has in his
5 supplemental report that there was a white bag, but the
6 only incident report that was written and finished before
7 they apprehended Mr. Desaussure says absolutely nothing
8 about a white bag and neither does the dispatch tape that
9 was provided to me by the solicitor.

10 And so I just want an opportunity for this
11 gentleman to find where he heard about the white bag and
12 point that out to me.

13 THE COURT: I thought he said he stopped him.
14 Isn't that what he testified to?

15 MR. MAYER: He did, and then he also
16 testified that it had been put out on dispatch that part
17 of the description was that there was this white bag on
18 the bicycle.

19 THE COURT: Okay. Ms. Haley?

20 MS. HALEY: Your Honor, I would say that
21 while it may not be in his supplemental report, it could
22 have been left out of that; however, in the initial
23 report written by Officer Gaskins, who is no longer with
24 Charleston Police Department, he said there was a white
25 plastic bag.

1 THE COURT: That was the first report?

2 MS. HALEY: It's the very first report that
3 would have been written by --

4 MR. MAYER: No. We're confused. This report
5 was not closed before they apprehended Mr. Desaussure.
6 The only report that was completed before they
7 apprehended Mr. Desaussure was by Officer Burckhardt, and
8 it mentions nothing about a white bag.

9 THE COURT: Well, if you want to bring
10 Burckhardt in and put him up and ask him about his own
11 report, you can, but this officer did put in his
12 supplemental that there was one, so you can ask him about
13 that, but I'm not going to have you cross-examine him on
14 another officer's report.

15 MR. MAYER: I understand that, Your Honor.
16 The other thing I would like to have this officer listen
17 to is the dispatch tape. He just testified that he heard
18 on the dispatch that there was a white bag, that there
19 was a description on this bike. I happen to have that
20 dispatch tape. I understand the solicitors would object
21 to that, even though they're the ones that provided it to
22 me, so we might have to listen to it outside the presence
23 of the jury.

24 THE COURT: How long is it, do we know?

25 MS. HALEY: I think the dispatch he's

1 referring to is from the EMS phone call. I think that's
2 different than the radio that goes out to CPD officers
3 when they're trying to radio out about potential
4 suspects.

5 THE COURT: Well, let's ask him what he heard
6 about the bag and where. Okay? Let's go ahead and do
7 that now.

8 MS. HALEY: Mr. Mayer, or myself?

9 THE COURT: Either one of y'all.

10 BY MR. MAYER:

11 Q. You just testified earlier, Officer, that you
12 heard about the description of the suspects on dispatch.
13 I assume you weren't listening to an EMS dispatch?

14 A. No.

15 Q. You were listening to officers' dispatch?

16 A. Yes.

17 Q. And on officers' dispatch, there's radio traffic
18 back and forth from individual officers to a radio
19 control unit that coordinates with where officers are
20 patrolling, looking for a suspect, and this type of
21 thing?

22 A. Yeah.

23 THE COURT: Okay. Anything further?

24 Q. All I would say is that's different than calls
25 that would go to EMS and 911, right?

1 A. Absolutely.

2 MS. HALEY: Okay.

3 THE COURT: I guess I need what y'all to
4 elicit from them is what they record and provide as the
5 dispatch tape which is called several different things is
6 the same radio transmission that he heard, and some of
7 those go into dispatch and some of them don't.

8 Ideally, we have a records person here from
9 the department, but we don't have to have that, but you
10 heard it go out. Was it over someone's walkie? Was it
11 over the radio?

12 THE WITNESS: It would have either been over
13 our walkie or over my radio from our dispatcher who was
14 putting the call out, or we also have mobiles where they
15 put notes in there sometimes, and I believe it's called
16 the CAD system.

17 THE COURT: But that's what you heard.

18 THE WITNESS: But it came from dispatch.

19 THE COURT: Okay.

20 MR. MAYER: I have the dispatch tape, Your
21 Honor. It's not that long. It's a few minutes.

22 THE COURT: I'm happy to listen to it outside
23 the presence of the jury, or we can just play it when the
24 jury comes in. I think it's fair game for the defense to
25 question him on what he heard, and it's also fair for you

1 to redirect on their other transmissions that occurred
2 other than the quote, unquote, dispatch tape, but I
3 understand where Mr. Mayer is going with this, so --

4 MR. MAYER: Thank you, Your Honor. I'll just
5 play it in the presence of the jury.

6 MS. HALEY: Yes.

7 THE COURT: You want to listen to it now?

8 MS. HALEY: Yes. I would prefer that.

9 THE COURT: Let's listen to it now, so the
10 objection is sustained in part and overruled in part.

11 (Whereupon, the 911 call was played.)

12 MR. MAYER: This was the tail end of the 911
13 call, and this is the dispatch, where it picks up.

14 That's it, Your Honor.

15 THE COURT: Anything further?

16 MS. HALEY: I would still object to playing
17 the entire thing for the jury. I think it's just a bit
18 confusing and prejudicial because they're talking about
19 multiple events that were going on at the same time.
20 There is a car break-in. They talk about this
21 potentially being a strong arm. I think it is
22 potentially confusing to the jury because he is charged
23 with armed robbery. They mention a larceny and an
24 aggravated assault. I just think there is too much going
25 on, and I don't really think any of it is of any

1 probative value here.

2 THE COURT: Normally, I would agree with you.
3 The issue the defense is trying to establish, though, is
4 at the time of the stopping of this particular defendant,
5 there was no mention whatsoever of a plastic bag tied to
6 a bike. I understand it's in this officer's
7 supplemental, but the door has been opened for him to
8 cross-examine him on what he heard about what went out,
9 so if that's what the defense wants to do, I'm going to
10 let them play the dispatch tape, or ask him where he can
11 identify what was heard about a plastic bag.

12 It's not in the other officer's report. If
13 you want him to use that instead -- but you don't just
14 get to say that and they don't have any follow-up. That
15 would be prejudicial.

16 MS. HALEY: I do want to clarify, it is not
17 in this officer's supplemental.

18 THE COURT: I thought it was.

19 MS. HALEY: No. It's in other officers'
20 reports, and it is in the initial reporting officer's
21 reports, who would have essentially called this out to
22 other officers. I know it wasn't on that dispatch tape,
23 and Adam Corbin, I believe, testified to this, and, you
24 know, he was at the initial scene and this was three
25 hours later, and that is what I'm arguing.

1 THE COURT: Show me the two reports. One of
2 y'all says it was the initial report, one of you says it
3 wasn't, but I have yet to see them.

4 MS. HALEY: This is this officer's
5 supplemental report, and it does not mention a white
6 plastic bag. He doesn't mention the description that
7 went out period in that report.

8 THE COURT: Okay.

9 MS. HALEY: This is Officer Gaskins' report.
10 He is no longer with CPD. It does mention that Adam
11 Corbin said there was a white plastic bag attached to the
12 bike, and he was the responding officer, the first
13 officer on the scene.

14 The case agent, Sergeant Stone, also
15 responded to the scene, and she will testify more to
16 this. And Mr. Mayer had Officer Burckhardt's
17 supplemental, who we can produce if necessary. We just
18 thought it would be redundant to have both her and
19 Detective Burckhardt, but he is available if we need him
20 to testify, and it is also in his supplemental.

21 MR. MAYER: Burckhardt? No, there is not. I
22 thought Burckhardt's was the initial.

23 MS. HALEY: No. This is a supplemental. The
24 initial report was Officer Gaskins, and it was in that.

25 MR. MAYER: Which wasn't completed until a

1 day or two later.

2 MS. HALEY: That's how they always --

3 MR. MAYER: I understand. I just want
4 something contemporaneous.

5 THE COURT: He can play the tape and ask him
6 what he heard on dispatch.

7 I'm going to overrule the objection and let
8 him ask that. You can follow up after that and ask how
9 it's done. I don't find it to be more prejudicial than
10 probative, or substantially more prejudicial than
11 probative. Okay? Anything else before we bring the
12 jury?

13 MS. HALEY: Nothing from the State, Your
14 Honor.

15 MR. MAYER: Nothing, Your Honor.

16 THE COURT: Okay. Let's bring them in.

17 (In open court, jury present.)

18 THE COURT: Thank you, sir. I appreciate it.
19 And thank you, ladies and gentlemen. I appreciate your
20 patience. We are ready to continue with
21 cross-examination.

22 MR. MAYER: Thank you, Your Honor.

23 This is this officer's supplemental.

24 THE COURT: Defendant's 3?

25 MR. MAYER: Yes.

1 BY MR. MAYER:

2 Q. Officer, just before the jury went out, you
3 testified that you had a description of the suspect that
4 you heard go out on dispatch that named the suspect,
5 black male, right, six-two-ish, right?

6 A. Yes.

7 Q. Had a bicycle. Had a long-sleeved black shirt?

8 A. Yes.

9 Q. Blue jeans?

10 A. Yep.

11 Q. And you testified that there was also a white
12 plastic bag on the front of his bicycle.

13 A. Yes.

14 MR. MAYER: May I approach, Your Honor?

15 THE COURT: You may.

16 (Defendant's Exhibit No. 3 was marked for
17 identification.)

18 BY MR. MAYER:

19 Q. You testified you had put that in your own
20 supplemental report?

21 A. Yes.

22 Q. Please identify what I've just handed you marked
23 Defense Exhibit 3.

24 A. It's my supplemental.

25 Q. Please find in there where you describe a

1 description of the suspect that includes a white plastic
2 bag.

3 A. All I can see in here is where I said -- our
4 requested crime scene to the location to photograph the
5 bicycle and plastic bag which the subject had in his
6 possession.

7 Q. And you wrote that up after you stopped
8 Mr. Desaussure?

9 A. Yes.

10 Q. And Mr. Desaussure did, in fact, have a white
11 plastic bag on his bicycle.

12 A. Yes.

13 Q. But is there anything in there that describes the
14 suspect before you encountered Mr. Desaussure as having a
15 white plastic bag?

16 A. I don't understand what -- I don't follow.

17 Q. Okay. You typed up this report after arresting
18 Mr. Desaussure.

19 A. Yes.

20 Q. Okay. Is there anything in this report that
21 indicates that the description that went out looking for
22 the suspect before you encountered Mr. Desaussure
23 included a description of a white plastic bag?

24 A. I put in here observes the subject riding his
25 bicycle on King Street. Subject matches the description

1 of a party who had committed an armed robbery and an
2 assault at Gilroy's Pizza.

3 Q. And in that you didn't say anything about white
4 plastic bag at that time.

5 A. No. That would have been in the initial report.

6 Q. Okay. Thank you. The other thing you testified
7 to before the jury went out was that in addition to the
8 description that you had in your supplemental report that
9 included a white plastic bag, there was also a dispatch
10 that went out that put out a description of a suspect
11 that included a white plastic bag. I have a copy of that
12 dispatch tape. I would like you to hear it.

13 A. Okay.

14 Q. And when you hear the description put out over the
15 radio that says -- that includes white plastic bag, just
16 call out and I'll stop it.

17 This picks up at the end of that 911 call.

18 (Whereupon, the 911 call was played for the
19 jury.)

20 MR. MAYER: That's it.

21 BY MR. MAYER:

22 Q. Officer, you didn't stop me in, so I take it you
23 didn't heard the words white bag in that dispatch.

24 A. I did not.

25 Q. It's the ten minutes or so right after the

1 incident, right?

2 A. Yes.

3 Q. When you stopped Mr. Desaussure, he had a beer
4 with him, didn't he?

5 A. A beer?

6 Q. A beer, like, to drink beer?

7 A. I don't recall.

8 Q. I'm sorry. Is that a no?

9 A. I don't recall.

10 Q. I noticed earlier when were you testifying you
11 were referring to something. Could I see what you're
12 referring to earlier? When you testified with the
13 solicitor on your direct, were you looking at something
14 over there?

15 A. Yeah, my supplemental.

16 Q. Is that all it was?

17 A. Yeah.

18 Q. Let me just take a look at that. This happened
19 October -- well, technically October 4th is when you
20 stopped Mr. Desaussure, right?

21 A. Yes.

22 Q. And that was the year 2010?

23 A. Yes.

24 Q. What you're testifying to today is largely
25 dependent on your recollection based on your reading of

1 your notes?

2 A. Some of it, yeah.

3 Q. And so your testimony earlier was that you stopped
4 Mr. Desaussure because he fit a description of a black
5 male on a bicycle, right?

6 A. Yes.

7 Q. You don't recall if he had a beer with him or not.

8 A. No.

9 Q. Guys around that area will carry a beer around
10 with them at times?

11 A. Sometimes.

12 Q. Put it in a paper bag or something?

13 A. All depends.

14 Q. You were on patrol for a while. Did you see some
15 of that?

16 A. Yeah, you see people with open containers.

17 Q. Now, as it goes with the clothes that
18 Mr. Desaussure was wearing when you stopped him, he
19 wasn't wearing a black T-shirt, was he?

20 A. I believe he had a black shirt on up under the
21 one -- the multicolored one he had.

22 Q. Okay. If you were to see that multicolored shirt
23 again, would you be able to identify it?

24 A. Probably not.

25 Q. Was it you who made an inventory of what you took

1 off of Mr. Desaussure?

2 A. Yes. I put in my supplemental that he had a large
3 amount of loose change and a \$1 bill in his possession.

4 Q. But in terms of inventory, were you able to
5 identify the knife?

6 A. Crime scene took the knife.

7 Q. Crime scene took the knife. Okay.

8 Let's see here. Let's talk about this witness a
9 minute, Mr. Silcott, who was riding by on his bicycle.
10 You testified on direct that you didn't recall exactly
11 what Mr. Silcott called out, but you paraphrased
12 something like, Hey, you got the guy, good job.
13 Something like that. Is that approximately what he said?

14 A. I mean, it was to that effect.

15 Q. And you didn't put it in your supplemental report,
16 word for word.

17 A. No.

18 Q. Did you?

19 A. No.

20 Q. So, really, all that we had to go on as to what
21 that witness called out is your memory?

22 A. Yes.

23 Q. Mr. Desaussure's memory?

24 A. Yes.

25 Q. And that witness's memory?

1 A. Yes.

2 Q. Is it possible that that witness called out a
3 racial slur?

4 A. No. I think I would remember that.

5 Q. You don't remember him doing it, but you don't
6 remember either way.

7 A. I think I would remember if he did. I don't think
8 he did.

9 Q. Do you think you'd remember if he cursed?

10 A. Probably not.

11 Q. But whatever he said was enough for you to flag
12 him down and say, Hey, come over here. Right?

13 A. He actually turned around and approached us, came
14 back to us.

15 Q. You did not call to him?

16 A. No, he came back to us. He came to me.

17 Q. I understand that he came to you, but you did not
18 call to him before he came to you?

19 A. I don't think so.

20 Q. But, again, if it's not in your supplemental, you
21 would be relying only on your memory?

22 A. Yes, sir.

23 Q. And is that detail, whether or not you called out
24 to him to have him come back, in your supplemental
25 report?

1 A. No.

2 Q. So this guy is riding by, says, Good job, you got
3 the guy, comes back, and he said -- told you he looked
4 like the guy who had been at Gilroy's?

5 A. Said it was the guy.

6 Q. Okay. And the person who stopped, was he one of
7 the witnesses from Gilroy's earlier?

8 A. He was an employee of Five Guys. He was a witness.
9 He worked at Five Guys, which was across the street.

10 Q. Was he a known witness at the time before he
11 stopped and talked to you?

12 A. I believe so. I believe he is in the initial
13 report.

14 Q. What would you have to refer to to be certain of
15 that?

16 A. The initial report.

17 Q. The initial report by Officer Gaskins?

18 A. Yes, sir.

19 Q. Would you also be able to tell from the statement
20 that was provided by Mr. Silcott whether he was an
21 initial witness?

22 A. I haven't read his statement. I couldn't say one
23 way or the other.

24 MS. HALEY: Objection, Your Honor. May we
25 approach?

1 THE COURT: You may.

2 (Discussion held at sidebar.)

3 MS. HALEY: I'm not sure what he's trying to
4 do. He hasn't testified, and he didn't take this
5 statement.

6 MR. MAYER: I'm certainly not trying to get
7 this in evidence. The witness just said he would be able
8 to tell from this statement perhaps when Mr. Silcott
9 became a witness.

10 THE COURT: It's not in initial report,
11 correct? Okay.

12 MR. MAYER: I'm just trying to establish that
13 Silcott wasn't a witness prior to stopping.

14 THE COURT: You can cross-examine, but don't
15 get into any document issue.

16 MR. MAYER: Okay.

17 (End of sidebar.)

18 THE COURT: Objection sustained.

19 BY MR. MAYER:

20 Q. So you don't know whether Mr. Silcott was
21 previously spoken to by police officers or not.

22 A. I believe he was, but I would have to see the
23 initial report to say yes or no.

24 THE COURT: Is that the initial report?

25 MR. MAYER: Will you mark this Defense 4,

1 please.

2 (Defendant's Exhibit No. 4 was marked for
3 identification.)

4 BY MR. MAYER:

5 Q. I'm handing you what has been marked for
6 identification as Defense Exhibit 4. Can you tell me
7 what that is?

8 A. It's the initial incident report.

9 Q. Take a look and see if you can refresh your
10 recollection.

11 A. It doesn't say. It says Mr. Silcott identified
12 Mr. Desaussure after I had stopped him. It doesn't say
13 whether he was an initial witness or he was spoken to by
14 officers.

15 Q. Just follow along and correct me if I read this
16 wrong. Later on, 10/5/2010 at approximately 1245 hours,
17 Officer A. Burns stopped a person matching the
18 description of subject from the earlier incident.
19 Subject was riding a list bike and serial number with a
20 white plastic bag attached to the front, wearing blue
21 jeans, a multicolored top shirt, and a black shirt
22 underneath, short haircut and facial hair.

23 While responding officer was talking to the
24 subject, Alonda Desaussure, witness three, Stephen
25 Silcott, approached and said that was the subject --

1 stated that the subject was the person who committed the
2 earlier offenses.

3 Did I read that right?

4 A. Yes.

5 Q. And that's the first mention of witness three in
6 here, right?

7 A. Yes.

8 Q. So with you stopping Mr. Desaussure, and
9 Mr. Silcott happening to come by and happening to call
10 out what he called out, that's the reason that you
11 arrested Mr. Desaussure, right?

12 A. Yes.

13 Q. Mr. Desaussure was not under arrest before
14 Mr. Silcott rode by and called out whatever he called
15 out.

16 A. No.

17 MR. MAYER: Nothing further, Your Honor.

18 THE COURT: Okay.

19 MS. HALEY: Brief redirect, Your Honor.

20 THE COURT: Yes, please.

21 MS. HALEY: Your Honor, may I approach the
22 court reporter and get this marked?

23 THE COURT: Yes.

24 MS. HALEY: Your Honor, may I approach the
25 witness?

1 THE COURT: You may.

2 (State's Exhibit Nos. 10, 11, and 12 were
3 marked for identification.)

4 BY MS. HALEY:

5 Q. Officer Burns, I'm showing you what has been
6 marked as State's 10, 11, and 12. When you collect
7 items, or when someone collects items at a crime scene,
8 does evidence or anyone inventory those items?

9 A. Yes.

10 Q. Do you recognize these? Please take your time.

11 A. These are property vouchers. What we do when we
12 collect evidence, we have to fill one of these out.

13 Q. And do those -- do you fill out evidence vouchers?
14 Do officers fill out evidence vouchers?

15 A. We do, ma'am.

16 Q. Do you recognize those as pertaining to this case?

17 A. Yes.

18 MS. HALEY: Your Honor, at this time the
19 State would move to admit State's 10, 11, and 12 into
20 evidence.

21 THE COURT: Okay.

22 MR. MAYER: Objection, Your Honor. I would
23 like to be heard on that.

24 THE COURT: All right. Let me take a look at
25 them.

1 (Discussion held at sidebar.)

2 THE COURT: What is the basis of your
3 objection?

4 MR. MAYER: The basis of my objection is that
5 if this witness didn't type them, it's improperly
6 authenticated. He testified earlier when I was crossing
7 him he couldn't figure out --

8 THE COURT: I'm going to let you go ahead and
9 do that, and you can put in the rest of your argument,
10 but if it was made --

11 MR. MAYER: Even if they can't identify the
12 items he's referred to?

13 THE COURT: I thought he did, but she can ask
14 him. Objection is overruled. Let's go ahead and ask him
15 about it.

16 (End of sidebar.)

17 BY MS. HALEY:

18 Q. How do you recognize those as pertaining to this
19 case?

20 A. It's got Officer Gaskins's name, the date, the
21 time, Mr. Desaussure's name, the shirt he was wearing,
22 February 9, his clothing.

23 Q. Do you recognize those as items that you collected
24 from Mr. Desaussure at the time of his arrest?

25 A. Yes. The dollar bill and the loose change, the

1 bicycle, the knife, and his clothing.

2 Q. Is that -- I would ask, at this time, that he
3 publish to the jury everything that was collected. I
4 don't know if that was everything written on those.

5 A. Yes, this was what was collected.

6 Q. And can you repeat that one more time? I'm sorry.

7 A. Yes. It's the bicycle, silver mountain bike, one
8 dollar bill, four quarters, five dimes, four nickels,
9 seven pennies, a Farberware four-inch blade with a black
10 handle, and his clothing, one pair of blue jeans, one
11 black T-shirt, one multicolored shirt one long-sleeved
12 gray and black shirt, and two white tank tops.

13 Q. Is there any beer mentioned in there?

14 A. No, ma'am, not that I see.

15 Q. Thank you. Referring back to your supplemental
16 report, did you mention anything in that report about the
17 defendant's description that was radioed out?

18 A. I didn't put any detailed description of him in
19 here, no, ma'am.

20 Q. Were you --

21 A. Just that he matched the description.

22 Q. I'm sorry. What was that?

23 A. Just that he matched description of the earlier
24 incident.

25 Q. Were you at the initial incident location?

1 A. No, ma'am.

2 Q. When did you become involved in this?

3 A. At 12:30 a.m.

4 Q. And the dispatch that we just listened to, was
5 that a full summary of every radio communication you
6 heard that night?

7 A. No.

8 Q. What other kinds of radio communications go out
9 between officers?

10 A. There's all kinds of, you know, radio
11 transmission. We actually have other channels that we'll
12 go to and relay information back and forth to each other.
13 Sometimes, so we don't have to tie up channel one, which
14 is our main channel, we'll go to meeting channels, event
15 channels, other channels that we talk on.

16 Q. But you heard the description of the defendant
17 over dispatch that night?

18 A. I'm pretty sure, yes, ma'am.

19 Q. Did some of the recordings that we just heard
20 include unrelated communications?

21 A. Yes.

22 Q. And when Stephen Silcott rode up, did you say
23 anything to prompt his identification?

24 A. No, ma'am.

25 Q. Did you have any idea that he was riding his bike

1 by?

2 A. No. I was focussed on Mr. Desaussure.

3 MS. HALEY: Court's indulgence.

4 THE COURT: Certainly.

5 BY MS. HALEY:

6 Q. And did you give Mr. Silcott any reason to know
7 that the defendant, Alonda Desaussure, was involved in
8 the incident at Gilroy's that night?

9 A. No, ma'am.

10 MS. HALEY: Nothing further.

11 THE COURT: Okay.

12 MR. MAYER: Just briefly, Your Honor. May I
13 approach?

14 THE COURT: You may.

15 RECROSS-EXAMINATION

16 BY MR. MAYER:

17 Q. Officer, I'm showing you what you saw earlier,
18 Defense Exhibit 4, which you identified as the initial
19 report, correct?

20 A. Yes.

21 Q. And when I was reading this earlier, I neglected
22 to have you identify this time in here. I think I read
23 it, but will you read it off? I think the date is wrong,
24 but --

25 A. Yeah. It says later, on 10/5/2010. Actually,

1 10/4 at approximately 1245 hours.

2 Q. Okay. So this report here refers to the very time
3 that you had stopped Mr. Desaussure?

4 A. Yes, ma'am -- yes, sir, I'm sorry.

5 Q. So it stands to reason this report couldn't have
6 been completed and finished prior to you stopping
7 Mr. Desaussure?

8 A. That's correct.

9 Q. Okay. On the issue of the open container, if a
10 guy had an open container and you stopped him,
11 specifically here, you stopped Mr. Desaussure, he had a
12 beer, you put it on the curb to talk to Mr. Desaussure,
13 would that sound right to you?

14 A. I don't remember a beer, so I can't tell you what
15 I did with a beer.

16 Q. Sure, sure. If that did happen, it might not make
17 the evidence list, isn't that correct, of the things that
18 were confiscated from Mr. Desaussure a few minutes later
19 when he was officially put under arrest?

20 A. I mean, I guess --

21 Q. Maybe I can make that more clear. So when you
22 first stopped Mr. Desaussure, if you pulled the beer off
23 of him and set it on the curb, that beer may not have
24 made it on to the evidence list that Ms. Haley just had
25 you discuss.

1 A. I guess it could have been left there.

2 Q. Okay.

3 A. I don't remember a beer, so I -- but there's not a
4 beer on that evidence list, so --

5 Q. Right. And you testified earlier on cross that
6 you would not remember the shirt that Mr. Desaussure was
7 wearing.

8 A. No.

9 Q. But you were able to say everything with Ms. Haley
10 that you pulled off of him, all his other shirts?

11 A. I just read what was on the evidence -- I don't
12 remember all his clothing. I remember our -- I remember
13 the knife and I remember his bicycle and when I put in
14 here about the dollar and the large amount of loose
15 change. I didn't go through all his clothes, but I read
16 what was Officer Gaskins logged in.

17 Q. But you had seen his clothes before? He was
18 wearing clothes when you saw him?

19 A. Yes..

20 Q. And --

21 MR. MAYER: May I approach the witness again,
22 Your Honor?

23 THE COURT: You may.

24 BY MR. MAYER:

25 Q. Could this be the shirt that Mr. Desaussure was

1 wearing when you stopped him?

2 A. It could be.

3 Q. To the best of your recollection, is it?

4 A. I don't remember.

5 MR. MAYER: Nothing further, Your Honor.

6 THE COURT: All right. Anything further?

7 MS. HALEY: No, Your Honor.

8 THE COURT: All right. Sir, you may step
9 down. Any objection to this witness being excused?

10 MS. HALEY: No, Your Honor.

11 MR. MAYER: None, Your Honor.

12 THE COURT: Okay. Thank you. All right.
13 Everybody doing okay? Okay. Call your next witness.

14 MS. HALEY: State calls Stephen Silcott.

15 STEPHEN SILCOTT,

16 having been first duly sworn,

17 was examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MS. HALEY:

20 Q. Good afternoon, Stephen. How old are you?

21 A. Twenty.

22 Q. Where do you currently reside?

23 A. Baltimore, Maryland.

24 Q. Where are -- are you presently employed there?

25 A. Yes.

1 Q And where are you employed?

2 A. T&J Nichols Construction Company.

3 Q. And what do you do there?

4 A. Various trades electric, plumbing, carpentry.

5 Q. How long have you been employed there?

6 A. One year.

7 Q. Please tell the jury a little bit about your
8 educational background.

9 A. I'm studying mechanical engineering and going on
10 my third year.

11 Q. Where are you studying that?

12 A. Montgomery College.

13 Q. Where were you employed in October 2010?

14 A. Five Guys Burgers and Fries.

15 Q. Which one Five Guys?

16 A. The one on King Street.

17 Q. In what city?

18 A. Charleston.

19 Q. How long were you employed there?

20 A. Probably ten months.

21 Q. And what was your position at Five Guys?

22 A. Cashier.

23 Q. Were you involved in an incident that occurred at
24 Gilroy's, outside Gilroy's Pizza, on October 3, 2010?

25 A. Yes.

1 Q. Can you tell me what happened that evening.

2 A. I was returning from my lunch break, coming from
3 Marion Square. I observed an incident across the street,
4 and I -- two gentlemen were arguing over some money that
5 had allegedly been stolen from Gilroy's, and the victim
6 was asking the suspect for the money back.

7 The suspect was backing up towards Marion Square,
8 and he was telling the victim that he hadn't taken
9 anything, but at that point it was clear that he had
10 obviously taken something, and it appeared to be a tip
11 jar, or money from a tip jar.

12 So they kept arguing, and eventually pushes
13 were -- pushes were made and punches were thrown until
14 the suspect decided he was fed up with the pushing and
15 shoving. He pulled out a blade and swung his arms wildly
16 and managed to connect with the face of the victim.

17 Q. When you say you were returning from your lunch
18 break, what time was that?

19 A. Somewhere between 9:00, 9:30.

20 Q. And you were returning from Marion Square. When
21 were you when you first noticed this?

22 A. I was on the side that Five Guys is on, I believe,
23 and I was walking down -- going toward -- down King
24 Street, and about the time I got in front of Five Guys
25 restaurant, I had noticed the situation.

1 Q. And where is Five Guys in relation to Gilroy's?

2 A. It's a little north of Gilroy's, but it's within
3 eyesight.

4 Q. Is it on the same side of the street?

5 A. Opposite side.

6 Q. So after you noticed the altercation, what did you
7 do next?

8 A. I observed for a few minutes until I realized
9 that -- you know, what the situation was, and I made an
10 attempt to go help the victim, but at that point, as soon
11 as I, you know, came within contact of the suspect, the
12 knife was pulled and I realized that the situation was
13 out of my control, and I -- you know, after the victim
14 was cut, I decided that I'm going to return to the
15 restaurant before, you know, something happens to me.

16 Q. And how close did you get to the altercation?

17 A. Within three feet.

18 Q. And you saw a knife?

19 A. Yes.

20 Q. Who was holding the knife?

21 A. The suspect.

22 Q. And do you see the suspect in court today?

23 A. Yes.

24 Q. Would you please point him out, and could you
25 please describe him. Just where he's sitting is fine.

1 A. Next -- on this table, on the right side of me.

2 Q. And did -- do you happen to remember which hand he
3 was holding that with?

4 A. No.

5 Q. Had you ever seen the defendant before?

6 A. Yes.

7 Q. When had you seen him before?

8 A. Around 5:00. On my way to work, I had seen him
9 out front of Pop's Pizza.

10 Q. Where is Pop's Pizza?

11 A. It's directly across the street from Five Guys.

12 Q. So is that the same side as Gilroy's?

13 A. Yes.

14 Q. And about what time was that?

15 A. Probably about 5:00. My normally shifts were
16 consistent.

17 Q. And how do you know that you saw the defendant
18 then?

19 A. Because I had seen him two other times later that
20 night.

21 Q. And what was going on at that time that made you
22 notice him?

23 A. He asked me for some change.

24 Q. Did you have an interaction with him at that time?

25 A. Yes.

1 Q. About how long was that interaction?

2 A. Five seconds.

3 Q. Then the later altercation, about how long was
4 that that you witnessed the altercation?

5 A. Probably five minutes.

6 Q. Did you notice any particular physical
7 characteristics about the defendant?

8 A. Yes. He had salt about pepper hair. He was tall,
9 thin.

10 Q. Did you happen to notice after the altercation?
11 You say you walked away and went back to work. Did you
12 see where the defendant went?

13 A. Yes. His went north on King Street, and I believe
14 he went west on Calhoun.

15 Q. Did you see how he left the scene?

16 A. He started walking, and then -- or maybe running.
17 I'm not sure which one it was, but I believe he grabbed
18 his bike on the corner.

19 Q. What did the suspect do -- excuse me. Strike
20 that.

21 Approximately -- once the incident was over, you
22 went back to work. Why was that?

23 A. Because I felt that I was in danger for being too
24 close, you know, to the situation. Plus, you know, it
25 was time for me to get back to work as it was, so it was

1 already late from my lunch break.

2 Q. What was your state of mind during the incident?

3 A. I was in the middle of, you know, a work session,
4 so I wasn't -- I was totally awake. I had three more
5 hours to work, so, I mean, it was a normal evening for me
6 at that point.

7 Q. Had you consumed alcohol or taken any drugs or
8 medication?

9 A. No.

10 Q. Were you scared at all?

11 A. Upon seeing the knife, yes, I was a little scared.
12 I mean, that's what prompted me to get back to where I
13 was working.

14 Q. About how close were you to the knife when the
15 suspect pulled the knife out?

16 A. I was between the -- I don't know what the
17 building was, but the building and him. He had pulled
18 the knife out in a motion like that and it came pretty
19 close to me, so that's when I realized, you know, this is
20 not for me.

21 Q. Can you describe the knife.

22 A. I would say that the overall knife was about this
23 big (indicating). The blade was probably somewhat -- I
24 guess that's about two inches, inch and a half, and it
25 had a serrated on the edge of it and a little thumb hole

1 where you can open it up. It's a pretty common knife.
2 I've seen it plenty of times before.

3 Q. What did you focus on during the incident?

4 A. During the incident, I was focussed on, you know,
5 the suspect and the victim, you know, their interaction
6 and their fighting. I mean, they were scuffling for far
7 too long and little was accomplished, so that's when I
8 realized that maybe I should help this guy, but upon the
9 knife being pulled, it was out of my control.

10 Q. What -- do you remember what the physical
11 conditions were like outside that evening?

12 A. It was definitely clear. I think there might have
13 been a little chill in the air. It was the beginning of
14 October. I don't know.

15 Q. Do you know if the streets are well lit there?

16 A. Yes. Absolutely.

17 Q. What was your line of sight throughout the
18 incident?

19 A. It was -- nobody was really around that I could,
20 you know, remember, because I could remember just seeing
21 those two fighting and that was it. I don't remember
22 anybody else crowding the situation. Nobody walked
23 through or blocked my vision the whole time.

24 Q. What did you do after work that night?

25 A. I got on my bicycle and I sped up King Street to

1 get home.

2 Q. About what time was that?

3 A. It was probably 11:30 to 12:00, somewhere between
4 there. We usually ended somewhere around that hour.

5 Q. And you were going home. How were you going home?

6 A. I was going north on King Street on my bicycle.

7 Q. And what happened next?

8 A. I got about halfway up King Street to Spring where
9 I normally go, and I seen a couple police cars had pulled
10 a man over, and it was a well lit corner, so when I seen
11 the man, I said, Okay, you got that piece of shit.

12 And I had yelled that across the street, because I
13 was still upset from earlier that night about what I had
14 witnessed. And after I had said that, the police officer
15 said, Hey, you come here real quick.

16 And I initially thought I was in trouble for
17 yelling that to the police, or, you know, the suspect,
18 but then they said, Do you recognize this gentleman?

19 I said, Yes. That's the man from Gilroy's that
20 had, you know, been involved in a robbery earlier that
21 evening.

22 Q. So when did you first report your involvement in
23 this incident?

24 A. At that time.

25 Q. And about how much later was that?

1 A. Three hours, tops.

2 Q. With whom did you discuss the incident that night
3 once you got --

4 A. Yes, just the detective, I believe. I'm not even
5 sure I really discussed too much with the police officers
6 at the scene. I mean, most of my time there we were -- I
7 had said a few choice words to the suspect, and after
8 that the detective arrived and, you know, I went to his
9 car and gave him my statement.

10 Q. What did you tell the officers when you gave them
11 your statement?

12 A. I said yes, I recognized this gentleman from
13 earlier that evening. He was undoubtedly the man who
14 held the knife and, you know, cut the victim's face
15 earlier.

16 Q. And you gave -- did you give a written statement?

17 A. Yes.

18 Q. Did you review that for accuracy?

19 A. Yes.

20 Q. Did you forget to tell the police anything at that
21 time?

22 A. Yes. I had not mentioned that I had seen the
23 gentleman earlier that night, but at the time it hadn't
24 occurred to me when I was talking to the police about it.
25 They never asked, so --

1 Q. What was your initial description that you gave to
2 the officers in that statement?

3 A. His salt and pepper hair, which was his strongest
4 characteristic, and he was tall, thin, African American.

5 Q. Did the officer say anything to you before you
6 made your identification?

7 A. No.

8 Q. Did he say anything to you during or after you
9 made the identification?

10 A. No.

11 Q. Did you know at all when you rode by that this
12 man -- did anyone tell you he was involved with the
13 Gilroy's incident?

14 A. No.

15 Q. Any at any point before making your
16 identification, did Officer Burns or anyone else make a
17 suggestive comment to you regarding the defendant's
18 identity?

19 A. No.

20 Q. Did anyone influence your identification?

21 A. No.

22 Q. Did you hear anyone else identify the defendant as
23 a suspect?

24 A. No.

25 Q. What was your reaction to seeing the defendant

1 that night?

2 A. I was upset, because I knew he was guilty of a
3 crime that I had just witnessed, you know. He cut an
4 innocent man's face..

5 Q. Did you identify anyone else?

6 A. No.

7 Q. How sure were you that the defendant was the
8 suspect?

9 A. 100 percent.

10 Q. Is there any doubt whatsoever in your mind?

11 A. None.

12 Q. Has the defendant's condition changed at all since
13 then?

14 A. No. He looks pretty much the same.

15 MS. HALEY: Court's indulgence.

16 THE COURT: Yes.

17 BY MS. HALEY:

18 Q. Do you want to be here today?

19 A. Yes.

20 MS. HALEY: All right. Nothing further.
21 Please answer any questions the defendant may have.

22 THE COURT: All right. Cross-examination.

23 MR. MAYER: Thank you, Your Honor.

24 CROSS-EXAMINATION

25 BY MR. MAYER:

1 Q. Good afternoon, Mr. Silcott.

2 A. How are you doing?

3 Q. You mentioned you're in college. Have you earned
4 a degree?

5 A. No.

6 Q. You said you've got three years of college?

7 A. Yes, 50 credits.

8 Q. Congratulations. I want to jump right to this
9 knife that you saw. You described it earlier on direct,
10 and you said it was -- the whole knife was about this big
11 (indicating)?

12 A. No, no. I would say it was more like this big.

13 Q. Would you say that's about four inches long?

14 A. Yes, including the handle, though the blade was
15 probably an inch and a half.

16 Q. An inch and a half long blade, not an inch and a
17 half wide blade?

18 A. Yes, the blade was probably about this big
19 (indicating).

20 Q. How wide was the blade?

21 A. Not very wide, I mean --

22 Q. Can you show me with your fingers?

23 A. It's a piece of metal.

24 Q. I don't mean the cutting edge of the blade, I mean
25 kind of so --

1 A. You mean the handle?

2 Q. No, I mean -- so if my hand is a knife and this is
3 the length this way, how far across --

4 A. Probably like this (indicating).

5 Q. Okay.

6 A. You know, it obviously died out into a point.

7 Q. Okay. It was like a pocketknife?

8 A. Yeah, but it was one of the smaller pocketknives
9 that -- like I said, it's a very common knife.

10 Q. Sure. And you mentioned that there was something
11 like a thumb hole on it?

12 A. Yes, like a -- you slide your thumb in there to
13 pull it open.

14 Q. Okay. Now, so, like, literally a hole that you
15 could put your thumb in and open the blade with?

16 A. No. It looked like, you know, a side profile of a
17 crocodile, or an alligator.

18 Q. Okay. Go on.

19 A. Well, I don't know when the knife is closed I'm
20 not sure if that part is exposed, but I know when you
21 open the knife, there is a small hole about that big in
22 the knife.

23 Q. Okay. All right. And you were three feet away
24 from this knife.

25 A. Yes.

1 Q. And you were over there because you wanted to help
2 the victim?

3 A. I did.

4 Q. But you didn't want to help the victim enough to
5 stick around and give a statement to the police?

6 A. No. I was late for my shift.

7 Q. Did you see the police activity out there after
8 you went back to work?

9 A. I did.

10 Q. You couldn't have told whoever you were working
11 with that, Hey, I got to tell these guys?

12 A. I did. I mentioned it when I got back to work to
13 several people. It was a pretty significant incident not
14 to mention.

15 Q. But you could have told them, Hey, cover for me
16 for five minutes, I got to go talk to the cops?

17 A. It didn't occur to me at the point. I was more
18 shaken by the scenario outside.

19 Q. You testified on direct that you were still shaken
20 up when you got off of work.

21 A. I was.

22 Q. When you were riding your bike --

23 MR. MAYOR: Well, Your Honor, may I approach
24 the witness?

25 THE COURT: You may.

1 BY MR. MAYER:

2 Q. I'm showing you what has been marked for
3 identification purposes as -- I'm sorry. It's been
4 marked as State's Exhibit 9. It's actually in evidence.
5 Is this the knife you saw that night?

6 A. No.

7 Q. You're certain?

8 A. I'm certain.

9 Q. No thumb hole in this?

10 A. It's too big.

11 Q. The blade is a lot bigger. When you were riding
12 home that night, you testified that you called out
13 something to the police officers?

14 A. I did.

15 Q. And you toned your language down a little bit here
16 for court, didn't you?

17 A. No, I believe that's what I said. I might have
18 said Fing piece of shift, but it was definitely piece of
19 shit.

20 Q. You might have used the N word?

21 A. No.

22 Q. You didn't call out, you know, arrest that N?

23 A. No. Absolutely not.

24 Q. And you didn't say later, while you were talking
25 smack to the defendant here, you didn't say lock that

1 N up?

2 A. No. I never used the N word.

3 Q. It's not popular to be a racist, is it?

4 A. No.

5 Q. So, really, what happens when you arrived home was
6 you saw the cops having stopped a black guy and you had
7 just seen a crime with a black guy and you thought it
8 would be good to have a black guy arrested?

9 A. No. I seen the same gentleman that I seen earlier
10 that night. He was wearing a bright neon shirt that made
11 it very visible to me, and I seen his salt and pepper
12 hair from the bright lit corner across the street, so
13 that's when I said to myself, That's the man. Holy crap.
14 They got him.

15 Q. So you saw a black man with salt and pepper hair,
16 that's the man, you recognized him even though he had a
17 different shirt on?

18 A. Yes. Absolutely.

19 Q. When -- after you called out -- whenever it was
20 that you called out from the other side of the street,
21 the officer flagged you down?

22 A. He said, Hey, come here.

23 Q. And you thought you were in trouble?

24 A. Yes.

25 MR. MAYER: Nothing further.

REDIRECT EXAMINATION

BY MS. HALEY:

Q. Stephen, how old were you when this occurred?

A. Eighteen.

Q. How long had you had the job at Five Guys?

A. One week.

Q. Were you a little worried maybe you would get in trouble for not going back to work?

A. Absolutely.

Q. Had you ever seen anything like this before?

A. No.

Q. And what were the distinguishing features about the defendant that night?

A. His salt and pepper hair.

Q. And what seemed odd to you that night when you rode by him?

A. That he changed his shirt and put a bright neon shirt on.

MS. HALEY: Court's indulgence? Nothing further.

THE COURT: Sir, you may step down.

THE WITNESS: Thank you.

THE COURT: Thank you.

All right, ladies and gentlemen. We're going to take about a five-minute break. Y'all had a lengthy

1 break, but my court reporter and the lawyers have not had
2 one, so if y'all take a five-minute break, I think we can
3 get one or two more witnesses back in and we'll get you
4 back in as soon as we can.

5 (Recess taken.)

6 (In open court, jury not present.)

7 THE COURT: Okay. I admitted State's 10
8 through 12 over defendant's objection.

9 MS. HALEY: Yes, sir.

10 THE COURT: And I didn't know if y'all wanted
11 to put anything further on the record about that. I
12 admitted them under 803(6), which we call the business
13 records exception, but also really is called records of
14 regularly conducted activity, and then also they arguably
15 would be admissible under 803(8) as records of a public
16 agency, but I'm happy to hear anything else that you
17 wanted to put on the record.

18 I think your objection is preserved but out
19 of an abundance of caution --

20 MR. MAYER: Your Honor, and I just -- I would
21 just like to check that rule. I don't have my book on
22 me, if we could.

23 THE COURT: If you want to look at it, we can
24 talk about it after we take a quick break, if you want.

25 MR. MAYER: Could we talk about it in the

1 morning? I don't even know if I can talk about it.

2 THE COURT: You can put your argument on the
3 record whenever you want it. I'm not going to change my
4 mind. It's already in.

5 All right? That's fine.

6 MR. MAYER: Thank you, Your Honor.

7 THE COURT: All right. Y'all take five and
8 we'll be back.

9 (Recess taken.)

10 THE COURT: Briefly, we didn't actually
11 dismiss Mr. Silcott, but I was hoping we could do that so
12 he could get back to Maryland.

13 MS. HALEY: Yes, thank you.

14 THE COURT: No problem. Anything else before
15 we bring in the jurors? Okay. Thank you.

16 (In open court, jury present.)

17 THE COURT: Okay. Thank you. Thank you,
18 ladies and gentlemen. Ms. Haley, call your next witness,
19 please, or Ms. Compton.

20 MS. COMPTON: Thank you, Your Honor. The
21 State calls Sergeant Kelly Stone.

22 KELLY STONE,

23 having been first duly sworn,

24 was examined and testified as follows:

25 DIRECT EXAMINATION

1 BY MS. COMPTON:

2 Q. Good afternoon, Sergeant Stone. Where are you
3 presently employed?

4 A. Charleston Police Department.

5 Q. How long have you been with CPD?

6 A. Eleven years.

7 Q. Is that your whole time in law enforcement?

8 A. Yes, ma'am.

9 Q. Okay. What do you do for CPD right now?

10 A. I'm currently the administrative sergeant for team
11 three.

12 Q. What does that mean?

13 A. I work some cases, simple assaults, threats, small
14 property crimes. I am in charge of the school resource
15 officers. Another investigator and I assist the team
16 commander with whatever he needs.

17 Q. Was that your position back in October 2010?

18 A. No. I was a patrol supervisor in team two.

19 Q. What did that mean?

20 A. I rode some calls, supervised four or five
21 officers to take care of whatever their needs were, gave
22 them advice for reports, traffic; just all kinds of
23 things.

24 Q. And while you were supervising patrol, how long
25 were you doing that patrol generally?

1 A. I was there for about four years.

2 Q. Okay. During that time, did y'all make a lot of,
3 for example, open container arrests?

4 A. Yes. That's a big part of team two

5 Q. Okay. Does team two have, like, a territory?

6 A. Yes. It's everything south of Calhoun Street,
7 from the water on both sides, down to the Battery.

8 Q. Okay. And those arrests, did you ever recall or
9 hear of anyone just leaving an open beer can on the
10 sidewalk on King Street?

11 A. No, ma'am.

12 Q. Okay. Now, were you involved in an incident on
13 Gilroy's Pizza on October 3, 2010?

14 A. I was.

15 Q. Do you know the address there?

16 A. It's 353 King Street in Charleston County.

17 Q. And how did you know to go there? What happened?

18 A. We were dispatched over the air to a dispute with
19 weapons.

20 Q. Okay. Were you the first officer on the scene?

21 A. No, I was not.

22 Q. Do you know who was?

23 A. Officer Gaskins was the first officer.

24 Q. And are you the case agent in this case?

25 A. Yes, ma'am.

1 Q. And as part of that, is it your job to review all
2 the reports and everything submitted for the case?

3 A. Yes.

4 Q. Okay. Were you aware of whether or not Officer
5 Gaskins did anything when he was there?

6 A. When he responded, he immediately checked on the
7 victim, checked to see if he needed EMS, and then he
8 began speaking with witnesses that saw the event.

9 Q. And were you aware of whether or not he spoke with
10 any witnesses?

11 A. He did.

12 Q. Did he give any descriptions of suspects from
13 these witnesses?

14 A. He got the description, yes.

15 Q. What was that description?

16 A. The offender was described as a black male, around
17 six-two, six-three, slender build, salt and pepper hair,
18 close cut, scruffy beard, facial hair. It was close cut,
19 though, wearing a dark shirt and jeans.

20 Q. Was there anything else about the suspect that was
21 described to Officer Gaskins?

22 A. He fled the area on a bicycle.

23 Q. Was there anything in particular?

24 A. He was advised that there was a bag attached to
25 the front of it.

1 Q. Okay. Did that stand out to you or to anyone
2 else?

3 A. It seemed a little bit unique that somebody would
4 have a grocery bag attached to their bike.

5 Q. Now, did you later -- I'm sorry. Do you know who
6 this description was obtained from?

7 A. Mr. Corbin.

8 Q. And did you later take a written statement from
9 Mr. Corbin?

10 A. I did.

11 Q. Did you ask him about the bike in that statement?

12 A. I did not.

13 Q. Now, when you arrived on scene, you indicated that
14 you met with officers, and you got a description. Did
15 you do any other sort of investigative work or anything
16 like that?

17 A. I took the statement. A description was put out.
18 I asked for crime scene and the investigator to come to
19 assist with any other witnesses, and Investigator
20 Burckhardt asked about surveillance inside the
21 establishment, but unfortunately it was not working at
22 the time of incident.

23 Q. Where was the victim when you got there?

24 A. The victim was being treated by EMS at the time.

25 Q. Did you talk with the victim?

1 A. I don't think I did.

2 Q. Okay. Did the investigation continue that night?

3 A. It did. It continued till about 12:30 at night.

4 It continued.

5 Q. Okay. Were you involved at 12:30 that night?

6 A. I was.

7 Q. Tell me about that.

8 A. Officer Burns put out over the air he was out with
9 a possible suspect from the earlier crime, so I went over
10 there to assist him to see exactly what it was he had.

11 Q. Okay. What happened when you got there?

12 A. He had the suspect stopped. He was speaking with
13 him, and he also pointed out that the guy from Five Guys
14 had come by and pointed out that that was the person from
15 earlier.

16 Q. Okay. Were there any other further investigative
17 work done in this?

18 A. Investigator Burckhardt came back over and got a
19 statement from Mr. Silcott.

20 Q. Okay. Are you aware of whether or not he got any
21 other statements from anyone else that night?

22 A. The only thing I'm aware that he got was the one
23 from Mr. Silcott.

24 Q. Were there any lineups done, any six packs or
25 lineups?

1 A. No.

2 Q. Why not?

3 A. We felt confident that that was the strongest ID,
4 was from Mr. Silcott.

5 MS. COMPTON: I have nothing further at this
6 time.

7 THE COURT: All right. Cross-examination.

8 MR. MAYER: Thank you, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. MAYER:

11 Q. Good afternoon. So you're saying to me -- you're
12 saying to this jury that you saw a description -- heard a
13 description about a white bag, and it stuck out in your
14 mind.

15 A. It did.

16 Q. And it stuck out in your mind so much that when
17 you took a statement from the witness who told you about
18 the white bag that you didn't even put that white bag in
19 his statement?

20 A. It just didn't get on there.

21 Q. You would agree that the white bag is pretty
22 unique, right?

23 A. It is.

24 Q. Pretty important piece of a description?

25 A. It was.

1 Q. And you were the case officer on this case?

2 A. I was the supervisor, working that night.

3 Q. And I think you testified on direct that you would
4 have read whatever reports were written up about this.

5 A. I did.

6 MR. MAYER: May I approach, Your Honor?

7 THE COURT: You may.

8 BY MR. MAYER:

9 Q. Sergeant, I'm showing you what has been marked for
10 identification as Defense Exhibit 2. Can you tell me
11 what that is.

12 A. This the supplemental completed by Investigator
13 Rich Burckhardt.

14 Q. Did you review that during the investigation?

15 A. I did not. I'm not his supervisor.

16 Q. I'm sorry. I thought you were the case
17 supervisor, the case agent.

18 A. He has a different supervisor than I do.

19 Q. So you haven't reviewed all the documents in this
20 case.

21 A. I read it after the fact, before -- in preparation
22 for the trial.

23 Q. Okay. Can you tell from that document what time
24 the last time edited was?

25 A. It appears that it was approved on October 4th at

1 10:26 in the morning.

2 Q. I'm sorry. Could you point it out it for me?

3 A. This is when it was approved (indicating).

4 Q. So can you tell from that when the last time was
5 that it was edited?

6 A. Well, it was sent in by the investigator on
7 October 3rd it looks like at 2319, but, I mean, I
8 wouldn't know if it was sent back --

9 Q. Okay.

10 A. And he made any changes.

11 Q. How do those time stamps work?

12 A. When I type a report, you hit send, and it goes
13 into a database, so it would have been sent in then and
14 it would have been stamped when it would come back. If
15 it were approved, it would be stamped at the time the
16 supervisor approved it, but if there were any changes in
17 between that, they would not be on here.

18 Q. It would not be reflected in there.

19 A. Not on this particular document.

20 Q. Okay. So from looking at that document you can't
21 necessarily say with certainty that it wasn't edited
22 after the officer sent it in, Officer Burckhardt sent it
23 in?

24 A. It says he sent it in at 20:30:19 and it was
25 approved at 10:26.

1 Q. And Officer Burckhardt, you said, had a different
2 supervisor than you.

3 A. Yes, he did.

4 Q. But he was involved in this investigation?

5 A. Yes, sir.

6 Q. So if that time stamp is accurate, then that
7 report was sent in, submitted, to the police system prior
8 to any officers encountering Mr. Desaussure, right?

9 A. Yes, sir.

10 Q. That's a record held in normal police business?

11 A. This particular document?

12 Q. This type of document.

13 A. A supplemental report is a typical record.

14 Q. Okay. All right. Take your time and look through
15 this and tell me where it mentions anything at all about
16 a white plastic bag.

17 A. It does not.

18 Q. So you had, theoretically, Mr. Corbin who saw this
19 incident. You had, theoretically, Mr. Silcott who says
20 he saw the incident. You had another witness who saw the
21 incident. Did you do any lineups, identification lineups
22 or anything, to ID the person who is apprehended?

23 A. I did not, no.

24 Q. And you're the case supervisor?

25 A. That night, yes.

1 Q. Just that night. You were not the supervisor of
2 this entire case?

3 A. That was the case for us that night.

4 Q. Okay. So -- anyway, there were no other
5 identifications made ever of this defendant here, were
6 there?

7 A. There was --

8 Q. You mentioned Silcott.

9 A. There was an identification made on the night of
10 the incident by Mr. Silcott.

11 Q. Right. And besides that, there was no other
12 eyewitness identification made of this defendant here.

13 A. That's correct, just Mr. Silcott.

14 Q. Right. Not through show-ups -- can you tell the
15 jury what a show-up is?

16 A. A show-up is when you bring a victim or a witness
17 of a crime to where the offender is stopped and allow
18 them to say yes or no, that is the person who committed
19 the crime.

20 Q. And there was none of those.

21 A. That wasn't possible at that point.

22 Q. Why not?

23 A. The victim was being treated and was injured.
24 There was no way --

25 Q. What about Mr. Corbin?

1 A. Mr. -- three hours later, we were unable to
2 contact Mr. Corbin, I believe, was the issue.

3 Q. What about the other guy?

4 A. I don't know where he was.

5 Q. All right. So you didn't do a show-up. How about
6 a photo line-up? Why don't you tell the jury what a
7 photo line-up is.

8 A. A photo line-up is usually six pictures that are
9 put, similar looking people. You present it to a victim
10 or a witness. They look at it and determine if they see
11 the offender in the line-up.

12 Q. That's something that could have been done at the
13 victim and witnesses' convenience later, right?

14 A. It can be.

15 Q. But it wasn't done in this case.

16 A. It was not.

17 Q. Okay. And is there another option for how to make
18 an ID on a witness, like an actual line-up? Can you
19 describe what a line-up is for the jury? Like, not a
20 photo line-up, like a real line-up.

21 A. I personally have never been a part of a line-up
22 of six people. I've never seen that done.

23 Q. Okay. So y'all don't have any of that kind of
24 identification here.

25 A. Putting six people in a line and having a victim

1 or witness say that's him or not him?

2 Q. No. I just mean y'all have any other
3 identifications, like we talked about. It's just
4 Silcott?

5 A. I'm sorry. Mr. Silcott was the person who
6 identified him, yes.

7 Q. Were you involved at all in sending -- in doing an
8 DNA collection in this case?

9 A. I was not part of that. That's something
10 Investigator Burckhardt was involved with.

11 Q. Have you seen the results of that?

12 A. I have not.

13 Q. So do you know when that was done, the DNA?

14 A. I do not. It may have been February.

15 Q. How about the fingerprints? Were you still at
16 Gilroy's when they came and dusted for fingerprints?

17 A. I believe so.

18 Q. Do you know the results of that?

19 A. They did not obtain any fingerprints.

20 Q. And they certainly didn't obtain any matches to
21 this defendant, did they?

22 A. No, they did not.

23 Q. So now two-and-a-half years later, with no IDs
24 from these other witnesses, no DNA evidence, and no
25 fingerprint evidence and nothing in the police report

1 about a white bag, you're telling me about a white bag?

2 A. The white bag is mentioned in the original report.

3 Q. Okay. And the original report was finished when?

4 A. I don't see a time for when this was one approved.

5 They're a little bit different than the supplemental
6 reports, but it would have been done probably sometime on
7 the night of the 4th.

8 Q. And it was written up, you can tell from rereading
9 it, after Mr. Desaussure was stopped, right?

10 A. It would appear so, yes.

11 Q. I mean, it refers to Mr. Desaussure being stopped.

12 A. It does, yes.

13 Q. So therefore it had to have been written up
14 afterwards?

15 A. Yes.

16 Q. After they found a white plastic bag on his bike.

17 A. Yes.

18 Q. Can you point to anything at all for this jury,
19 anything, to show that there was a white plastic bag
20 reported as being on the suspect's bicycle?

21 A. The fact that it was written in the original
22 report.

23 Q. Can you point to anything that wasn't written up
24 after the fact?

25 A. No, I cannot.

1 MR. MAYER: No further questions.

2 THE COURT: Redirect?

3 MS. COMPTON: Oh, I'm or sorry. Thank you,
4 judge.

5 REDIRECT EXAMINATION

6 BY MS. COMPTON:

7 Q. Sergeant, Mr. Mayer asked you a lot of questions
8 about reports and approval times. Can you tell the jury
9 just generally about how reports were written and
10 approved in the computer system.

11 A. We have a computer system where all reports are
12 typed. You can start a report and go to another call and
13 not have it finished, it's saved, so Officer Gaskins had
14 started on this report and other calls may have come in.
15 He stopped. You can leave at any time and come back to
16 it, but reports are completed before the end of your
17 shift.

18 MS. COMPTON: Your Honor, permission to
19 approach the witness?

20 THE COURT: You may.

21 BY MS. COMPTON:

22 Q. And now you were Officer Gaskins's supervisor,
23 correct?

24 A. I was.

25 Q. And to be honest, this is -- I usually don't like

1 to ask questions that I've never asked anyone before, but
2 is this the report from this case?

3 A. Yes, it is.

4 Q. And is there any sort of time stamp on this
5 report?

6 A. Yes, date and time the incident was reported.

7 Q. Okay. And what. And what does that say?

8 A. October 3rd, 2010 at 2112 hours, which is 9:12 in
9 the evening.

10 Q. Is there anything else on this report that would
11 indicate to you what time it was entered or what time it
12 was approved?

13 A. No, there is not.

14 Q. Okay. Now, do you recognize page three of this
15 report?

16 A. Yes.

17 Q. Okay. And whose report is this?

18 A. This is Officer Gaskins's original report.

19 Q. Okay. And in the narrative, not the time stamp,
20 but the narrative of this report, does he indicate any
21 time?

22 A. He does. On October 3rd, 2010, at
23 approximately -- well, at 2115, which is 9:15 p.m.,
24 Officer Gaskins was dispatched to 325 King Street,
25 Charleston, South Carolina.

1 Q. And in that, does he list anything about the white
2 bag?

3 A. He does. He lists the witness number one was
4 Mr. Corbin stated that the subject left the scene on a
5 bike north on King Street and making a left turn
6 westbound on Calhoun Street. Subject left the scene on a
7 bike with a white plastic bag attached to the front.

8 Q. Now, does this anywhere from these pages of this
9 report that I've shown you indicate what time this report
10 was entered or approved?

11 A. It does not.

12 Q. Okay. So it could have been either before or
13 after?

14 A. He could have begun writing this report before.

15 Q. But there is nothing that indicates it was
16 necessarily after either?

17 A. No.

18 Q. I can take all that back from you. Now, when an
19 officer goes out, do they generally make notes?

20 A. They usually do write thing downs in a notebook.

21 Q. Okay. And what are those notes used for?

22 A. Typically writing a report, reminders, names,
23 dates, times.

24 Q. But those aren't -- those are assimilated into the
25 report; is that correct?

1 A Yes.

2 Q. Okay. And officers typically rely on those notes
3 when writing a report, correct?

4 A. Yes.

5 Q. Now, would there be an occasion when you or
6 Officer Gaskins or anyone you supervised would go back
7 and add evidence into a report that wasn't initially
8 there in your notes?

9 A. I would think typically anything that's important
10 was written in your notes. If there is something that
11 was accidentally left out or a date was wrong or
12 something was incorrect, it can be corrected.

13 Q. And would you manufacture evidence to include it
14 in a later version of a report?

15 A. Absolutely not.

16 Q. All right. Now, was Mr. Corbin present three
17 hours later that night when the defendant was stopped?

18 A. No.

19 Q. Okay.

20 MS. COMPTON: Nothing further. Thanks.

21 THE COURT: Okay. Any redirect?

22 MR. MAYER: Just briefly.

23 THE COURT: Or recross.

24 MR. MAYER: May I approach the witness?

25 THE COURT: You may.

RECROSS-EXAMINATION

1
2 BY MR. MAYER:

3 Q. We have marked as Defense Exhibit 4 what I'm
4 handing you, what Ms. Compton was having you refer to
5 just a minute ago when you read off the top date there.
6 That's the same thing that I had you read earlier on the
7 early cross-examination when it refers to October 5th,
8 which is erroneous, which they mean to be October 4th.

9 A. Correct.

10 Q. Okay. And Ms. Compton asked you if there was
11 anything in that report that would indicate it was
12 completed later than the incident at Gilroy's, and you
13 said no, but you were referring to, like, time stamps and
14 this sort of thing, right?

15 A. Yes.

16 Q. You weren't referring to the information that's
17 contained in the body of that report, right, to ascertain
18 whether it was closed or sent or finished or finalized
19 prior to when Mr. Desaussure was stopped on the bicycle
20 early in the wee hours of October 4th?

21 A. At one point there was a question about time
22 stamp, and there was also a question about what's
23 actually in the narrative. I'm not sure which one you're
24 referring to.

25 Q. All right. Well, let me just make it simple.

1 Does that report show that it couldn't possibly have been
2 completed prior to when Mr. Desaussure was stopped
3 sometime after midnight on the 4th?

4 A. I don't know how much of the report he had done at
5 that point, but as far as a completed document, no.

6 Q. I mean, you don't know if he had any of the report
7 done.

8 A. I do not know.

9 Q. But we definitely know that he hadn't finished the
10 report at the time, right?

11 A. No.

12 Q. So it's entirely possible that either he started
13 the report after he pull -- stopped Mr. Desaussure or
14 that he went back and completed the report after he
15 stopped Mr. Desaussure, either one of those -- one or the
16 other of those had to have happened, right?

17 A. The only other thing I could think is it had not
18 been approved. If it had not been approved by the time
19 he was stopped, it could have been pushed back to finish
20 it, to the put the end on it, and you could to do a
21 supplemental. In this case, it may have been sent back,
22 but that, I don't know.

23 Q. I guess my question is, we can't tell when the
24 officer wrote that narrative in there, can we?

25 A. Not with what I have here today, no.

1 Q. We can't tell if it was before he stopped
2 Mr. Desaussure or after he stopped Mr. Desaussure.

3 A. No.

4 Q. And that report -- nowhere in that report does it
5 say that this description about a white bag came from
6 some witness, correct?

7 A. It says Adam Corbin, witness number one, Adam
8 Corbin.

9 Q. Let me help. Show me where it says that.

10 A. Right here. Witness number one stated the subject
11 left the scene on a bike, north on King Street, and
12 making a left westbound down Calhoun Street. Subject
13 left the scene on a bike with a white plastic bag
14 attached to the front.

15 Q. And it goes on and says, correct me if I'm reading
16 wrong, EMS arrived on the scene, and stated that the
17 laceration, blah, blah, blah, but Mr. Corbin didn't say
18 anything about EMS.

19 A. No, he did not.

20 Q. So what on earth makes you think Mr. Corbin said
21 anything about a plastic bag?

22 A. But it doesn't have a different name there. It
23 comes right after witness number one, Adam Corbin.

24 Q. It says subject?

25 A. Subject left the scene would be the person that

1 committed the crime.

2 Q. Yeah.

3 A. Grammatically, I don't think you would list his
4 name twice two sentences in a row.

5 Q. Let me ask you this: You're looking at your copy
6 where it says within one there is an open parentheses,
7 right?

8 A. That is correct.

9 Q. Where does that parentheses close?

10 A. It closes after his birth date, as most reports do
11 when would you're putting additional information after a
12 person's name.

13 Q. Okay. So in no way does that parentheses indicate
14 that he is still stating something.

15 A. It doesn't have anything to do with the sentence
16 structure.

17 Q. So do the ends justify the means, Sergeant?

18 A. I'm not sure what you're implying.

19 Q. If you guys catch someone who you think is the
20 right guy, is it okay to fix the evidence --

21 MS. COMPTON: Objection.

22 MR. MAYER: -- to make that work?

23 THE COURT: Sustained.

24 MR. MAYER: No further questions.

25 THE COURT: All right. Thank you, Sergeant.

1 You may step down.

2 Okay. Ladies and gentlemen: We are at a
3 logical stopping point for the day. We have a few issues
4 we need to iron out, which we're going to try to do this
5 afternoon, and then in the morning, before y'all get
6 here, to avoid sending you out for any extended period of
7 time, we do have several things. We need to deal with
8 the information, and we'll ask you to come back at 10:00
9 instead of 9:30, so be back, if you would, at 10:00.

10 Please don't discuss the case or do any
11 independent research or watch anything or read anything,
12 I don't anticipate there will be any reporting on this,
13 but ignore it should you come across any.

14 Thank you very much.

15 (Jury recessed.)

16 THE COURT: Okay. Those witnesses will be
17 back at 9:30. I got that grand juror to meet with 9:30,
18 and I don't think that will take but a few minutes. Be
19 here at 9:30 and 10:00.

20 Sarah is going to print y'all the draft jury
21 charge. We just sent that to the office computer to get
22 printed. It's very bare bones. Anything y'all need
23 added or changed, we'd do the actual charge conference at
24 the end of all the evidence, but if you have anything you
25 want me to be working on tomorrow while we're in trial,

1 I'll be happy to do that.

2 Now, Mr. Mayer, what was your concern about
3 Officer Burckhardt?

4 MR. MAYER: This is my first General Sessions
5 trial, and I may have made the error of assuming that
6 Mr. Burckhardt would be here because I have him down as
7 like the chief investigator.

8 THE COURT: Well, it looks like he's a
9 supervisor on this matter.

10 MR. MAYER: I very much would like to speak
11 with him. I don't have him under subpoena, but I would
12 really like to get him.

13 THE COURT: Has he been notified to be here?

14 MS. HALEY: We do have him under subpoena.
15 We were trying to try to streamline things. I also
16 called Sergeant Stone. Also, I don't know what we're
17 trying to get into with the DNA base of stipulation.

18 THE COURT: I don't either, but if he's under
19 subpoena for y'all, y'all tell him to be here at 9:30 in
20 the morning. Aaron can at least talk to him. Obviously,
21 I think you have a stipulation, and I think what y'all
22 had said was the DNA didn't get a hit or there was no
23 match, so, you know. I've got a copy of the stipulation,
24 right?

25 MR. MAYER: I do, your honor. AS long as I

1 can argue it to the jury --

2 THE COURT: Argue what, about the DNA?

3 MR. MAYER: Argue there was no match and it
4 was tested.

5 MS. HALEY: And that's what the stipulation
6 says.

7 THE COURT: Well, hang on one minute. Let me
8 just look at it. As I read number eight, both Alonda
9 Desaussure and Adam Cobiella were excluded as possible
10 contributors on the known DNA on the knife because their
11 DNA profile does not match the DNA found on the knife.

12 Number six notes that the mixture of two
13 unidentified individuals was found on the knife, but
14 number eight then says it was neither the defendant nor
15 the victim. So I think that let -- that's going to be in
16 evidence.

17 I think you'll have already signed that, but
18 certainly if you want him to be here so you can talk to
19 him, let Ms. Haley and Ms. Compton know. I'm not going
20 to make them come if they're not going to call him,
21 unless you are planning to call him or you're going to do
22 something.

23 MR. MAYER: I think I would still like him
24 here, Your Honor.

25 THE COURT: All right. Tell him to be here

1 at 9:30. He can chat with him, figure out what our that
2 strategy will be for the day. Anything else we need to
3 be -- think told I y'all this. I'm tired, so I'm not
4 sure if I said this already, but I'm going to the
5 visitation this afternoon but not the funeral.

6 Sarah is going to go to the funeral so we can
7 get rolling in the morning. Anyway, we are going to be
8 at ease unless y'all have anything else you need to do.

9 MR. MAYER: Your Honor, if I could, I just
10 want to hand up what I've already given Ms. Haley. It's
11 just a motion to include an identification charge to the
12 jury.

13 THE COURT: Okay. I'll take a look at it
14 tonight.

15 MR. MAYER: Thank you, Your Honor.

16 THE COURT: I'll look at it and we'll argue
17 about it tomorrow. Okay?

18 (Recess taken.)

19 (July 10, 2013.)

20 (In open court, jury not present.)

21 MS. HALEY: We don't see a reason to
22 necessarily call Officer Burckhardt this morning;
23 however, we were discussing it last night, and we were
24 interested in potentially entering the defendant's
25 booking photo into evidence through Officer Burckhardt to

1 show that's how he looked that night. Of course, we
2 would be willing to redact it to make it less prejudicial
3 to the Court, if the Court would like us to do that, so
4 we just kind of wanted to bring that up and see how Mr.
5 Mayer felt about that.

6 THE COURT: So you're saying -- yeah, come on
7 up. Thank you, sorry. I mean, obviously, we would make
8 it not look like a booking photo.

9 MR. MAYER: And, Your Honor, we had the exact
10 same thought, and I was going to authenticate this
11 picture through the crime scene from Officer Burckhardt.

12 THE COURT: If y'all want to reach an
13 agreement to put the pictures in without calling
14 Burckhardt, I'm fine with that, if y'all agree to that or
15 we could put them up and y'all could put both of them in.

16 I'm going to let that in for sure. This, I
17 will let in but I'm not going to let it in with all the
18 detention center markings on it, but y'all can mark it.

19 So y'all decide what you want to do. If you
20 need Burckhardt for other reasons, you can obviously call
21 him in your case or --

22 MR. MAYER: Everything else would be
23 redacted. I'm concerned about being prejudicial because
24 it shows him in his prison barb. If they -- could we use
25 one picture and not the other?

1 THE COURT: Sure. They don't need both of
2 them.

3 MR. MAYER: The two of them, this and that
4 make it feel --

5 THE COURT: Okay. So y'all will agree to
6 admit those as redacted?

7 MS. COMPTON: That's a crime scene picture
8 and --

9 THE COURT: Or we can admit it over your
10 objection.

11 MR. MAYER: Let's do it over my objection.

12 THE COURT: Let's do all that formally in a
13 minute.

14 Now, what about Burckhardt do y'all want to
15 call him? It's your case --

16 MS. HALEY: After reviewing the charges, I
17 don't have an issue with those; however, because of the
18 interesting nature of this type of armed robbery, we do
19 have State v. Moore which goes into continuous offense
20 theory and we were hoping there was a way to include the
21 language from that case into the jury charge.

22 THE COURT: Let me pull State v. Moore up.

23 MS. HALEY: I have a copy for you right here,
24 if you like it, State v. Moore and State v. Mitchell. It
25 starts at the bottom of that page that I flipped over to,

1 and then State vs. Moore goes into a little bit more
2 detail.

3 THE COURT: Let's see this: I still have to
4 figure out how I feel about Mr. Mayer's charge that he
5 ended up and let y'all argue about that, so as soon as
6 y'all are ready, get the jury back in, and let the State
7 finish its case, send them out, have motions, talk about
8 the Fifth Amendment, and then in the meantime I'll be
9 working on the jury charges as well, and we'll go from
10 there, we'll just have an actual charge conference.

11 Okay. It's my understanding that through
12 Officer Burckhardt the State is going to offer the
13 redacted booking photo as State's 13, and go ahead and
14 put your objections on the record now if you would.

15 MR. MAYER: Thank you, Your Honor, and the
16 defendant objects on the basis that the admission of this
17 photo would be substantially more prejudicial than
18 probative because there are plenty of alternative photos
19 from the crime scene that can be used that show the
20 defendant's face and the nature of the booking photo
21 where he's looking directly into the camera or
22 alternatively looking square off to the side. Both
23 scream booking photo, whether his jail shirt is covered
24 up or not.

25 And we feel that even though the jury knows

1 that he was incarcerated, we feel like they do not know
2 the full extent of exactly how incarcerations work and
3 that the person's clothes are removed from them and they
4 are processed in the system in a very complete way.

5 We feel like the photo would insinuate that
6 process. It would insinuate the State supporting his
7 guilt in this case. It would be substantially more
8 prejudicial than probative.

9 THE COURT: Okay. Yes, ma'am?

10 MS. HALEY: The State would argue it's not
11 prejudicial, that they know that he was arrested that
12 night for this crime. Also, we're redacting the photo to
13 only have the front view and to make it look less like a
14 booking photo and to get rid of all the information about
15 the detention center and about his date of arrest.

16 And we also think it looks very similar to
17 the scenes taken at the crime scene. It's just a better
18 photo of the defendant of how he looked.

19 THE COURT: Okay. I'm going to admit the
20 photo over the defense objection. Identification and
21 what the defendant looked like on the night of the
22 incident and the arrest is really the major issue in this
23 trial, so any photo of what he looked like at the time of
24 the incident that evening is certainly relevant under
25 Rule 403.

1 The standard under Rule 403 states that
2 although relevant evidence may be excluded if its
3 probative value is substantially outweighed by the danger
4 of unfair prejudice, confusion, or misleading jury, here
5 the probative value isn't outweighed at all by the
6 prejudicial effect, much less the substantially
7 outweighed requirement of Rule 403. Probably even as is
8 the photo even satisfies Rule 403 if we take off the
9 detention center language, but out of an abundance of
10 caution, we're going to redact it to one photo, which is
11 straight on, not sideways look, and we're going to take
12 out the striped green part of the uniform.

13 So it will be just essentially a head shot of
14 that night, and then it's my understanding too that Mr.
15 Mayer has a crime scene photo he wants to put in as well,
16 so I'm very comfortable with allowing the photo in as
17 redacted, and I find that the prejudice does not
18 substantially outweigh the probative value under Rule
19 403, so when she goes to put the photo in with
20 Burckhardt, just say objection, and I'll do it all then.
21 Okay?

22 MR. MAYER: Thank you, Your Honor.

23 THE COURT: What else?

24 MR. MAYER: I have one other request, as the
25 Court mentioned, identification is at issue in this case.

1 I've already given the solicitors this information. It's
2 just a request -- there's some case law in the back.

3 Your Honor, that's a request by the defendant
4 to take judicial notice of any one of those articles that
5 discuss eyewitness, eyewitness testimony problems. My
6 understanding of the rules on this is that the Court can
7 take judicial notice under Rule 803(18) as an exception
8 to hearsay in the South Carolina rules. It's for
9 periodicals and this sort of thing, and the way that that
10 would work is the Court would say --

11 THE COURT: Actually, it's for learned
12 treatises, isn't that what 803(18) is?

13 MR. MAYER: Well, the text of it does mention
14 periodicals. Section 18 does mention periodicals, and
15 the way that that would work -- my understanding the way
16 that would work is the Court can take judicial notice
17 that one of these publications is unbiased and reputable,
18 and then within that context, the judicial notice
19 statute, the statute, I think it's Section 203. I
20 included it up there.

21 THE COURT: This is an issue for the fact
22 finder, not for the Court. I'm aware of the studies on
23 the problems with eyewitness identification. I mean,
24 I've read about all that, okay? And I understand -- I
25 appreciate the articles one from Scientific American and

1 one is from the New York Times. What 803(18) talks about
2 when it references periodicals is when they are
3 established as a reliable authority by the testimony or
4 admission of a witness or by other expert testimony or by
5 judicial notice.

6 They usually are not -- that rule really
7 doesn't apply for magazine and newspaper articles unless
8 there is some kind of expert witness that says this is
9 what we rely on. I'll read them again. I've read them
10 before, but I'm not quite sure what you're asking me to
11 do with them.

12 MR. MAYER: What I'm asking for, Your Honor,
13 is based on the judicial notice section of that 803(18).
14 It refers to the judicial notice statute. My
15 understanding of that statute is the Court can take
16 judicial notice, saying we, the Court, recognize this is
17 a valid publication, and then through 803(18), the
18 information in that publication -- the publication itself
19 doesn't get admitted, but it can be read into the record
20 so that the jury could have the benefit of it.

21 THE COURT: Yes, ma'am.

22 MS. HALEY: Thank you, Your Honor. I believe
23 under Rule 201 where it discusses judicial notice, it
24 talks about how these items must not be capable -- they
25 must be capable of accurate and ready determination to

1 resort to sources whose accuracy cannot be reasonably
2 questioned, and judicial notice, it's my understanding,
3 does not typically involve cutting edge technology or
4 things that are still in question, and here, these are
5 very much fact issues, and the State would argue that Mr.
6 Mayer could have called expert witnesses to talk about
7 eyewitness identification; however, I don't believe that
8 judicial notice is appropriate based on magazine articles
9 and other scientific web sites and studies.

10 THE COURT: What 201(b) says is a judicially
11 noticed fact must be one not subject to reasonable
12 dispute, and then it provides additional information.
13 You know, the kind of things I would take judicial notice
14 of is what time high tide was on the day of the incident,
15 or, you know, what stage of the moon was, lighting were
16 more at issue, not something that experts continue to
17 debate about. And --

18 MR. MAYER: And, Your Honor, I totally
19 understand that, and just so my position is clear, the
20 only thing we would ask you take judicial notice of is
21 the fact that either Scientific American or New York
22 Times is a reputable publication, and then, through
23 803(18), we could read into the record.

24 THE COURT: We're not doing that. Overruled.
25 Thank you.

1 MR. MAYER: Fair enough. Thank you.

2 THE COURT: All right. What else?

3 MS. HALEY: Nothing further -- oh, we do need
4 a minute, if we could, to wait a minute or two for our
5 investigator to get back with the redacted photo. Other
6 than that, we're ready to proceed, and Culver is on his
7 way.

8 THE COURT: Okay. -- let me read you -- we
9 just got an e-mail from Scarlett Wilson: This morning
10 ASOL Elizabeth Riddle was approached by a man asking for
11 help. He asked her if she worked here, meaning at the
12 courthouse. She believed he was looking for plea court.
13 She told him she did work here but did not say where.

14 The man told her he was a juror and was told
15 to come to the fourth floor, so that's not our juror.
16 Elizabeth pointed him in the direction of deputies near
17 plea court, had no further interaction. The man did not
18 have on a juror sticker.

19 I'm going to obviously forward this to Judge
20 Jefferson. Anybody have any problem that somebody he did
21 not know -- an assistant solicitor interacting with a
22 civil juror --

23 MS. HALEY: No objection from the State.

24 THE COURT: That wasn't one of our jurors,
25 so -- that happened. I don't think it's relevant.

1 MR. MAYER: Just two quick things before we
2 get started.

3 The first is of the three subpoenas I served,
4 two of my people have shown up. One of them has not.
5 I've not encountered this before. Is there some way to
6 collect him and bring him in here or --

7 THE COURT: I mean, we can send somebody to
8 get him if y'all, need me to sign a bench warrant, I
9 guess. I'm not sure how happy he'll be when he gets
10 here, but --

11 MS. HALEY: And Your Honor, if I may speak to
12 this, we actually have a man who resides with him out in
13 the hallway and he says he doesn't know where he is.
14 They usually reside at the same residence, so --

15 THE COURT: Well, if y'all want to try to
16 track him down, we can.

17 MR. MAYER: I think we would like to attempt
18 to bring him in here, Your Honor, if possible. I've got
19 his address.

20 THE COURT: We know he was served?

21 MR. MAYER: Yes, he was served.

22 The other issue I want to take up before we
23 get started is the consideration about if my client does
24 testify how much of his prior rap sheet the State will be
25 allowed to question him about.

1 THE COURT: Right.

2 MR. MAYER: Normally, it's the prior ten
3 years. Of course, any felonies or crimes of moral
4 turpitude --

5 THE COURT: Why don't y'all give me a copy of
6 the rap so I can look at that before the State finishes
7 its case, and then we can discuss it when we break for
8 motions.

9 MS. HALEY: Right now I could go make a copy.
10 The only copy I have has notes on it. Would that be okay
11 with you?

12 THE COURT: I just want to look at it, so if
13 you want to show it to Mr. Mayer so he doesn't have any
14 objection to my looking at it.

15 (In open court, jury present.) Thank you,
16 sir.

17 Thank you, ladies and gentlemen. I
18 appreciate your patience as we worked on our matters this
19 morning. We are ready to continue with the State's case.
20 I will call on Ms. Compton.

21 MS. COMPTON: Thank you, Judge. At this time
22 the State calls Investigator Rich Burckhardt.

23 THE COURT: All right, sir. If you come up,
24 we'll swear you in. Thank you.

25

1 RICHARD BURCKHARDT,
2 having been first duly sworn,
3 was examined and testified as follows:

4 DIRECT EXAMINATION

5 BY MS. COMPTON:

6 Q. Good morning, Investigator Burckhardt. How are
7 you?

8 A. Good morning. Thank you. I'm fine.

9 Q. Would you please tell the jury where you're
10 employed.

11 A. I'm a detective with the City of Charleston Police
12 Department.

13 Q. And how long have you been doing that?

14 A. It will be 25 years in January.

15 Q. Congratulations. Now, is that the capacity you
16 were employed in October of 2010?

17 A. Yes.

18 Q. Were you called out to an incident at Gilroy's
19 Pizza on October 3, 2010?

20 A. I was.

21 Q. Could you please tell the jury what your
22 involvement was in that.

23 A. Yes. On that night, I was the duty detective for
24 the weekend when the incident occurred. I believe it was
25 a Sunday evening, and we had had a -- I was alerted by my

1 car radio that we had a cutting incident. It happened at
2 one of our restaurants on King Street where an individual
3 had been cut and robbed of some money. I responded to
4 the scene.

5 Q. All right. Now, were you the first officer on
6 scene?

7 A. No, I was not.

8 Q. When you arrived, had other officers done
9 anything, spoken with anyone?

10 A. Yeah. So the command duty officer, I believe, was
11 Lieutenant Dutton. He was there at the scene. EMS was
12 already there, and they had already loaded up the victim,
13 ready for transport to the hospital. I was directed by
14 an officer, uniformed officer at the scene, to the inside
15 of the restaurant where, as I recall, there were two, I
16 think, patrons that may have had -- made some
17 observations that I wanted to talk to, see if they could
18 shed any light on what happened, had any information. I
19 also conducted a canvass for any video that I may have
20 been able to obtain that would have aided in my
21 investigation.

22 Q. Okay. Do you recall whether the witnesses that
23 you spoke to had been inside at the time or outside?

24 A. As I recall, the restaurant itself at the time of
25 the incident was empty with the exception of the victim,

1 who was working there, and the suspect that went inside.

2 There were a couple individuals, as I recall, that
3 were actually out on the sidewalk and we -- I remember
4 when I interviewed him, we were seated at the table. We
5 went back into the restaurant, sat down, and took
6 statements from them.

7 Q. But at the time of the incident -- I'm sorry.
8 What did you say?

9 A. As I recall, it's -- I'm a little vague as to
10 whether they were actually -- just outside the door or
11 seated inside the restaurant.

12 Q. Okay. Thank you. Now, did you get involved later
13 with the case at all? Were you -- was that the extent of
14 your investigation that night at Gilroy's or were you
15 involved --

16 A. No. What had happened was my shift was ending
17 around midnight that night, and as we do in law
18 enforcement, we also work private security details of
19 such, and on that particular evening, I had gone to a
20 security detail in the peninsula. I had my radio on with
21 me, and after the incident had occurred, there was a BOLO
22 that was produced with --

23 Q. Could I stop you there? What is a BOLO?

24 A. Be on the lookout.

25 Q. Okay.

1 A. So a description was put out for all the officers
2 and I was on my detail, and I think it was somewhere in
3 the neighborhood of 12:45, after midnight, one of the
4 downtown officers had stopped and detained what he
5 believed to be an individual involved in the incident at
6 Gilroy's.

7 So I was virtually just a couple minutes away, and
8 having already been involved in it from the start, I also
9 neglected to say after leaving the restaurant I went and
10 interviewed the victim so I had a better understanding
11 what had taken place and obtained a pretty good
12 description of the individual who had attacked him.

13 I thought it would be a good idea if I left. Even
14 though I'm off duty, I was back on duty and went to the
15 scene where the officers had the individual stopped.
16 When I got out of the car -- and I noticed and I was able
17 to look at the individual that was stopped, he matched
18 the same physical description pretty much head to toe
19 that was offered to me by the victim.

20 Q. But just to be clear, you did not see the suspect
21 at Gilroy's, correct?

22 A. No, I did not.

23 Q. But did you come into contact with him once he was
24 detained later on King Street, correct?

25 A. That's correct.

1 Q. Now, were you familiar with his appearance that
2 night, I mean, you're familiar today --

3 A. Right.

4 Q. All right.

5 MS. COMPTON: Permission to approach the
6 witness?

7 THE COURT: You may.

8 BY MS. COMPTON:

9 Q. I'm going to show you what's been marked for
10 identification only as State's Exhibit 13. Do you
11 recognize the person depicted in that?

12 A. Yes, I do.

13 Q. Is that a fair and accurate representation of his
14 appearance that night?

15 A. That would be, yes.

16 MS. COMPTON: And, Your Honor, at this time I
17 would move to admit State's Exhibit 13.

18 THE COURT: Okay.

19 MR. MAYER: We'll renew our objection.

20 THE COURT: Thank you. State's is 13
21 admitted into the record over defense counsel's
22 objection.

23 (State's Exhibit No. 13 was marked for
24 identification and admitted into evidence.)

25 BY MS. COMPTON:

1 Q. Who do you recognize as being depicted in the
2 photo?

3 A. Could you repeat, please?

4 Q. Who do you recognize as being depicted in the
5 photo?

6 A. That would be the defendant.

7 Q. Is that how he appeared that night?

8 A. Yes.

9 Q. And is this a photo taken at or about the time of
10 his arrest?

11 A. That would be his processing photo that evening.

12 MS. COMPTON: Beg the Court's indulgence.

13 THE COURT: Certainly.

14 BY MS. COMPTON:

15 Q. Okay. You indicated that you believed he matched
16 the description. Do you recall what that description
17 was?

18 A. I don't have my statement in front of me, but I
19 recall the victim describing what he -- an African
20 American male. I think he said 40's --

21 MR. MAYER: Objection.

22 THE COURT: What's the basis of your
23 objection?

24 MR. MAYER: Hearsay.

25 THE COURT: Objection is overruled.

1 BY MS. COMPTON:

2 Q. Please continue.

3 A. Age bracket was somewhere in his 40's. He
4 referenced as having salt and pepper hair, ash in color,
5 dark clothes. He had some striped clothes, dark striped
6 clothes, I should say. Some growth, facial growth of
7 sorts.

8 MS. COMPTON: Okay. Thank you. Nothing
9 further.

10 THE COURT: Okay. Cross examination?

11 MR. MAYER: Thank you, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. MAYER:

14 Q. Good morning, Detective.

15 A. Good morning.

16 Q. Just provided us pretty detailed description -- is
17 that based entirely on memory?

18 A. Yes, memory being reflected from my reports, and
19 from the statement that was offered to me from the
20 victims.

21 Q. And did you review some reports or documents to
22 prepare for your testimony here today?

23 A. I had some time to look at it, yes.

24 Q. So the description that you just provided here in
25 court isn't based solely on your recollection from

1 speaking with witnesses from that night?

2 A. No. It's a little wild. It's been a few years.

3 Q. Okay. And you mentioned that you were the case
4 officer.

5 A. Yeah, we could say that. This thing happened,
6 what I would consider, very fast, open and closed very
7 fast. It wasn't one of these things where an event
8 happened, several days went by, and we launched some sort
9 of investigation.

10 The event happened. The statements were
11 collected, and a couple hours later an identification was
12 made and an arrest was made.

13 Q. Would you be the considered the lead investigator
14 in this case?

15 A. I would. I was asked to do some follow-up stuff
16 by the state prosecutor, yes.

17 Q. And in the situations, not like this case where
18 it's not solved for a period of days or weeks afterwards,
19 would you be the detective or investigator in charge with
20 your --

21 A. Probably. More than likely, yes.

22 Q. Okay. So the buck would kind of stop with you in
23 terms of what investigation was done on a case like that?

24 A. I would imagine it would have been assigned back
25 to me, yes.

1 Q. Okay. Now when you were investigating this case,
2 did you -- you just gave us a nice description there.
3 Did you make notes about what you were finding and helped
4 refresh your memory along the way?

5 A. I'm sure at the time I probably made some
6 notations of things, that there's a checklist, location,
7 the time, you know, we arrived, who was there. Those
8 notations are then transferred into statement form, which
9 is what you have for me, and also the witness statements
10 which were taken.

11 Q. When you say statement form, do you mean like an
12 investigative report?

13 A. Yes.

14 MR. MAYER: May I approach?

15 THE COURT: You may.

16 BY MR. MAYER:

17 Q. Detective, I'm handing you what has been marked
18 previously for identification as Defense Exhibit 2.
19 Could you tell us what that is.

20 A. That's my investigative report.

21 Q. And is that what you were just talking about a
22 moment ago, that you would incorporate?

23 A. Yes.

24 Q. And when you're writing up that investigative
25 response, it would be important to include whatever

1 descriptions there were of a suspect, right?

2 A. It's either in this report or I would say
3 something to the effect of see actual victim or witness
4 statement for further detail description. I think in
5 this particular case, I did not make the notation to
6 refer to --

7 Q. You did?

8 A. I believe I did.

9 Q. Take a minute to find it.

10 A. Sure. I did not note that in this report.

11 Q. Okay. So since you didn't note that, we can
12 surmise that this report is full and complete?

13 A. As far as this information, yes.

14 Q. Okay. Okay. And in this report -- or let me
15 rephrase that.

16 The bicycle that the suspect from Gilroy's was on
17 was a nondescript bicycle?

18 A. I couldn't get any real detail from the bicycle,
19 and that's why I worded it as nondescript bicycle.

20 Q. And you talked to the witnesses about this?

21 A. I had talked to two people that were out in front
22 of the restaurant, those two witnesses and the third
23 witness, Mr. Silcott, who arrived and actually made the
24 identification on the street.

25 Q. Right.

1 A. Okay.

2 Q. Now, this report that you're looking at there, can
3 you tell me when you finalized that report? Does that
4 say?

5 A. It appears that I -- it looks like the time I
6 typed it would have been at 2319 hours, so 11:19 on
7 Sunday. Didn't go through a supervisor until Monday at
8 10:26 in the morning.

9 Q. So the time, 11:19 on Sunday, would that be the
10 last time that you had any input into this?

11 A. This is the time that I would actually -- the time
12 reflected on the report is when you start to type your
13 report. That's what the computer generates. That's the
14 top notation.

15 Q. And not the time it's closed?

16 A. No. To my recollection, I believe the computer
17 generates that time at the time you start it. And I can
18 say that too, because I've done other reports, and if I
19 go back into the computer and I need to find that report,
20 I'll also look for the time and it will indicate if I
21 start something at 9:00 in the morning and go back to it
22 at 3:00 in the morning, it will say 9:00 in the morning.
23 So to answer your question, it would be the time we
24 started.

25 Q. Just to be clear, that's not the same as the time

1 it was submitted to the supervisor?

2 A I don't know if you understand how it's submitted.
3 It's sent into a database, okay? It's electronically
4 sent from my desk. At whatever time he opens up the
5 screen and reads it or checks it, that's the time that
6 you're seeing down here.

7 Q. Okay. Under the supervisor --

8 A. 10:00, 10:26 the next day.

9 Q. Okay. Would you know if a supervisor made any
10 changes to your report?

11 A. I don't believe in this case there was any changes
12 made.

13 Q. Okay. And --

14 A. And I would know if there was some corrections
15 needed to be made or -- it's kicked back.

16 Q. They would provide you that feedback?

17 A. Uh-huh.

18 Q. Okay. And you testified earlier that your shift
19 on this particular day ended at midnight?

20 A. I believe it was a 4:00 to 12:00 shift.

21 Q. And would it have been your practice to submit
22 your report before the end of your shift?

23 A. We try to, yeah, yes.

24 Q. Okay. Can you tell if this report was submitted
25 before the end of your shift?

1 A. Yes. I had gone to my office and typed this
2 report.

3 Q. So you're certain this report was submitted before
4 midnight?

5 A. There were times reflected on this report is when
6 I -- well, I started at that particular time, and to
7 answer your question, I wouldn't have left my office
8 until this was typed and sent.

9 Q. Right.. Okay. And can you confirm that this
10 report was not modified after Mr. Desaussure was
11 arrested?

12 A. No, it wasn't.

13 Q. Okay. It was completed before he was arrested?

14 A. Yes.

15 Q. Okay. Take a minute and look through there -- let
16 me ask you this first: In the last 24 hours, has anyone
17 mentioned anything to you about a white plastic bag being
18 on this bicycle?

19 A. There's been discussion about the bicycle and its
20 description, what was attached to it, yes.

21 Q. Okay. Let me ask you just to take a moment and
22 find in your report here where, if anywhere, you mention
23 anything about a white plastic bag on that bicycle?

24 A. I don't believe I mentioned anything about a white
25 bag. That information was relayed to me by one of the

1 uniformed officers, if I'm not mistaken, either Burns
2 or --

3 Q. Sure, but you weren't there when this was related?

4 A. No. It wasn't related to me.

5 Q. It's not in your report?

6 A. No, it's not.

7 Q. And this report was completed before
8 Mr. Desaussure was encountered later on upper King
9 Street?

10 A. That's correct.

11 Q. Now, you took statements from some of the
12 witnesses and the victim. Did you ever have them make
13 any sort of formal identifications in this case?

14 A. It wasn't required or necessary in this case.

15 Q. Okay. So that's a no.

16 A. Correct.

17 Q. Some time later in the investigation -- let me ask
18 you about fingerprints first. They dusted for
19 fingerprints at Gilroy's?

20 A. I put in a request to my crime scene technician, I
21 believe it was Mr. Middleton at the time, who has since
22 retired, that he processed the tip jar where the money
23 was taken from. I was told he did that, but I don't
24 believe there was any positive results from that process.

25 Q. There is no match of fingerprints to

1 Mr. Desaussure?

2 A. Right, right.

3 Q. And then -- now, some time later, I believe you
4 asked for a DNA test?

5 A. Yes. I think the request actually came from the
6 solicitor's office, that -- in preparation for trial,
7 that DNA sample be collected. A search warrant was drawn
8 up for Mr. Desaussure, and I collected his sample at the
9 Charleston County Detention Center.

10 Q. And if I told you that was some time around March
11 of 2012, would that sound about right?

12 A. Yeah. It was some time later, after the event.

13 Q. And was a DNA sample taken of the victim as well?

14 A. I don't believe I collected a DNA sample of the
15 victim.

16 MR. MAYER: Your Honor, may I approach?

17 THE COURT: You may.

18 (Discussion held at sidebar.)

19 MR. MAYER: Your Honor, this is just the
20 DNA report. I just wanted to refresh your recollection.

21 BY MR. MAYER:

22 Q. Just take a look at that and see if that refreshes
23 your recollection about if a sample was taken from the
24 victim.

25 A. Yes. It is sent to me is from state law

1 enforcement, from the lab in Columbia.

2 Q. And they tested -- can you tell from that what
3 they tested for DNA?

4 A. No. I mean, there's a -- it says a buccal swab
5 was taken from the victim. It also says a buccal swab
6 was taken from the defendant. It's addressed to me
7 probably because I was the case agent. The collection
8 process was, a good chance, done by another detective in
9 my office.

10 Q. Okay. Thank you.

11 A. Okay.

12 Q. Do you know the results of those DNA tests?

13 A. I don't think it was of any significance as far as
14 a linkage without getting too technical.

15 Q. But it's your understanding there was no match
16 from the DNA to Mr. Desaussure?

17 A. That's true.

18 MR. MAYER: No further questions, Your Honor.

19 THE COURT: Thank you. Any redirect?

20 MS. COMPTON: Yes, Your Honor.

21 REDIRECT EXAMINATION

22 BY MS. COMPTON:

23 Q. Investigator Burckhardt, the report you submitted,
24 was it the whole report or one supplemental within that
25 report?

1 A. My supplement would be, if you will, one part of
2 the file. It would be the uniformed officers' reports,
3 crime scene reports, my report, and any additional
4 reports would be all put together.

5 Q. So other officers would also submit their
6 supplementals correct?

7 A. They would.

8 Q. And would that contain the exact same information
9 or different information?

10 A. We typically -- myself, as detectives and
11 uniformed officers, like to report on exactly what we do
12 ourselves and not what somebody else does. It's
13 typically their role in the investigation.

14 Q. And so if a uniformed officer had spoken with one
15 of the witnesses, would that be in your report or the
16 uniformed officer's report?

17 A. That would be in his report, not mine.

18 Q. Now, Investigator, I want to talk to you a little
19 bit about fingerprints. In your 25 years of experience,
20 do you have some familiarity with fingerprints?

21 A. I do.

22 Q. When your office or your department processes a
23 crime scene, do you always find fingerprints?

24 A. No, we don't.

25 Q. I'm touching this right now. Am I necessarily

1 leaving fingerprints?

2 A. No, you're not.

3 Q. What kind of factors does that depend on?

4 A. There's numerous variables that enter into the
5 collection process of fingerprints. We'll start with
6 surfaces.

7 Not every surface can yield a print. The other
8 problem, if you will, that we run into is when a -- when
9 it's collected, you have to have what we call a quality
10 fingerprint. In other words, it's got to be good enough
11 where they can take that print and match it to something.

12 They'll get partials. They'll get pieces and bits
13 and pieces which typically doesn't yield a positive
14 identification, so there's a lot of things that enter
15 into that process of fingerprint collection.

16 Q. Now, were you the officer who initially spoke with
17 Adam Corbin that night?

18 A. I'm not sure if I made first contact with him or
19 not.

20 Q. Okay.

21 MS. COMPTON: I don't think I have anything
22 further for you. Thank you.

23 THE COURT: All right. Thank you. Anything
24 further? Sir, you may step down. Thank you. May this
25 witness be excused? You may be excused. Thank you.

1 Yes, ma'am.

2 MS. HALEY: Your Honor, at this time the
3 State has a stipulation we to like to move into evidence
4 and publish to the jury. It's Court's Exhibit 1.

5 THE COURT: A stipulation is an agreement,
6 admission, or understanding made in a judicial proceeding
7 by the parties or by their attorneys. Stipulations are
8 binding on the parties and attorneys who make them. If
9 counsel for the parties have stipulated as to any fact,
10 and they're getting ready to read you a stipulation, you
11 are to regard that fact as having been conclusively
12 proven as to the party or parties making the stipulation.
13 Okay.

14 MS. HALEY: Thank you, Your Honor.

15 The State and defendant agree that on October
16 3, 2010, Detective Richard Burckhardt of the Charleston
17 Police Department collected a buccal swab containing
18 Daniel Cobiella's known DNA. On March 8, 2012 Mary
19 Phillips of the Charleston Police Department collected a
20 swab containing DNA located on a knife carried by Alonda
21 Desaussure at the time of his arrest.

22 On March 9, 2012, Detective Richard
23 Burckhardt of the Charleston Police Department collected
24 a buccal swab containing Alonda Desaussure's known DNA.
25 These DNA samples were properly recovered, properly

1 secured, and sent to the South Carolina Law Enforcement
2 Division Forensic Services Laboratory.

3 From the recovery by Detective Richard
4 Burckhardt and Mary Phillips, two submissions of Lilly
5 Gallman and Brenda Stein with South Carolina Law
6 Enforcement Division, all requisite procedures regarding
7 proper chain of custody were adhered to.

8 Lilly Gallman tested swabs from the knife and
9 compared to the buccal swabs from Alonda Desaussure and
10 Daniel Cobiella and concluded that the DNA on the night
11 was at mixture of at least two unidentified individuals.
12 No other items were tested.

13 Both Alonda Desaussure and Daniel Cobiella
14 were excluded as possible contributors to the DNA on the
15 knife because their known DNA profiles did not match the
16 DNA found on the knife.

17 THE COURT: All right.

18 MS. HALEY: Your Honor, at this time the
19 State rests.

20 THE COURT: All right. Thank you very much.

21 All right. Ladies and gentlemen, the State
22 has rested their case. I have a few matters I need to
23 take up with the parties before we continue with the
24 trial. I'm going to ask you to return to your jury room
25 while we handle these matters.

1 Please do not discuss this case as you have
2 possibly not heard all of the evidence and you have not
3 been given the charge on the law or heard the closing
4 arguments by the attorneys.

5 Thank you.

6 (In open court, jury present.)

7 THE COURT: Okay. Any motions?

8 MR. MAYER: Your Honor, I had planned to make
9 a motion, but based on Mr. Corbin's testimony that he
10 actually saw money get taken --

11 THE COURT: Go ahead and move for a directed
12 verdict, and then I'll rule on that.

13 MR. MAYER: Okay. Fair enough. At this time
14 the defense will move for a directed verdict.

15 THE COURT: And I appreciate you doing that.
16 As you know, because I know you read your law before you
17 came in here, which is why were hesitant to make the
18 motion, when the Court rules on a motion for directed
19 verdict, it's concerned with the existence or
20 nonexistence of evidence in a criminal case, not weight.
21 Defendant is only entitled to to a directed verdict when
22 the State fails to produce any evidence of the offense
23 charged.

24 In the Court's opinion, the State has
25 produced quite a bit of evidence of the offense charged

1 as noted, and I appreciate your candor through both the
2 eyewitness, the victim, and the officers that have
3 testified, the weight to give to that evidence and how
4 they consider it as a fact finder is for the jury, so I'm
5 going to deny the motion for a directed verdict at this
6 time, but thank you for putting that on the record.

7 Do you need anything? Thank you.

8 Okay. I have a note from the juror. It says
9 request to make a call for business for ten minutes,
10 juror number 155. It's going to take us more than ten
11 minutes. I obviously have no problem with that. Do
12 y'all?

13 MS. HALEY: No objection.

14 THE COURT: Let them just know that that is
15 fine.

16 Okay. Any other motions at this time?

17 MS. HALEY: None from the State, Your Honor.

18 THE COURT: Okay. Let me talk to the
19 defendant about his right to remain silent. How about
20 that?

21 Sir, if you could stand up for me, I just
22 want to make sure you can hear me, and we need to be able
23 to hear you when you respond. And I know you've
24 discussed this with your attorney, but as I told the jury
25 panel and the jury at the beginning of the case, the

1 defense doesn't have to prove anything.

2 The burden is on the State of South Carolina
3 to attempt to prove its case and to prove its case beyond
4 a reasonable doubt in order for the jury to be able to
5 overcome the presumption of innocence that all defendants
6 have in our criminal court system.

7 If you want to present a case, the defense
8 certainly has a right to present a case. As part of that
9 case, you have the right to testify in your own behalf
10 and it will be subject to cross-examination by the State
11 and then redirect by your attorney as you've seen with
12 the other witnesses during the trial, but that's a
13 strategic decision that you make with your attorney.

14 Sometimes defendants testify and sometimes
15 they choose not to testify because there are always risks
16 involved in such testimony. Under our constitution, the
17 South Carolina and United States constitution, you have
18 an absolute right to remain silent. That means nobody
19 can force you to say anything about this case. You
20 cannot be forced to testify, and I'm going to instruct
21 this jury that if you choose not to testify, they can't
22 hold that against you, but more significantly, they can't
23 even consider that at all. They can't talk about it in
24 their jury room. It can't be part of their
25 deliberations.

1 In other words, a defendant's right to
2 testify or not testify is his own, and the jury can't
3 consider that or hold that against you in any way.

4 Do you understand that?

5 THE DEFENDANT: Yes, ma'am.

6 THE COURT: So you understand you have the
7 right to testify or not to testify?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: All right. Have you had a chance
10 to discuss that with your attorney, whether you want to
11 testify or not? Have you?

12 THE DEFENDANT: Not yet.

13 THE COURT: You have not discussed with your
14 attorney whether you want to testify or not? Okay.

15 We're going to take a quick break before we
16 start with the defense case. I know there are some other
17 witnesses here for y'all to talk about that, and y'all
18 can go and talk about it wherever it's easiest, and then
19 we'll come back and we'll discuss that, and we can
20 also -- Aaron, if you want to put up witnesses first and
21 then talk with him about whether he wants to testify or
22 not.

23 Again, I'm going to ask you to do it now as
24 well, but I understand that's a strategic decision. Do
25 you understand that, sir?

1 THE DEFENDANT: Yes, ma'am.

2 THE COURT: Do you want to talk to him about
3 that to you --

4 MR. MAYER: And, Your Honor, just to be
5 clear, we have discussed at length whether he should or
6 not testify. I think we haven't come to a decision on
7 is, it what my client means.

8 THE COURT: Have you discussed with your
9 lawyer that you would have the right to testify or not
10 testify?

11 THE DEFENDANT: He brought it to my
12 attention, but we never sit down and talked about it.

13 THE COURT: You've discussed it, but you've
14 just never decided? Tell me what you mean. He's never
15 mentioned it to you at all?

16 THE DEFENDANT: He mentioned it to me. We
17 never sit down and talk about it.

18 THE COURT: Why don't y'all go sit down and
19 talk about it now for a few minutes, and I will take a
20 quick break and then we will get started back. Okay?
21 We'll be at ease for about ten minutes. Y'all talk about
22 that, and if he doesn't understand, we'll talk about it
23 some more, but we're not going to delay the trial for
24 that because I believe he probably has talked to you
25 about it.

1 MR. MAYER: Correct. And, Your Honor, I
2 think one of the factors in my client's consideration as
3 to whether to testify or not is what portion of his
4 criminal record may be potentially used to impeach him.

5 THE COURT: We can talk about that right now,
6 or y'all can talk first and then we can argue about it.

7 MR. MAYER: I think it would help our
8 discussion --

9 THE COURT: If we do it now?

10 MR. MAYER: Yes, Your Honor.

11 THE COURT: I saw two things on the record
12 that I thought would probably be fodder for discussion,
13 so let's hear what -- then I'll tell you what I think
14 about it.

15 MS. HALEY: Your Honor, the State would argue
16 that the strong-arm robbery conviction from 2009 would
17 come in and not be subject to the 403 balancing due to
18 the fact that is a crime of moral turpitude. Also, the
19 State would potentially argue that the burglary second
20 degree, because of the release date, would come in.

21 THE COURT: Well, talk to me about that one.
22 Is the release date that he was released on because of
23 the 15-year sentence for burglary or for the 30-year
24 concurrent sentence for criminal sexual conduct first?

25 MS. HALEY: Your Honor, I cannot -- I did not

1 know the answer to that.

2 THE COURT: He would have had to be a pretty
3 bad inmate to get convicted in 1987 and not get out until
4 200 -- what is it, 2008 on the burglary?

5 MS. HALEY: I only know they were concurrent
6 sentences. I don't know how that works.

7 THE COURT: Also, we're faced with the -- let
8 me find a nice way to say this: We have State v.
9 Broadnax now and State v. Cooper and State v. Bryant, and
10 burglary and armed robbery and strong-arm robbery aren't
11 necessarily subject to 609(a)2. There must be some
12 affirmative false statement or act of deceit beyond the
13 basic crimes themselves for those to be admitted.

14 Now, they still could possibly be admitted
15 under 609(a)1, but your argument, the moral turpitude
16 argument; tell me about those offenses such that they
17 could overcome the Broadnax prohibition.

18 MS. HALEY: Your Honor, I do not have
19 information as to the specific time, however, the 2009
20 incident I can get from the office.

21 THE COURT: So we're going to be looking at
22 that time from the context of 609(a)1, probably, which
23 would be the one-year provision, and then I need to do
24 the weighing of the probative value versus the
25 prejudicial effect under 609(a)1 and then the similar

1 weighing under Rule 403.

2 So I do need to have the information about
3 that, and about the burglary, but, quite frankly, I'm
4 feeling the burglary is too remote, and particularly with
5 the Broadnax, Bryant, and Cooper concerns I'm not going
6 to allow the burglary.

7 Let's find out about the strong arm, and then
8 we can argue about that.

9 MS. HALEY: Yes, Your Honor. We're working
10 on that.

11 THE COURT: In the meantime, Mr. Mayer --

12 MR. MAYER: So in terms of my discussion now
13 with my client, can I represent to him that, at most, if
14 he were to testify, the most that the State could ask him
15 about is whether he had been previously convicted and he
16 would only have to say this strong arm?

17 THE COURT: Well, no, you can't ask him that
18 way. Don't let him open the door. If he opens the door,
19 we got a whole different ball game.

20 MR. MAYER: So if done properly, the only
21 prior conviction that would have to come out would be the
22 strong arm.

23 THE COURT: They would be able to use, for
24 impeachment purposes, possibly the strong arm. I just do
25 not know yet enough about the circumstances of the strong

1 arm to know whether they can use that for impeachment or
2 not. but he knows if he testifies there is always the
3 danger that if the door gets opened to something else,
4 but that generally -- that's what we still have left in
5 play.

6 So why don't y'all talk now for a few
7 minutes. That will give the solicitors time to get the
8 information on that non-remote conviction, and then we
9 can argue about it some more, and if you need to talk
10 some more, you can do that. I would rather y'all take
11 more time than less to decide. It's an important issue,
12 obviously. Okay? All right. Y'all take ten, and then
13 we will proceed from there. And this will be a good time
14 for the jury to have its mid-morning break because I
15 would like to go till about 1:00.

16 (Recess taken.)

17 (In open court, jury not present.)

18 MS. HALEY: We do have the victim's statement
19 from the strong-arm robbery, and under Broadnax, it says
20 there just needs to -- in this incident, the defendant
21 asked the victim for a cigarette and then proceeded to
22 rob her and a friend, I believe, is what happened.

23 So we would argue that the act of asking for
24 that cigarette would have been an act of deceit.

25 THE COURT: In the prior incident, the strong

1 arm?

2 MS. HALEY: Yes.

3 THE COURT: Let me just take a look at and
4 put whatever I need to on the record.

5 MS. HALEY: That is an extra copy that could
6 become a Court's exhibit.

7 THE COURT: All right, Mr. Mayer. What about
8 the State's argument that the manner of the robbery, in
9 the prior strong-arm robbery, involved an element of
10 deceit in that the defendant asked for a cigarette first,
11 I guess in an effort to approach the victim?

12 MR. MAYER: I mean, Your Honor, it seems like
13 from that statement that there -- it's not clear that
14 that was some artifice that was used. It may have been
15 just an unrelated, you know, request or something like
16 this.

17 The data doesn't talk about how much time
18 this victim spent at the gas station or wherever it was
19 and anything else that might have been going on. It's
20 just an assumption that's unwritten in there, so we would
21 object to it.

22 THE COURT: All right. Yes, ma'am?

23 MS. HALEY: Your Honor, once again, the State
24 would say this occurred -- I do have an incident report
25 here, just so we're aware, that it occurred in the

1 morning. The victim said she went to the gas station and
2 was getting out of her car to go to the ATM when the
3 defendant approached her and then asked her for a
4 cigarette, and when she moved to her hand to attempt to
5 get the cigarette, that's when he grabbed her hand and
6 snatched her purse from her.

7 So it seems as though when he asked for the
8 cigarette, he was trying to get her to move somehow to
9 get closer to him and make it easier for him to do that.
10 He just didn't run up and grab the purse -- it seemed he
11 didn't want a cigarette at all, so I would call that an
12 act of deceit.

13 THE COURT: Okay. Anything further?

14 MR. MAYER: Your Honor, only that at the
15 preliminary hearing, that charge was dismissed the first
16 time, which, you know, isn't here or there, except to
17 say, you know, there is some weaknesses to that prior
18 charge.

19 THE COURT: I think there was actually a
20 different charge that was dismissed at the prelim, but
21 y'all might want to look at the rap and talk about that.

22 MS. HALEY: Yes, I do believe that was a
23 different incident.

24 THE COURT: There were other issues. I can
25 certainly look at the warrant numbers if y'all want to

1 hand me the paperwork again.

2 MS. HALEY: We just confirmed that was
3 dismissed at prelim. That's because the officer wasn't
4 present.

5 THE COURT: That's not really pertinent to my
6 inquiry anyway, but I appreciate the defense bringing
7 that up. Okay.

8 If the defendant chooses to testify, I'm
9 going to allow impeachment under 609, the strong-arm
10 robbery. As I explained earlier before we broke, to me
11 the burglary conviction is simply too remote. We don't
12 have the details on it indicating whether there were
13 affirmative false statements or acts of deceit beyond the
14 basic burglary itself, and looking at the release date,
15 it appears that the release date on the burglary
16 conviction would have been significantly earlier than the
17 30 years that the defendant received for the criminal
18 sexual conduct first, and what 609(a)1 explains is that
19 if the crime is punishable by imprisonment of less than
20 one year, under the law under which the witness or
21 defendant was convicted.

22 And so under the specific burglary, whether
23 it was a plea, trial, I'm not sure, it would be too
24 remote, I find. As for the strong-arm robbery from -- I
25 believe it was 2008 or 2009? Okay. 2009 conviction,

1 that obviously is not too remote, and I believe it would
2 come in properly under 609(a)1 or 609(a)2.

3 Looking at State v. Al-Amin, which has been
4 somewhat limited by Bryant and Broadnax, what the Court
5 explained -- and this is still applicable, they talk
6 about it in Bryant and Broadnax -- that the Court must
7 admit evidence that a witness has been convicted of a
8 crime that involved dishonesty, Rule 609(a)2 applies to
9 any of those offenses which evident the element of
10 affirmative misstatement or misrepresentation of fact, to
11 be dishonest means to steal, deceive, defraud, or
12 steal -- clearly, there was some artifice in the prior
13 incident, based on the information from the witness
14 statement, the approaching, asking for a cigarette, and
15 then doing essentially a snatch and grab of the \$20.

16 So that would be proper under 609(a)2.⁵ With
17 the proper limiting instruction, I believe it's proper
18 under 609(a)1 as well as the probative value of admitting
19 the prior conviction, just the one, for impeachment
20 purposes only does outweigh any prejudicial effect.
21 We're not going to go into the facts of it. We're not
22 going to go into any similarities or dissimilarities
23 between the current robbery at issue. The time when this
24 happened is not remote.

25 In fact, two years, I guess, before the

1 Gilroy's incident allegedly happened, and I don't find
2 the two situations are so similar as to cause prejudicial
3 or substantial prejudice under 403. So I believe
4 properly it comes in under 609(a)1. With the Rule 403
5 analysis, I don't find that the prejudicial effect
6 outweighs the probative value.

7 Now, I am certainly willing to give a
8 limiting instruction if we do get to that point, that it
9 is for impeachment purposes only. We can craft the
10 language of that. I'll give y'all some suggested
11 language. Okay?

12 So with that being said, only one conviction
13 will be allowed to be used for impeachment purposes if
14 the defendant decides to testify. Have you talked with
15 him again or have y'all worked out --

16 MR. MAYER: I think, Your Honor, he's going
17 to keep considering while we call our first witness.

18 THE COURT: All right. Let me talk to him
19 about that real quick.

20 Sir, have you had sufficient time to discuss
21 whether you want to testify or not with your attorney?

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT: And you understand your rights
24 under the Fifth Amendment?

25 THE DEFENDANT: Yes, ma'am.

1 THE COURT: And I'll give you a few more
2 minutes after your other witnesses testify to decide
3 whether you want to testify or not, okay, sir? All
4 right. Thank you, sir.

5 THE DEFENDANT: Yes, ma'am.

6 THE COURT: Do any of y'all need a quick
7 break before we put up the first witness?

8 MS. HALEY: No, Your Honor.

9 THE COURT: Anything else we need to take up
10 before we bring in the jury?

11 MR. MAYER: I don't think so, Your Honor.

12 THE COURT: Okay. Let's bring the jury.

13 (In open court, jury present.)

14 We are ready to continue with the trial. I
15 appreciate your patience as we worked out our legal
16 issue.

17 I will call on Mr. Mayer for the defense.

18 MR. MAYER: Thank you, Your Honor. At this
19 time, we'll call Mr. Roger Jenkins to the stand.

20 ROGER DAMON JENKINS,

21 having been first duly sworn,

22 was examined and testified as follows:

23 DIRECT EXAMINATION

24 BY MR. MAYER:

25 Q. Hi, Mr. Jenkins. How are you today?

1 A. All right, and you?

2 Q. Good, thanks. Please tell the jury where you grew
3 up.

4 A. Charleston, South Carolina.

5 Q. And where do you live these days?

6 A. [REDACTED] Avenue.

7 Q. How long have you lived at [REDACTED]

8 A. All my life, basically.

9 Q. So you grew up in that neighborhood?

10 A. Yes.

11 Q. And did you grow up and know other people from the
12 neighborhood there?

13 A. Yes.

14 Q. Okay. Was one of those people that you knew
15 growing up Mr. Alonda Desaussure?

16 A. Yes.

17 Q. Okay. Was one of those people you knew growing up
18 a guy named Eddie Nelson?

19 A. Yes.

20 Q. And was another of those acquaintances from
21 growing up a guy named Patrick Rivers?

22 A. Yes.

23 Q. And did you grow up with someone who goes by the
24 name of Big Hamp?

25 A. Yeah. I knew of him.

1 Q. Did you grow up with him?

2 A. Well, he lived in the neighborhood also.

3 Q. And on occasion with those different people who I
4 mentioned, you would pass some time here and there with
5 one or the other of them?

6 A. Yeah. I mean, over the time of years, yes.

7 Q. Do you know Big Hamp's legal name?

8 A. No, I really don't. As long as I have known him,
9 I really don't know.

10 Q. Okay. And what is your full legal name again?

11 A. Roger Damon Jenkins.

12 Q. Okay. And some people know you as Nick, right?

13 A. Yeah.

14 Q. And growing up, did Mr. Desaussure have sort of a
15 nickname like that?

16 A. Yeah.

17 Q. What was that nickname?

18 A. Pick.

19 Q. Pick. Do you recall why or how he got that
20 nickname?

21 A. I don't --

22 MS. COMPTON: Objection. Relevance.

23 THE COURT: Overruled.

24 BY MR. MAYER:

25 Q. Can you answer the question.

1 A. I don't remember why.

2 Q. Was it from carrying an Afro pick in his back
3 pocket?

4 A. I really can't say.

5 Q. And what is your educational background?

6 A. High school, two-and-a-half years of college.

7 Q. Okay. Are you currently employed?

8 A. Yeah.

9 Q. What are you employed doing?

10 A. Construction work.

11 Q. Do you work for yourself or do you work for
12 someone else?

13 A. Someone else.

14 Q. Okay. In October of 2010, two-and-a-half years
15 ago, you were living at [REDACTED]

16 A. Yes.

17 Q. Who else lives there with you?

18 A. My mother and my father.

19 Q. Do you remember the evening of October 3rd of
20 2010?

21 A. I can't say that I do, no.

22 Q. Okay. Some time during that time period back
23 then, is it possible that you hung out with
24 Mr. Desaussure on your front porch?

25 MS. COMPTON: Objection. Leading.

1 THE COURT: Sustained. Don't lead the
2 witness.

3 BY MR. MAYER:

4 Q. You ever hang out with Mr. Desaussure on your
5 front porch in 2010?

6 A. No. Not that I remember.

7 Q. Is it possible that you did? You don't remember
8 that?

9 A. I don't --

10 MS. COMPTON: Objection. Asked and answered.

11 THE COURT: Sustained.

12 BY MR. MAYER:

13 Q. Okay. Do you have a complete recollection of what
14 you did in 2010?

15 A. No, I sure don't.

16 Q. Okay.

17 A. It's so long ago.

18 Q. Did you hang out with Big Hamp at all in 2010?

19 A. I might have seen him. I might have seen him. I
20 can't -- I can't say definitely I did or I didn't.

21 Q. Uh-huh. And did you hang out with Eddie Nelson at
22 all in 2010?

23 A. Probably, yes, because he's my cousin and he lives
24 right down the street, and we, you know, frequented each
25 other every day.

1 Q. You frequent each other's houses?

2 A. Yeah. So I would say surely I hung out with Eddie
3 in 2010. I can say that definitely.

4 Q. How about Patrick Rivers?

5 A. 2010? I can't -- I couldn't recall that.

6 Q. Okay. Have you hung out with Mr. Rivers some
7 since then?

8 A. Yes. He actually works with me also.

9 Q. Okay. All right. So in 2010, do you remember
10 seeing Mr. Desaussure?

11 A. Yeah, probably.

12 Q. At some point in 2010, you saw Mr. Desaussure?

13 A. Yeah, I probably have.

14 Q. Do you remember where that was?

15 A. It probably was in the neighborhood somewhere.

16 Q. Okay. So can you say with particularity where
17 that was?

18 A. No, I can't, really.

19 Q. Okay. So in 2010, you might have hung out with
20 Mr. Desaussure?

21 A. Maybe, yeah. I can't say I did or I can't say I
22 didn't.

23 Q. So you just don't recall. And that hang out with
24 Mr. Desaussure might have occurred on your property?

25 A. May have. I really can't say. Like I say, I

1 don't recall.

2 Q. Do you recall an evening when Mr. Desaussure asked
3 to use your bathroom in your house?

4 A. No. It would not be possible.

5 Q. Is that because of your parents?

6 A. No one -- no, it's not possible.

7 Q. Would you be able to recall not allowing him to go
8 in your house for that very reason?

9 A. I don't recall -- I don't recall him asking me. I
10 don't recall nothing having him being at my house,
11 nothing about going inside my house, no.

12 Q. You don't remember telling him to go around the
13 side of the house to use the bathroom one night?

14 A. No.

15 Q. Do you know where Big Hamp lives?

16 A. No, not at this particular time.

17 Q. Do you know where Patrick Rivers lives?

18 A. Yes.

19 Q. Where is Patrick Rivers?

20 A. He's on Ashley Avenue. I don't know the exact
21 street number. It's Ashley Avenue.

22 Q. Is it your understanding that he lives by himself
23 or somebody else?

24 A. He lives with his brother-in-law.

25 Q. What is his brother-in-law's name?

1 A. Bernard. I don't know his last name.

2 MR. MAYER: All right. Thank you very much,
3 Mr. Jenkins. Please answer any questions the solicitor
4 has for you.

5 THE COURT: Okay. Cross-examination.

6 CROSS-EXAMINATION

7 BY MS. COMPTON:

8 Q. Thank you. Good morning, Mr. Jenkins. How are
9 you?

10 A. Good morning.

11 Q. You've known Mr. Desaussure for a while now,
12 right?

13 A. Yes.

14 Q. You don't remember whether or not you hung out
15 with him in 2010. Do you know him to be the kind of
16 fellow that carries knives around?

17 A. I couldn't say whether he does or not.

18 Q. Okay.

19 MS. COMPTON: That's all I've got, Judge.

20 THE COURT: Okay. Anything further?

21 MR. MAYER: Nothing further, Your Honor.

22 THE COURT: Sir, you may step down. Thank
23 you so much. You may be excused.

24 Yes, sir?

25 MR. MAYER: Your Honor, I don't know if my

1 other witnesses are here.

2 THE COURT: Do you want to check and see?

3 MR. MAYER: Yes, thank you.

4 THE COURT: Ladies and gentlemen: Just bear
5 with us for one moment. Thank you, sir. Any luck?

6 MR. MAYER: No, Your Honor.

7 THE COURT: Ladies and gentlemen: We have
8 been having some witness issues this morning. Trials are
9 often like live theater, and we have to work with several
10 different moving parts and get everyone here.

11 We're going to do the best we can to resolve
12 that, and what we're going to do is take lunch a good bit
13 earlier than I had intended on taking it today.

14 I need to apologize as well. We have got the
15 department of mental health bringing to people down in
16 unrelated matters over the lunch hour at 1:30 for me to
17 consider some issues. It should be finished about 2:15
18 or so or 2:30. Unfortunately sometimes I get double
19 booked, and we could not help that, so that is my fault
20 and my fault alone, but I'm going to ask y'all to be back
21 in your jury room at 2:15 so that as soon as I finish
22 with the Department of Mental Health in those other
23 cases, we'll be ready to start again, and I hope we'll be
24 able to track down any loose witnesses by then, so thank
25 y'all.

1 I appreciate your patience and understanding.
2 Please do not discuss the case yet or anything about it
3 or do any independent research. Thank you.

4 (In open court, jury not present.)

5 MR. MAYER: I just confirmed on the stand
6 there that Mr. Bernard, who is outside, lives with
7 Patrick Rivers who I'm trying to get here, and
8 Mr. Bernard is who I asked earlier to go ahead and get
9 him here by 2:00.

10 THE COURT: Do you have an investigator or
11 somebody from your office that you could send to go
12 facilitate them?

13 MR. MAYER: No. I mean, myself, the
14 person --

15 THE COURT: I'm happy to hold them in
16 contempt and bring them in here, if you haven't let them
17 know that's going to happen already. What time did the
18 subpoena tell you to be here?

19 MR. MAYER: At 9:30 yesterday morning.

20 THE COURT: And one of them I know I ordered
21 to be back here at 9:30. We saw two people yesterday.
22 You decided you didn't need him?

23 MR. MAYER: Yeah, he was going to be so
24 unhelpful that --

25 THE COURT: Well, that happens sometimes.

1 Well, you know, if I need -- they're in contempt. If the
2 subpoena was properly served, we can get him in here.

3 MR. MAYER: So I can go by there during
4 lunch, and my serve person who served the subpoena --

5 THE COURT: Do it now.

6 MR. MAYER: That's what I'm saying, yeah,
7 right now. I'll go right now. I'll just e-mail the
8 Court from there or whatever.

9 THE COURT: No, just get them and come back,
10 and we'll see where we need to go, and if we need to have
11 a little hearing and hold them in contempt, we'll do it.

12 Okay? And in the meantime get me copies of
13 subpoenas so I that can go from there.

14 MR. MAYER: Yes. Okay. Thank you, Your
15 Honor.

16 THE COURT: Okay. All right. Thank you.

17 (Recess taken.)

18 A F T E R N O O N S E S S I O N

19 THE COURT: I understand we have an issue
20 with a witness, and I have taken a look at the subpoena,
21 at the proof of service at Rule 45, at Rule 4, and at
22 Rule 40, which deals with continuance issues when a
23 witness is absent.

24 My initial concern is that the subpoena was
25 not served properly. I looked at it. You can't tape it

1 to the door. If you're going to leave it at someone's
2 home, the subpoena to be served in accordance with either
3 Rule 40 or Rule 4(j) must be left by delivering a copy of
4 the summons or the subpoena to the person individually,
5 personally, or by leaving copies thereof at his dwelling
6 house or usual place of abode with some person of
7 suitable age or discretion then residing therein or by
8 delivering a copy to an agent authorized by appointment
9 or by law to receive service of process.

10 As I read your process server's proof of
11 service, she taped it to the door; is that correct?

12 MR. MAYER: Your Honor, that is my
13 understanding. I didn't see that until today.

14 THE COURT: That's okay. And I have no doubt
15 that this person -- and I have not reviewed the rap sheet
16 yet, but the name I mentioned was familiar to me earlier,
17 and I assumed the solicitor is going to let me take a
18 copy of the criminal history, which we'll make a Court's
19 exhibit, but he probably knows how to dodge a subpoena,
20 and I don't think we're probably going to find him.

21 He's not in contempt, for one thing, so we
22 can't go pick him up. You can try to get him properly
23 served, but I don't anticipate that happening.

24 MR. MAYER: No.

25 THE COURT: Here is the next concern, and I

1 want you to address this for me if you can.

2 Rule 40, which is a rule of civil procedure,
3 but as you know, the Rules of Civil Procedure encompass a
4 lot of service of process issues and procedural issues
5 that rules of criminal procedure do not, and if I'm
6 missing a rule of criminal procedure that is applicable,
7 y'all please let me know, but Rule 40(I)2 specifically
8 addresses the absence of a witness and the need for a
9 continuance, and you haven't moved for an continuance,
10 but I just want to make sure out of an abundance of
11 caution we put everything on the record.

12 No motion for continuance of trial shall be
13 granted on account of absence of a witness without the
14 oath of the party, his counsel, or a kin to the following
15 effect, to wit that the testimony of witness is material
16 to the support of the defense that is not intended for
17 delay, I don't have a concern here, and that it is made
18 solely because the party cannot go safely to trial
19 without such testimony that there's been due diligence to
20 produce the testimony, and then there's a section of the
21 subpoena.

22 I want to hear from you on that, Mr. Mayer.
23 My concern is I have a feeling the last witness was
24 called because there was a thought that he would support
25 the defense. I'm not sure that turned out like we

1 thought it would. So talk to me -- give us the name of
2 this witness that did not appear and let us know what it
3 is that you believe he will say and what your basis is
4 for believing that. Has he agreed to meet with you
5 before?

6 MR. MAYER: Your Honor, I spoke with Patrick
7 Rivers when Ms. Eva Desaussure accompanied me to his
8 house and was able to get him to open the door on that
9 occasion, and at that time he told us that he did not
10 remember that specific day, that he and Mr. Desaussure
11 were -- could have been hanging out in that general time
12 period, which is basically the exact same thing that
13 Mr. Jenkins had told me outside the court earlier.

14 Of course he says it a little bit different
15 in court, but I don't think that we would need to wait
16 and try to get Mr. Rivers. I don't think that he's
17 got -- that he's going to have the memory to say that on
18 October 3, Mr. Desaussure was there. At the very best
19 case scenario would be that he would say, you know, it's
20 possible that we were hanging out that night, but he's
21 not going to be able to say he specifically remembers.

22 THE COURT: Well, I certainly don't find that
23 relevant and probative to the extent we would need to
24 continue the trial, and, quite frankly, it might be to
25 the defendant's detriment to put that up, but that's just

1 free legal advice.

2 Anything the State wants to add or tell the
3 Court?

4 MS. HALEY: No, Your Honor. I would just
5 second what Mr. Mayer said, that the testimony that
6 Patrick Rivers would add to this case -- because I have
7 spoken to Bernard Flynn who lives with him and apparently
8 is his brother-in-law and he told me that they had a
9 discussion and Patrick told him he doesn't remember that
10 day, he doesn't know if they were hanging out, so -- and
11 I have never been able to contact him either.

12 THE COURT: Well --

13 MR. MAYER: What it does, Your Honor, what we
14 wanted to do is kind of support any testimony that might
15 have come from the defendant. I think we've decided at
16 this point not to put the defendant on the stand.

17 THE COURT: Okay.

18 MR. MAYER: As a result of not having any
19 good supportive testimony as to what he might have said,
20 so having to change the tactics a little bit, I really
21 would like for the jury to see what's in the evidence bag
22 that the police collected, and if we didn't -- I don't
23 know if we authenticated that previously --

24 THE COURT: I know we put the knife in.
25 Didn't y'all put some of the evidence in?

1 MS. HALEY: We put the knife in, Your Honor.
2 That's it.

3 THE COURT: What else is there that you
4 didn't put in?

5 MS. HALEY: Clothing.

6 THE COURT: Well, I mean, you're certainly
7 welcome to call one of the officers back to put in the
8 clothing or y'all can agree and put it in. I mean, I'm
9 going to let it in.

10 MS. HALEY: I know Mr. Mayer did hold up the
11 clothing during --

12 MR. MAYER: One piece.

13 THE COURT: Well, I mean, y'all take a look
14 at it in a minute. I don't think there is anything
15 objectionable. It's clearly probative.

16 Here's my concern with even allowing
17 Mr. Rivers up if you were able to locate him. Under Rule
18 401 of the rules of evidence, the definition of relevant
19 evidence becomes significant, and relevant evidence means
20 evidence having any tendency to make the existence of any
21 fact more or less probable, essentially.

22 Putting somebody up to say, yeah, we might
23 have been hanging out, but I can't say for sure really
24 doesn't satisfy Rule 401, so I don't think it harms you
25 or helps you that he's not here, and it certainly makes

1 me more comfortable, you know, the fact that he didn't
2 show up.

3 Now, y'all talk about the evidence and what
4 you want to put in. I think we need to get Officer
5 Burckhardt or someone back or the case agent here we
6 could put her in and she can say what's in the evidence
7 bag. You could certainly call her in your case to do
8 that or y'all can stipulate that it's an exhibit and we
9 will let it in without objection. Doesn't matter to me.
10 I'm going to let it in. He's already put up a witness,
11 so we don't have an issue with him opening and closing.

12 MS. HALEY: Your Honor, if he wants to recall
13 Sergeant Stone, that's fine. I do want to keep in mind
14 that we had him read out and entered the evidence list,
15 so all that is there. They know what was on him that
16 night. We don't want to actually send the physical
17 clothing back.

18 THE COURT: He says he wants to send what is
19 in the evidence bag back, or have you looked at it? What
20 do you want to do?

21 MR. MAYER: I just want to be able to hold it
22 up. I understand there's an odor with some of the stuff.
23 I want to avoid sending back to the jury room for that
24 reason.

25 THE COURT: You can have her identify the

1 items that are in the evidence bag as matching the list.

2 MR. MAYER: That's all I need.

3 THE COURT: Well, it's your case. You can
4 call her back up there to do that. All right. A couple
5 other things before we bring the jury back.

6 I did look at Mr. Mayer's identification
7 charge. It is proper. It's a proper charge; however, we
8 have a state court charge that is very similar to it that
9 I would prefer using, and I have a copy of that for you.
10 I'll print that at the next break I get to take.

11 Let's see. It's State v. Simmons, is the
12 case, a single witness identification. The Court should
13 instruct the jury that the burden of proving the identity
14 rests with the State in certain identification cases.
15 It's not required that the judge instruct the jury, but I
16 think they said that in 1992 so they could affirm the
17 trial judge at that time because they, they being the
18 Supreme Court, then took that opportunity to admonish
19 trial judges to give the charge in cases in which
20 identification is at issue.

21 So I will give that charge. I am still
22 looking at State v. Moore and State v. Mitchell, but I'm
23 inclined to give those charges as well, but I will print
24 them for you to look at before -- and, Mr. Mayer, this
25 was your copy too.

1 MR. MAYER: Thank you, Your Honor.

2 THE COURT: So --

3 MS. HALEY: And, Your Honor, I still would
4 like to be heard on that point. The only thing the State
5 would argue in this case is this is not simply a single
6 witness identification case, that there were two people
7 who pointed out the defendant in court. One person might
8 have done it prior to today; however, in State v. Jones,
9 the one witness identification rule was designed to focus
10 on the attention and minimize the risk, you know, through
11 one person who's doing this, but we think since there was
12 two, it just focuses on the facts here, and I think
13 that's for the jury to decide.

14 I understand that it is our burden to prove
15 that both of them identified the defendant in this case;
16 however, I think this is different than a single witness
17 identification case.

18 And, also, according to State v. Patterson,
19 it just says that a charge on the facts like that is
20 contrary to our constitutional prohibition against
21 charges to the jury.

22 THE COURT: Does Patterson specifically deal
23 with the identification charge?

24 MS. HALEY: Yes. Well, it's dealing with --

25 THE COURT: What is the cite for Patterson?

1 MS. HALEY: Well, I've got an extra copy.

2 THE COURT: Okay. Well, I'll look at it. It
3 will take me two seconds to find what I want to find.

4 MS. HALEY: I have State versus Patterson and
5 State v. Jones.

6 THE COURT: All right. I'll just take a look
7 at these briefly.

8 Okay. Both of these cases are cases that the
9 defense asserted the trial judge was in error. One of
10 the trial judges was extremely respected and someone that
11 I looked to as a mentor on legal matters and he sits on
12 our court in Columbia, but that Court declined to give
13 the charge there, and the Courts affirmed him.

14 But in State v. Patterson, what Judge
15 Anderson said is the charge Patterson requested is
16 essentially a charge on the facts, which is contrary to
17 our constitutional prohibition against charges to juries
18 on the facts. In the present case, instead of giving the
19 requested charge the trial judge instructed the jury with
20 a charge containing many of the same points of law as
21 Patterson's requested instruction.

22 We have a similar situation in State v. Jones
23 without the interesting personalities. At no time did
24 any Court find it was erroneous to give the charge, and,
25 you know, this case is based pretty much completely on

1 identification. Whether it's a single witness or not
2 really is arguable based on the way the investigation was
3 conducted. Okay in.

4 So I'm going to give the charge. I'm going
5 to give the one from State v. Simmons. It's very similar
6 than the Telfair charge. I'll print a copy for you to
7 see before I have the final charge ready, and then in the
8 next break we will address the State v. Moore and State
9 v. Mitchell charge. I'm inclined to give that as well,
10 but we'll work that in.

11 Let's just get our chronology -- it's fine
12 with me to argue and charge today if we put up one more
13 witness. I don't know if y'all have any rebuttal or
14 reply. I'm going to ask the jury what they want to do,
15 if they want to have that today or if they want to come
16 back in the morning. Anybody feel one way strongly?

17 MS. HALEY: No, Your Honor. I don't believe
18 we'll put up our rebuttal witness.

19 MR. MAYER: No, Your Honor. I don't feel
20 strongly either way.

21 THE COURT: All right. Well, then let's
22 bring the jury back and we'll get the rest of the defense
23 case in and go from there.

24 MR. MAYER: My only other question was with
25 the change in plans here is I wanted to get in the record

1 Mr. Desaussure's height. Is that something the Court can
2 take judicial notice of?

3 THE COURT: You could ask the officer.

4 MR. MAYER: If she knows his height?

5 THE COURT: Somebody has that in a report
6 somewhere. He's described on either the cab records or
7 the dispatch records. That's in their records somewhere.

8 MR. MAYER: Okay. Thank you, Your Honor.

9 THE COURT: Okay?

10 MS. HALEY: I also did have the criminal
11 history for Patrick Rivers that you mentioned you might
12 want.

13 THE COURT: I was just interested to look at
14 it to see if it was the same Patrick Rivers I heard of,
15 but I don't know. Thank you.

16 MS. HALEY: You're welcome.

17 THE COURT: I'll give it right back. All
18 right. Bring the jury in, sir.

19 (In open court, jury present.)

20 Thank you, sir. You may call your next
21 witness, please.

22 MR. MAYER: Your Honor, we would call back to
23 the stand Sergeant Stone.

24 THE COURT: All right, Sergeant, if you could
25 come back up. You are still under oath.

1 MR. MAYER: May I approach the witness, Your
2 Honor?

3 THE COURT: You may.

4 KELLY STONE,
5 having been previously duly sworn,
6 was examined and testified as follows:

7 DIRECT EXAMINATION

8 BY MR. MAYER:

9 Q. Sergeant, I'm handing you what has already been
10 entered into evidence as State's Exhibits 10, 11, and 12.
11 Will you just remind the jury what those are.

12 A. These are the evidence vouchers that we have
13 whenever we use our computer system to list what evidence
14 we have.

15 Q. If you look at those, would you be able to match
16 up the actual physical evidence that those vouchers refer
17 to?

18 A. Yes.

19 MR. MAYER: At this time, Your Honor, we ask
20 that she be able to come up and come to the evidence --

21 THE COURT: Certainly.

22 MR. MAYER: Identify each item.

23 THE COURT: Okay.

24 BY MR. MAYER:

25 Q. Maybe bring the list with you.

1 A. This is the shirt, the top shirt, that he was
2 wearing.

3 Q. When you say he, you mean the defendant?

4 A. Yes. These are the jeans he was wearing, the
5 defendant. This is the shirt that was underneath.

6 Q. And this is a short-sleeved shirt, right?

7 A. Yes, sir.

8 Q. No elbows?

9 A. No, sir.

10 Q. And no stripes on the elbows.

11 A. No, sir. This is a shirt that was in his
12 possession.

13 Q. Okay. Again, short-sleeved shirt, you would
14 agree?

15 A. Yes, sir.

16 Q. No elbows.

17 A. These are two tank tops that were also in his
18 possession.

19 Q. Okay. That's fine, I guess. You can go back to
20 your seat. Thank you very much.

21 I'm handing you what has been marked for
22 identification purposes as Defendant's Exhibit 6. Do you
23 recognize that.

24 A. Yes, sir.

25 Q. Please tell the jury what that is.

1 A. This is a photograph of the defendant wearing the
2 jeans and the multicolored shirt.

3 Q. And do you know when that was taken?

4 A. The night of his arrest, which would have been
5 October 4th, 2010.

6 Q. Thank you very much.

7 MR. MAYER: Your Honor, we offer Defendant's
8 Exhibit 6 into evidence at this time.

9 MS. HALEY: Admitted without objection.

10 THE COURT: Exhibit is admitted without
11 objection.

12 (Defendant's Exhibit No. 6 was marked for
13 identification and admitted into evidence.)

14 MR. MAYER: May we publish it to the jury?

15 THE COURT: You may.

16 BY MR. MAYER:

17 Q. So here he's wearing the colorful shirt he held up
18 and the jeans you just held up?

19 A. Yes.

20 Q. But I didn't see the shoes in the bag. Are they
21 somewhere else?

22 A. They didn't take the shoes, as far as I know.

23 Q. Okay. I'm handing you what's been marked as
24 Defense Exhibit 5. Do you recognize that one?

25 A. Yes.

1 Q. Could you please tell the jury what that is.

2 A. This is a photograph of the shirt that the
3 defendant had on underneath the multicolored shirt. It's
4 the black shirt.

5 Q. Okay. And that was taken the same time?

6 A. Yes.

7 Q. Is this a fair and accurate representation of how
8 he looked at the time?

9 A. Yes.

10 MR. MAYER: Your Honor, we would ask to admit
11 Defense Exhibit 5.

12 THE COURT: Okay.

13 MS. HALEY: Without objection.

14 THE COURT: Defense 5 is admitted without
15 objection.

16 (Defendant's Exhibit No. 5 was marked for
17 identification and admitted into evidence.)

18 BY MR. MAYER:

19 Q. At this point the defendant was in custody?

20 A. Yes, sir.

21 Q. And were you there at the scene -- I know you were
22 at the scene of the arrest. Were you there at this time?

23 A. Yes.

24 Q. Do you know why the colorful shirt was blocked
25 over the shoulder this way it is in the document?

1 A. They wanted to document the dark in color shirt
2 that was on as well.

3 Q. And is it your understanding that the dark in
4 color shirt that's shown in that photograph is, in fact,
5 this very shirt right here?

6 A. As far as I know, yes.

7 Q. Okay. This was taken off the defendant the night
8 of his arrest?

9 A. Yes.

10 Q. This is the shirt the police department wanted to
11 document him having on?

12 A. Yes.

13 MR. MAYER: Thank you. No further questions.

14 THE COURT: All right. Cross-examination.

15 CROSS-EXAMINATION

16 BY MS. HALEY:

17 Q. Are defendant's belongings, if they're of no
18 evidentiary value, are they logged into evidence usually?

19 A. No.

20 Q. Are personal possessions usually logged into
21 evidence if they have no evidentiary value?

22 A. Personal possessions are usually turned over to
23 the jail, and they would put them in safekeeping.

24 Q. So things like shoes might be --

25 A. Yes.

1 Q. And how many hours after the incident at Gilroy's
2 was the defendant arrested?

3 A. Approximately three hours.

4 MS. HALEY: Court's indulgence? Nothing
5 further.

6 THE COURT: Okay. Anything further?

7 MR. MAYER: Nothing further, Your Honor.

8 THE COURT: All right. Sergeant, you may
9 step down. Okay.

10 Yes, sir?

11 MR. MAYER: Your Honor, the defense rests.

12 THE COURT: Wonderful. Thank you. Any reply
13 testimony from the State?

14 MS. HALEY: No, Your Honor.

15 THE COURT: Ladies and gentlemen: The State
16 and the defense have rested, so you have heard all of the
17 evidence in the case. The remainder of the trial for you
18 to hear will be the closing arguments of the attorneys
19 and the charge on the law.

20 We have been working on the charge of the law
21 throughout the trial and at lunch, but we still have
22 about 15, 20 more minutes to do on it, as well as the
23 verdict form, so I would anticipate that if we took a
24 break and did finish that, got y'all back here, we would
25 get the case to you around 4:30 or 5:00.

1 I'm not sure if that makes as much sense as
2 bringing y'all back in the morning to do it, but I
3 will -- I wanted to see how y'all felt about it. If you
4 want to wait around and go ahead and try to get the case
5 today and finish it or if you want to come back in the
6 morning, it really -- I have no preference either way.

7 Do y'all want to break for a minute and
8 discuss that while we work on our legal matters, or do
9 you want me to send y'all home for the day and bring
10 y'all back around 9:30?

11 At this point I'm going to ask you to adjourn
12 to the jury room. Please do not discuss the case yet.
13 If anybody needs to make phone calls to home or let them
14 know that you might be a little later tonight than
15 normal, I'm happy to do that.

16 Okay? Thank you.

17 (In open court, jury not present.)

18 THE COURT: I printed for you all the charge.
19 I'm going to print for you the Simmons and the Telfair
20 charge. Ms. Haley, I'm assuming the language on
21 continuous offense theory that you would like is the
22 crime of robbery is not complete at the moment the stolen
23 property is in the possession of robbers but may be
24 deemed continued during their attempt to escape.

25 Is that what you want?

1 MS. HALEY: Yes, Your Honor.

2 THE COURT: Is there any objection to that
3 particular language or any way that you would like for it
4 to be tweaked?

5 MR. MAYER: That's consistent with my
6 understanding of the law. I don't object to that.

7 THE COURT: I appreciate that, and on that
8 note, we did prepare a draft verdict form. It does not
9 have a lesser included offense of robbery, which often is
10 a lesser included choice on a verdict form based on the
11 evidence. Would y'all like to be heard on that? I don't
12 want to comment on the facts, so y'all -- should the
13 alternate stay, is all that was asked.

14 MS. HALEY: I would think that the alternate
15 would at least stay for the closing.

16 THE COURT: I'm asking about lesser included
17 offense.

18 MS. HALEY: I don't believe they need to be
19 charged on the lesser included.

20 THE COURT: Okay. Anything from the defense?

21 MR. MAYER: I would like there to be a lesser
22 included charge on the verdict form, if possible. I feel
23 like there was -- there's reason -- there is availability
24 in the jury's mind to come to a conclusion that it was --
25 that there was not a weapon used, due to the disparity

1 between the only description we have of a weapon and the
2 weapon that's in the courtroom.

3 So we would ask for that, Your Honor.

4 THE COURT: All right. Anything from the
5 State?

6 MS. HALEY: No, Your Honor.

7 THE COURT: I think out of an abundance of
8 caution I am going to put that as a choice on the verdict
9 form. We did have some differing testimony regarding the
10 alligator knife versus the knife that was actually found.
11 It does appear that the victim suffered a cut, you know,
12 a cutting wound, but he also said the wound reminded him
13 of the kind of wound you could get if you took a punch a
14 certain way.

15 But, anyway, I think there is enough there to
16 give the lesser included charge, so I'm going to add that
17 to the verdict form as well and to the charge. Why don't
18 y'all give me about 15 minutes to get the charge and the
19 verdict form in final form? That will give you time to
20 work on your closing, and then we'll come back and I'll
21 let y'all look at the draft one more time. How does that
22 sound? So we'll be at ease until 3:30 and everybody take
23 a quick break.

24 (Recess taken.)

25 In open court, jury not present.)

1 All right. Mr. Mayer? Are we ready for the
2 jury?

3 MR. MAYER: Yes, Your Honor.

4 MS. COMPTON: Yes, Your Honor.

5 THE COURT: All right. Bring them on in.
6 Thank you.

7 (In open court, jury present.)

8 THE COURT: All right. Thank you, sir.

9 Thank you for your patience. The attorneys
10 are ready to give their closing arguments, so I will call
11 on Ms. Haley or Ms. Compton.

12 MS. HALEY: Thank you. The State will waive
13 closing on the law.

14 THE COURT: All right.

15 MR. MAYER: We're up?

16 THE COURT: You are.

17 MR. MAYER: May it please the Court: Well,
18 you already know what I want to talk to you about this
19 afternoon, is the fact that science doesn't lie, but
20 before we get there, this case has some complex emotions
21 running through it.

22 Mr. Daniel Cobiella was the victim of an
23 assault, and his assailant wasn't caught, and that can
24 create some complicated emotions for folks to think
25 about, having someone out there who wasn't apprehended,

1 not having justice for Mr. Cobiella, and to proceed
2 forward in a case with unclouded minds. I think it's
3 important when y'all have feelings like that to discuss
4 it back there in the jury room, get those out of the way
5 so you can analyze the facts of this case clear headed,
6 as you can see, the vast array of discrepancies and the
7 significant lack of evidence in the State's case here.

8 So Mr. Cobiella, you heard from, who is
9 working at Gilroy's Pizza had never made an
10 identification of Mr. Desaussure prior to yesterday,
11 never, and it's not his fault. The police never asked
12 him to. Not that he could have, you know? And I don't
13 think that he could have. I don't think that he would
14 have, that he would have picked someone else out if the
15 police had done their job in this case better. The
16 police missed a lot of opportunities in this case to
17 actually capture the person who committed this assault,
18 and that started right there at the very beginning with
19 Mr. Cobiella.

20 Mr. Cobiella, you heard him testify. He was
21 close to the person. He could have made an
22 identification at the time, at the time being October 3rd
23 of 2010, over two years ago, two-and-a-half years ago. I
24 think we all understand that Mr. Cobiella wanted justice.
25 A horrible thin happened to him. I will never diminish

1 that, but for him to come in here two-and-a-half years
2 later, having never made an identification prior and
3 pointing to my client, Mr. Desaussure, as the perpetrator
4 of this crime is so absolutely unfair and unfathomable
5 that I hope you will consider the emotional aspect of
6 that when you weigh his credibility because he is a
7 victim. He wants justice, and he's been told by the
8 prosecutor that justice involves convicting
9 Mr. Desaussure, and that's just not true, and that's the
10 only reason that he wanted my client brought in. If I
11 could have substituted one of the bailiffs or anybody
12 else around here who generally matched the description,
13 if Mr. Cobiella hadn't had known we made that
14 substitution, I bet you anything he would have pointed
15 right to him because he was sitting beside me at that
16 defense table.

17 The descriptions that Mr. Cobiella provided
18 at the time of the incident back October of 2010 were
19 that -- and he testified to that in court today, or
20 yesterday, were that it was a male, black male, with
21 black long-sleeved or navy blue long-sleeved shirt,
22 perhaps with stripes on the sleeve, six foot three inches
23 tall.

24 There has been no testimony about how tall my
25 client, Mr. Desaussure is, but I can tell you he's not

1 six-foot-three. I don't think he's six foot, but the
2 case has given you no evidence to consider along those
3 lines, so why is that?

4 So it's important as you go and begin your
5 deliberations that you address the consideration of
6 Mr. Cobiella's feelings. I think that Mr. Cobiella is
7 well intentioned. I think he means to be honest. I
8 think he intends to be honest. I think he has only the
9 right motives, but I think he's been led drastically
10 astray in the way he identified my client.

11 With regard to what he saw and what he
12 experienced during this incident, Mr. Cobiella testified
13 that he did not see a weapon, all right? He testified
14 that he was swung on by the assailant. He couldn't say
15 how many times he was swung on. He couldn't say with
16 certainty how many times he was hit, right? He said he
17 was hit for sure one time really hard and he compared it
18 to like a boxing match where he was hit so hard that his
19 eyebrow was cut open.

20 That's consistent with what the -- that's
21 consistent with what his injuries were afterward. He
22 testified he had two black eyes, and he thinks it's from
23 some hematoma or something like that. He felt like he
24 got hit in a boxing match, or something like that, so
25 there is a question as to whether a weapon was used by

1 the assailant in this case, and there is also a question
2 as to whether money was taken.

3 Mr. Cobiella testified that there was a door
4 at Gilroy's Pizza that had a hydraulic closer on it, not
5 unlike the hydraulic closer on this door, and he heard
6 the hydraulic closer closing. When I asked him more
7 detail than that, he said it wasn't actually the
8 hydraulic closer that he heard, it was the metal door
9 running against the metal door frame, and he had been
10 back there in the back, cleaning up the oven, I guess it
11 was the grill that was behind the oven, he said, for
12 about ten minutes or so.

13 There is no door chime on that door. There's
14 no light that flashes. There is nothing to notify
15 employees of Gilroy's that, Hey, somebody is coming to
16 the door. You got to go tend to it. It's just that the
17 door clangs loud enough then they know there is someone
18 in there.

19 So it's possible that someone snuck in and
20 didn't let the door clang because you can easily hold the
21 door and keep it from smashing loud. You could let it
22 close more quietly, walked in, took the money out, left,
23 closed the door the same way, and Mr. Cobiella never
24 knew. It's a possibility.

25 It's also possible that that happened and

1 then the person who would be the assailant came in and
2 was accused by Mr. Cobiella of taking money when, in
3 fact, his timing was just really bad, and that's how the
4 altercation started.

5 So if that's how it happened, then the person
6 who was the assailant came in, got accused of taking some
7 money, said, Hey, I didn't take any money, and they saw a
8 store employee got all aggressive with him, blocking his
9 way, didn't let him get out of the store.

10 He eventually gets his way out, and this
11 person keeps following him down the street, and
12 ultimately, the guy who, in that scenario, would have
13 been falsely accused, punches Mr. Cobiella, Get away from
14 me.

15 Now, I don't think that's what happened. You
16 know, we heard from Mr. Corbin, Adam Corbin, that he was
17 standing out there and that he saw a person in a black
18 long-sleeved or Navy long-sleeved shirt with stripes on
19 the sleeve panhandling, going in, taking money out of the
20 tip jar, and that was, in fact, the person that got in
21 the altercation with Mr. Cobiella.

22 Mr. Corbin never said anything about a white
23 plastic bag. He never said anything about a white
24 plastic bag. He was on the stand. He provided a
25 description of the perpetrator of this crime as someone

1 who was six-foot-two, six-foot-three, 25 to 30 years old.
2 Remember that, from the 911 call? He was on the phone
3 with 911.

4 We all heard it. He's on the phone with 911.
5 The operator said, Describe him. We're going to come
6 catch the guy. Describe him.

7 Oh, 25 to 30 years old? African American
8 male, six-two, six three? Black long-sleeved or navy
9 long-sleeved shirt with stripes on the sleeve? Oh, he's
10 getting on a bicycle. He's riding north on King Street.
11 Never said anything about a white plastic bag being on
12 that bicycle, never did.

13 The one thing that you can count on in this
14 case besides the State's witnesses, through credibility
15 you have to really access, the one thing you can actually
16 count on in this case is that science doesn't lie.

17 Now, my own witness who I called,
18 Mr. Jenkins, is no kind of friend that I would ever want.
19 I had expected differently. You heard him testify that
20 he's known my client their whole lives, grew up together.
21 He grew up with a guy named Big Hamp, grew up with a guy
22 named Patrick Rivers, grew up with a guy named Ed
23 Jenkins. I found it interesting that he grew up with Big
24 Hamp but didn't know Big Hamp's real name, but in my
25 opening statement to you all, I had explained what I

1 thought you would hear in terms of testimony, and as you
2 saw, we had a problem with our witnesses, and for that, I
3 sincerely apologize. Had lots of witness problems in
4 this case, I think on both sides.

5 Let's talk about truthfulness for a minute.
6 We know we can count on science. We got a math teacher
7 who can tell you, two and two is always four. We got
8 some DNA. They tell you that it wasn't my guy who did
9 this crime, but we got a bunch of witnesses too that
10 muddy the waters, and we got to talk through that a
11 little bit.

12 First witness I want to talk about is this
13 Stephen Silcott guy. Mr. Silcott was one of the last
14 witnesses that you heard from the State. He's the guy
15 who works -- who worked at Five Guys Burgers and Fries.
16 He was coming back from his break when he saw the fight.
17 He actually crossed the street to go over to the fight.

18 He testified that he was about three feet
19 away from this fight and that he saw the knife with
20 crystal clarity. He described it as an alligator knife.
21 I don't even know what that is, but he went further to
22 describe that knife as being less than four inches long
23 in total with a blade of about an inch and a half long or
24 something. An inch and a half long blade is how he
25 described that knife with a thumb hole of some sort.

1 Now, this was the knife that was taken off my
2 client, Mr. Desaussure. This is about an inch and a
3 half, I would guess. That's definitely not that blade.
4 I mean, four inches would be the whole length of that
5 other knife that Mr. Silcott described, and that's just
6 the length of this handle. This is a much bigger knife,
7 and Mr. Silcott testified that, in fact, this knife was
8 not the knife that he saw.

9 As sure as Mr. Silcott was that that was not
10 the knife that he saw, he was also certain that the
11 person he saw riding on King Street actually stopped by
12 an officer on a different section of King Street was, in
13 fact, the perpetrator. He testified to that.

14 I pressed him on it some and he said, Yeah,
15 I'm sure it was him because he was a skinny, aged African
16 American guy with salt and pepper hair.

17 Any other way you can -- any other way you
18 can identify him? Salt and pepper hair, salt and pepper
19 hair. He was on a bicycle.

20 One of you lives down in the 29403 area {sic}
21 code where this occurred, where there are any number of
22 African American men with salt and pepper hair riding
23 bicycles on any given day. It's a very common mode of
24 transportation.

25 For a young white guy like Mr. Silcott who

1 may or may not have a lot of African American friends,
2 it's probably very difficult for him to make a cross
3 racial identification with any accuracy. You know, he
4 saw what he pictured in his head. He called out
5 something to the police officer who had stopped
6 Mr. Desaussure. Sounds to me he called out something
7 extremely inappropriate and ridiculous and that the
8 officer flagged him back and said, Hey, what did you say?

9 And we heard Mr. Silcott testify, When the
10 officer flagged me back I thought I was in trouble for
11 saying what I said.

12 He claims he only said something like, and
13 forgive my language, arrest that piece of shit, and when
14 I pressed him on it, he admitted, well, he might have
15 said arrest that Fing piece of shit.

16 He wasn't going to admit to what he really
17 said that caused that officer to call him back, but I
18 think we know what his real sentiments on the matter are,
19 and I think that it's really important to consider that
20 when you assess the credibility of his identification.

21 Takes us back to the one thing we can count
22 on in this case which is science doesn't lie. You can't
23 say the same thing for people, and that brings us to
24 Officer Burns.

25 Officer Burns was the officer who had the

1 uncomfortable task of sitting on the witness stand while
2 I impeached him, impeached his credibility for ten
3 minutes or so, listening to the dispatch recording. He
4 had just testified about this white plastic bag that was
5 supposedly attached to the bicycle, and I asked him, I
6 said, Where did you hear about that?

7 He said, Oh, well, it was in the witness
8 descriptions and it was on the dispatch, and yet it
9 wasn't -- he couldn't pick out the white plastic bag
10 anywhere in any of the witness descriptions about the
11 perpetrator or the bicycle.

12 I gave him ample opportunity. You know why
13 he couldn't pick it out? Because it's just not in there.
14 It doesn't exist. You guys hear the dispatch tapes. He
15 couldn't pick out where they said there was a bicycle
16 with a white plastic bag attached to the handlebars. He
17 couldn't pick it out, not cause he's going deaf, he
18 couldn't pick it out because it wasn't said. It was not
19 there.

20 This is a perfect example of how in this case
21 the police dropped the ball. They fell flat. They did
22 not do their jobs. They didn't do proper witness
23 identifications after the crime, and they let
24 Mr. Cobiella down. And to make up for that, they find a
25 guy, okay, riding down the street, drinking a beer,

1 stopped him -- oh, very distinctive white plastic bag on
2 his bike.

3 Well, let's get that in the report. There is
4 no evidence anywhere that a white plastic bag was
5 reported to the police one second before Mr. Desaussure
6 was stopped.

7 They knew nothing about a white plastic bag
8 before he was stopped. Yeah, I know, the police officer
9 said he heard on dispatch. Well, we hear the dispatch.
10 The police officer said it was in the witness statements.
11 He couldn't find it there.

12 Science doesn't lie. Science doesn't lie.
13 The only description that Officer Burns had of the
14 perpetrator of this crime was black male, on a bicycle,
15 approximately six-foot-two inches, black long-sleeved
16 shirt or navy long-sleeved shirt with stripes around the
17 elbows, blue jeans, somewhere between 25 years old and 50
18 years old. Oh, and skinny, not a heavysset gentleman.

19 I don't know how many people that describes
20 in downtown Charleston, but it's a bunch. It's a whole
21 bunch. Mr. Desaussure, riding down King Street on his
22 bicycle was not the only one. Maybe one of 100, maybe
23 the unlucky one to have an open container when some
24 racist rides by and says, Arrest that guy, paraphrasing.
25 He's unlucky. He's the only one out there who fit that

1 description, that's for sure. In fact, he doesn't fit
2 that description in a lot of ways.

3 Yes, he's a black man. Yes, he's not
4 overweight. Yes, he's got salt and pepper hair. He sure
5 as heck did not have on a black long-sleeved shirt. Did
6 y'all see shirt that he was wearing? Yes, this is the
7 shirt Officer Stone testified a few minutes ago. This is
8 the shirt that my client was wearing when he was stopped
9 by that officer. This is so not a black colored or navy
10 colored shirt.

11 While we're on that topic, this is the shirt
12 that he was wearing underneath it. This is the shirt
13 that the officers in their crack investigation in this
14 matter had pulled -- they pull this shirt up, they pull
15 the colorful shirt up, because, lo and behold, they found
16 the black shirt that this perpetrator was wearing, except
17 for it's not a long-sleeved shirt and it doesn't have
18 stripes on the elbows and it certainly wasn't altered in
19 three hours before -- between the time of the incident
20 and the time of Mr. Desaussure's being stopped.

21 Officer Stone testified, I guess attempting
22 to come to the aid of Officer Burns, he got Burns so
23 badly on the stand, Officer Stone tried to say something
24 about the white plastic bag as well. What I noticed
25 about Officer Stone's testimony, I hope you guys noticed,

1 when the prosecutors asked a question, she said, Would
2 you ever manufacture evidence, or, Would you ever go back
3 into your report and add something else?

4 And before Officer Stone answered that
5 question, there was a long pause before she answered that
6 question. There was a long pause. Would you ever go
7 back into a report and add information? And the question
8 was asked because of this white plastic bag issue,
9 because that's what we think they did it. We think they
10 went back in and said hey, yeah, let's -- he said he had
11 the white plastic bag earlier. That will lock that case
12 right back up.

13 So the prosecutor asked her, she said, Would
14 you ever go in and change -- would you ever go in and
15 change the report?

16 And she had to think long and hard about how
17 she answered that question. Of course she denies that
18 any report was changed, and I'm not saying she knew this
19 report would have been changed. In fact, the main
20 officer who wrote up this report no longer works at the
21 police department, so, you know, no harm, no foul, but
22 don't use it against Mr. Desaussure, absolutely do not
23 use it against Mr. Desaussure. It is not reliable, not
24 reliable.

25 What's reliable in this case? Science.

1 Science doesn't lie. Science is reliable in this case.
2 All these emotions from the victim, all the officers
3 trying to patch up the work that they have done, not
4 reliable. That brings me back to my favorite topic, the
5 DNA.

6 Officer Burckhardt testified this morning.
7 Officer Burckhardt was the detective on this case.
8 Officer Burckhardt testified that he wrote up his report
9 and finished his report before Mr. Desaussure was
10 encountered by the police three hours after the incident.

11 His report is the only report that was
12 finished before Mr. Desaussure was stopped. Therefore,
13 his report is the only report that is reliable in terms
14 of whether there was a white plastic bag included on the
15 bicycle. It stands to reason he couldn't have
16 manufactured anything afterwards because he didn't go
17 back into his report, and the contrary is also true: If
18 there is no white plastic bag in his report, then there
19 was no white plastic bag on the assailant's bicycle.

20 You guys heard him testify just like I did.
21 He testified that it was a nondescript bicycle,
22 nondescript bicycle. He didn't say it was an extremely
23 unusual bicycle because it had this white plastic bag on
24 it. He didn't say that. He didn't know about a white
25 plastic bag at that time. None of the officers knew

1 about that, none of the witnesses knew about that.

2 This is something that came up afterwards.
3 It's not something that existed as part of this crime.
4 Detective Burckhardt testified they didn't try to take
5 fingerprints off of the crime scene, that they had no
6 matches to Mr. Desaussure. I guess they didn't have any
7 good fingerprints.

8 The same was not true for the DNA. The same
9 was not true for the DNA. They got the DNA off of
10 Mr. Desaussure. They got the DNA off of the victim, and
11 he got the DNA off of the knife.

12 THE COURT: Mr. Mayer, I want to stop you for
13 just a minute. Could I get the lawyers up for a minute?
14 If y'all would stretch real quick about just stand.

15 (Discussion held at sidebar.)

16 All right. Thank you.

17 MR. MAYER: So they took the DNA samples off
18 the knife, took the DNA samples off the victim, and he
19 took the DNA sample off Mr. Desaussure. This is the
20 science.

21 They tried to match it together. They tried
22 to link Mr. Desaussure to this crime, and when did they
23 do this? Not until March of 2012, 18 months after this
24 crime when they tried to do this. You know why? Because
25 they were starting to look at this case for trial, and

1 they said, We don't have these ID. They said these
2 police officers did not do a good job here. We've got to
3 try and patch this thing up and try to get some DNA.

4 No problem. DNA will patch this case up, no
5 problem, except it doesn't. The DNA shows that it wasn't
6 Mr. Desaussure. The DNA shows that knife never cut that
7 victim, and I guess Mr. Silcott's right about the knife.

8 So to convict Mr. Desaussure, what you have
9 to think is you have to think, okay. He went in. He did
10 this, and then he went somewhere, changed clothes, or
11 else put a top shirt on, got rid of that knife that he
12 used, got this other knife, and went and had beer.

13 Maybe he shaved. There is testimony that he
14 had -- the perpetrator had a beard. Maybe he grew three
15 inches or so. There is no evidence how tall he is, but
16 he ain't six-three. Do you believe there is a white
17 plastic bag all along? Guys, this is a classic case of
18 reasonable doubt, all right? If you hesitate, if you
19 hesitate to think, Oh, Mr. Desaussure, he's definitely
20 guilty, if you don't think that, you've got to find him
21 not guilty.

22 It's your obligation as part of this system.
23 If you hesitate to believe that he's guilty, if you don't
24 think, oh, that guy is so guilty it's ridiculous, then
25 you found him not guilty because this is serious. We're

1 talking about serious stuff here. This ain't magistrate
2 court. We're talking about making a big time mistake.

3 Now, I picked you guys in the beginning,
4 called you my A Team, all right, and I think that you
5 are. I think that together you guys can talk this thing
6 through and get it figured out. You got science people,
7 got business people, teachers, people with real world
8 experience. I want you guys to pool your resources.
9 Don't let your emotions get in the way, okay?

10 It's not Mr. Desaussure's fault that the
11 police did a horrible investigation in this case. It's
12 not his fault that he failed to get proper
13 identifications way back when. It's not his fault that
14 they tried to link him up with some plastic bag mystery.
15 It's not his fault that they can't match up his DNA. My
16 God.

17 There is no DNA. Not only is there no DNA,
18 but there is DNA, and it shows it was not Mr. Desaussure.
19 Guys, if you have any hesitation at all about convicting
20 Mr. Desaussure, it means it's not the right thing to do.
21 It means you need to find him not guilty.

22 He wasn't down there doing an armed robbery.
23 He wasn't down there doing a robbery. He wasn't down
24 there beating anybody up. There are parts now where I
25 wish he had better friends, but he was in a whole

1 different part of town. It's not his burden, it's not my
2 burden, to prove to you what he was doing.

3 It's the State's burden to prove to you what
4 he's doing, and they have not carried that. There are
5 some discrepancies in this case. You know what they are.

6 Science does not lie, and this guy did not do
7 this crime, and I implore you to acquit him because the
8 science doesn't fit. Find him not guilty, please.

9 Thank you for your service.

10 THE COURT: Ms. Haley, thank you, or
11 Ms. Compton?

12 MS. HALEY: Thank you, Your Honor. May it
13 please the Court: First, I would like to thank you.
14 It's been a long few days in the courtroom. I'm sure you
15 are ready to go home, but we are here today for a very
16 serious issue, and Mr. Mayer would like you to believe
17 his story. He thinks it's an easy story to prove, but
18 there are a few things you have to believe if you're
19 going to believe the defense's case as they have
20 presented it thus far.

21 First, there was an alibi mentioned at the
22 beginning of all of this. Supposedly something was
23 happening in the area of Congress and Rutledge Streets,
24 and Mr. Desaussure was drinking with some friends.
25 However, his friend didn't testify to that. He said he

1 didn't know what he was doing that day. He wasn't with
2 him, has no idea.

3 We're supposed to believe all this talk of a
4 beer that the defendant had that night. We're also
5 supposed to believe that he was drinking that beer and
6 went to go buy more beer, and that's when he was stopped
7 and he just happened to have a knife on him at that time.

8 We're also supposed to believe that he needed
9 that kitchen knife in his waistband to go buy beer or
10 that there was no weapon that was used in the offense
11 itself because that wasn't the weapon.

12 We're also supposed to believe that the
13 entire City of Charleston Police Department, from
14 uniformed officers all the way up to the highest
15 detectives, fabricated this entire story and made up some
16 story about a white bag on a bicycle and that it never
17 existed and that this was some big conspiracy for the
18 city of Charleston to plant evidence in a case.

19 You also have to believe that someone
20 silently snuck into Gilroy's that night and stole money
21 before the defendant happened to be there. Finally, you
22 have to believe that Stephen Silcott lied about
23 everything that he said to you on the stand, that he just
24 drove down from Maryland and lied, but let's think about
25 what a liar would have said.

1 A liar would have gotten up and said he was
2 polite to the police officer and he kindly said, Oh, you
3 caught that man that did that at Gilroy's earlier. He
4 wouldn't have been sarcastic and used curse words in
5 front of us. A liar would have claimed that knife was
6 recovered from the defendant three hours after this
7 incident was the same knife that he saw and it was very
8 close to him earlier that night, but he didn't do that.
9 He said that it was a different knife.

10 A liar would have given you a nice packaged
11 story that you could take back to the jury room and say,
12 yes, he definitely did it. We have the guy. Everyone
13 pointed it out. Unfortunately, that's not what we have
14 here, and Mr. Mayer pointed that out. What we have here
15 is real life, and things aren't nicely packaged stories
16 that seem to make sense.

17 Now let's talk about what is reasonable. The
18 defense would like for you to believe that it's not
19 reasonable for there to have been a white bag radioed out
20 that night. Yes, we did listen to the dispatch records,
21 some of them. However, Officer Burns testified that
22 there is multiple ways for them to radio to one another,
23 there various channels we only heard a small portion of
24 what was said that night.

25 It's also reasonable that maybe Adam Corbin,

1 as he said on that stand, had terrible judgment about the
2 defendant's age. He acknowledged that. It's also
3 reasonable for Stephen Silcott to tell you that he cursed
4 at the officers and that he thought he was going to get
5 in trouble for doing that because he realized he wasn't
6 treating a police officer with the respect he probably
7 deserved.

8 It's also reasonable that Stephen Silcott
9 would say, I thought it was strange that the defendant
10 was wearing a different shirt than he was wearing earlier
11 that night. It was strange especially because he was
12 wearing dark colored and now he's wearing brightly
13 colored clothing in the middle of the night, after he
14 just committed a crime.

15 It's also reasonable for Stephen Silcott to
16 get up on that stand and say that he recognized the
17 defendant at 12:30 that night because he had seen him
18 twice that day. He testified to you that he saw him at
19 around 5:00 when he was walking to work and the defendant
20 asked him for money.

21 It's reasonable that the defendant would have
22 asked him for money that night and Corbin testified he
23 asked his friend the same thing. It's also reasonable
24 that Adam Corbin testified to seeing defendant take the
25 money out of tip jar at Gilroy's. Finally, it's

1 reasonable that the defendant would have taken money out
2 of the tip jar at Gilroy's if he was asking people for
3 money earlier that night and didn't get enough.

4 The State isn't claiming that the knife we
5 have is the knife that was used in that assault. It
6 wouldn't be reasonable to claim that; however, the State
7 is claiming that it's reasonable that the defendant had a
8 knife on him that night, Stephen Silcott said it looked
9 like a different knife.

10 It's a reasonable story that at around 9
11 p.m., the defendant had one knife on him. He went in,
12 tried to take the money out of the tip jar at Gilroy's,
13 he was confronted, he sliced Mr. Cobiella's face with a
14 knife, decided to go home because, as his friend
15 testified, he lived nearby. He had a bicycle. He could
16 have gone home, gotten different clothes. He had lots of
17 clothes on him at the time. It doesn't mean they were
18 the clothes he was wearing at the time.

19 But it's reasonable that these wounds are
20 from a knife. He said it felt like a punch, and when you
21 see on television a boxer's eye splits open, he didn't
22 say just because he didn't see a knife that there wasn't
23 one there. Those injuries would reasonably be from a
24 knife wound.

25 Also, it's reasonable that Mr. Cobiella could

1 point out the defendant in court. Sure, hindsight is
2 20/20. It would have been wonderful if the officers had
3 identification procedures in this case. Unfortunately,
4 as Detective Burckhardt testified, they thought that
5 Stephen Silcott's identification was all they needed.
6 They couldn't have asked for a more independent witness
7 to come upon the scene and say, You got the guy. That's
8 him.

9 But Mr. Cobiella got up on that stand and
10 said, That is definitely him. I was interacting with him
11 for several minutes. We were very close to one another.
12 I was focussed on him the entire time. It was a well-lit
13 restaurant. We went out to a well-lit street. I knew
14 what was going on. I wanted my money.

15 He said he's not a vengeful person. He just
16 wanted the little bit of money that he had earned on that
17 slow Sunday night. That's all he wanted. He didn't want
18 any trouble. Unfortunately, the defendant did, and it's
19 reasonable for Mr. Cobiella to be able to identify the
20 assailant who attacked him two-and-a-half years later.
21 You can't blame him because the officers didn't ask him
22 to do an identification before then.

23 Another thing Mr. Mayer said is science
24 doesn't lie. Once again, it's not reasonable that this
25 weapon was the one that was used during the incident.

1 We're not claiming that, but the science tells us that
2 there was no DNA recovered from a knife that belonged to
3 either the defendant or the victim. That's all the
4 science says here.

5 The science says that two unidentified
6 individuals' DNA was found on there didn't belong to
7 either one of them. Also, the science of fingerprints in
8 this case, we found out they're not always able to be
9 recovered from certain circumstance. There were no
10 prints recovered in this case. Of course, we would all
11 like this nice packaged story. Who wouldn't want that?
12 We all watch CSI. It would be great if we came in here
13 and said, Fingerprint, DNA, we've got it all. We don't
14 even need eyewitnesses. That's just not the way it
15 works.

16 Now, finally, the judge is going to talk to
17 you about reasonable doubt and about the law, and she
18 will instruct you on that far better than I can, but
19 there are a few things to touch upon in this case.

20 First, money was taken from that tip jar.
21 Mr. Cobiella testified that he saw money in there before
22 and that he knew it was in there and he heard -- when the
23 defendant came in, he heard the change rustling around.
24 He knew that.

25 Now, we have to prove an item was taken of

1 value from another that belongs to Ms. Silcott and it was
2 carried away, and we have to prove that beyond a
3 reasonable doubt a weapon was used during this robbery.
4 Now, it's reasonable that a weapon was used during this
5 robbery, and just because the weapon wasn't used
6 initially doesn't mean that this isn't an armed robbery.

7 The carrying away of that property and the
8 use of a weapon can also occur immediately after the
9 taking. It's called continuous offense theory. The
10 offense does not end until they have successfully gotten
11 away from the crime, and in this case, the defendant was
12 trying to escape from Mr. Cobiella when he used that
13 knife.

14 Finally, there is a lot of talk of reasonable
15 doubt. We have to prove this case beyond a reasonable
16 doubt, that the defendant committed an armed robbery at
17 Gilroy's and assault and battery in the first degree
18 against the victim, Daniel Cobiella, and we welcome the
19 burden of proving this beyond a reasonable doubt.

20 Now, very few things we know in this world
21 with absolute certainty. If y'all knew what happened on
22 that night and you were absolutely certain about it, you
23 wouldn't be on there jury. You would be witnesses
24 testifying. But if you are firmly convinced about what
25 happened on October 3rd, 2010, you must convict the

1 defendant of armed robbery and assault and battery in the
2 first degree, which occurred during the commission of
3 that robbery.

4 Now, please, consider the evidence carefully.
5 If you have any questions, feel free to pass them up.
6 Feel free to talk to us. Take your time, and please
7 review everything that you can take back with you.

8 And, please, use your common sense. And
9 after you have reviewed everything, we are confident that
10 you will find the defendant guilty of armed robbery and
11 assault and battery in the first degree.

12 THE COURT: Thank you. Ladies and gentlemen
13 of the jury: You have heard the testimony, evidence, and
14 arguments of State and of the defense. I will now
15 explain to you the law that applies to this case.

16 Under the constitution and laws of the State
17 of South Carolina, you are the finders of fact in this
18 case. I do not have the right to pass upon the facts or
19 even to express any opinion that I might have about those
20 facts.

21 This is a matter solely for you, the jury, to
22 determine. As jurors, it is your duty to determine the
23 effect, the value, the weight and the truth of the
24 evidence presented and admitted during this trial.

25 As the trial judge, it is my responsibility

1 to preside over the trial of the case and to rule upon or
2 pass upon the admissibility of the evidence offered
3 during the trial. You are to consider only the testimony
4 which has been presented from this witness stand together
5 with any exhibits and stipulations which have been made a
6 part of the record.

7 I have the additional duty to charge you
8 about the law applicable to this case, and as the
9 presiding judge, I'm the sold judge of the law in this
10 case. Is your duty as jurors to accept and apply the law
11 as I now state it to you and then to reach your verdict.
12 Finally, I charge you in that regard that you should not
13 be concerned with what you think the law ought to be, but
14 with what the Court charges you the law is.

15 The testimony of a victim or any witness need
16 not be corroborated; however, it is up to you, ladies and
17 gentlemen, as the fact finder to weigh and determine the
18 testimony of all witnesses in this case.

19 You are the judges and the sole judges of the
20 credibility, meaning the believability, of the witnesses
21 who have testified and of the evidence in this case. In
22 passing upon credibility, you may take into consideration
23 many things, such as the demeanor or manner of the
24 testifying witness, whether the witness had a reason to
25 be biassed or prejudiced, whether a witness's testimony

1 was contradicted on the one hand or supported and
2 corroborated on the other hand.

3 You may believe a small portion of a
4 witness's testimony and disregard the larger or vice
5 versa. You may believe one witness against many or many
6 against one. All of these things you will consider
7 bearing in mind you should give the defendant the benefit
8 of any reasonable doubt. It becomes your duty as jurors
9 to analyze and to evaluate the evidence and determine
10 that evidence which convinces you of its truth.

11 There are two types of evidence that are
12 subsequently presented during a trial, direct evidence
13 and circumstantial evidence. Direct evidence is the
14 testimony of a person who claims to have actual knowledge
15 of a fact, such as an eyewitness. It is evidence which
16 immediately establishes the main fact to be proved.

17 Circumstantial evidence is proof of a chain
18 of facts and circumstances indicating the existence of
19 the fact. It's evidence to me which immediately
20 establishes collateral facts from which the main fact may
21 be inferred. Circumstantial evidence is based on
22 inference and not on personal knowledge or observation.

23 An issue in this case is the identification
24 of the defendant as the person who committed the crimes
25 charged. The State has the burden of identification

1 beyond a reasonable doubt. You must be satisfied beyond
2 a reasonable doubt of the accuracy of the identification
3 of the defendant before you may convict the defendant.

4 Identification testimony is an expression of
5 belief or impression by a witness. You must determine
6 the accuracy of the identification of the defendant. You
7 must consider the believability of any identification
8 witness in the same way as you would consider the
9 believability of any other witness.

10 You may consider whether the witness had an
11 adequate opportunity to observe the offender at the time
12 of the offense or afterward. This will be affected by
13 things such as how long or short a time was available,
14 how far or close the witness was, the lighting
15 conditions, and whether the witness had a chance to see
16 or know the person in the past.

17 Once again, I instruct you that the burden of
18 proof in the case relates to every element of the crime
19 charged and that specifically includes the burden of
20 proving beyond a reasonable doubt the identity of the
21 defendant as the person who committed the crime.

22 If after examining the testimony you have a
23 reasonable doubt as to the accuracy of the
24 identification, you must find the defendant not guilty.
25 The fact that the defendant was arrested, charged, and

1 indicted is not evidence in this case and cannot be
2 considered by you as evidence of guilt in this case, nor
3 does it create any presumption or inference of guilt.
4 The indictment is simply the formal written instrument
5 which contains the charge made against the defendant.

6 An indictment is the formal document by which
7 this case is brought into court. The indictments in this
8 case allege one count of armed robbery and one count of
9 assault and battery in the first degree against this
10 defendant.

11 Each indictment charges a separate and
12 distinct offense. You must decide each indictment
13 separately on the evidence and the law applicable to it
14 and influenced by your decision as to the other
15 indictment. The defendant may be convicted or acquitted
16 or either or both of the offenses charged.

17 You will be asked to write a separate verdict
18 of guilty or not guilty or guilty of any applicable
19 lesser included offense, and we'll talk about that
20 shortly, as to each indictment.

21 The defendant has pled not guilty to the
22 charges in these indictments, and that puts the burden on
23 the State to prove the defendant guilty. A person
24 charged with committing a criminal offense in South
25 Carolina is never required to prove himself innocent.

1 It is an important rule of law that the
2 defendant in a criminal trial, no matter what the
3 seriousness of the charge may be, will always be presumed
4 to be not guilty of the crime for which the indictment
5 was issued unless guilt has been proven by evidence
6 satisfying you of that guilt beyond a reasonable doubt.

7 This presumption of innocence does not end
8 when you begin your deliberations, but it accompanies the
9 defendant throughout the trial unless you reach a verdict
10 of guilt based on evidence satisfying you of guilt beyond
11 a reasonable doubt.

12 The presumption of innocence is like a robe
13 of righteousness placed on the shoulders of the defendant
14 which remains with him unless it has been stripped from
15 him by evidence satisfying you, the jury, of the
16 defendant's guilt beyond a reasonable doubt. The
17 presumption of innocence is not mere legal theory. It is
18 not just a legal phrase. It is a substantial right to
19 which every defendant is entitled unless you, the jury,
20 are satisfied of the evidence of the defendant's guilt
21 beyond a reasonable doubt.

22 What is reasonable doubt in the law? We talk
23 a lot about reasonable doubt. A reasonable doubt is a
24 doubt which makes an honest, sincere, conscientious juror
25 in search of the truth hesitate to act. Proof beyond a

1 reasonable doubt must therefore be proof of such a
2 convincing character that a reasonable person would not
3 hesitate to rely and act upon it in the most important of
4 his offer her own affairs.

5 Proof beyond a reasonable doubt can also be
6 described as proof which leaves you firmly convinced of
7 the defendant's guilt. There are few things in this
8 world we know with absolute certainty, and in criminal
9 cases, the law does not require proof that overcomes
10 every possible doubt. If, based on your consideration of
11 the evidence you are firmly convinced that the defendant
12 is guilty of the crime charged, you must find him guilty.

13 If, on the other hand, you think there is a
14 real possibility that he is not guilty, you must give him
15 the benefit of the doubt and find him guilty or not
16 guilty, or guilty of the lesser included offense, but the
17 defendant receives the benefit of all doubt.

18 One other important thing to consider in your
19 deliberation before we talk about the elements of the
20 offenses at issue, I told you at the very beginning, I
21 think when you were still in the panel before we selected
22 the jury, that the defense doesn't have to prove
23 anything. They don't have to talk; they don't have to
24 say a word. The burden remains on the State to prove the
25 defendant's guilt beyond a reasonable doubt.

1 When the defendant in a criminal case chooses
2 not to testify, that is his absolute constitutional right
3 under the United States constitution and the South
4 Carolina constitution. No one is allowed to use that
5 against him, including you, the jury, as the fact finder.
6 In fact, that has no bearing whatsoever on your
7 deliberations, and you are not to consider that in any
8 manner.

9 It would, in fact, be error to even mention
10 that in your jury room, so keep that in mind. The fact
11 that the defendant did not testify in no way weighs upon
12 your deliberation. You consider and your consideration
13 is limited to the evidence that has been presented here
14 in the court either from the witness stand, by
15 stipulation as we read into the record, and you'll have
16 the stipulation, actually, as well as the exhibits, and
17 the evidence that came in and was admitted during the
18 trial.

19 In the last several trials I've had, we
20 always get a note from the jury asking for certain items
21 that may have been referenced during the trial but didn't
22 actually come into evidence. When I send y'all back to
23 the jury room, before we bring you the indictments and
24 the evidence, we are going to have, the lawyers and I and
25 the court reporter, will go through it and put it in

1 order and make sure you have all the exhibits. If you
2 don't receive something, that means it wasn't admitted
3 into evidence. It may just be something that was
4 referenced or offered for identification, but I wanted to
5 go ahead and tell y'all that to avoid any confusion.

6 Likewise, the knife has been discussed.
7 Whatever y'all decide about the knife, and, again, that's
8 within your province as fact finders. I don't send
9 knives back to the jury room. If anybody wants to see
10 the knife or handle the knife, y'all just pass us a note
11 through your foreperson and we'll have the bailiff bring
12 back the knife.

13 I know y'all are fine with the knife. It
14 just makes me and everybody else feel a lot better if we
15 move forward. Let's talk the indictments set forth in
16 the indictment.

17 The defendant is charged with armed robbery.
18 In order to prove this offense, the State must prove
19 beyond a reasonable doubt that the defendant took
20 personal property from the person or presence of another
21 person. Property is in the presence of a person if it's
22 within that person's reach, inspection, observation, or
23 control so that the person could, if not overcome with
24 violence or prevented by fear, keep possession of that
25 property.

1 The State must also prove beyond a reasonable
2 doubt that the defendant carried away the property
3 intending to permanently deprive the owner of the
4 property and to keep the property for the defendant's own
5 use.

6 The slightest removal of the property or the
7 complete possession of the property, even for an instant
8 by the defendant, is sufficient to show him taking and
9 carrying away of the property. The taking and carrying
10 away of the property must have been done by violence or
11 putting the owner of property in fear of violence.

12 Finally, the State must prove beyond a
13 reasonable doubt that the defendant was armed with a
14 deadly weapon during the robbery. A deadly weapon is any
15 article, instrument, or substance which is likely to
16 cause death or great bodily harm. Whether it has been
17 used as a deadly weapon depends on the facts and
18 circumstances of each individual case.

19 If you find the State has failed to to prove
20 the defendant was armed with a deadly weapon, you may
21 then consider whether the State has proved by a
22 reasonable doubt that the defendant committed the lesser
23 included offense of robbery. In order to prove robbery,
24 the State must provide beyond a reasonable doubt all the
25 elements I just explained, except the defendant was armed

1 with a deadly weapon.

2 The crime of robbery is not completed the
3 moment the stolen property is in possession of the
4 alleged robber, but it must be deemed to continue during
5 any attempt to escape. The defendant is charged with
6 assault and battery in the first degree. A person
7 commits an offense of assault of the first degree if the
8 person unlawfully injures another person, and the act
9 occurred in the commission of a robbery, burglary,
10 kidnapping, or theft.

11 A person may also commit the offense of
12 assault and battery in the first degree if the person
13 unlawfully offers or attempts to injure another person
14 with the present ability to do so and the act is either
15 accomplished by means likely to produce great bodily
16 injury or occurred during the commission of a robbery,
17 burglary, kidnapping, or theft.

18 Great bodily injury is bodily injury which
19 causes a substantial risk of death or which causes
20 permanent disfigurement or a protracted loss or
21 impairment of function of a bodily member or organ.

22 Ladies and gentlemen: You have been selected
23 by both the State and the defense to be fair and
24 impartial jurors. It is your duty then during your
25 deliberation to determine the truth in this case. From

1 the facts which you determine to be true, you take and
2 allow the law I've just given to you and arrive at a
3 verdict which speaks that truth.

4 You must consider the instructions as a whole
5 and not follow some and ignore others. You have heard
6 the evidence, and now you have heard the law. Whatever
7 your verdict, your foreperson will indicate it on the
8 verdict form by checking the applicable section. I have
9 this for you.

10 The verdict form in this case is one page,
11 and it's fairly simple. It addresses both indictments.
12 The first, on the charge of the armed robbery, we, the
13 jury, unanimously find the defendant, Alonda Baron
14 Desaussure, and then you have three choices as to the
15 armed robbery indictment, not guilty, guilty of the
16 lesser included of robbery, or guilty of armed robbery.

17 As to the second indictment, on the charge of
18 assault and battery in the first degree, we the jury
19 unanimously find the defendant, Alonda Barron Desaussure,
20 two choices there, not guilty or guilty.

21 Once you have concluded your deliberations
22 and the foreperson signed the verdict, you'll knock on
23 the door and let the bailiff know, and that will be our
24 signal that it's time to bring you out for your verdict.
25 In a similar manner, if you have any questions and you

1 need to be here, knock on the door, send a note. I will
2 share any question or issue that you have with the
3 attorneys and then we'll try to figure out a way to
4 address it.

5 Please remember that although the foreperson
6 is the only juror who writes on the jury form, it's not
7 hers alone. The verdict must be a unanimous verdict.
8 The foreperson is not authorized to write the verdict
9 until you all agree what the verdict should be.

10 Ladies and gentlemen: I'm going to send you
11 to the jury, but, again, and I know you're tired of
12 hearing this, please do not discuss the case until you
13 have seen the verdict form and exhibits.

14 The indictments will come as well. Once you
15 receive those, that will be your signal to deliberate.
16 Once you begin your deliberations, you'll deliberate
17 until it's time you all either let us know that you have
18 a question or reached a verdict. Okay?

19 Thank you, ladies and gentlemen. I'm going
20 to ask you to go to the jury room. I'm going to go over
21 a few things with the attorneys while they get their
22 exhibits ready.

23 (5:52 p.m., jury retires to deliberate.)

24 THE COURT: All right. Any objections to the
25 charge as given? Part of it was ad libbed.

1 MS. HALEY: None from the State, Your Honor.

2 MR. MAYER: None from the defense, Your
3 Honor.

4 THE COURT: All right. Then I'm going to
5 bring the alternate in and let the alternate go and ask
6 y'all to come up and look at the exhibits and make sure
7 we have everything.

8 I know Amanda is pretty good about not
9 letting them go away. Here is the verdict form and the
10 indictments.

11 Ms. Lau, thank you so much. I am required by
12 statute now to release the alternate before deliberations
13 begin. Thank you so much for being here. Our alternates
14 are such an important part of the system. You would not
15 believe how often we are biting our fingernails, hoping
16 we have enough jurors to go forward, so thank you so
17 much. You are finished for the week, so she does not
18 have to call, right? All right.

19 You do not have to call. Will she receive
20 some information in the mail?

21 THE CLERK: We'll be sending out the checks
22 Friday.

23 THE ALTERNATE JUROR: It's my honor. Thank
24 you so much. Good luck.

25 THE COURT: All right.

1 (Recess taken.)

2 (In open court, jury not present.)

3 All right. Looks like we got a verdict.

4 (7:14 p.m., in open court, jury present.)

5 THE COURT: Thank you, sir. And thank you,
6 ladies and gentlemen. Madame foreperson: It's my
7 understanding the jury has reached a verdict; is that
8 correct?

9 THE FOREPERSON: Yes.

10 THE COURT: All right. Thank you. If you
11 will hand the verdict form to the bailiff, please. Okay.

12 THE CLERK: Please have the defendant stand.
13 The verdict form: In the matter of the State of South
14 Carolina versus Alonda Barron Desaussure, on the charge
15 of armed robbery, we, the jury, unanimously find the
16 defendant, Alonda Barron Desaussure, guilty of armed
17 robbery on the charge of assault and battery in the first
18 degree.

19 We, the jury, unanimously find the defendant
20 Alonda Barron Desaussure, guilty of assault and battery
21 of the first degree, signed by the foreperson of the jury
22 on July 10, 2013.

23 Ladies and gentlemen of the jury: If this
24 was your verdict, please raise your right hand. Thank
25 you please. Let the record reflect all 12 jurors raised

1 their right hand.

2 All right. Would you like us to poll the
3 jury, Mr. Mayer?

4 MR. MAYER: No, Your Honor.

5 THE COURT: All right. All right. Anything
6 from the defense while in the presence of jury?

7 MR. MAYER: Not at this time, Your Honor.

8 THE COURT: Anything from the State?

9 MS. HALEY: Nothing from the State, Your
10 Honor.

11 THE COURT: Ladies and gentlemen: Thank you
12 so much for your service and for your kind attention
13 during the case. We're going to move into sentencing
14 now, and you are welcome to stay, if you like to, but
15 your service is complete. You have reached your verdict.

16 We will get the foreperson to sign the two
17 indictments, if we could get those back, and I could get
18 those to her. And, also, your pizza is here, and so
19 you're welcome to stay and eat if you like or take some
20 with you, either way, but I did want to come and thank
21 everyone for their help.

22 Would y'all like to stay for the sentencing
23 portion? You certainly don't have to. Okay. Then I
24 will see you in your jury panel room. Why don't y'all
25 take about five to prepare for sentencing, and I'll come

1 back and do that in just a minute. I'll take the
2 indictments -- or the evidence is back there. Great.

3 (Jury dismissed.)

4 THE COURT: Okay. Do you have sentencing
5 sheets and are y'all ready to proceed?

6 MS. HALEY: Yes, Your Honor.

7 THE COURT: Thank you. Okay. I'm happy to
8 hear from the State.

9 MS. HALEY: Thank you, Your Honor. I will
10 read the defendant's record. In 1980, strong-arm
11 robbery, grand larceny; 1983, house breaking and
12 receiving stolen goods; in 1987, false report and assault
13 with intent to commit criminal sexual conduct in the
14 first degree, for which he received a 30-year sentence
15 and burglary second degree, for which he received a
16 15-year sentence; in 2007 a parole revocation, and in
17 2009 a strong-arm robbery, and just to preserve the
18 record, the State will be null prossing two additional
19 pending charges against Mr. Desaussure.

20 THE COURT: Okay.

21 MS. HALEY: After this.

22 THE COURT: And I have listed that the armed
23 robbery charge under 16-11-0330 subsection A is a violent
24 and a most serious offense.

25 MS. HALEY: Yes, Your Honor.

1 THE COURT: Which of the prior offenses were
2 also either serious or most serious, for the record?

3 MS. HALEY: The assault with intent to commit
4 criminal sexual conduct in the first degree was a most
5 serious offense.

6 THE COURT: So this would be the second most
7 serious offense.

8 MS. HALEY: Yes, Your Honor.

9 THE COURT: It's my understanding that notice
10 with intent to seek life without parole was served; is
11 that correct?

12 MS. HALEY: Yes, Your Honor.

13 THE COURT: Do you have that date?

14 MS. HALEY: Yes, Your Honor. It was June
15 21st.

16 THE COURT: Of this year?

17 MS. HALEY: Yes.

18 THE COURT: Anything further to add on that?

19 MS. HALEY: Nothing further, Your Honor.

20 THE COURT: Anything regarding the assault
21 and battery first?

22 MS. HALEY: Nothing, Your Honor.

23 THE COURT: Okay. I'm happy to hear from the
24 defense, but, as you know, I don't have much discretion
25 here, sir.

1 MR. MAYER: Your Honor, it's my understanding
2 you don't have any discretion.

3 THE COURT: You're correct.

4 MR. MAYER: Okay. I won't waste the Court's
5 time.

6 THE COURT: Does your client understand about
7 the most serious offenses?

8 MR. MAYER: Your Honor, I have explained the
9 life without parole provision in the statute and how that
10 works, and my understanding, how that should function in
11 reality for him, being 50 years old now, he's looking at
12 potentially -- he might have an option or something, age
13 70 or something.

14 THE COURT: I'm not sure that's correct under
15 the statute. Let me pull the statute, and we'll go over
16 the sentencing. You're welcome to have a seat. Just
17 give me one minute.

18 Okay. Sir, if you'll stand up, under Section
19 17-25-45 subsection A of the South Carolina code, and
20 notwithstanding any other provision of law, upon
21 conviction of a most serious offense as defined in this
22 section, and armed robbery is, indeed, defined as a most
23 serious offense, a person must be sentenced to a term of
24 imprisonment for a life without the possibility of parole
25 if that person has a prior most serious offense, which

1 according to the prior record indeed you do; therefore,
2 the sentence on the armed robbery charge is life without
3 parole. The sentence on the assault and battery first
4 degree charge is ten years concurrent, obviously, to life
5 without parole.

6 God bless you, sir. Good luck.

7 All right. Anything further from the State
8 or the defense?

9 MS. HALEY: Nothing from the State, Your
10 Honor.

11 MR. MAYER: Nothing from the defense, Your
12 Honor.

13 THE COURT: All right. Thank you. Y'all did
14 a great job. I know this was tough. I did see the
15 jurors. Some of them were very interested in talking to
16 y'all to share their thoughts. Some of them have very
17 pointed thoughts about the investigation, some of the
18 same thoughts I shared with y'all earlier in the week, so
19 I think it might be beneficial to reach out to them,
20 maybe send a letter saying they want to talk to -- there
21 are two of them that definitely wanted to talk to Mr.
22 Mayer. I'm sure they wanted to talk to you all as well.

23 One or two didn't want to, so what I told
24 them, I told the lawyers they can contact you. If you
25 don't want to talk to them, you don't have to talk to

1 them, but if you do it helps them hone their skills and I
2 know when I was practicing a always liked to find out
3 what I could have done get per, what I didn't, so you
4 should have your jury list. Obviously, they aren't to be
5 shared with anyone else, but the attorneys are permitted
6 to do that.

7 Okay? Thank y'all.

8 - - -

9 (Whereupon, the proceedings were concluded.)

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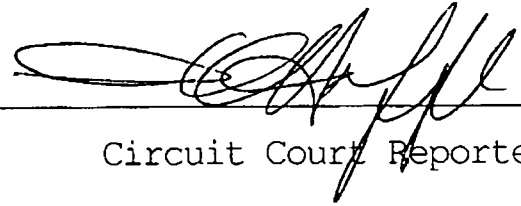
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25

I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 10th of July 2013.

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

November 25, 2013



Circuit Court Reporter

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

County of CHARLESTON)

2013-CP-10-5614

Alonda BARRON DESAUSSE)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

BY

JULIE J. ARISTONG
CLERK OF COURT

2013 SEP 24 AM 11:33

FILED

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 INST.
990 WISACKY HWY. BISHOPVILLE S.C. 29010
2. Name and location of Court which imposed sentence COURT OF GENERAL
SESSIONS, CHARLESTON COUNTY, SOUTH CAROLINA
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) K 674649 K 674650

5. The date upon which sentence was imposed and the terms of the sentence:

(a) 7-10-2013

(b) LIFE ^{100%} AND 10 YEAR

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty yes

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

NO

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. N/A

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. N/A

ii. _____

iii. _____

(c) the date of each such result:

i. N/A

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. N/A

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) MY TRIAL COUNSEL did not APPEAL

- (b) _____
- (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) INSUFFICIENT EVIDENCE. I WAS DENIED
- (c) EQUAL PROTECTION BY COUNSEL AND JUDGE
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) 6 AMEND. EFFECTIVE ASSISTANCE OF
- (b) COUNSEL. 14. AMEND EQUAL PROTECTION
- (c) OF THE LAW. 5. AMEND FAIR TRIAL
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____

iv. _____

(c) the disposition thereof:

i. _____ *N / A*

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____ *N / A*

ii. _____

iii. _____

iv. _____

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

i. _____ *N / A*

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

_____ *No*

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

(a) which grounds have been presented:

i. _____ *N / A*

ii. _____

iii. _____

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

i. _____ *N / A*

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) COUNSEL did NOT FILE
 (b) MY APPEAL
 (c) _____

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

(a) your arraignment and plea? _____
 (b) your trial, if any? YES
 (c) your sentencing? YES
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? NO
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NO

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. ARON MAYER
2000 SAM RITTENBERG BLVD-STE.
2011 CHARLESTON, S.C. 29407
 ii. _____
 iii. _____
 (b) the proceedings at which each such attorney represented you:
 i. TRIAL AND SENTENCE
 ii. _____
 iii. _____

19. State clearly the relief you seek in filing this application:

CONVICTION VACATING

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

NO

Revised 3/2003.

STATE OF SOUTH CAROLINA)

VERIFICATION

County of CHARLESTON)

I, Alonda Deussen, 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.

Alonda Deussen

SWORN to and subscribed before me this 17
day of Sept, 2013.

Debra Jones (L.S.)
Notary Public

My Commission Expires: 11-4-2015

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

I, Alonda Reardon, 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.

Alonda Reardon
Applicant

SWORN or affirmed to, and subscribed before me this

17 day of Sept, 2013.

Debra Sines
Notary Public

My Commission Expires:

11/4/15

Charleston Police Department

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

AFFIDAVIT

Personally appear before me, a magistrate of this county one, **David Vargo**

who first being duly sworn deposed and says that, Alonda Barron Desaussure,

did within this county and state on the 3rd of October 2010 violate the criminal laws of the State of South Carolina in the following particular:

DESCRIPTION OF OFFENSE

Assault and Battery (First Degree)
16-3-600 C

The affiant states there is probable cause to believe that the defendant named did commit the crime set forth and that such probable cause is based on the following facts:

That on 10/3/10 at approximately 2115 hrs while at 353 King Street (Gilroy's Pizza) which is located in the City and County of Charleston, SC the above named defendant did knowingly, willingly and unlawfully violate South Carolina Code of Law Assault and Battery First Degree (16-3-600 C) to wit:

That on the above date and time the defendant (Alonda Desaussure) entered Gilroy's Pizza, approached the counter, and began removing money from the tip jar. The victim (Daniel Cobiella) followed the defendant out of the business and confronted him. He demanded the defendant return the money. At that time a physical altercation ensued. During the altercation, the defendant removed a knife from the waistband of his pants and cut the victim approximately one inch above his right eye and down his right cheek. He then fled the scene on a bicycle which had a white bag on the handle bars. The victim was treated for his injuries at Roper Hospital.

At approximately 0030 hrs on 10/4/10 Officer Burns observed a person matching the suspect's description at the intersection of King and Morris Streets. A witness (Scott Silcott) arrived on scene and identified the defendant as the person who assaulted and robbed the victim. At that time the defendant was found to be in possession of a 4-inch kitchen knife, a one dollar bill and loose change, and a dark-colored bike with a white bag on the handle bars.

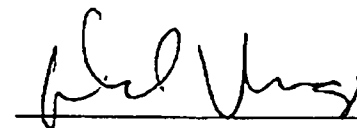
The above facts are true and believable based on the statements of the victim, witness Scott Silcott, and the investigations of Charleston Police officers Burns, Stone and Gaskin.

SWORN TO AND SUBSCRIBED BEFORE ME

THIS

DAY OF

OCT 04 2010



AFFIANT

180 Lockwood Blvd.
Charleston, SC 29403
843-577-7434

SIGNATURE OF JUDGE

(L.S.)

COMPLAINT #: 1016687

WARRANT#

CPD Form OT3

MEG20101005287

WITNESSES

MARY BURNS

Charleston City Police Department

AGENCY CASE NUMBER

1016687

ARREST WARRANT NUMBER

K674649

DATE OF ARREST

October 4, 2010

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

APR 04 2011

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2011GS1002047

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

ALONDA BARRON DESAUSSURE

DOB: [REDACTED] S

B/M

Indictment for

Armed Robbery

FILED4/15/2011 3:37:27 PM
JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

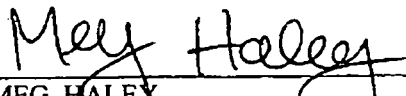
INDICTMENT

At a Court of General Sessions, convened on April 4, 2011 the Grand Jurors of Charleston County present upon their oath:

Armed Robbery

That on or about October 3, 2010, in Charleston County, South Carolina, at 353 King Street by use of force, threats or intimidation and while armed with a deadly weapon, to wit: a knife, the Defendant, ALONDA BARRON DESAUSSURE, did take and carry away goods and/or monies from the person or immediate presence of Daniel Cobiella with the intent to permanently deprive him of possession thereof, in violation of Section 16-11-330(A) of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


MEG HALEY
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Charleston
 STATE VS.
Alonda Barron Desaussure

AKA:

Race: BLACK Sex: M Age: 51DOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED]City, State, Zip: CHARLESTON, SC 294070000DL#: [REDACTED] SID#: [REDACTED]*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: ARMED ROBBERY

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS1002047A/W#: K674649Date of Offense: 10/4/2010S.C. Code §: 16-11-0330(A)CDR Code #: 0139

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSin violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
 w/minor 1st or Lewd Act)
The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: Meg Haley 78209

Haley, Meg

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of LWOP days/months/years or Life & 100 Years under the Youthful Offender Act not to exceed years
 and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
 of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$ Payment Terms: ☐ Set by SCDPPPS Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$30	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)		\$ <u>3.90</u>
TOTAL		\$ <u>133.90</u>

PTUP days/hours Public Service EmploymentObtain 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 FundOther:
☐ Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code: Sentence Date: July 10, 2013

Form Approved by
S.C. Attorney General
April 17, 2009
SCCA 619

ARREST WARRANT
K-674649
STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of
CHARLESTON

THE STATE
against

ALONDA BARRON DESAUSSEURE
CHARLESTON, SC 29407
Phone: **843-766-1771** SSN: **[REDACTED]**
Sex: **M** Race: **B** Height: **601** Weight: **174**
DL State: **SC** DL# **[REDACTED]**
DOB: **[REDACTED]** Agency ORI#: **[REDACTED]**
Prosecuting Agency: **CPD**
Prosecuting Officer: **BURNS**
Offense: **ARMED ROBBERY**
Offense Code: **[REDACTED]**
Code/Ordinance Sec: **16-11-330**

This Warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality of **CHARLESTON**. The accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge (L.S.)

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant on

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

STATE OF SOUTH CAROLINA)
☒ County/ ☐ Municipality of
CHARLESTON)

AFFIDAVIT

Personally appeared before me the affiant **DAVID VARGO** who
being duly sworn deposes and says that defendant **ALONDA BARRON DESAUSSEURE**
did within this county and state on **OCTOBER 3, 2010** violate the criminal laws of the
State of South Carolina (or ordinance of ☒ County/ ☐ Municipality, **CHARLESTON**)
in the following particulars:
DESCRIPTION OF OFFENSE: **ARMED ROBBERY**
16-11-330

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:

SEE ATTACHED AFFIDAVIT

Signature of Affiant

STATE OF SOUTH CAROLINA)
☒ County/ ☐ Municipality of
CHARLESTON)

Affiant's Address **180 LOCKWOOD DRIVE**
CHARLESTON, SC 29403
Affiant's Telephone **843-577-7434**

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that
on **OCTOBER 3, 2010** defendant **ALONDA BARRON DESAUSSEURE**
did violate the criminal laws of the State of South Carolina (or ordinance of
☒ County/ ☐ Municipality of **CHARLESTON**) as set forth below:

DESCRIPTION OF OFFENSE:

ARMED ROBBERY

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said
defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to
the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me
on **OCTOBER 4, 2010**

Signature of Issuing Judge

Judge Code: **7004**

Judge's Address **3870 LEEDS AVENUE, SUITE 106**
N. CHARLESTON, SC 29405

Judge's Telephone **843-745-9822**

Issuing Court ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ARMED ROBBERY
BURNZ
CPD
3-12-1905
SC
B
601
101020877
174
075-69-6580
CHARLESTON, SC 29407
1051 LITTLE JOHN DRIVE
ALONDA BARRON DESAUSURE
X
CHARLESTON

Charleston Police Department
STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

AFFIDAVIT

Personally appear before me, a magistrate of this county one, **David Vargo**,
who first being duly sworn deposed and says that, Alonda Barron Desaussure,
did within this county and state on the 3rd of October 2010 violate the criminal laws of the State of South
Carolina in the following particular:

DESCRIPTION OF OFFENSE

Armed Robbery
16-11-330

The affiant states there is probable cause to believe that the defendant named did commit the crime set forth
and that such probable cause is based on the following facts:

That on 10/3/10 at approximately 2115 hrs while at 353 King Street (Gilroy's Pizza) which is located in the
City and County of Charleston, SC the above named defendant did knowingly, willingly and unlawfully violate
South Carolina Code of Law Armed Robbery (16-11-330) to wit:

That on the above date and time the defendant (Alonda Desaussure) entered Gilroy's Pizza, approached the
counter, and began removing money from the tip jar. The victim (Daniel Cobiella) followed the defendant out
of the business and confronted him. He demanded the defendant return the money. At that time a physical
altercation ensued. During the altercation, the defendant removed a knife from the wasteband of his pants and
cut the victim approximately one inch above his right eye and down his right cheek. He then fled the scene on a
bicycle which had a white bag on the handle bars. The victim was treated for his injuries at Roper Hospital.

At approximately 0030 hrs on 10/4/10 Officer Burns observed a person matching the suspect's description at
the intersection of King and Morris Streets. A witness (Scott Silcott) arrived on scene and identified the
defendant as the person who assaulted the victim. At that time the defendant was found to be in possession of a
4-inch kitchen knife, a one dollar bill and loose change, and a dark-colored bike with a white bag on the handle
bars.

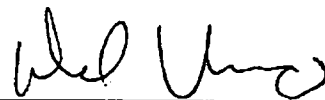
The above facts are true and believable based on the statements of the victim, witness Scott Silcott, and the
investigations of Charleston Police officers Burns, Stone and Gaskin.

SWORN TO AND SUBSCRIBED BEFORE ME

THIS DAY OF OCT 04 2010

SIGNATURE OF JUDGE

(L.S.)



AFFIANT
180 Lockwood Blvd.
Charleston, SC 29403
843-577-7434

COMPLAINT #: 1016687
WARRANT#
CPD Form OT3

STATE OF SOUTH CAROLINA

COUNTY OF CharlestonSTATE VS.Alonda Barron Desaussure

AKA:

Race: BLACK Sex: M Age: 51DOB: 01-01-1958 SS#: 1-1-1-1-1-1

Address:

City, State, Zip: CHARLESTON, SC 294070000DL#: 1-1-1-1-1-1 SID#: SC00232685*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: ASSAULT & BATTERY 1ST DEGREE

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS1002048A/W#: K674650Date of Offense: 10/4/2010S.C. Code §: 16-03-0600(C)(1)CDR Code #: 3412

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSin violation of § 16-03-0600(C)(1) of the S.C. Code of Laws, bearing CDR Code # 3412☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury, (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: Meg Haley 78209Haley, Meg

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)	\$	\$ <u>3.90</u>
TOTAL	\$	\$ <u>133.90</u>

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

PTUP

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge

Judge Code:

Sentence Date:

2167
July 10, 2013

MEG20101605287

WITNESSES

MARY BURNS

Charleston City Police Department

AGENCY CASE NUMBER

1016687

ARREST WARRANT NUMBER

K674650

DATE OF ARREST

October 4, 2010

ACTION OF GRAND JURY

TRUE BILLForeperson of Grand Jury
Date: APR 04 2011

VERDICT

Guilty

Foreperson of Petit Jury

Date: 7/10/2013

INDICT

DOCKET NO. 2011GS1002048

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

ALONDA BARRON DESAUSSURE

DOB: 1962-03-15

B/M

Indictment for

Assault and Battery First Degree

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

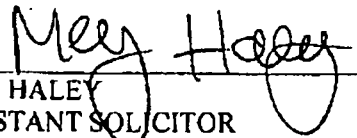
INDICTMENT

At a Court of General Sessions, convened on April 4, 2011 the Grand Jurors of Charleston County present upon their oath:

Assault and Battery First Degree

That in Charleston County, South Carolina, on or about October 3, 2010, the Defendant, ALONDA BARRON DESAUSSURE, did commit an assault and battery in the first degree constituting an unlawful act injuring the victim, Daniel Cobiella, and the act either: involved nonconsensual touching of the private parts of an adult, either under or above clothing, with lewd and lascivious intent; or occurred during the commission of a robbery, burglary, kidnapping, or theft; or the defendant offered or attempted to injure another person with the present ability to do so, and the act was accomplished by means likely to produce death or great bodily injury; or occurred during the commission of a robbery, burglary, kidnapping, or theft; all in violation of Section 16-3-600(C)(1) of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


MEG HALEY
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA)
 COUNTY OF CHARLESTON)

COURT OF GENERAL SESSIONS
 NINTH JUDICIAL CIRCUIT

Indictment(s): 2011-GS-10-2047
 2011-GS-10-2048

STATE OF SOUTH CAROLINA)
 Plaintiff,)

vs.)

VERDICT FORM

ALONDA BARRON DESAUSSURE,)
 Defendant.)
 _____)

On the charge of **Armed Robbery**, we, the jury, unanimously find the Defendant, Alonda Barron Desaussure:

_____ Not Guilty

_____ Guilty of the Lesser Included Offense of Robbery

☒ Guilty

On the charge of **Assault and Battery in the First Degree**, we, the jury, unanimously find the Defendant, Alonda Barron Desaussure:

_____ Not Guilty

☒ Guilty

Please stop your deliberations at this time and have your Foreperson sign and date the verdict form.


 Foreperson

Charleston, South Carolina
 July 10, 2013

MEG20101005287

WITNESSES

MARY BURNS

Charleston City Police Department

AGENCY CASE NUMBER

1016687

ARREST WARRANT NUMBER

K674650

DATE OF ARREST

October 4, 2010

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

APR 04 2011

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2011GS1002048

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

ALONDA BARRON DESAUSSURE

DOB: 1962-03-15

B/M

Indictment for

Assault and Battery First Degree

FILED4/15/2011 3:37:27 PM
JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

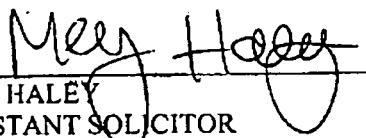
INDICTMENT

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Assault and Battery First Degree

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Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


MEG HALEY
ASSISTANT SOLICITOR

ARREST WARRANT

K-674650

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
CHARLESTONTHE STATE
against

1020

ALONDA BARRON DESAUSSUREAddress: **180 LITTLE JOHN DRIVE
CHARLESTON, SC 29403**Phone: **843-766-2771** SSN: **075-69-6280**Sex: **B** Race: **601** Height: **174**DL State: **SC** DL #: **101960877**DOB: **03-15-1962** Agency ORI#: **CPD**Prosecuting Agency: **BURNS**Prosecution Officer: **ASSAULT & BATTERY 1ST DEGREE**Offense: **16-3-600 C** Offense Code: **16-3-600 C**Code/Ordinance Sec: **16-3-600 C**

This Warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

The accused

is to be arrested and brought before me to be

dealt with according to law.

Signature of Judge (L.S.)

Date:

RETURN

A copy of this arrest warrant was delivered to

defendant

on

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
CHARLESTON

AFFIDAVIT

Personally appeared before me the affiant **D. VARGO** who
being duly sworn deposes and says that defendant **ALONDA BARRON DESAUSSURE**
did within this county and state on **10-3-10** violate the criminal laws of the
State of South Carolina (or ordinance of ☒ County/ ☐ Municipality **CHARLESTON**)
in the following particulars:
ASSAULT & BATTERY 1ST DEGREE
16-3-600 C

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:

SEE ATTACHED AFFIDAVIT

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
CHARLESTONAffiant's Address: **180 LOCKWOOD DRIVE****CHARLESTON, SC 29403**Affiant's Telephone: **843-577-7434**

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that
on **10-3-10** defendant **ALONDA BARRON DESAUSSURE**
did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of **CHARLESTON**) as set forth below:

ASSAULT & BATTERY 1ST DEGREE

16-3-600 C

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said
defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to
the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on **October 4, 2010**

(L.S.)

Signature of Issuing Judge

Judge Code: **7004/DNK**Judge's Address: **3870 LEEDS AVENUE, SUITE 106****N. CHARLESTON, SC 29403**Judge's Telephone: **843-746-9822**Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

BAIL set by

WITNESSES

Judge Lambert
on 007 6 4 D. VARGO
ALONDA BARRON DESAUSURE
Type and Amount: 52,000
Name of Surety: CHARLESTON
ASSAULT & BATTERY 1st DEGREE

Name: _____ X
Address: CHARLESTON
Telephone: _____
10-3-10
Name: _____
Address: _____
Telephone: _____

PRELIMINARY HEARING held by

Judge _____
on _____
Defense Attorney: _____
Disposition: _____

Name: _____
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____

Judge _____
on _____
by _____
(Indicate jury trial, bench trial, plea not. pros., etc.)
Disposition: _____
Sentence: _____

Name: _____
Address: _____
Telephone: _____
Name: _____ X
Address: CHARLESTON
Telephone: _____
10-3-10

Name: _____ X
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____

ASSAULT & BATTERY 1st DEGREE
10-3-600 C
3810 LEBBES AVENUE, SUITE 100
N. CHARLESTON, SC 29403
843-748-8233
X

Name: _____
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____

CHARLESTON X

ALONDA BARRON DESAUSURE
1021 LITTLE JOHN DRIVE
CHARLESTON, SC 29403
843-748-2771
B 101
SC 1010827
03-12-1985
CPD
BURNS
ASSAULT & BATTERY 1st DEGREE

10-3-600 C

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Alonda Barron Desaussure, #142994,

Applicant,

v.

State of South Carolina,

Respondent.

2013-CP-10-5614 BY

JULIE J. ARISTRONG
CLERK OF COURT

2014 FEB 11 PM 2:54

FILED

RETURN

The Respondent, making its Return to the application for post-conviction relief (PCR) filed September 24, 2013, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the April 2011 term of the Charleston County Grand Jury for assault and battery- first degree (2011-GS-10-2048) and armed robbery (2011-GS-10-2047). The Applicant was represented by Aaron Mayer, Esquire.

On July 8-10, 2013, the Applicant proceeded to trial and was convicted. The Applicant was sentenced by the Honorable Stephanie McDonald to confinement for a period of ten years for assault and battery and life without parole for armed robbery. The sentences are to be served concurrently. The Applicant did not appeal his convictions or sentences.

Attached herewith and incorporated herein are the records of the Charleston County Clerk of Court regarding the subject convictions and the Applicant's records from the South

Carolina Department of Corrections. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
2. Insufficient evidence.
3. Denied equal protection by counsel and judge.

III.

First, the Applicant alleges ineffective assistance of counsel. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their 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

"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 also alleges insufficient evidence. The post-conviction relief court cannot consider the sufficiency of the evidence against a convicted defendant. S.C. Code Ann. ' 17-27-20(a)(6) (1985). The Uniform Post-Conviction Procedure Act is not a substitute for remedies that were available before and during the original trial or by review on motion for a new trial or on appeal. Irick v. State, 264 S.C. 632, 216 S.E.2d 545 (1975); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975). Therefore, the Court should summarily dismiss this ground for relief.

V.

The Applicant also alleges a violation of his equal protection rights. The Respondent construes Applicant's claim as an allegation of infringement upon the Applicant's constitutional rights. However, the Applicant does not explain with any specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires the Applicant to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985).

Before the Court will hold an evidentiary hearing, the Applicant must make a *prima facie* showing that he is entitled to relief. 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). This allegation is so vague that it is impossible for the State to respond. Since the Applicant has not made the minimum *prima facie* showing, the Court should dismiss this ground for failure to comply with the Uniform Post-Conviction Procedure Act.

VI.

Each and every allegation contained within the application not herein before either expressly admitted, qualified or explained is hereby denied.

VII.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held on the issue of ineffective assistance of counsel and that the remaining allegations be summarily dismissed.

[Signature on the following page.]

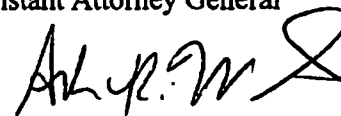
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

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

Feb. 7, 2014.

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

2013-CP-10-5614

ALONDA BARRON DESAUSSURE, #142994)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent.)

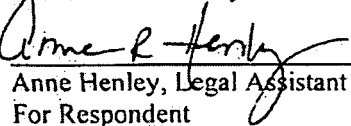
AFFIDAVIT OF SERVICE BY MAIL

FILED
2014 FEB 11 PM 2:54
JULIE J. ARSTRONG
CLERK OF COURT

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:

James K. Falk, Esquire
3 Broad Street, Ste 450
Charleston, SC 29401

DATED this 7th day of February, 2014


Anne Henley, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)

THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

DOCKET NO. 2013-CP-10-5164

ALONDA B. DESAUSSURE,)

Applicant)

vs.)

STATE OF SOUTH CAROLINA,)

Defendant)

TRANSCRIPT OF RECORD

September 11, 2014

Charleston, South Carolina

B E F O R E:

THE HONORABLE G. THOMAS COOPER, JR., JUDGE

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

JAMES K. FALK, ESQ.

Attorney for the Applicant

ASHLEIGH R. WILSON, ESQ.

Attorney for the Defendant

JOYCE C. RUEGER, CVR-M
Circuit Court Reporter

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PLAINTIFF

<u>No.</u>	<u>Description</u>	<u>Marked</u>	/	<u>Admitted</u>
1	Petition to authorize funds	5		14
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PROCEEDINGS

MS. WILSON: May it please the court, Your Honor.
This is Alonda Desaussure v the State of South Carolina
docket number 2013-CP-10-5614 [sic]. Mr. Desaussure was
indicted in April 2011 for one count of Assault and
Battery First Degree and one count of Armed Robbery. He
proceeded to trial and was represented by Aaron Mayer.

He was convicted at trial by jury and he was
sentenced by Judge McDonald to ten years for Assault and
Battery First Degree and he was sentenced to Life without
Parole for Armed Robbery. He filed an application for
post conviction relief on September 24, 2013.

In his application he alleged ineffective assistance
of counsel, insufficient evidence, denial of equal
protection by the counsel and Judge. And today he is
here and represented by Mr. Falk and we would just ask
that Mr. Falk specify which claims of ineffective
assistance of counsel Mr. Desaussure will be proceeding
on today.

THE COURT: Did he have a direct appeal?

MS. WILSON: He did not, Your Honor.

THE COURT: No direct appeal. Mr. Falk?

MR. FALK: Thank you, Your Honor. It's our
contention that Mr. Desaussure's trial counsel should
have -- under the facts in this case Mr. Desaussure's

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1 trial counsel should have obtained an eyewitness
2 identification expert and that his failure to obtain this
3 expert led to his ineffective assistance at Mr.
4 Desaussure's trial.

5 THE COURT: Have you got the packet?

6 MS. WILSON: I'm sorry, Your Honor.

7 THE COURT: I thought we had it on the bench.

8 [Whereupon, Ms. Wilson provides documents to the
9 court]

10 THE COURT: Is that your only...

11 MR. FALK: --- yes, Your Honor ---

12 THE COURT: --- grounds? All right. Call your
13 first witness.

14 MR. FALK: We would like to call Mr. Aaron Mayer.

15 [Whereupon, Mr. Mayer comes forward]

16 [Whereupon, the witness is duly sworn by the Clerk
17 of Court]

18 CLERK OF COURT: If you'll please state your full
19 name and spell your last name for the record.

20 THE WITNESS: Aaron Cole Mayer. Last name is
21 M-A-Y-E-R.

22 [Whereupon, plaintiff's exhibit numbers 1 and 2 are
23 marked by the court reporter]

24

25

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1 AARON MAYER

2 Having been first duly sworn,

3 Was examined and testified as follows:

4 DIRECT EXAMINATION

5 BY MR. FALK:

6 Q. Mr. Mayer could you tell me -- could you tell the
7 court where you're practicing currently?

8 A. Charleston, South Carolina.

9 Q. Are you with a firm?

10 A. No.

11 Q. So it's -- the name of your -- is it Aaron Mayer
12 LLC?

13 A. Oh, I'm sorry. Mayer Law Practice is the name of
14 it.

15 Q. Thank you.

16 A. It's a sole proprietorship.

17 Q. I see. And when were you admitted to the Bar?

18 A. The Bar of South Carolina I was admitted to in 2011.
19 The Bar of North Carolina was 2009. The Bar of Florida
20 was 2010.

21 Q. Thank you. Prior to -- can you tell the court how
22 you came to represent Mr. Desaussure in this case?

23 A. I don't recall where they said they got my name. I
24 was called by a woman who said she was a friend of Mr.
25 Desaussure's and said that they were interested in hiring

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1 a private attorney. I spoke with her by telephone, I
2 believe, and I don't recall if she actually came into the
3 office and met with me or not.

4 And she was the payor for Mr. Desaussure and then I
5 went to visit Mr. Desaussure, I don't recall if it was
6 before or after we actually did a contract.

7 Q. So you are a paid attorney in this case?

8 A. Yes, sir.

9 Q. And did Mr. Desaussure have a -- was he already
10 appointed a public defender?

11 A. He had a public defender before me. Yes, sir.

12 Q. Prior to accepting the engagement in this case, what
13 investigation did you do about the underlying facts?

14 A. I spoke with his friend, who called me, and she --
15 the way that the posture of the case was explained to me
16 at the time was that Mr. Desaussure had been called for
17 trial and the first day of his trial was supposed to have
18 happened and they were displeased with how that was
19 forming up with their public defender.

20 And, among the things we talked about in that first
21 conversation was eyewitnesses who would be testifying
22 against him and who would be showing up for trial who, I
23 guess, had shown up for that first call of the case --
24 with that initial call of the case. Which led us into a
25 conversation about the importance of having an expert

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1 witness to testify about the flaws and the problems
2 associated with eyewitness identification. So, that came
3 up in our very first conversation.

4 Q. Thank you. Prior to -- and so when did -- did this
5 case go to trial July 8, 2013? Does that sound right to
6 you?

7 A. I'd have to look at my file. I mean, it was June or
8 July.

9 Q. Okay. So, prior to this trial, how many other
10 General Sessions jury trials had you participated in?

11 A. I think this was my first.

12 Q. Okay. Prior to this trial, how many General
13 Sessions jury trials did you participate in as like a
14 second chair, did you observe?

15 A. So, I went to law school in North Carolina and I
16 haven't done any jury trial -- I hadn't done any jury
17 trials in General Sessions, in South Carolina, since I
18 started practicing here.

19 The only trials I'd done that would be in a
20 comparable court of record were in the Circuit Court -- I
21 think I did one trial in the Circuit Court in North
22 Carolina when I was in law school there as a second
23 chair.

24 Q. And what were the -- what kind of case was that, do
25 you recall?

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1 A. That was an assault case and I was assisting the
2 prosecutor in that one.

3 Q. You were assisting the prosecutor?

4 A. Yes, sir.

5 Q. So, it was like an internship -- clerkship?

6 A. Yeah, exactly.

7 Q. Okay. Prior to when this case went to trial in July
8 of 2013, had your legal knowledge, skill thoroughness, or
9 preparation required to represent a criminal client ever
10 been questioned by a South Carolina Circuit Court Judge?

11 MS. WILSON: I'm going to object, Your Honor, to the
12 relevance of this line of questioning.

13 THE COURT: Overruled.

14 A. [Mr. Mayer] Can you repeat the question, I'm sorry.

15 Q. Yeah. Prior to this case, July of 2013, had your
16 legal knowledge, skill thoroughness, or preparation
17 required to represent a criminal client ever been
18 questioned by a South Carolina Circuit Court Judge?

19 A. Like questioned like they asked me am I prepared for
20 a case?

21 Q. Competency, yes.

22 A. They asked me if I was competent to represent a
23 client?

24 Q. Yes.

25 A. I think Judge Harrington asked me that when she was

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1 getting upset with me one time.

2 MR. FALK: May I approach the witness?

3 THE COURT: Sure.

4 [Whereupon, plaintiff's exhibit number 3 is marked
5 by the court reporter]

6 [Whereupon, the witness reviews document]

7 MS. WILSON: Your Honor, I'm going to object to a
8 the admissibility of this document based on relevance
9 because it's a document from another General Sessions
10 matter totally separate from this matter that we're here
11 on today. And also, Your Honor, I think that its
12 prejudicial value is more ---

13 THE COURT: --- have you seen it before?

14 MS. WILSON: I have seen it before, Your Honor. I
15 think that its prejudicial value is outweighed by its
16 probative nature, Your Honor, because it appears that Mr.
17 Falk is trying to basically use this to say that Mr.
18 Mayer's representation in another matter is parallel or
19 one in the same as his representation in this matter of
20 which we are here today. So, I object on this basis.

21 THE COURT: All right. Well, I'll give it the
22 credence that I think it deserves. I'm going to allow
23 it. Go ahead.

24 [Whereupon, plaintiff's exhibit number 3 is entered
25 into evidence by the court]

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1 Q. [Mr. Falk] Can you identify that document that I
2 handed you?

3 A. Yes.

4 THE COURT: Which is this, one, two, or three?

5 MR. FALK: This is actually marked as my exhibits.
6 This is marked as, I guess, plaintiff's exhibit 3.

7 THE COURT: Three.

8 Q. [Mr. Falk] Have you seen that document before?

9 A. Yeah.

10 Q. When you had said earlier that you think Judge
11 Harrington might have said something about my question
12 when she was getting mad at you in another case, is this
13 the case that you were talking about?

14 A. It is.

15 Q. Okay. And, the second, or I guess the first
16 paragraph on page two of the order, can you read that
17 where it says I find that?

18 A. The first full paragraph on page two?

19 Q. Yes, sir.

20 A. [Reading] I find that Mr. Mayer does not possess
21 the required legal knowledge, skill thoroughness, and
22 preparation required under our rules of professional
23 conduct.

24 Q. And you were relieved in that case, is that correct?

25 A. Um.

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1 Q. You were relieved from -- this is, again, you're
2 reading from an order to pay costs in South Carolina,
3 Charleston County General Sessions action 2010-GS-10-
4 06182?

5 A. Yeah. I was relieved. Would you like to know why?

6 Q. I'll get to that. Thank you.

7 A. Thank you.

8 Q. And that was the case of State v Bryant Edward
9 Loyal, is that correct

10 A. Yes, sir.

11 Q. Okay. And one of the issues in that case was --
12 this was a case that was going to require expert
13 testimony from a D-N-A expert, is that correct?

14 A. It was my -- it was my analysis that it was going to
15 require a D-N-A expert ---

16 Q. --- okay ---

17 A. --- yes.

18 Q. And, were you prepared to go forward with that case
19 without a D-N-A expert?

20 A. No.

21 Q. Had you had an opportunity to retain a D-N-A expert?

22 A. I had put in -- the answer is, I probably had an
23 opportunity to retain a D-N-A expert, but let me give you
24 the background on what that was ---

25 Q. --- I'll give you the opportunity to respond, but

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1 let me just show you something again.

2 A. Well, just to answer the question fully, I'd like to
3 answer the question fully if I may sir?

4 THE COURT: Yes, go ahead.

5 A. Thank you very much. I had an opportunity to
6 request a D-N-A expert and I had put in a motion, I was
7 retained counsel in that case too. I put in a motion
8 with the Chief Admin Judge for General Sessions at the
9 time to authorize funds from the Indigence Fund to do
10 that because similar to Mr. Desaussure's case, that
11 client Mr. Loyal had paid a portion of his fee to me and
12 then was no longer able to pay.

13 Unlike Mr. Desaussure's case, it was not clear from
14 the beginning in Mr. Loyal's case that he would need an
15 expert. So, this was something that came up after the
16 representation was decided upon. And when it came up,
17 that's when I put in my motion to authorize funds from
18 the Indigence Fund to pay for a D-N-A expert for him
19 because he didn't have the money to.

20 And so I put in that motion and that motion was
21 pending for something like three months and we had a
22 hearing on it and the Chief Administrative Judge was
23 considering ruling on it when the Solicitor called it for
24 trial, yet again. So, it was called for trial in front
25 of Judge Harrington who was not the Chief Admin Judge

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1 while this motion was still pending.

2 MR. FALK: May I approach?

3 THE COURT: Uh Huh.

4 Q. [Mr. Falk] I'm going to show you what has been
5 marked as plaintiff's exhibit number one.

6 [Whereupon, the witness reviews document]

7 Q. You had just talked about putting in a motion for
8 funds?

9 A. Yes.

10 Q. Is that document I just showed you, was that that
11 motion that you submitted?

12 A. It looks like it.

13 MS. WILSON: Your Honor, I'd just like to note that
14 I object to -- document.

15 THE COURT: All right. Overruled.

16 [Whereupon, plaintiff's exhibit number 1 is entered
17 into evidence by the court]

18 Q. [Mr. Falk] And this is a petition -- did you file
19 this as an ex parte petition?

20 A. I'm not sure I understand the question.

21 Q. When you were petitioning for funds to pay for your
22 expert, did you file that as an ex parte motion before
23 the Chief Administrative Judge? Did you serve it upon
24 the Solicitor?

25 A. It was -- it was served on the Solicitor, yes.

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1 Q. So, you did not file it as an ex parte motion?

2 A. I don't know that I can answer that. I don't know
3 the answer to that question.

4 Q. Have you filed an ex parte motion before?

5 A. Not that I know of.

6 Q. Now you had just testified that you said that you
7 were trying to get money from Indigent Defense to pay for
8 your expert when you filed this motion, is that correct?

9 A. Correct.

10 Q. Can you look at your numerical paragraph two on
11 that? Could you read that to the court?

12 [Whereupon, the witness reviews document]

13 A. [Reading] That he is indigent and is currently
14 being represented by the undersigned who has a received
15 zero compensation for this defense, instead has only a
16 lien against his civil settlement.

17 Q. And then could you read paragraph three?

18 A. [Reading] That he hereby grants a lien against his
19 civil settlement for any monies advanced to him.

20 Q. Who is the he that you were talking about in that
21 paragraph?

22 A. I believe it was the defendant Bryant Loyal
23 [phonetic].

24 Q. Well, is it not that you were granting the lien?

25 Because doesn't that just repeat the paragraph you just

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1 read prior to that and said he's on the lien against a
2 civil settlement?

3 MS. WILSON: Objection, Your Honor. I'm not really
4 sure the relevance to this current post conviction relief
5 matter.

6 MR. FALK: Your Honor, if I could address the
7 point.

8 THE COURT: Overruled. Yes, you may address. Go
9 ahead, tell me about it.

10 MR. FALK: All right, Your Honor, I believe --
11 first of all the date of this motion request was filed in
12 March 6, 2013 which was approximately 90 days before Mr.
13 Desaussure's trial. I do not believe that trial counsel
14 was familiar with the method for going about seeking
15 funding in a case like this.

16 And I think this petition, a, it should have been an
17 ex parte petition should have said -- and then I can
18 provide further testimony that when he was following up
19 on this he was asking for the Solicitor to schedule a
20 hearing on this one.

21 I think the proper procedure would probably have
22 been talking to Don Michel of the Circuit Court to be
23 soliciting this and be contacting directly with the Chief
24 Administrative Judge typically. I think I can add
25 further testimony that had these things been filed

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1 properly these things are granted almost as a matter of
2 course without hearing. I think -- my whole issue here
3 is that in the first part of 2013, Mr. Mayer did not know
4 how to go about applying for funding to get an expert
5 test -- to help him with his case.

6 And I think his taking on a case like this, which
7 I'm going to show further, I believe I will be able to
8 show this case begged for an expert. I think his taking
9 on this case without having a plan for making sure that
10 he's going to have money to pay this expert is
11 ineffective assistance.

12 And I think this is -- I think -- I'm not talking --
13 I mean the specific problem I think he had in the Loyal
14 case is the same problem I think he had in Mr.
15 Desaussure's case because he didn't know the mechanism
16 for getting the money.

17 THE COURT: All right. Objection is overruled.
18 You may continue.

19 Q. [Mr. Falk] All right. So, is there anywhere in
20 this motion where you're requesting funds from Indigent
21 Defense?

22 A. Is there anywhere in the petition?

23 Q. Where you're specifically requesting that you get a
24 court order that the Chief Administrative Judge for
25 General Sessions is ordering the Office of Indigent

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1 Defense to pay?

2 A. I don't recall specifically, but I believe along
3 with this I filed a draft order that Judge McDonald could
4 have used. I can't -- I don't want to swear to that, but
5 I think that's how it went and we did have a hearing on
6 this.

7 Q. When was the hearing?

8 A. I think the hearing was late March. I didn't come
9 prepared today to talk about the Bryant Loyal [phonetic]
10 case or else I would have refreshed my memory on it.
11 But, as I recall we had a hearing on it.

12 I know we had a hearing on it with myself, Meg Haley
13 the prosecutor in that case who was also the prosecutor
14 for Mr. Desaussure, and Judge McDonald. And at the time
15 Judge McDonald basically seemed at a loss because I was
16 private retained counsel asking for indigent funds and
17 she said she didn't know how to go about that.

18 So, after that hearing she said she was going to
19 research a little bit, I went to research a little bit
20 and that was where we left it. We were going to try to
21 regroup 30 days later and I think I sent an email to her
22 and to Ms. Haley and then Ms. Haley noticed us for trial
23 and we didn't actually regroup physically in the court
24 room again.

25 THE COURT: Did you ever apply for Indigent Defense

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1 funds prior to this?

2 THE WITNESS: That was my first time, in Bryant
3 Loyal's case.

4 THE COURT: Are you aware of the electronic filing
5 requirements of the Office of Indigent Defense?

6 THE WITNESS: No Judge, I just thought I had to get
7 the Chief Judge here to authorize it.

8 THE COURT: Okay.

9 MR. FALK: May I approach?

10 THE COURT: Sure.

11 Q. [Mr. Falk] I'm going to show you what as marked as
12 petitioner's exhibit 2. Can you identify that document?

13 [Whereupon, the witness reviews document]

14 A. Yeah. It's the motion to reconsider what is in
15 evidence here as your exhibit one, order to pay State's
16 cost. It's my motion to reconsider.

17 Q. And so, this is in response to the petition for
18 paying costs in the Loyal case, is that correct? To
19 Judge Harrington to order in the Loyal case requiring you
20 to pay the cost?

21 A. Yeah, in fact, this has the timeline on it for when
22 we had the hearing with Judge McDonald...

23 Q. Speaking of the timeline, can you read the notation
24 on April 24, 2013?

25 A. On page three?

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1 Q. Oh, I'm sorry, yes on page three.

2 A. [Reading] Became stymied in researching the issue
3 of authorizing funds for Indigent Defense on Westlaw.
4 Emailed contact who formerly worked at South Carolina
5 Indigent Defense fund.

6 Q. Who was that contact?

7 A. Michael Pratt.

8 Q. And what did Michael Pratt tell you?

9 A. I don't think he ever got back to me.

10 Q. Okay. Is it fair to say then that in April of 2013,
11 you were still unfamiliar with the process for seeking
12 funding for getting an expert witness?

13 A. I don't know. I don't know the answer to that.

14 Q. What do you mean by became -- what did you mean by
15 your statement, became stymied in researching the issue
16 of authorized funds for Indigent Defense on Westlaw?

17 A. So, I had been on Westlaw, apparently from that
18 statement, trying to figure out how to get funds
19 authorized for indigent defense when you're private
20 counsel.

21 Q. And, did you find out?

22 A. No.

23 Q. So, is it fair to say that in April of 2013 you were
24 unaware of the process for getting funds?

25 A. I believe at the time -- I don't know right, because

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1 I believe at the time that I thought the process was to
2 get the Chief Judge here to authorize it. And as far as
3 I knew at the time, that was the right way to do it.

4 Q. How about let's talk more specifically about Mr.
5 Desaussure's case. You made an entry of appearance in
6 this case sometime in late March 2013?

7 A. That sounds right.

8 Q. Okay. And, I think you testified earlier that his
9 case was actually called for trial about the time that
10 you made this entry of appearance?

11 A. That was what I was told by his friend who contacted
12 me.

13 Q. Okay. And so, Mr. Desaussure obviously already
14 qualified as indigent in order to be represented by the
15 public defender?

16 A. Yes.

17 Q. And then you were substituted as counsel for Mr.
18 Desaussure's public defender?

19 A. Correct.

20 Q. Okay. How much compensation did you receive?

21 A. I don't remember what the full contract was for.
22 The initial payment was 500 dollars and I know there was
23 no additional payment ever made.

24 Q. Do you have -- are you familiar with what the
25 arrangement you thought was, for payment?

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1 A. I did bring the whole file with me, as I was
2 subpoenaed to do. It would be in there, I believe the
3 contract would be in there.

4 Q. Do you recall, I mean maybe we'll ask you to go and
5 get it out of the file, but do you recall what
6 arrangement was made for payment of trial expenses?

7 A. Well, anything outside of -- I always explain to
8 somebody anything other than my fee they have to pay,
9 that's extra, right. So, it wouldn't in the contract,
10 costs and trial expenses and stuff, totally separate.

11 Q. So, do you believe it was your understanding with
12 the client that if an expert was going to be called that
13 they were going to pay for it?

14 A. Absolutely.

15 Q. Had they made any -- at the time you entered into
16 this agreement, had they made any representation to you
17 about their ability to hire an expert?

18 A. Well, I told them from the very beginning that the
19 State got a free expert, right, and that if they wanted a
20 free expert that's the way they needed to stay. They
21 needed to stay with the public defender.

22 I told them that in the very first conversation with
23 both, Mr. Desaussure and with his friend who called me.
24 You know, so at no time did I ever express that I would
25 be paying for an expert witness for him.

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1 Q. Did you tell -- did you have any idea how much it
2 was going to cost to retain an expert?

3 A. Did I quote them a price or give them a range or
4 something?

5 Q. Give them any kind of estimate?

6 A. I would have, yeah, I would have estimated somewhere
7 between a thousand and three thousand dollars.

8 Q. And did they represent to you that they had the
9 means to pay for the expert?

10 A. You know, they never gave me the idea that they
11 didn't have the means. You know, all the way up through
12 -- I don't know how many conversations I had with Mr.
13 Desaussure saying we needed an expert for that purpose
14 and I don't know how many conversations I had with his
15 friend saying the same thing, but there were multiple
16 conversations with both of them.

17 And at every point, they were like yeah we know,
18 working on it or whatever, or something like that. Never
19 did I think, until the very end as trial approached about
20 a month before trial, never before that did I think what
21 are we going to do without an expert? I always thought
22 all right, they're going to get money together, we're
23 going to hire an expert, we're good.

24 Q. When you took the case in late March of 2013, did
25 you know when this case was going to be called for trial?

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1 A. No, I don't think so.

2 Q. Were you surprised that it was called for trial on
3 July 8, 2013?

4 A. I don't think I was surprised because when I
5 accepted representation I knew that it had already been
6 up on the docket.

7 Q. Okay. So you said a month before trial you were
8 worried that you didn't have an expert. Is that what
9 your testimony just was?

10 A. Yeah, it was about a month -- I think it was about a
11 month before trial and I talked to Mr. Desaussure's
12 friend and I said look we really need to get an expert
13 here.

14 I said don't worry about the money you'll owe me,
15 just get the money together for an expert because that's
16 the most important thing.

17 Q. Again, how much had they paid you by this time, do
18 you recall?

19 A. They only ever paid 500 dollars.

20 Q. Okay.

21 A. That was the initial payment.

22 Q. And, was that a -- I know you can go and get the
23 contract, but is that a small fraction of what your fee
24 was? Was it half what your fee was? Do you know?

25 A. I would guess it was 10-20 percent.

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1 Q. Okay. Did you ask them for more money, initially,
2 as a down payment against your fee?

3 A. Did I ask them for more money initially?

4 Q. Yes, in March?

5 A. I don't recall. I don't recall.

6 Q. So, do you think 500 dollars was all that they could
7 scrape up to pay you in March of 2013?

8 A. I don't know. I don't know.

9 Q. When you are taking private cases, do you generally
10 try and get as much money up front as you can?

11 A. I don't typically pressure people. I try to work
12 with people and I don't mind putting them on a payment
13 plan. So, it's not in my practice has not been to
14 maximize the amount that they pay up front.

15 Q. I guess my point is in March of 2013, weren't you
16 pretty aware that they didn't have a lot of money to pay
17 your fee and to hire an expert?

18 A. No, I didn't know that because I specifically said
19 to them if you need a free expert, stay with the State.
20 And he said, yeah we know but we don't like the way
21 that's going down.

22 They seemed to have a misapprehension; they seemed
23 to think that their expert should have showed up on the
24 first day of trial. And I think I said to them the first
25 day of trial might just be jury selection, you know.

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1 That expert may not necessarily even have to come for a
2 couple of days. So, I mean we had that whole
3 conversation and they said we still want a private
4 lawyer; we want to hire an expert. So, I didn't ask them
5 for a financial declaration.

6 Q. Do you have an understanding of how long it would
7 take for an expert to prepare for a trial?

8 A. It -- I think it depends on what the testimony ---

9 Q. --- I'm sorry, let me withdraw that question. We
10 were talking about hiring an eyewitness identification
11 expert for this trial, is that correct?

12 A. Yes, sir.

13 Q. Okay. What do you think the eyewitness
14 identification expert would have to review before they
15 could give you an opinion?

16 A. They'd have to see the identification.

17 Q. And, how long do you think it would take them to
18 turn that around?

19 A. I have no idea.

20 Q. I mean, you know the discovery of this case ---

21 A. --- ten hours, you know.

22 Q. So, were you expecting an expert to be able to give
23 you an opinion within a week?

24 A. Surely, yeah.

25 Q. Okay. You said that in June of 2013 you were

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1 getting concerned -- first of June 2013 you were getting
2 concerned an expert hadn't been retained, is that
3 correct?

4 A. Yeah.

5 Q. Why did you not go to the court and ask for funding
6 for an expert?

7 A. Well, probably because of my experience with the
8 Loyal case.

9 Q. So, the research, just so I'm clear -- so the
10 research that you were doing in April of 2013 until the
11 first of June, you really hadn't figured out how to get
12 an expert appointed, is that correct -- I mean funding
13 for an expert, is that correct?

14 A. Right. I mean when the Chief Administrative Judge
15 told me she'd never seen private counsel get authorized
16 to have an expert paid for by the State, I thought we
17 were in new ground.

18 Q. So, let's go back. So, in March -- late March of
19 2013, you got appointed to this case that had already
20 been called once for trial, is that correct?

21 A. I didn't get appointed.

22 Q. Excuse me, you're absolutely right, you were
23 substituted in as counsel?

24 A. Yes, sir.

25 Q. Okay. What kind of -- did you -- what kind of

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1 conversations did you have with his public defender?

2 A. I don't think I had any conversations with him.

3 Q. So you don't know what the public defender's trial
4 strategy was going to be?

5 A. Well, so, I talked to, like I said, I talked to Mr.
6 Desaussure's friend who told me that the public defender
7 had prepared an eyewitness identification expert because
8 that came up because I said you're going to need one and
9 she said they were going to have one, but she didn't show
10 up at the trial; or whatever, the person didn't show up
11 for the trial.

12 I said that's probably not how it went down, but
13 okay. So, I did not get with the public defender to ask
14 him/her what her trial strategy would have been, no.

15 Q. The time -- so, what was the sentencing exposure
16 that Mr. Desaussure was facing?

17 A. At the time that I took the case it was just Armed
18 Robbery. He had not been put on LWOP notice.

19 Q. Okay.

20 A. So just the exposure for Armed Robbery. What is
21 that, 25 years or something?

22 Q. Were you aware that he had a two strike a most
23 serious offense already, when you took the case?

24 A. Not at the time that I took the case.

25 Q. Okay. When did you become aware of that?

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1 A. It would have been when I got discovery and was
2 going through his record. At one point I sat down with
3 the Solicitor to try and negotiate a plea deal for him
4 and when we were looking at the record, at his criminal
5 record together, her eyes got bright and she said, oh
6 he's eligible for LWOP.

7 And I thought, oh no and she said well I'm going to
8 LWOP him. I'm going to serve LWOP notice in ten days if
9 he doesn't take this plea. And so I think that's when I
10 really realized that he was eligible for that.

11 Q. So, you're diving into a case which could possibly
12 be called within 90 days of when you got appointed and
13 you didn't think it would have made sense to communicate
14 with the public defender to find out what their strategy
15 is, to find out what notes they had?

16 A. I didn't see the need for it.

17 Q. Okay. When did you get the discovery?

18 A. I don't remember.

19 Q. Well, it's already March 25 when you became counsel
20 in this case; did you have it by mid-April?

21 A. I'd have to look in my file. I honestly don't
22 remember.

23 Q. Were you aware though, that when you took this case
24 it had already been called for trial, so the public
25 defender was already ready to go to trial?

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1 A. I had presumed that, yeah.

2 Q. So, they would have had discovery, is that correct?

3 A. I would hope so.

4 Q. You didn't try and cut down your learning curve on
5 this case by getting the discovery from the public
6 defender?

7 A. I don't understand how it would cut down my learning
8 curve. You still have to read whatever pages of
9 discovery are; talk to the witnesses.

10 Q. Well, with your starting point you didn't have the
11 discovery March 25, 2013. When did you get it?

12 A. Typically I get the discovery from the Solicitor
13 because I don't want to have a situation arise when the
14 Solicitor has a document that I don't.

15 And so, if I've gotten a file from someone other
16 than the Solicitor, I've got no one to blame but myself
17 if that did happen. So, I get those from the Solicitor.

18 Q. Did you know -- do you know of any eyewitness
19 identification experts in this state?

20 A. Can I name any?

21 Q. Yeah.

22 A. No.

23 Q. Did it not even make sense to you to find out who
24 the Solicitor was going to use as their eyewitness
25 identification expert?

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- 1 A. The public defender?
- 2 Q. Excuse me, the public defender.
- 3 A. Could have been.
- 4 Q. And again, you would agree that this case called for
- 5 an eyewitness identification expert?
- 6 A. Absolutely.
- 7 Q. And what led to -- what leads you to that
- 8 conclusion?
- 9 A. There were, I think, three that I knew of in my
- 10 initial consult with whomever, with Mr. Desaussure's
- 11 friend -- there were three eyewitnesses or people who
- 12 claimed to be eyewitnesses to the event. So, I mean, if
- 13 you're taking that to trial it made sense to me to have
- 14 an eyewitness expert.
- 15 Q. Because there was also no forensic evidence in the
- 16 file that tied Mr. Desaussure, is that correct?
- 17 A. That is correct.
- 18 Q. There's no security footage, there's no image on
- 19 security footage that tied Mr. Desaussure to the
- 20 incident, is that correct?
- 21 A. That's correct.
- 22 Q. So really the only thing that there was that the
- 23 State had is the testimony of the witnesses, is that
- 24 correct?
- 25 A. Yeah. And, I mean -- yeah.

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1 Q. Okay. So when the case was called on July 8, 2013
2 why didn't you move for a continuance in order to give
3 you time to get an eyewitness identification expert?

4 A. I talked to the family, I talked to Mr. Desaussure,
5 I talked to his friend going -- leading up to that I told
6 him we need this money to get an eyewitness person.

7 They said okay, okay, okay. When I said, hey we're
8 coming to trial it's either get the money and get the
9 expert or go without an expert and they said well we
10 don't have the money.

11 Q. So, when the trial starts, I'm sure the trial Judge
12 asked if defense counsel was ready to go forward?

13 A. I don't recall specifically, probably.

14 Q. But you said you were ready for trial?

15 A. Yeah.

16 Q. Okay. What do you know about the issues relating to
17 the reliability of eyewitness identification experts?

18 A. I'm sorry, can you restate that?

19 Q. Have you ever done any research as to the
20 reliability of an eyewitness identification expert or the
21 amount of false convictions that are attributed to
22 eyewitness identification experts?

23 A. I don't think -- I didn't do any research about if
24 the eyewitness expert contributes to misidentification.
25 I did research regarding whether eyewitnesses misidentify

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1 people.

2 Q. Okay. And I'm sorry if I misspoke because that's
3 what I meant to say. What did you learn about the
4 reliability of eyewitness identifications?

5 A. That eyewitness identifications are often times not
6 reliable. That, especially in moments of stress and
7 things that might be associated with an armed robbery,
8 short periods of time to see the person, cross-racial
9 identifications, lighting, you know there are a variety
10 of factors that I wanted an expert to testify to that
11 would have affected whether the I.D. could be relied upon
12 or just to call doubt as to upon the I.D.

13 Q. Sure. And what was your plan for doing that in this
14 case when trial started in July 2013?

15 A. We had made the decision to go forward without an
16 expert.

17 Q. Well, what was your plan as far as calling into
18 question their identifications?

19 A. Well, so, with the different witnesses who the State
20 wanted to use to identify Mr. Desaussure in court, if
21 memory serves, one of them had made a previous
22 identification of Mr. Desaussure and I think the other
23 two had not.

24 And so, we were going to try and chip away at not
25 allowing them to make an in court identification of Mr.

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1 Desaussure.

2 Q. You just said that we made the decision to go
3 forward without the eyewitness?

4 A. Yeah.

5 Q. Okay. How informed of a decision do you think that
6 was for Mr. Desaussure?

7 A. Well, I would think it was pretty informed, but
8 there were certainly times when I was speaking with Mr.
9 Desaussure that I felt like he was following what I was
10 saying better than at some other times.

11 I had at one point asked the person who had paid his
12 initial bill if he had been evaluated or anything like
13 that or if he was all there and she told me that the
14 public defender had had him evaluated and that he did
15 fine. It's my recollection of that.

16 But, I talked to Mr. Desaussure at length, multiple
17 times; I'd say maybe half a dozen times between the time
18 that I took on the representation and the time that we
19 went to trial.

20 A lot of those were contact visits without the
21 bullet proof glass between us where we could shake hands
22 and sit down beside each other and discuss it.

23 Q. So, his decision was -- but you never told him that
24 there's a possibility I could get funds to hire an
25 eyewitness identification expert is there? Isn't that

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1 true?

2 A. I never told him that. That was not my
3 understanding. I told him just the opposite. I told him
4 if you want a free expert, stay with the public defender.

5 Q. So, the only evidence you have or the only
6 information you had saying that it was not a possibility
7 was your experience with the Loyal case, is that correct?

8 A. Correct.

9 Q. You never followed up with anybody from Indigent
10 Defense, right? You said you called a Mr. Pratt?

11 A. Yeah.

12 Q. And you never heard back from him?

13 A. I emailed him and no, I didn't hear back from him.

14 Q. Okay. And you never thought that it was worth
15 looking back into that issue again?

16 A. No. I guess at the time I didn't. No.

17 Q. So, in March of 2013 Mr. Desaussure could have gone
18 to trial with a public defender, is that correct?

19 A. That's -- that's you know, as it was relayed to me,
20 that's my understanding, yes.

21 Q. And it's also your understanding that in March of
22 2013 that he could have had an eyewitness identification
23 expert?

24 A. That's my understanding.

25 Q. And, it's also your understanding that in March when

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1 he went to trial that he had not been served notice of an
2 LWOP, is that correct?

3 A. Correct.

4 Q. So, by July of 2013 -- on July 8, 2013 he was facing
5 trial with no identification expert and facing an LWOP,
6 is that correct?

7 A. That's correct.

8 Q. You think there's anything that you could have done
9 to more effectively represent Mr. Desaussure in this
10 case?

11 A. Man, I could have paid for an expert out of my own
12 pocket, I suppose. I don't know. I don't know how long
13 you stay in business as a lawyer doing that kind of stuff
14 but, I suppose I could have done that.

15 Q. Do you think it was a mistake to take on the case
16 without knowing that funds were going to be available for
17 an eyewitness identification expert?

18 A. Well, I, again, I prequalified them by discussing
19 that up front. And so, when I took on the case, it was
20 my understanding that they knew full well that if they
21 were going to have an I.D. expert they were going to be
22 paying for it.

23 Q. Without knowing in advance that there wasn't going
24 to be funds, you did not -- when you say prequalify them
25 you said you didn't get any financial reports, so you

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1 don't know anything of their financial nature, do you?

2 A. No, I don't.

3 Q. The only thing you knew was that he was indigent, is
4 that correct?

5 A. Right.

6 Q. Okay.

7 A. Well, what I knew was they were saying, yes we hear
8 what you're saying about needing an expert witness and we
9 can do that.

10 Q. Okay. And these conversations are taking place
11 between the end of March 2013 and the first of June 2013?

12 A. I think that's accurate.

13 Q. And you were expecting clients who had only paid you
14 to that date 500 dollars to come up with, in your
15 estimation between 1500 and 3000 dollars for this expert?

16 A. That's correct.

17 Q. But you didn't -- did you get any information from
18 them of where that money was going to come from?

19 A. No.

20 Q. And the assault case that you tried in North
21 Carolina was that a -- where you second chaired in North
22 Carolina ---

23 A. --- yeah ---

24 Q. --- for the prosecution. Had the defendants in that
25 case called an eyewitness expert?

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1 A. No. It was between a husband and wife.

2 Q. Okay.

3 A. Yeah.

4 MR. FALK: I believe I have no further questions.

5 THE COURT: Cross-examination?

6 MS. WILSON: Thank you, Your Honor.

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1 CROSS-EXAMINATION

2 BY MS. WILSON:

3 Q. Mr. Mayer, just kind of to go back, you recall that
4 in this case there were two eyewitness identifications of
5 Mr. Desaussure. Does that sound correct?

6 A. Well, there was -- there were at least two. Two or
7 three, I think.

8 Q. Do you recall one of them who identified Mr.
9 Desaussure, in court and the second one had identified
10 him prior to court and in court? Is that your
11 recollection?

12 A. It would be helpful, I think, for me to think about
13 it the way the allegations were through the facts of the
14 armed robbery. And I think one witness was the victim
15 and there was -- there were two witnesses outside --
16 outside the Gilroy's Pizza.

17 THE COURT REPORTER: What's the name of the Pizza?

18 THE WITNESS: Gilroy. G-I-L-R-O-Y.

19 Q. [Ms. Wilson] And it's your testimony that you
20 discussed with Mr. Desaussure the need to retain this
21 type of expert witness when he was considering hiring
22 you, is that correct?

23 A. Yes, ma'am.

24 Q. And you also explained to him that he would have to
25 bear the cost of the expert since he retained you?

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1 A. Yes.

2 Q. And it's also your testimony that you gave him an
3 approximate cost of retaining this expert?

4 A. Yes. I believe that I did. I don't recall -- I
5 don't recall that part of the conversation specifically,
6 but yeah.

7 Q. And you were -- it's also your testimony that you
8 were under the impression that he could pay for the
9 expert?

10 A. Yes. I was under the impression that his friend
11 could pay for the expert.

12 Q. Okay. And it's your testimony today that you hadn't
13 had any success in the past with obtaining money from
14 Indigent Defense for cases in which you were retained
15 counsel, is that correct?

16 A. That's correct.

17 Q. And as you were preparing to represent Mr.
18 Desaussure at trial, do you recall what kind of research
19 you did with regard to eyewitness identification. Did
20 you look for any -- review any scholarly articles or
21 treatises did you read any books about it?

22 A. About, you know, are you saying the reliability of
23 eyewitness identification?

24 Q. Right, that you -- right the reliability of
25 eyewitness identification before trial juries ---

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1 A. --- yeah, I did research that really hard after they
2 told me they didn't have money for an expert witness. I
3 attempted to find articles and things in the public realm
4 that I then later sought -- asked the court to take
5 judicial notice of, but that was denied.

6 Q. Do you also recall during Mr. Desaussure's trial
7 moving to preclude the in court identification of Mr.
8 Desaussure by one of the -- by the witnesses? And do you
9 recall what your argument was, if you did?

10 A. I know I did do that. I researched this issue
11 because, I think, of the three witnesses I think only one
12 of them had previously identified Mr. Desaussure and so I
13 moved to preclude the in court identification by the
14 other two. I think the Judge granted it as to one
15 witness and denied it as to the other.

16 Q. And do you also recall asking the court to give a
17 jury instruction on identification during trial?

18 A. Yeah. I think so.

19 Q. Do you also recall in your -- recall arguing in your
20 opening and closing, before the jury, the fact that the
21 victim had never identified Mr. Desaussure prior to
22 trial? Do you recall that?

23 A. I recall that one of the witnesses hadn't previously
24 identified Mr. Desaussure. If you say that was the
25 victim, then that sounds right.

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1 Q. And do you also recall arguing to the jury in your
2 closing argument that it was a possibility that the fact
3 that the identification from some of the witnesses to the
4 defendant was a cross-racial I.D. and that it could have
5 affected the accuracy of his identification?

6 A. Yes.

7 Q. And, just generally, do you know -- can you recall
8 how frequently you got to meet with Mr. Desaussure before
9 trial?

10 A. I think I probably met with him about six times
11 preparing for the trial.

12 Q. And did you file Brady or Rule 5 motions on his
13 behalf?

14 A. Did I file Brady or Rule 5, yes I did.

15 Q. And the materials that you received, did you review
16 them with Mr. Desaussure?

17 A. Yes.

18 Q. When you were preparing for trial, did you talk to
19 him about the elements of the charges he was facing and
20 what the State had to prove to convict him?

21 A. Yes.

22 Q. Did you talk to him about his version of the facts?

23 A. Yes.

24 Q. Did you discuss with him possible defenses you could
25 present at trial or the lack thereof?

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1 A. Yes.

2 Q. And could you just kind of recount for the court
3 what your strategy was going into trial?

4 A. The strategy was that Mr. Desaussure had said that
5 he had been with some people who, on a front porch, who
6 he was with shortly before the armed robbery occurred,
7 who could testify that he was in a somewhat different
8 part of town during that time.

9 At first, he didn't know anything but kind of their
10 first names and maybe a street name on one of the guys.
11 So we, you know, I tracked down with his family some of
12 these names and addresses and drove around with someone
13 who these witnesses may potentially trust to try and
14 recruit them to testify on Mr. Desaussure's behalf.

15 So, our strategy going to trial was to provide Mr.
16 Desaussure's description of what had happened that night
17 before the armed robbery and what he was doing at the
18 time of the armed robbery.

19 And it was my conversation with him, what we
20 discussed time and again was that he was going -- it
21 would be best for his case for him to testify to provide
22 the jury with an alternative narrative as to what
23 happened that night other than what the State was telling
24 them. And so to corroborate what he was going to testify
25 about being with these guys, I wanted to have the guys

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1 there. And so that was a big part of our trial strategy.

2 Q. Mr. Mayer, you talked today about the fact that this
3 was your first General Sessions trial in South Carolina
4 and everybody has a prep, so did you do any type of
5 general preparation to prepare for proceeding on a
6 General Sessions trial before Mr. Desaussure's?

7 A. I'm sorry; I don't think I quite understand your
8 question.

9 Q. Did you research the process of how trial proceeds
10 prior to Mr. Desaussure's trial? Had you sat in on any
11 or anything like that before?

12 A. Oh yeah. Yeah. I, yeah, I had sat in on trials and
13 sat on jury selection and I'd picked juries. I'd done
14 pretrial motions. I felt very comfortable in the court
15 room.

16 Q. And we had already talked a little bit about your
17 experience with getting money from Indigent Defense and
18 you testified earlier that you didn't have any success
19 with that in the past. And, was that experience kind of
20 the basis for why you didn't request that in Mr.
21 Desaussure's case?

22 A. I don't recall a thought process specifically, but
23 it would seem like it would. It would seem like it was
24 relevant to me probably.

25 Q. We also talked -- you also talked a little bit about

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1 the discovery that you requested and received from the
2 State and you talked about how you always request it from
3 the Solicitor instead of getting it from the public
4 defender. Did you feel like you had ample time to review
5 that -- those materials before trial?

6 A. Oh yeah.

7 Q. And also you talked -- you testified that you after
8 you and Mr. Desaussure made a decision to go forward at
9 trial without the expert, eyewitness expert that it was
10 your strategy to chip away at the identification of these
11 eyewitnesses. Would you not consider that a part of your
12 trial strategy?

13 A. Yes.

14 Q. Thank you.

15 MR. FALK: May I redirect?

16 THE COURT: Yes, sir. I'm reading the transcript.
17 Go ahead.

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1 REDIRECT EXAMINATION

2 BY MR. FALK:

3 Q. When you were -- the Solicitor -- Ms. Wilson just
4 asked you about part of the reason for not going back and
5 asking for money from Indigent Defense for the expert was
6 your experience in the Loyal case, is that right?

7 A. That's what she asked me.

8 Q. Yeah. And your -- is it your testimony that Judge
9 McDonald conducted a hearing and said she had never heard
10 of that before?

11 A. That's my recollection. I don't want to put words
12 in a Judge's mouth, but that's my recollection of it.

13 Q. Okay. You also said that an important part of your
14 trial strategy was creating an alternative narrative, is
15 that correct?

16 A. Yes.

17 Q. And that alternative narrative was going to come
18 through -- how were you going to create the alternative
19 narrative?

20 A. Mr. Desaussure, at the time, told me ---

21 Q. --- so would it be through Mr. Desaussure's
22 testimony?

23 A. Well, I was just -- I was saying -- I was trying to
24 think of how many witnesses he told me he had who were on
25 a particular front porch with him. I think it was three

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1 or four witnesses who he said could corroborate the fact
2 that he was on this front porch sometime in the hour or
3 so before this armed robbery occurred.

4 And so, the other prong of the trial strategy was to
5 provide Mr. Desaussure's side of the story and to
6 corroborate it with these guys saying yeah, he was there
7 with us not long before this happened.

8 And he would be saying that and he would be saying
9 what he was doing during the armed robbery which was
10 going to be not armed robbing someone.

11 Q. Were you relying on Mr. Desaussure to have to
12 testify in this case?

13 A. Yeah.

14 Q. Did he have a prior record for violent crime prior
15 to this?

16 A. Yeah.

17 Q. Were you concerned about having him testify with
18 that record?

19 A. It wasn't ideal, right, but he was -- he was the
20 only witness we had as to his whereabouts at the time.

21 Q. I thought you said there were other witnesses?

22 A. As to his whereabouts at the exact time of the armed
23 robbery, he was alone. He said he had other witnesses in
24 the hour or so, in the hours before the armed robbery
25 where he was hanging out on this front porch.

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1 Q. And, did any of those alibi witnesses testify?

2 A. The way it happened with the alibi witnesses, after
3 I tracked down -- I think I tracked down two of the three
4 or three of the four of them. One initially told me
5 that it was entirely possible Mr. Desaussure was on his
6 front porch. He didn't remember the specific night. I
7 said okay come to trial and say that.

8 Another guy, the only name we had for him was Big
9 Hamp [phonetic] and we were unable to find him. A third
10 witness, his name was Eddie, we did find him and we
11 subpoenaed him to come to trial and he just refused to
12 the very end to testify.

13 So, I think the only person we ended up putting on
14 the stand, if memory serves, was the guy who lived on
15 Rutledge who Mr. Desaussure believed he'd been at the
16 front porch of. And, when he testified, when he got to
17 court he changed his story on me and he no longer said
18 that he thought it was possible that Mr. Desaussure had
19 been with him before.

20 He said he had no memory of it whatsoever and this
21 sort of thing and so, any potential corroboration of
22 whatever Mr. Desaussure might have said fell apart with
23 him.

24 Q. So, is it safe to say that even having -- that your
25 testimony regarding an alternative narrative -- your

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1 evidence regarding an alternative narrative or your proof
2 on that subject was weak?

3 A. At what point are we assessing it?

4 Q. When trial starts.

5 A. During trial it was weak.

6 Q. I'm -- when the trial was called?

7 A. When the trial was called I thought I had two
8 witnesses who could corroborate or plausibly believably
9 testify that it's possible that Mr. Desaussure was with
10 them in the hours before the armed robbery.

11 Q. Do you think testimony that it's possible that the
12 guy might have been here is strong evidence of an alibi?

13 A. Well, again, it wasn't really for an alibi, but no I
14 don't think it was strong evidence of an alibi.

15 MR. FALK: No further questions.

16 THE COURT: Anything further?

17 MS. WILSON: Nothing further from the State.

18 THE COURT: All right, you may come down, thank you
19 very much.

20 THE WITNESS: Thank you.

21 [Whereupon, the witness is excused and exits the
22 stand]

23 MR. FALK: May I have a moment, Your Honor.

24 THE COURT: Go ahead.

25 MR. FALK: Your Honor, we would like to call

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Aaron Mayer-Redirect Examination by Mr. Falk
September 11, 2014

1 Ashley Pennington to the stand.

2 THE COURT: All right.

3 [Whereupon, Mr. Pennington comes forward]
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Alonda B. Desaussure v State of S.C.
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1 [Whereupon, the witness is duly sworn by the Clerk
2 of Court]

3 CLERK OF COURT: Please state your full name and
4 spell your last name for the record.

5 THE WITNESS: My full name is Ashley Pennington and
6 the last name is spelled P-E-N-N-I-N-G-T-O-N.

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8 ASHLEY PENNINGTON

9 Having been first duly sworn,

10 Was examined and testified as follows:

11 DIRECT EXAMINATION

12 BY MR. FALK:

13 Q. Mr. Pennington, can you tell me your current
14 occupation?

15 A. I'm the Ninth Circuit Public Defender.

16 Q. Is that like the head public defender for the Ninth
17 Circuit?

18 A. That's right. I manage the Charleston and Berkeley
19 Public Defender Offices.

20 Q. How long have you been a public defender?

21 A. I've been practicing for 34 years and 30 of those
22 was as a public defender either in State or Federal
23 Court. The other four were with private practice.

24 Q. Of those 30 years, how much time was spent in
25 General Sessions Court in South Carolina?

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1 A. If you -- I was in Chicago for four years, so again,
2 its 30 years that I've had a practice in this state where
3 I've been active in the circuit courts of this state.

4 Q. Is it fair to say that you're pretty familiar with
5 General Sessions' trials occurring in Charleston County?

6 A. Yes, sir. For the last 30 years, yes sir.

7 Q. Are you -- do you have any recollection or do you
8 know of any time when a person has hired -- person has
9 been qualified for services of a public defender and then
10 gone and hired a private attorney?

11 MS. WILSON: Your Honor, I'm going to object to this
12 line of questioning based on the fact that he's
13 essentially calling Mr. Pennington to act as an expert to
14 talk to -- to testify with regard to what he alleges to
15 be Mr. Mayer's deficiency. And I object on the basis of
16 Green v State and McKnight v State.

17 THE COURT: What is that mean?

18 MS. WILSON: I can provide the citation. Well, Your
19 Honor, the court in both of those said that he can't call
20 another criminal defense attorney to testify with regard
21 to the deficiency of another criminal defense attorney as
22 an expert, Your Honor, because they're not ---

23 THE COURT: --- he hasn't proceeded to get himself
24 qualified as an expert yet.

25 MS. WILSON: Well, Your Honor, I'm saying that he's

Alonda B. Desaussure v State of S.C.
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1 asking Mr. Pennington his opinion based on his experience
2 as a ---

3 THE COURT: --- well I don't know -- he hadn't said
4 that..

5 MS. WILSON: Well, he basically just asked about his
6 past history as a public defender, his experience and now
7 today he's asking him about his experience as a public
8 defender and if he's seen ---

9 THE COURT: --- and that's not an opinion on
10 anything yet.

11 MS. WILSON: Okay. Thank you, Your Honor. I just
12 wanted to note my objection for the record.

13 THE COURT: All right.

14 MS. WILSON: Thank you.

15 THE COURT: Overruled at this point.

16 Q. [Mr. Falk] In your experience as a Chief Public
17 Defender, have you ever known cases when somebody has
18 retained a public defender and then hired private
19 counsel?

20 A. Yes, many times.

21 Q. In your experience here in Charleston County, have
22 you ever known a time when somebody who has -- that
23 initially qualified for services of a public defender
24 hired private counsel and then sought funding from
25 Indigent Defense to pay for expert witnesses?

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1 A. We have run into that. There are cases -- the first
2 case that ever arose, that I was familiar with, was when
3 the Stephen Beckham case in what was Newberry County when
4 Jack Swerling and Dick Harpootlian were retained in a
5 murder case there.

6 The defendant in that case, son of a bishop,
7 apparently the funds ran out and they applied and were
8 granted funds through OID at that time commissioned on
9 Indigent Defense to allow them to hire experts.

10 That began to establish that occasionally you would
11 see lawyers in private practice who would essentially go
12 to court and say I am not going to seek funding for any
13 of my time, however my client has exhausted all their
14 resources and we would seek to have the defendant
15 declared indigent for purposes under due process of
16 getting access to reimbursement for trial expenses like
17 expert witnesses. It is not a frequent occurrence, but
18 it has been done, yes.

19 Q. You cited one case, the ---

20 A. --- Beckham ---

21 Q. --- the Becker [sic] case. Are you aware of it
22 happening more recently and in Charleston County?

23 A. You've asked me about that and it's hard for me to
24 pin down and name a specific instance of that. I get
25 calls, regularly, from lawyers who have inquired about

Alonda B. Desaussure v State of S.C.
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1 that proposition. I can't say that I have followed them,
2 their case after that to see whether or not they actually
3 acted on it and were successful.

4 I do know that the chief legal counsel in Columbia
5 who works with the Office of Indigent Defense will say
6 that it does happen from time to time.

7 Q. You said that at time to time you get calls from
8 lawyers, private counsel?

9 A. Yes; I do.

10 Q. Have they ever asked you that question?

11 A. Yes.

12 Q. And what advice did you give them?

13 A. Basically what I've just said. That there is a
14 precedent for it, it has been done, and that I believe
15 that the commission has tried to be responsive to the
16 Circuit Court when the Circuit Court has found that there
17 was a due process need in a case to get an expert in
18 order for the case to withstand appellate scrutiny. And
19 so, they've gone ahead and provided funding based on
20 orders authorized by the Circuit Court.

21 Q. Had Mr. Mayer asked you that question, would you
22 have given him that response?

23 A. Yes, sir.

24 MR. FALK: No further questions.

25 THE COURT: Cross-examination?

Alonda B. Desaussure v State of S.C.
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1 MS. WILSON: Nothing from the State.

2 THE COURT: Thank you very much.

3 [Whereupon, the witness is excused and exits the
4 stand]

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Alonda B. Desaussure v State of S.C.
Mary A. Ford - Direct Examination by Mr. Falk
September 11, 2014

1 MR. FALK: We call Ms. Ford.

2 THE COURT: Come forward.

3 [Whereupon, Ms. Ford comes forward]

4 [Whereupon, the witness is duly sworn by the Clerk
5 of Court]

6 CLERK OF COURT: Please state your full name and
7 spell your last name for the record.

8 THE WITNESS: Mary Allison Ford, F-O-R-D.

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10 MARY ALLISON FORD,

11 Having been first duly sworn,

12 Was examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. FALK:

15 Q. What is your current occupation?

16 A. I'm an assistant public defender with the Charleston
17 County Public Defender's Office.

18 Q. Have you ever represented Mr. Desaussure?

19 A. I have.

20 Q. Were you with the Public Defender's Office at that
21 time?

22 A. Yes.

23 Q. It's safe to say that he had qualified for your
24 services at that time?

25 A. Yes. He was incarcerated, so anyone who's

Alonda B. Desaussure v State of S.C.
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1 incarcerated qualifies for our services.

2 Q. Okay. Do you know if he was also indigent?

3 A. I believe so.

4 Q. Okay. There's been testimony that you were -- the
5 Public Defender's Office was relieved from representing
6 him on the first day of a trial term, is that correct?

7 A. Yes.

8 Q. And so, when about was that? Was that...

9 A. That was, I believe, March of 2013.

10 Q. Mr. Mayer made an entry of appearance, or
11 substitution of counsel sometime about March 25, does
12 that sound about the right week in March?

13 A. I think it was before then. I know when I was
14 relieved he had not obtained counsel yet.

15 Q. Okay. When -- so you were ready to go to trial on
16 whatever the State was in March, is that correct?

17 A. Yes.

18 Q. Okay. You had reviewed all of the discovery?

19 A. Yes, I had.

20 Q. And in your review of the discovery did you think
21 that it was necessary to hire an expert witness?

22 A. Yes, I did.

23 Q. And did you retain an expert witness?

24 A. Yes, I retained Doctor Brian Cutler [phonetic] for
25 trial.

Alonda B. Desaussure v State of S.C.
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1 Q. And what was -- what was going to be his area of
2 expertise?

3 A. Eyewitness identification issues.

4 Q. Okay. Why did you think that was important in this
5 case?

6 A. In this case I felt it was important because
7 ultimately, there was no other evidence other than one
8 I.D. There were things that initially, I think the
9 police thought was evidence, like for example Mr.
10 Desaussure was found with a knife on him.

11 However, the knife didn't even match the description
12 of the knife given by the witnesses at the crime and
13 there were some other issues with D-N-A.

14 But, ultimately, it was just the one I.D. and the
15 I.D. basically happened, it was three hours later after
16 the crime. Mr. Desaussure was handcuffed at a police car
17 because the police detained him because -- to looking to
18 see if he was the person responsible. And a witness who
19 had been across the street, Mr. Silcott [phonetic], he
20 actually had not even talked to police when they were
21 there investigating the crime.

22 So, this was Mr. Silcott's [phonetic] first
23 involvement in the case and he was riding his bicycle
24 down the street and as Mr. Desaussure was handcuffed at
25 the police car he basically congratulated police for

Alonda B. Desaussure v State of S.C.
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1 catching the guy. And so, considering that was the
2 identification as were the circumstances and that was
3 essentially the only evidence I thought that an expert
4 would be very important.

5 Q. Thank you. So, you retained an expert?

6 A. Yes.

7 Q. You said, Doctor Brian Cutler [phonetic]?

8 A. Yes.

9 Q. And, where was he?

10 A. I'm sorry.

11 Q. Where is his office?

12 A. He's at a university in Canada. He's American and
13 had worked in universities here, but at that time he was
14 working in a university in Canada.

15 Initially, I had consulted with another expert, but
16 -- I believe Doctor Bingham [phonetic], but when we got a
17 trial date finally, that expert was not going to be
18 available because the case was so old at that point and I
19 had already asked for a speedy trial.

20 I knew I could have asked for a continuance, but I
21 wanted to be able to go to trial that week, so he gave me
22 some referrals. And, Doctor Cutler was going to be able
23 to be there.

24 Q. How much in advance of the first trial date in March
25 had you contacted an expert witness?

Alonda B. Desaussure v State of S.C.
Mary A. Ford - Direct Examination by Mr. Falk
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1 A. Well, I know Doctor Cutler probably -- probably
2 started talking to him about a month, or so, in advance,
3 but I can't say for sure.

4 When I was talking to Doctor Bingham I know that I
5 noticed I had printouts of his, you know resume basically
6 from July of 2012. But I can't remember exactly when I
7 talked to him.

8 Q. What do you think would be a reasonable turnaround
9 time for once you've discussed a possible hiring of an
10 expert to them being able to render a preliminary
11 opinion?

12 A. Well, it depends on the case. In this case I don't
13 think it would have taken necessarily that long.
14 Essentially, well there were other witnesses, they didn't
15 identify Mr. Desaussure.

16 The discovery itself when it came down to it, it
17 wasn't too extensive. I mean, I think a month probably
18 would have been sufficient time for an expert to review
19 the materials and things like that but...

20 Q. What conversations did you have with Mr. Mayer about
21 this case?

22 A. None.

23 Q. When you went to trial in March 2013, had you
24 received notice from the Solicitor of their intention to
25 seek LWOP, Life Without Parole?

Alonda B. Desaussure v State of S.C.
Mary A. Ford - Direct Examination by Mr. Falk
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1 A. No, they had never mentioned it to me. I had
2 noticed that Mr. Desaussure did have a conviction on his
3 record that would make him LWOP eligible.

4 So I informed Mr. Desaussure of that on several
5 occasions just telling him that basically that was my
6 main concern, that that could pop up. But, the Solicitor
7 never mentioned it to me and I was not going to raise it
8 to her.

9 Q. Are you aware of what the notice time is for that?

10 A. I believe ten days. I've never actually had a
11 client who's been served LWOP.

12 Q. It's at least a day, isn't it?

13 A. Yes. I believe its ten days, but...

14 Q. So, had the trial actually started on that date in
15 March they would not have been seeking LWOP, is that
16 correct that you would have ---

17 A. --- correct. At that point I don't think the
18 Solicitor had realized it yet.

19 Q. Okay. Would you ever have considered taking this
20 case to trial without an eyewitness expert?

21 A. I -- I mean I think there was enough that the I.D.
22 lacked so much in credibility that I could have easily
23 attacked it on my own because a lot of other things
24 didn't match up and I think I could have easily done
25 that. But, considering that that one I.D. is all that

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Mary A. Ford - Direct Examination by Mr. Falk
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1 the State had as far as evidence, I do feel like an
2 expert was necessary, yes.

3 MR. FALK: No further questions.

4 THE COURT: Cross-examination?

5 MS. WILSON: Thank you, Your Honor.

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Alonda B. Desaussure v State of S.C.
Mary A. Ford - Cross-Examination by Ms. Wilson
September 11, 2014

1 CROSS-EXAMINATION

2 BY MS. WILSON:

3 Q. Ms. Ford, before Mr. Desaussure essentially fired
4 you, was he aware that you were ready for trial and had
5 an expert?

6 A. Yes. He was aware. We had met multiple times the
7 week prior to his trial and we discussed the expert. The
8 expert, actually, the day we started -- I had tried to
9 get a date certain so that we could know in advance, but
10 I was not able to do that so we basically got our expert
11 a plane ticket maybe a day or two before the trial
12 started.

13 And so after Mr. Desaussure fired me I basically had
14 to call the expert -- run and call him immediately
15 because he was literally on his way to the airport. He
16 had just gotten there.

17 Q. Okay. It's your testimony that you retained this,
18 Doctor Cutler maybe about one month in advance of trial?

19 A. I believe so.

20 Q. And it's also your testimony that while you thought
21 an expert was necessary, that you probably could have
22 proceeded without it based on the facts?

23 A. I think that there was a lot for me to work with,
24 but I don't -- if an expert, if it's possible to have an
25 expert I don't see any reason not to have the expert. To

Alonda B. Desaussure v State of S.C.
Mary A. Ford - Cross-Examination by Ms. Wilson
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1 me this case screamed for an expert. I was actually his
2 third public defender, so I'm not sure if there had been
3 conversations with his prior public defenders about an
4 expert.

5 They left the office, that's why I came into -- I
6 was appointed to be Mr. Desaussure's public defender in
7 January 2012. And as soon as I got the case that's the
8 first thing I recognized.

9 Q. Thank you.

10 MR. FALK: Just briefly.

11 THE COURT: Certainly.

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Alonda B. Desaussure v State of S.C.
Mary A. Ford - Redirect-Examination by Mr. Falk
September 11, 2014

REDIRECT EXAMINATION

BY MR. FALK:

Q. When you had -- you said you first talked to another expert prior to Doctor Cutler, is that correct?

A. Yes.

Q. Had you ever used an eyewitness expert before?

A. No, I have not personally.

Q. Were you aware of experts being used by your office in the past?

A. Yes.

Q. Okay, so you had -- you knew where to -- who to ask for suggestions?

A. Yes. There's a -- Doctor, I think again I think his name is Bingham [phonetic], he was an expert used by another attorney in my office and that's where I got his name and why I consulted with him initially.

And he's the one who ultimately gave me Doctor Cutler's name. There's also a LISTSERV that we can use, statewide, for criminal defense attorneys to ask about experts.

Q. So, a month before trial, if it only would take 30 days to get an expert on board, that's assuming that you knew on day one who to call?

A. I think so. It could vary and it also, of course, it depends if they're available and things of that

Alonda B. Desaussure v State of S.C.
Mary A. Ford - Redirect-Examination by Mr. Falk
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1 nature. It may depend on how much the expert has going
2 on and you know, I can't say for sure how long they would
3 take. In this case, I don't think it was too complicated
4 for an expert to review.

5 MR. FALK: No further questions.

6 THE COURT: Anything further?

7 MS. WILSON: Nothing further.

8 THE COURT: All right. You may come down now.

9 Thank you very much.

10 [Whereupon, the witness is excused and exits the
11 stand]

12 MR. FALK: One last witness.

13 THE COURT: Yes.
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Alonda B. Desaussure v State of S.C.
Lori R. Van Wallendael - Direct-Examination by Mr. Falk
September 11, 2014

1 MR. FALK: We would like to call Doctor Lori R.
2 Van Wallendael.

3 [Whereupon, Doctor Van Wallendael comes forward]

4 [Whereupon, the witness is duly sworn by the Clerk
5 of Court]

6 CLERK OF COURT: Please state your full name and
7 then spell your last name.

8 THE WITNESS: Lori R. Van Wallendael, V-A-N space
9 W-A-L-L-E-N-D-A-E-L.

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11 LORI R. VAN WALLENDael,

12 Having been first duly sworn,

13 Was examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. FALK:

16 Q. You are a doctor?

17 A. Yes.

18 Q. And that's a Ph.D doctor?

19 A. That is a Ph.D. doctor.

20 Q. Okay. And what is your current occupation?

21 A. I'm associate professor and associate chair at the
22 University of North Carolina at Charlotte.

23 Q. And chair of what department?

24 A. Psychology.

25 Q. Have you ever been qualified in the state of South

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Lori R. Van Wallendael - Direct-Examination by Mr. Falk
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1 Carolina to testify in the area of forensic psychiatry?

2 A. Psychology.

3 Q. Psychology?

4 A. Yes.

5 MR. FALK: Your Honor, I've submitted Doctor Van
6 Wallendael's C.V. to Ms. Wilson. We don't have a jury
7 here and I don't think there's a lot to be gained by
8 going through a huge voir dire. We would move to have
9 her accepted as an expert.

10 THE COURT: Any objections?

11 MS. WILSON: Your Honor, I just have a few
12 questions.

13 THE COURT: Certainly. Voir Dire, go ahead.

14 MS. WILSON: Just briefly.

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Alonda B. Desaussure v State of S.C.
Lori R. Van Wallendael - Voir Dire by Ms. Wilson
September 11, 2014

1 VOIR DIRE

2 BY MS. WILSON:

3 Q. Ms. Van Wallendael, was your testimony that you had
4 been qualified as an expert in court in South Carolina
5 before?

6 A. Yes.

7 Q. Okay. And do you recall how many times you've been
8 qualified?

9 A. In South Carolina, I'm guessing at least six or
10 eight.

11 Q. And do you recall if you were testifying for the
12 defense or prosecution?

13 A. I was testifying for the defense.

14 Q. All times?

15 A. Yes.

16 Q. Can you just kind of review what type of materials
17 you reviewed to be prepared for this case today?

18 A. Sure. I was basically given discovery in the form
19 of the initial police reports on the case, statements of
20 witnesses; I think I also reviewed some sections of a
21 trial transcript that was regarding the identifications
22 of the witnesses.

23 Q. And you were paid to be here today?

24 A. Yes.

25 Q. And what was your fee?

Alonda B. Desaussure v State of S.C.
Lori R. Van Wallendael - Voir Dire by Ms. Wilson
September 11, 2014

1 A. I was -- I basically make 200 dollars an hour for
2 reviewing the file and then the actual testimony and I'm
3 also paid for my time for driving down.

4 Q. And have you written a lot of publications on
5 accuracy of eyewitness identifications?

6 A. I've had several, yes.

7 Q. Give me a good number. I'm sure they're your babies
8 so you know ---

9 A. --- well, actually my overall, I've probably got
10 about 20 publications. I'd say about eight of those are
11 specific to eyewitness and earwitness reliability.

12 Q. Okay. Thank you.

13 THE COURT: All right I'll qualify her as an
14 expert. You may proceed.

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Lori R. Van Wallendael - Direct Examination by Mr. Falk resumes

September 11, 2014

DIRECT EXAMINATION (RESUMES)

BY MR. FALK:

MR. FALK: Again, I should have been asked, she is being qualified as an expert in eyewitness identifications?

THE COURT: Yes.

Q. [Mr. Falk] You had testified that you had done a lot of work for defense counsel, is that correct?

A. Yes.

Q. Have you also done work with the law enforcement in North Carolina?

A. Yes, I have.

Q. Can you tell us just a little bit about that?

A. Yes. When the state of North Carolina's Innocence Commission was looking into recommendations for changes to our eyewitness identification procedures, I was working at the time with Doctor Brian Cutler in our department and the Charlotte-Mecklenburg police approached us.

They basically -- they could see potential changes to the way that they did things coming down the line and they wanted to be very proactive in understanding the impact that it might have on their department and their ability to do their jobs. And so, they approached us about actually conducting a study in the field where they

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Lori R. Van Wallendael - Direct Examination by Mr. Falk resumes
September 11, 2014

1 could test the accuracy of their standard simultaneous
2 basically six-pack lineups versus the new sequential
3 lineup procedures.

4 And they were willing to basically create a
5 scientific experiment where they would randomly assign
6 cases in their armed robbery division to either
7 sequential or simultaneous lineups for a period of time
8 to see -- their concern basically, was that they might
9 get fewer identifications with the new sequential
10 procedures.

11 And, as we worked on the study with them we learned
12 about a national study that was going on that we
13 ultimately became a part of. So, we had had a chance to
14 basically really work with Charlotte on the procedures
15 that they ultimately did adopt in sequential lineups and
16 talk to them a lot about how to do a good study and how
17 to interpret the results when they got them.

18 Q. So your exposure is not limited just to the defense
19 counsel? You've worked on both sides of the fence?

20 A. Yes.

21 Q. You said that you had an opportunity to review the
22 discovery in this case?

23 A. Yes.

24 Q. And did you also look at the trial transcript?

25 A. Yes.

Alonda B. Desaussure v State of S.C.

Lori R. Van Wallendael - Direct Examination by Mr. Falk resumes

September 11, 2014

1 Q. Okay. Based on your review of the information that
2 I gave you, did you have any concerns about the
3 reliability of the eyewitness identifications in this
4 case?

5 A. Yes, definitely.

6 Q. Can you explain what they concerns would have been?

7 A. Sure. There was really only one identification that
8 took place near the time of the actual crime and that
9 was, I believe his name was Mr. Silcott [phonetic] who
10 had seen the incident from across the street and then
11 later did a very informal identification when he just
12 happened to chance upon the defendant being questioned by
13 police.

14 And, my first concern was simply the uncontrolled
15 circumstance of that identification because although you
16 might argue that it was kind of a show up procedure, it
17 was a show up that was not done under the kinds of
18 circumstances where a show up normally would be
19 conducted.

20 For instance, police have statements that they read
21 to a witness before a show up cautioning them that this
22 might or might not be the person. And we know from
23 research that that's a very important caution and it
24 didn't seem like any of those cautions were in effect in
25 this particular circumstance. So, it struck me that we

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Lori R. Van Wallendael - Direct Examination by Mr. Falk resumes
September 11, 2014

1 had a situation of a show up which is inherently
2 suggestive by its nature being made more so because of
3 these sort of surprise and uncontrolled circumstances
4 where the police were basically just -- this witness just
5 kind of showed up and said oh I saw this and that was the
6 first contact that they had with him, so there was no
7 preparation there.

8 I was also concerned that there were -- that it was
9 a cross-racial identification which is something that
10 I've done research on and I know that these kinds of
11 identifications are very difficult for witnesses that
12 they very often involve over confidence on the part of
13 witnesses.

14 And coupled with the distance and lighting factors
15 that might have impeded the witness's ability to view the
16 perpetrator in the first place, that it seemed very shaky
17 ground for an accurate memory to have been formed.

18 And I was just I was struck to the point of almost
19 stunned that no additional identification procedures were
20 ever done that, for instance, there was no line up done
21 with the victim or any other potential witnesses. So
22 those struck me as very significant factors that the jury
23 should have considered.

24 THE COURT: Did the -- just for the record and my
25 information, did the court do an in camera questioning of

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1 the witness about the lighting -- I mean, prior to the in
2 court ---

3 MR. FALK: --- there wasn't actually a Biggers
4 hearing but there was ---

5 THE COURT: --- Biggers, that's what I'm ---

6 MR. FALK: --- but there was an in camera and Mr.
7 Mayer can sort of flesh this out, but there was Mr. Mayer
8 saw it as a different issue because there was never an
9 out of court identification.

10 So, there was an in camera testimony given by the
11 witnesses regarding whether or not they should be able to
12 identify him in court having not prior identified him and
13 whether -- and the reliability of that. So, there was an
14 in camera discussion, but it wasn't exactly a Biggers
15 hearing.

16 THE COURT: Okay. That probably wouldn't show --
17 go ahead.

18 Q. [Mr. Falk] You had talked about cross-racial and
19 that would be a factor in this case?

20 A. Yes.

21 Q. Okay. Is there any scientific studies, scholarly
22 studies regarding what happens when somebody puts a
23 weapon in a victim's face?

24 A. Yes. There's -- we actually have a name for it; the
25 weapon focus effect. When a weapon is visible in a crime

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1 scene area, what typically happens is not too
2 surprisingly that victims and witnesses attention are
3 drawn to that weapon as being the item that is physically
4 threatening their well being.

5 And, so, what this does is it tends to decrease a
6 person's ability to make an identification later. It
7 also decreases their ability to remember details about
8 events, even things that are not visual because it's not
9 just that your eyes are on the weapon it is that your
10 attention is on the weapon.

11 So, it affects your ability to remember voices, to
12 remember what was said in conversation. It's kind of a
13 very natural sort of reaction that a person would have to
14 them needing to focus on the thing that could hurt them.

15 Q. Did you recall in Mr. Silcott's [phonetic] testimony
16 that he walked up and he saw a knife?

17 A. Yes. Okay, I remember that the victim said he
18 didn't really see a knife he just, he was struck and then
19 he realized he had been struck by something more than a
20 hand.

21 But, I know there was a witness and I believe it was
22 Mr. Silcott [phonetic] who mentioned that he -- there was
23 one witness who said something about just seeing the
24 person put his hand in his pocket before he struck and I
25 think Mr. Silcott [phonetic] was the one who actually

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1 said he saw a knife.

2 Q. And there is scholarly research on the ability to
3 recall incidents related to the amount of initial
4 exposure there was?

5 A. Yes. Basically, with any kind of memory the more
6 time you have to study the more likely you are to recall.
7 Obviously as a college professor, I'm always nagging my
8 students to spend more time studying.

9 The problem with an eyewitness situation is that
10 very frequently there is no time to study. You know,
11 what happens takes place over a matter of seconds, you
12 know, minutes at the most.

13 So, that ability to view is very often, you know,
14 just a glance by the time a person really realizes that
15 they are witnessing something that could be a violent
16 incident or a crime.

17 Q. In your study in this field, have you found that --
18 are you familiar with the Innocence Project nationwide?
19 I believe you said you were familiar with the North
20 Carolina's Innocence Project?

21 A. Yes.

22 Q. And those are the D-N-A exoneration cases?

23 A. Yes.

24 Q. Okay. Is there a significant amount of eyewitness
25 identifications in the D-N-A exoneration -- in the D-N-A

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1 conviction cases?

2 A. Yes, absolutely. I think the current percentage is
3 around 75 percent that have involved an incorrect
4 eyewitness identification.

5 Q. So there can be a correlation between eyewitness
6 identifications and false convictions?

7 A. Yes.

8 Q. Okay. Is it your experience in your study in this
9 field, how do jurors generally react to the testimony of
10 an eyewitness?

11 A. That is actually an area that I've studied as well
12 and jurors tend to be very persuaded by eyewitnesses
13 because they -- yeah, it's a person that they have in
14 front of them with a compelling narrative to tell and
15 there's usually no reason to question the honesty of an
16 eyewitness.

17 Jurors don't tend to think to question accuracy. We
18 tend to try to believe in memories. We believe in our
19 own memories for the most part and there are a lot of
20 areas where research what research suggests about memory
21 is not common sense and is not necessarily what you see
22 on television or what you think you know about memory.
23 So, there's a lot of misinformation out there.

24 Q. And there's a correlation between the confidence
25 that a witness has and the believability that the jury

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1 has in their testimony?

2 A. Yes, very much so. The jury relies very heavily on
3 the witness's confidence as their cue to how much weight
4 to give that witness's testimony.

5 Q. And in cases like this where Mr. Silcott [phonetic]
6 possibly saw the defendant or at least testified that he
7 saw the defendant on two occasions, initially and then at
8 the bicycle ---

9 A. --- right ---

10 Q. --- is there any study showing how a subsequent
11 viewing of a potential perpetrator when a witness sees a
12 perpetrator more than once, does that increase their
13 confidence or decrease their confidence?

14 A. It increases their confidence.

15 Q. Okay. So, eyewitness testimony can be somewhat of a
16 two-edged -- can be a double headed problem for a defense
17 counsel. Jurors love the testimony ---

18 A. --- yes ---

19 Q. --- and it's often unreliable?

20 A. Yes.

21 Q. Had a defense counsel asked you for help in this
22 case, consulted you what would you have -- what would
23 have been some suggestions you would have given defense
24 counsel as far as how he would have conducted his
25 examinations?

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1 A. I would have focused fairly heavily on the
2 examination of the police officers who encountered Mr.
3 Silcott [phonetic] in that I.D. that was not really
4 conducted, but that happened.

5 I would have wanted to hear if the police had any
6 kind of opportunity to control the situation or give any
7 cautionary instructions.

8 I would have wanted to know more about what they
9 might have asked Mr. Silcott at that point regarding his
10 initial viewing of the incident, since he hadn't come
11 forward earlier.

12 And I would definitely have wanted or would have at
13 least suggested that counsel ask, you know, why were no
14 other identification procedures conducted? Why would you
15 not conduct a lineup with the victim at any point?

16 Q. Had you had the opportunity to testify in this case,
17 what would you have told the jury?

18 A. I would have tried to explain to them how memory
19 works, you know, that it's not like playing a videotape
20 back from your head, that it's a very constructive
21 process.

22 I would have talked about the difficulties of cross-
23 racial identifications, the possible effect of a weapon,
24 and the kinds of best practice procedures that could have
25 been followed or should have been followed in regard to

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1 the identifications in the case or the lack of
2 identifications.

3 Q. You said that you had testified six or eight times
4 in South Carolina?

5 A. I believe that's right, yeah.

6 Q. You testified in North Carolina?

7 A. Yes.

8 Q. About how many times?

9 A. Probably at least 10 or 15.

10 Q. Is it your opinion that your testimony has ever made
11 a difference?

12 MS. WILSON: I object, Your Honor, it calls for
13 speculation.

14 THE COURT: I'll let her answer.

15 A. I think it has. I've had a couple of attorneys
16 contact me afterwards and, you know, they've had a
17 favorable outcome and they've said that they believed
18 that the jury was affected or that actually they had
19 polled the jury and jury members had said that the
20 testimony was important to them.

21 Q. [Mr. Falk] So some of the cases that you testified
22 in have resulted in acquittals?

23 A. Yes.

24 Q. You've testified in South Carolina before, you said,
25 and in North Carolina?

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1 A. Yes.

2 Q. Have you ever -- do you recall if in any of those
3 cases you were paid -- let me back up. Do you recall in
4 any of those cases that it was a client that originally
5 was represented by the public defender and then have paid
6 counsel?

7 A. I'm not sure about that.

8 Q. Let me ask it a different way. Do you know of any
9 times that you've ever been reimbursed through your fees
10 through an Indigent Defense Fund either in North Carolina
11 or South Carolina?

12 A. Yes. I definitely have.

13 Q. Do you know if that was in South Carolina?

14 A. I know I've done it in North Carolina. I think I've
15 primarily worked for public defenders in South Carolina.

16 MR. FALK: No further questions.

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Lori R. Van Wallendael - Cross-Examination by Ms. Wilson
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1 CROSS-EXAMINATION

2 BY MS. WILSON:

3 Q. Doctor Van Wallendael, sorry ---

4 A. --- good ---

5 Q. --- I always want to make the Van your middle name

6 and that other part your last name ---

7 A. --- yeah, everybody does that ---

8 Q. Can you kind of review again what you said some of

9 the factors were that could affect the accuracy of

10 eyewitness I.D.?

11 A. In this particular case?

12 Q. Or, yeah, that's fine.

13 A. Okay. Cross-racial identification, potentially the

14 weapon focus effect, brief time to view the defendant,

15 probably a fairly limited view of the person's face given

16 that it was across the street, and the way that the

17 identification itself is conducted the, you know,

18 difference between a show-up and a lineup, for instance,

19 the importance of the instructions given to the witness

20 before an identification procedure.

21 Q. Okay. And you also talked about today, you were

22 talking about exposure time was a factor and how the

23 length of time you have to view someone increases

24 accuracy.

25 A. Right.

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1 Q. Would seeing -- you talked a little bit about it
2 with regard to confidence, but would seeing a person more
3 frequently kind of also increase your exposure time which
4 could increase your accuracy?

5 A. Yes, definitely.

6 Q. Is change in appearance, maybe, also a factor that
7 could play into the accuracy of identification?

8 A. Yes.

9 Q. But you didn't -- there was no change in appearance
10 with regard to like facial features in this case that you
11 recall?

12 A. Not in terms of the identification that was actually
13 done before the trial itself.

14 Q. Also, do suspects that have certain type of
15 distinguishing features, does that kind of increase or
16 decrease the likelihood of an eyewitness being accurate?

17 And I guess I'll give an example like, a person
18 having red hair or some distinguishing feature like that.
19 Does that affect accuracy?

20 A. Sure. That tends to stand out in people's minds.

21 Q. Does that kind of lean to the way of helping
22 accuracy or ---

23 A. --- yeah, definitely, for the most part. I have to
24 be a little careful in that because sometimes somebody
25 can have a distinguishing feature that, you know, draws

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1 so much attention that it draws attention away from other
2 elements of their face, but ---

3 Q. --- right, I ---

4 A. --- for the most part a unique feature would be
5 something that would probably make a person easier to
6 identify.

7 Q. And we also talked a little bit about how you would
8 tell the jury about the cross-racial effect. But is it
9 -- is the cross-racial effect impacted or minimized in
10 any way by the amount of time an eyewitness has to view a
11 suspect?

12 A. It can be decreased, yes, by increasing exposure to
13 the suspect. So, the more time you have to look at
14 someone, hopefully the more chance you have to see
15 features that would be of greater benefit to you in
16 trying to recognize them later.

17 Q. You testified about the weapons focus and how you
18 felt like that was at play in this case. Do you recall
19 from the record that the victim who identified Mr.
20 Desaussure at trial said that he never saw a weapon?

21 A. Right.

22 Q. Okay. And you also gave some testimony about Mr.
23 Silcott saying he saw a knife, but, do you recall if he
24 viewed the altercation between Mr. Desaussure, or the
25 perpetrator, and the victim over some time before viewing

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1 the weapon?

2 A. I think, what I remember, is that he said that he
3 was kind of drawn -- his attention was drawn to an
4 argument in process and that at the end of that argument
5 that he saw the guy pull a knife out. So, yeah, there
6 was some time presumably that passed before the knife was
7 visible.

8 Q. Does speed or, I guess, how soon after an incident
9 affect the accuracy of that implication?

10 A. Yes ---

11 Q. --- about the eyewitness? Okay. And so, if someone
12 identifies a suspect on the same day of an incident,
13 would that increase the likelihood of accuracy or
14 decrease that -- the likelihood of accuracy?

15 A. Yes. That would increase the likelihood of
16 accuracy.

17 Q. What about stress? Does stress in any way affect
18 accuracy? And I give that example, would the stress
19 level and how it affected an eyewitness's identification
20 be different if one eyewitness was the victim and the
21 other witness was maybe like a passive observer, would
22 that have an effect?

23 A. Typically, yes. What we -- what the research
24 suggests is that the more stress you are under, the less
25 likely you are to be able to accurately identify someone.

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1 So, the question there, I guess between victim versus
2 witness is, you know, does the witness feel involved, you
3 know, in the sense of being threatened or, you know, is
4 the witness really kind of an observer who doesn't ever
5 really feel like they're in danger.

6 Q. And also, I don't know if this could be a conformal
7 factor, but, how does the surroundings of an altercation
8 or an incident when you're viewing a perpetrator, how
9 does that affect the accuracy of an eyewitness
10 identification?

11 A. Surroundings in what sense?

12 Q. I guess, is it a busy street? Is it a well lit
13 area? Is it, you know, ---

14 A. --- okay ---

15 Q. --- is it calm, is it quality, that type of thing.

16 A. Okay. Yeah, you know certainly well lit would be
17 better for identification. You know dimly lit, fog; rain
18 would go against an accurate identification. Busy, busy
19 street would have the potential, I guess, to be a
20 distraction from identification.

21 MS. WILSON: Beg the court's indulgence.

22 Q. [Ms. Wilson] You kind of testified a little bit
23 about the -- how the way that Mr. Silcott [phonetic] came
24 about identifying Mr. Desaussure didn't really have all
25 the procedures that you thought were best to have for

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1 kind of a show-up type identification.

2 A. Right.

3 Q. But, because Mr. Silcott's [phonetic] identification
4 was kind of spontaneous, did you think that that kind of
5 eliminated some of the suggestibility factors that could
6 come into play during a show-up?

7 A. Not really. I mean, he's just seen an incident
8 where -- you know, he claims to have seen a person, you
9 know, leaving the incident on a bicycle and then he's
10 biking home himself and he sees a person who, you know,
11 roughly fits the description of what he's seen earlier in
12 handcuffs being talked to by police.

13 So, I mean, it seems to me that it's a situation
14 where the police seem to clearly be questioning a suspect
15 in some case and it's not that far from where the
16 incident had occurred. So, you know, he probably just
17 kind of assumed, you know, oh, you know, is that the
18 thing I saw earlier tonight.

19 Q. Okay. And also, this is the last thing; does
20 distance between a person when they're viewing a
21 perpetrator have anything to do with accuracy? How close
22 you are to a person or how far away?

23 A. Sure, I mean, the closer you are the more able you
24 are to see details, you know, eyebrow shape, eye color,
25 you know things like that that if you were 100 yards away

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1 you wouldn't be able to see.

2 Q. Okay. And you testified today about your work with
3 the Innocence Project and false convictions and all that
4 kind of stuff, you're not saying that that's necessarily
5 what's involved in this case it's just you're -- is that
6 correct?

7 A. No. This is just additional data that, you know, we
8 use when we look at eyewitness accuracy.

9 Q. Thank you.

10 MR. FALK: Just a few.

11 THE COURT: Let me ask her, the Doctor, some
12 questions and then you may want to follow up.

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EXAMINATION

BY THE COURT:

Q. Doctor, I agree with everything you've said and I respect the work that you do to improve the -- this phase of police work and we want to get accurate identifications when there are identifications.

But, let me ask you a little bit about, specifically, about this case. And you told me you had read the transcript, is that correct?

A. Yes.

Q. Just coincidentally, or incidentally, have you ever been on King Street?

A. Yes, I have.

Q. You agree with me, then, that it's a fairly narrow street?

A. Yes, it is.

Q. It's not a four-lane highway.

A. Right.

Q. It's frequently crowded. This witness, I've just been reading his testimony, he says he observed the incident from across the street. So we know at least it's not as far as that wall [indicates] is from me I don't believe.

A. Yeah, that's probably...

Q. So, it's fairly close.

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1 A. Yeah, maybe the front of the jury box.

2 Q. And he says, first -- well, he says his first
3 encounter with the defendant was prior to the actual
4 incident and he says that the -- he had seen Mr.
5 Desaussure, I'm assuming, I mean it is that's who he says
6 he had seen. I had seen him two other times. What was
7 going on that made you notice him? He said he asked me
8 for some change. Do you recall that?

9 A. Yes.

10 Q. Okay. And did you have an interaction with him at
11 that time? He said yes. And how long was that
12 interaction? Five seconds.

13 And then later he witnessed the altercation and he
14 says how long that you witnessed it was it that you
15 witnessed the altercation? He says, probably five
16 minutes. Can you identify any particular physical
17 characteristics? Yes, he had salt and pepper hair, he
18 was tall, he was thin.

19 And then, we get to the altercation and he said he
20 saw the two pushing and shoving on the street and he says
21 the defendant pulled out a blade and swung his arms
22 wildly and managed to contact with the face of the
23 victim. Then he said, I observed for a few minutes until
24 I realized what the situation was and I went over and
25 attempted to help the victim. Do you recall that?

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1 A. Yes.

2 Q. And as soon as -- you know, came within contact of
3 the suspect a knife was pulled and I realized the
4 situation was out of my control and you know after the
5 victim was cut I decided I'm going to return to the
6 restaurant before, you know, something happens to me.
7 And how close did you get to the altercation? What did
8 he say?

9 A. I think it was just like within a couple of feet.

10 Q. Three feet, yeah. You saw a knife? Yes. Who was
11 holding the knife? The suspect. Do you see the suspect
12 in court today? And he identified him.

13 So, he had -- there was prior encounter with the
14 defendant and then some few minutes later or some time
15 later he had saw this altercation. He came within three
16 feet of it and saw a knife.

17 And then, he goes on -- I'm just jumping around.
18 How close were you to the knife when the suspect pulled
19 out the knife? He pulled out the knife and motioned that
20 it was pretty close to me. So, that's when you realized
21 this is not for me.

22 Can you describe the knife? I'd say the knife was
23 about this big indicating the blade was somewhat, I
24 guess, it was about two inches and a half and it had a
25 serrated edge and a little thumb hole where you can open

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1 it up; a pretty common knife. What were the physical
2 conditions like that night? It was definitely clear.
3 Was the street well lit? Yes. I don't remember any
4 crowding at the situation. Nobody through -- walked
5 through or blocked my vision the whole time. And then
6 comes the show-up. I would call it a show-up. I
7 recognized the gentleman from earlier that evening, he
8 was undoubtedly the man.

9 And I think that pretty well sums up the -- my
10 question, now, and I've conducted many as counsel alluded
11 to Biggers hearings and what do you think about
12 identification now that I've sort of pointed out what
13 I've just gleaned from the testimony that -- is that a
14 fair or reasonably good identification in your opinion?

15 A. Whether -- whether the identification is accurate or
16 not is to my mind, past the point of my opinion and
17 something that the jury needs to decide for itself.

18 Q. Right, it's a jury question.

19 A. Yes. But, what I would have said about that
20 identification and I think as the Solicitor ---

21 Q. --- but you were the -- yeah ---

22 A. --- certainly ---

23 Q. --- assuming you were the expert ---

24 A. --- yeah, assuming that I was the expert ---

25 Q. --- called after that testimony.

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1 A. There would be points in favor of, now possibly an
2 accurate identification and there would be points in
3 favor of what I would call red flags.

4 You know, on the one hand the person was clearly
5 close enough at one point to this situation to have seen
6 details of the knife and to, in fact, remember details of
7 those knife -- details of the knife that would suggest to
8 me weapon focus.

9 And at the point that he was that close, he would
10 have been under some stress; he was no longer the, you
11 know, impartial observer from across the street who's
12 just watching with curiosity. He's involved now. So,
13 what he sees, I think, at that point is probably a focus
14 on the knife a bit of that stress going through your
15 mind.

16 And so, you know, on the one hand yes he's
17 physically closer on the other hand there are now these
18 factors that are suggesting that he may not have a good
19 detailed focus on the face of the perpetrator anymore.
20 He's probably focusing on the knife and focusing on the
21 sudden realization that yikes, I really ought to get out
22 of here.

23 I also probably would have pointed out his
24 description of having watched the incident for five
25 minutes. One of the things that we know from research is

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1 that witnesses very often over estimate the amount of
2 time that an incident takes. And just from reading the
3 description given by the victim and trying to sort of
4 enact that mentally in my mind, particularly from the
5 point when they left the actual pizza parlor and got out
6 onto the street. My guess is that it was a lot less than
7 five minutes, you know, maybe more like one minute.

8 So, for the amount of time for him to decide across
9 the street that he was going to cross the street and get
10 involved in this situation, you know, we probably are
11 looking at less than the five minutes that the jury
12 heard. And, in fact, quite possibly less than one
13 minute. So, I think that's something that the jury
14 should have considered.

15 The fact of his certainty when he saw this person
16 again in police custody and went over to congratulate the
17 police that I think is where some research could have
18 helped the jury regarding the actual relationship between
19 confidence and accuracy. And we know that confidence is
20 affected by a lot of factors that really have very little
21 to do with accuracy.

22 So, the very context of the event and the events
23 that had taken place earlier could have, you know, made a
24 witness, you know not necessarily this witness, but any
25 witness, you know, jump to a conclusion about what he was

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1 seeing. And, what I like to tell the jury there's a lot
2 of technical, statistical studies about the correlation
3 between accuracy and confidence and that usually just
4 puts people to sleep and nobody really understands what
5 it means.

6 What I usually like to tell a jury is if you're
7 looking at the strength of a statistical correlation, the
8 correlation between accuracy and confidence is about the
9 same as the correlation between your gender and your
10 height.

11 So, on the average men are taller than women, but we
12 all know short men and we all know tall women. Finding a
13 person who is 100 percent confident who is wrong is about
14 the same likelihood as finding a couple where the man is
15 shorter than the woman.

16 THE COURT: All right. Thank you very much. Yes,
17 sir.

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Lori R. Van Wallendael - Redirect Examination by Mr. Falk

September 11, 2014

1 REDIRECT EXAMINATION

2 BY MR. FALK:

3 Q. I believe that Mr. Mayer in his cross-examination
4 raised some issues, talked about stress, talked about
5 cross-racial, possibly talked about weapon focus.

6 But, is it your opinion that jurors appreciate how
7 stress can possibly affect a person's ability to make an
8 observation and make an identification?

9 A. In my experience, people who don't actually study
10 memory or have had classes on it are generally surprised
11 by that finding.

12 In fact, just last week I was giving a lecture on
13 memory to a group of college freshmen and one of them
14 came up to me afterwards because I had said something
15 about stress decreasing the accuracy of memory and he
16 came up to me and said, you know, really, you know, I'd
17 always thought it was the opposite, you know and are you
18 sure and he wanted to ask me a lot more about the
19 research because it did surprise him, so.

20 Q. For example, if somebody identifies an African
21 American having white hair as possibly being the
22 distinguishing feature, is it your understanding that
23 some jurors may think that guy really saw him because he
24 was able to pick out a distinguishing feature but
25 actually is there any scholarly support to show that when

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1 somebody identifies a distinguishing feature their whole
2 focus is on the distinguishing feature, not on the rest
3 of the person?

4 A. That does frequently happen, yes. If there's
5 something that, you know, draws their attention then, you
6 know, you may be very certain of that feature but in fact
7 may not be able to say a lot about additional features of
8 the person.

9 Q. So, in your experience in testifying, jurors can
10 sometimes think that testimony is reliable because the
11 person was able to identify a specific feature. But, it
12 possibly was unreliable because the witness's focus was
13 just on that feature, not on the rest of the person?

14 A. Yes. That is possible.

15 Q. But that might not be something that the typical
16 juror would appreciate?

17 A. Probably not.

18 Q. So, if the defense counsel just raised that issue,
19 do you think that would be persuasive with a jury?

20 A. I suspect the jury would need to learn a little more
21 before they really would be persuaded by a point like
22 that.

23 Q. Possibly the same with stress?

24 A. Yes.

25 Q. So, it's not necessarily the issue being raised, but

Alonda B. Desaussure v State of S.C.
Lori R. Van Wallendael - Redirect Examination by Mr. Falk
September 11, 2014

1 it's whether or not the issue is being explained to the
2 jurors.

3 A. I think so. I mean, I think I can just tell you oh
4 white people are bad at identifying black people. And,
5 you may or may not believe that and you may even argue
6 about it on the jury.

7 But, if I can explain a little bit, you know, if I
8 have a chance to say this isn't about racism, this is
9 about how we process information, this is about the
10 details that we focus on, on a face and, you know, white
11 people probably focusing on a lot of the wrong details.

12 Then, I think, you know people understand a little
13 better about how it might work and then if you understand
14 how it works you're a little more likely to think that
15 might be relevant in this case.

16 Q. So, that's some of the value that you bring to one
17 of these trials?

18 A. I hope so.

19 MR. FALK: No further questions.

20 THE COURT: Anything further?

21 MS. WILSON: Nothing from the State.

22 THE COURT: All right. Thank you very much,
23 Doctor, appreciate you coming.

24 THE WITNESS: Thank you.

25 THE COURT: See you in court.

Alonda B. Desaussure v State of S.C.
Lori R. Van Wallendael - Redirect Examination by Mr. Falk
September 11, 2014

1 THE WITNESS: Probably.

2 [Whereupon, the witness is excused and exits the
3 witness stand]

4 MR. FALK: Your Honor, at this point we would
5 rest. My client has advised and he does not want to
6 testify...

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Alonda B. Desaussure v State of S.C.
Fifth Amendment Rights
September 11, 2014

1 FIFTH AMENDMENT RIGHTS

2 THE COURT: All right. Mr. Desaussure is that so?

3 MR. DESAUSSURE: Yes, sir.

4 THE COURT: Your counsel advises me at this point
5 that you do not care to testify, is that correct?

6 MR. DESAUSSURE: Yes, sir.

7 THE COURT: I do want to tell you that you have a
8 right to testify. I'll let you testify as long as you
9 want or to whatever thing you want to tell me, but you
10 don't have to. Are you -- has anybody threatened you or
11 coerced you in any way and asked you not to testify?

12 MR. DESAUSSURE: No, sir.

13 THE COURT: Have you been told by inmates or
14 something that you should not testify?

15 MR. DESAUSSURE: No, sir.

16 THE COURT: Your attorney has advised you, you
17 think, competently that that's your right and that he's
18 left it up to you whether or not you should testify, is
19 that correct?

20 MR. DESAUSSURE: Yes, sir.

21 THE COURT: All right. And you do not want to
22 testify, is that my understanding?

23 MR. DESAUSSURE: I --

24 THE COURT REPORTER: I couldn't hear you, I'm sorry.

25 MR. DESAUSSURE: No, sir. No, ma'am.

Alonda B. Desaussure v State of S.C.
Fifth Amendment Rights
September 11, 2014

1 THE COURT: You under the influence of any alcoholic
2 beverages, drugs or medication you're taking today? Are
3 you taking any medication?

4 MR. DESAUSSURE: Yes, sir high blood pressure
5 medicine and diabetic.

6 THE COURT: Okay. Those don't interfere with your
7 thinking?

8 MR. DESAUSSURE: No, sir.

9 THE COURT: Okay. All right. Thank you very much.

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Alonda B. Desaussure v State of S.C.
Proceedings
September 11, 2014

1 THE COURT: Anything further?

2 MS. WILSON: No witnesses from the State.

3 THE COURT: All right. Thank you very much
4 counsel. Do you wish to ---

5 MR. FALK: --- well, we can summarize or do you
6 just want us to submit orders?

7 THE COURT: I think orders is fine. I think I
8 understand your position and the State's position.

9 Interesting case. All right.

10 MS. WILSON: Thank you, Your Honor.

11 MR. FALK: Thank you, Your Honor.

12 THE COURT: Thirty days?

13 MS. WILSON: Yes, Your Honor.

14 *****END OF TRANSCRIPT OF RECORD*****
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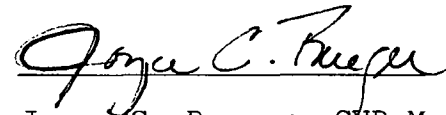
Alonda B. Desaussure v State of S.C.
Certificate of the Court Reporter
September 11, 2014

C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official
Circuit Court Reporter for the Ninth Judicial Circuit of
the State of South Carolina, do hereby certify that the
foregoing is a true, accurate, and complete Transcript of
Record of the proceedings had and evidence introduced in
the trial of the captioned case, relative to appeal, in
the Court of Common Pleas for Charleston County, South
Carolina on the 11th day of September, 2014.

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

March 11, 2015


Joyce C. Rueger, CVR-M
Court Reporter

SOUTH CAROLINA)
COUNTY OF CHARLESTON)

COURT OF GENERAL SESSIONS
NINTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA)
Plaintiff)

Warrant(s): K640021

Charge(s): Burglary 1st degree [§16-11-0311]

Vs.)

Bryant E. LOYAL)
Defendant)

PETITION TO AUTHORIZE FUNDS
FOR INDEPENDENT DNA REVIEW

FILED
2013 MAR -6 PM 3:54
JULIE J. ARMSTRONG
CLERK OF COURT

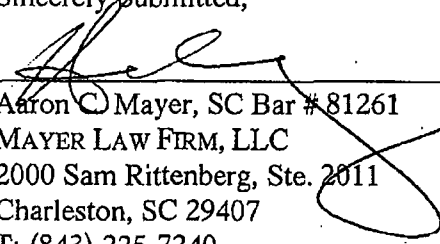
The Petitioner here, by and through his unpaid attorney, respectfully petitions this Honorable Court for an order pursuant to South Carolina Code Section 17-3-50(B), permitting him to obtain copies of any and all feasible printouts of the DNA testing process carried out by Marshall University, for independent review by Dr. Demers of Intelligenetics, of Hilton Head, South Carolina. In support of this Motion, Petitioner would show the following:

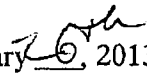
1. That he is presently charged with Burglary 1st Degree;
2. That he is indigent and is currently being represented by the undersigned, who has a received zero compensation for this defense, and instead has only a lien against a civil settlement;
3. That he hereby grants a lien against his civil settlement for any monies advanced to him;
4. That he financially qualified to be represented by the public defender, i.e. an appointed attorney.
5. That it is necessary that he have the Marshall University DNA testing records, and to have those tested independently, in order to prepare his own defense;
6. That the review by Dr. Demers of Intelligenetics will require approximately ten hours of review, in addition to the time required to testify;

PLAINTIFF'S
EXHIBIT

7. That the Solicitor can supply Petitioner with a copy of the DNA testing detail from Marshall University, and that Dr. Demers requires \$2,500.00 for his review of the detailed DNA data and for testifying.

Sincerely Submitted,


Aaron C. Mayer, SC Bar #81261
MAYER LAW FIRM, LLC
2000 Sam Rittenberg, Ste. 2011
Charleston, SC 29407
T: (843) 225-7240
F: (888) 446-3963
aaron@mayerlawpractice.com

February  2013
Charleston, SC

ATTORNEY FOR DEFENDANT

FILED
2013 MAR -6 PM 3:54
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED
STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

2013 MAY 29 PM 3:42

) IN THE COURT OF GENERAL SESSIONS
) NINTH JUDICIAL CIRCUIT

) JUDGE J. ARMSTRONG
) CLERK OF COURT

) INDICTMENT NO.: 2010-GS-10-06182

STATE OF SOUTH CAROLINA

Plaintiff,

) WARRANT NO.: K640021

-versus-

) CHARGES: Burglary 1st Degree

BRYANT EDWARD LOYAL

Defendant.

) ORDER TO PAY STATE'S COSTS

This matter was scheduled to be heard before the Court on May 28, 2013. Aaron Mayer, Attorney for the Defendant Bryant Edward Loyal, requested a continuance in the case on the morning of trial, as well on two previous occasions (April 30, 2012 and April 12, 2013) (See Procedural Time Line attached as Exhibit 1). Mr. Mayer indicated he had been retained as private counsel for the Defendant in December of 2011.

The State purchased flights for three out-of-state witnesses from the Marshall University Forensic Science Center in Huntington, West Virginia, to testify at the trial, and Mr. Mayer was aware that the witnesses were from out of state when this case was placed on the May 28, 2013, docket.

Prior to the swearing of the jury in this matter, Mr. Mayer indicated that the Defendant had a request of the Court. The Defendant indicated that he had been informed that this was Mr. Mayer's first DNA case, and that he was concerned about proceeding with Mr. Mayer as counsel. The Court inquired of Mr. Mayer if he was competent to handle the matter, and Mr. Mayer indicated he was not. This statement, as well as other comments and behaviors exhibited during the proceedings, caused the Court considerable concern about Mr. Mayer's ability to represent the Defendant in this matter as he did not have the required

1 of 2

KH 5/29/13

PLAINTIFF'S
EXHIBIT

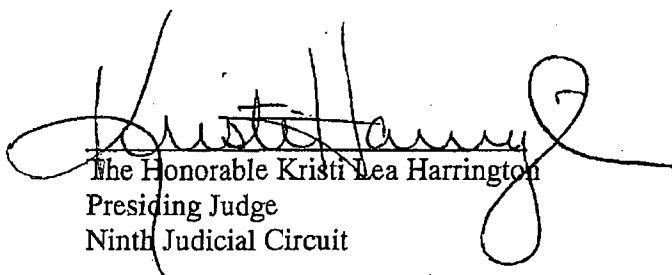
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legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation of the Defendant.¹ Further, Mr. Mayer had been informed on two prior occasions that this case would be called for trial and was aware of the need to secure an expert if necessary as a component of his client's defense. Each time, Mr. Mayer filed a motion for continuance due to the need of a DNA expert. As of today's date, Mr. Mayer has provided no documentation that satisfied this Court that he had retained any DNA expert even though it was requested that he show a substantial factual basis for his contention and that the services of that expert are integral to the building of an effective defense.

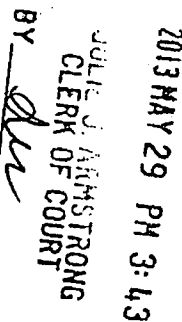
I find that Mr. Mayer does not possess the required legal knowledge, skill, thoroughness, and preparation required under our Rules of Professional Conduct. Further, I find that Mr. Mayer is unable to provide competent representation to the Defendant.

IT IS HEREBY ORDERED that Aaron Mayer be relieved of all representation of the Defendant in the above matter and that he reimburse the State of South Carolina for the plane tickets purchased for the out-of-state witnesses who planned to appear for trial, totaling \$2,461.80 (See Booking Confirmation Receipt attached as Exhibit 2).

AND IT IS SO ORDERED!


The Honorable Kristi Lea Harrington
Presiding Judge
Ninth Judicial Circuit

Charleston, South Carolina
May 29, 2013

FILED
2013 MAY 29 PM 3:43
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

¹ Please see Rules of Professional Conduct, Rule 1.1, RPC, Rule 407, SCACR.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Alonda B. Desaussure, #142994,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
2013-CP-10-5614

ORDER OF DISMISSAL

2014 DEC 15 PM 4:54
JULIE HENNINGSON
CLERK OF COURT

Presiding Judge:
Applicant's Attorney:
Respondent's Attorney:
Trial Counsel:
Date of Hearing:
Court Reporter:

The Honorable G. Thomas Cooper
James Falk, Esquire
Ashleigh R. Wilson, Esquire
Aaron Mayer, Esquire
September 11, 2014
Joyce Rueger

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 24, 2013. The Respondent made its Return. An evidentiary hearing on the matter was convened on September 11, 2014 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by James Falk, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Also present and testifying were Dr. Lori Van Wallendael, Mary Ford, Esquire, Ashley Pennington, Esquire, and Aaron Mayer, Esquire. The Court had before it the trial transcript, the Charleston County Clerk of Court records, the Applicant's records from the South Carolina

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Department of Corrections, the Applicant's application, the Respondent's Return, and exhibits submitted by the Applicant at the evidentiary hearing¹.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Applicant was indicted at the April 2011 term of the Charleston County Grand Jury for assault and battery-first degree (2011-GS-10-2048) and armed robbery (2011-GS-10-2047). He was represented by Aaron Mayer, Esquire.

On July 8-10, 2013, the Applicant proceeded to trial and was found guilty as indicted. The Honorable Stephanie McDonald sentenced the Applicant to ten (10) years for assault and battery and life without parole for armed robbery. The sentences are to be served concurrently. The Applicant did not appeal his convictions or sentences.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
2. Insufficient evidence.
3. Denied equal protection by counsel and the judge.

At the hearing, Applicant proceeded solely on the allegation of ineffective assistance of counsel for counsel's failure to request funding for and obtain an eyewitness identification expert to testify at trial. This Court finds the Applicant has failed to present any evidence or testimony

¹ Over the State's objection, the following were admitted into evidence: Applicant's Exhibit 1- State v. Loyal Petition to Authorize Funds for Independent DNA Review, Applicant's Exhibit 2-State v. Loyal Motion to Reconsider Order Requiring Payment of State's Costs, and Applicant's Exhibit 3- State v. Loyal Order to Pay State's Costs.



regarding any other claims raised in his application, therefore, this Court deems abandoned any other claims raised by the Applicant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

Summary of the Testimony

Dr. Lori Van Wallendael was present and called to testify for the Applicant. Dr. Wallendael testified she is an associate professor and chair of psychology at the University of North Carolina- Charlotte. She testified she has previously been qualified as a forensic psychology expert.

Dr. Wallendael testified she reviewed police reports, witness statements, and the portion of the trial transcript related to the eyewitness identifications in the Applicant's case. She testified she had some concerns with regard to the identification of the Applicant prior to trial. Dr. Wallendael testified she had concerns about the uncontrolled circumstances of the initial show-up where the Applicant was first identified. Dr. Wallendael testified that show-ups are normally conducted under circumstances that are inherently suggestive. She testified she was surprised the police failed to undertake any additional identification procedures after the initial identification of the Applicant.



Dr. Wallendael testified the Applicant's cases also involved cross-racial identification which is a factor that decreases the accuracy of an identification. She testified the impact of cross-racial identification is minimized by the amount of time an eyewitness has to view a suspect. She testified the weapon focus effect was also potentially at play in the identification of the Applicant. Dr. Wallendael testified when a weapon is visible one's attention is drawn to the weapon and their ability to make an identification later is decreased. She testified Stephen Silcott, who initially identified the Applicant, stated he saw the Applicant with a knife.

Dr. Wallendael also testified the length of the initial exposure before identification is a factor present in the Applicant's case. She testified the more time one has to study a person, the more likely they are to recall a person accurately. She also testified seeing a perpetrator more than once in a short period of time could increase the accuracy of an eyewitness' identification.

Dr. Wallendael testified she is aware that eyewitness identification and false convictions are connected, but she is not saying the identifications in this case are false. She also testified jurors are persuaded by both eyewitnesses and eyewitness confidence.

Dr. Wallendael testified that had she been consulted by defense counsel she would have suggested counsel focus on examining the police officers who first encountered the Applicant. She testified she would have explained to the jury at trial how our memories work, the weapons effect, cross-racial identification, and best practice procedures for identifications. Dr. Wallendael testified whether an identification is accurate or not is beyond the point of her opinion and a question for the jury.

Dr. Wallendael also testified there were other factors present which would increase the accuracy of the eyewitness identifications in this case. She testified distinguishing features that make the suspect unique or stand out increase the accuracy of an identification. She testified the



sooner an identification is made the more likely it is accurate. Dr. Wallendael also testified that a well-lit area is better for an accurate identification than a busy street which could be distracting. Dr. Wallendael concluded there were points in favor of a possible accurate identification in the Applicant's case, along with red flags which gave her concern.

Mary Ford, Esquire, was present and called to testify for the Applicant. Ford testified she is a public defender who was appointed to represent the Applicant in January 2011 and relieved as his counsel in March 2013. She testified she felt an identification expert was necessary in the Applicant's case and discussed it with the Applicant. Ford testified she was prepared for trial and prior to being relieved had retained Dr. Bryan Cutler, an eyewitness identification expert. Ford testified she started talking to Dr. Cutler one month prior to trial. She testified one month was sufficient time for Dr. Cutler to provide his expert opinion on the identification. Lastly, Ford testified she planned to present an eyewitness identification expert at the Applicant's trial, but the eyewitness identifications in the Applicant's case lacked enough credibility that she could have easily attacked the eyewitness identification on her own at trial without hiring an expert witness.

Ashley Pennington, Esquire, was also present and called by the Applicant to testify. Pennington testified he is the 9th circuit head public defender. He testified he has been a public defender for 34 years and is familiar with criminal cases in Charleston County. Pennington testified he is aware of cases where retained counsel requested funding from the State after their clients had been declared indigent. Pennington testified this is not a frequent occurrence, but he has seen it done before.

Aaron Mayer, Esquire, was present and testified he was retained to represent the Applicant prior to trial. Counsel testified the Applicant had previously been represented by a

Handwritten signature and initials, possibly "G. R. #5".

public defender. He testified he was initially contacted by a friend of the Applicant who explained the Applicant's case had been called for trial and the day the trial was to start the Applicant was displeased with his public defender.

Counsel testified he filed an entry of appearance on the Applicant's behalf in late March 2013. Counsel testified he met with the Applicant multiple times prior to trial. He testified he filed Brady and Rule 5 motions on the Applicant's behalf. He testified he had ample time to review the Applicant's discovery. Counsel testified he discussed with the Applicant the elements of the charges he was facing and what the State was required to prove to convict him. He testified they also discussed possible defenses and the Applicant's version of the facts.

Counsel testified when he initially spoke with the Applicant he discussed the importance of having an eyewitness identification expert witness at trial. Counsel testified he told the Applicant from the beginning that his public defender had already obtained an expert witness and if he wanted a free expert witness he should continue being represented by his public defender. Counsel testified he advised the Applicant that in addition to his attorney's fee, the Applicant would be responsible for any additional costs incurred during his representation of the Applicant. He testified the Applicant understood that if an expert witness was hired for trial, the Applicant would have to pay for it. Counsel testified the Applicant never gave him any indication that he did not have the means to pay for the expert witness.

Counsel testified he learned after he was retained that the Applicant was unable to pay for an eyewitness identification expert. Counsel testified the Applicant's case called for an eyewitness identification expert. He testified he had not had any success in the past obtaining money from Indigent Defense for cases on which he was retained as counsel. Counsel testified

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he told the Applicant he should come up with the funds to hire an expert or they would proceed to trial without an expert.

Counsel testified the Applicant was ultimately unable to come up with the money to hire an eyewitness expert, so he prepared to proceed to trial without an expert. Counsel testified he researched the reliability of eyewitness identification testimony. He testified he learned about the factors which often make eyewitness identifications unreliable and made a strategic decision to proceed to trial without an eyewitness identification expert witness. Counsel testified he moved to preclude in-court identification of the Applicant at trial and asked the Court to charge the jury on identification. Counsel testified he also recalled arguing to the jury the fact that the victim never identified the Applicant prior to trial and the possibility that cross-racial identification affected the accuracy of the eyewitness identifications.

Ineffective Assistance of Counsel

The Petitioner alleges counsel was ineffective for failing to obtain an eyewitness identification expert to testify for the defense at trial. This Court finds this allegation is without merit and the Applicant has failed to carry his burden of proving counsel was ineffective in this regard. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their 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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

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

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Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Harrington v. Richter, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011) (citing Strickland, 466 U.S., at 690, 104 S.Ct. 2052.) "Surmounting Strickland's high bar is never an easy task." Harrington v. Richter, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011).

The reviewing court applies 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, 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." Id.

This Court finds trial counsel was not deficient for failing to call an eyewitness identification expert at trial. This Court finds counsel articulated a valid strategic basis for his decision to proceed to trial without the aid of an eyewitness identification expert to testify for the defense.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of

GR 28

counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

Counsel provided credible testimony that after researching the reliability of eyewitness identification and the factors which tended to make identifications less reliable, he made a strategic decision to challenge the State's eyewitness identification testimony at trial without the use of an expert witness. This Court finds counsel's trial strategy was valid. This Court will not second guess counsel's decision to attack the accuracy of the eyewitness identification evidence at trial on his own simply because an alternative method to challenge the evidence existed.

This Court finds further counsel adequately cross-examined the State's witnesses, objected, and attacked the accuracy of the identification evidence without the support of an expert witness. The South Carolina Supreme Court has held counsel's failure to procure an expert witness does not render their representation deficient when counsel vigorously cross-examined the State's witnesses and attacked the accuracy of the evidence. Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008). See also Frasier v. State, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991) (holding counsel was not deficient for failing to procure an expert witness to challenge the DNA evidence presented at trial when trial counsel vigorously cross-examined the State's DNA experts and attacked the accuracy of the evidence).

This Court finds and the record reflects counsel vigorously challenged the eyewitness identifications of the Applicant at trial without the use of an expert witness. At the start of trial, trial counsel moved to preclude any in-court identifications by any State witness who had not identified the Applicant prior to trial on the basis that such identifications would be inherently suggestive. (Tr. 54:19-55:8). Counsel also argued that there were several factors present in the Applicant's case which would make an in-court identification prejudicial including the lapse of time since the incident, any emotion or stress the eyewitness was under, and the brief view of the incident by the eyewitness. (Tr. 95:24-96:22).

The record reflects trial counsel cross-examined Daniel Cobiella (the victim) regarding factors affecting the accuracy of the victim's in-court identification of the Applicant. Counsel elicited testimony from the victim about the following: his poor vision at the time of the assault and robbery (Tr. 129:21-130:6), his vague description of the clothing of the assailant (Tr. 130:18-25), the fact that he never saw a weapon (Tr. 131:2-3), the fact that he never mentioned a white plastic bag in his description of the assailant's bike (Tr. 132:3-12), and the fact that he was never asked to identify the Applicant prior to trial (Tr. 133:24-134:2). Trial counsel also cross-examined Stephen Silcott, who identified the Applicant shortly after the incident, on the affect the Applicant's distinguishing features and change of clothing had on his identification of the Applicant. (Tr. 209:5-18, 210:12-14).

The record reflects further counsel challenged the State's eyewitness identification evidence in both opening and closing statement. In his opening statement, counsel highlighted to the jury the shortcomings of the State's eyewitness identification evidence. (Tr. 79:5-80:14). In closing statement, counsel reiterated the shortcomings of the evidence and told the jury that Silcott's identification of the Applicant was cross-racial which may have affected the accuracy of



the identification. (Tr. 322:25-323:20). Counsel also asked the trial court to take judicial notice of articles that discussed problems with eyewitness testimony. (Tr. 242:24-245:25). This Court finds counsel vigorously attacked the credibility of the eyewitness identifications of the Applicant at trial, therefore, his performance cannot be found to be deficient.

The Applicant claims counsel was ineffective for failing to request funding from the Office of Indigent Defense to hire an expert witness to testify at trial after he learned the Applicant could not afford to pay for an expert. While retained counsel could have chosen to request funding, this Court finds counsel was not deficient for simply employing an alternative means of challenging the State's eyewitness identification evidence². This Court finds counsel for the Applicant effectively balanced his limited resources with effective trial tactics and adequate cross-examination of the State's witnesses. This Court finds counsel's performance was reasonable under professional norms.

This Court also finds the Applicant has failed to carry his burden of proving prejudice resulted from counsel's failure to request funds to hire an eyewitness identification expert. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland v. Washington, 466 U.S. 668, 694 (1984). An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Id. at 693. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test,

² This Court also notes that assistant public defender Mary Ford (who represented the Applicant prior to Mr. Mayer was retained) testified that based on the facts of the case and the circumstances of the eyewitness identifications she could have effectively challenged the identification at trial without an expert.



and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Id.

This Court finds the Applicant has failed to show that there is a reasonable probability that the result of the Applicant's trial would have been different had counsel obtained funds for and called an eyewitness identification expert at trial. At the evidentiary hearing, the Applicant presented the testimony of eyewitness identification expert Dr. Lori Van Wallendael. Dr. Wallendael testified there were factors and circumstances present in the Applicant's case which tended to *decrease* the accuracy of the eyewitness identifications of the Applicant. However, she also testified that there were factors and circumstances present in the Applicant's case which tended to *increase* the accuracy of the eyewitness identifications of the Applicant. This Court finds the nature of the expert testimony presented does not suggest a reasonable probability the testimony would have affected the outcome of the Applicant's trial since the testimony including conclusions that were favorable to both the Applicant and the State.

This Court finds the Applicant also could not have been prejudiced by counsel's failure to obtain an eyewitness identification expert since the jury was given an identification jury instruction which highlighted potential factors which affect the accuracy of eyewitness identification evidence. The record reflects the jury was instructed as follows:

"Identification testimony is an expression of belief or impression by a witness. You must determine the accuracy of the identification of the defendant. You must consider the believability of any identification witness in the same way as you would consider the believability of any other witness. You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense or afterward. This will be affected by things such as how long or short a time was available, how far or close the witness was, the lighting conditions, and whether the witness had a chance to see or know the person in the past." (Tr. 343:4-16).

GT 12

This Court finds the identification jury instruction highlighted to the jury several factors mentioned by Dr. Wallendael which could have affected the accuracy of the eyewitness identification evidence presented by the State.

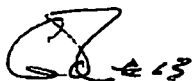
This Court finds further the Applicant was not prejudiced by counsel's failure to request funds from the Office of Indigent Defense to hire an expert witness. This Court finds the Applicant has failed to present any testimony or evidence to show that a request for funding by retained counsel from the Office of Indigent Defense would have been granted. This Court will not speculate on whether or not the Applicant's case would have fallen into the category of rare cases where retained counsel successfully obtains funding from the Office of Indigent Defense. This Court finds the Applicant has failed to carry his burden of proving that but for counsel's failure to request funds to obtain an eyewitness identification expert the outcome of his proceeding would have been different. This Court finds Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813.

All Other Allegations

As to any and all allegations that were raised in the application and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing



proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 11 day of December, 20 14



The Honorable G. Thomas Cooper
Presiding Judge
9th Judicial Circuit

COUNSEL, South Carolina.

MEG20101005287

WITNESSES

MARY BURNS

Charleston City Police Department

AGENCY CASE NUMBER

1016687

ARREST WARRANT NUMBER

K674649

DATE OF ARREST

October 4, 2010

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: APR 24 2011

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2011GS1002047

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

ALONDA BARRON DESAUSSURE

DOB: 1962-03-15

B/M

Indictment for

Armed Robbery

FILED

4/15/2011 3:37:27 PM

JULIE J. ARMSTRONG

CLERK OF COURT

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.
By: *[Signature]*
DEPUTY CLERK

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

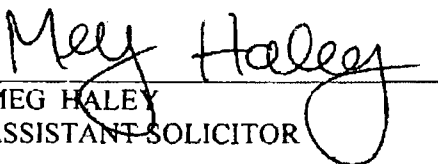
INDICTMENT

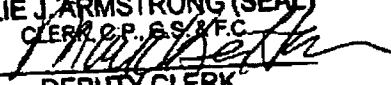
At a Court of General Sessions, convened on April 4, 2011 the Grand Jurors of Charleston County present upon their oath:

Armed Robbery

That on or about October 3, 2010, in Charleston County, South Carolina, at 353 King Street by use of force, threats or intimidation and while armed with a deadly weapon, to wit: a knife, the Defendant, ALONDA BARRON DESAUSSURE, did take and carry away goods and/or monies from the person or immediate presence of Daniel Cobiella with the intent to permanently deprive him of possession thereof, in violation of Section 16-11-330(A) of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


MEG HALEY
ASSISTANT SOLICITOR

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., S.C. & F.C.
By 
DEPUTY CLERK

MEG20101005287

DOCKET NO. 2011GS1002048

WITNESSES

MARY BURNS

Charleston City Police Department

AGENCY CASE NUMBER

1016687

ARREST WARRANT NUMBER

K674650

DATE OF ARREST

October 4, 2010

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: APR 04 2011

VERDICT

Foreperson of Petit Jury

Date:

INDICT

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

ALONDA BARRON DESAUSSURE

DOB: 1962-03-15

B/M

Indictment for

Assault and Battery First Degree

FILED

4/15/2011 3:37:27 PM

JULIE J. ARMSTRONG

CLERK OF COURT

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK C.P. GS & FC
By *[Signature]*
DEPUTY CLERK

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

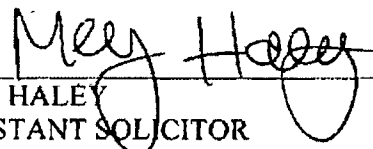
INDICTMENT

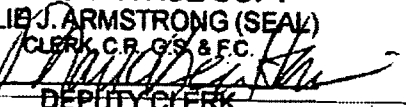
At a Court of General Sessions, convened on April 4, 2011 the Grand Jurors of Charleston County present upon their oath:

Assault and Battery First Degree

That in Charleston County, South Carolina, on or about October 3, 2010, the Defendant, ALONDA BARRON DESAUSSURE, did commit an assault and battery in the first degree constituting an unlawful act injuring the victim, Daniel Cobiella, and the act either: involved nonconsensual touching of the private parts of an adult, either under or above clothing, with lewd and lascivious intent; or occurred during the commission of a robbery, burglary, kidnapping, or theft; or the defendant offered or attempted to injure another person with the present ability to do so, and the act was accomplished by means likely to produce death or great bodily injury; or occurred during the commission of a robbery, burglary, kidnapping, or theft; all in violation of Section 16-3-600(C)(1) of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


MEG HALEY
ASSISTANT SOLICITOR

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, CR, GS & FC
By 
DEPUTY CLERK