

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

The Honorable Tanya A. Gee

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SC SUPREME COURT

RICHARD KOUGH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002311

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1 that was with her come with her for the ID, and I
2 agreed to do so.

3 Q And at that time you traveled back to

4

5 A That's correct. We got in my vehicle and rolled out
6 there.

7 Q And where was the victim and her manager seated?

8 A I had them seated in the rear behind me.

9 Q And when you got to what was your
10 next course of action?

11 A Upon arriving at I had officers
12 illuminate the defendant with spotlights and
13 headlights so the witness could get a good view of
14 him, and then I asked her: Is this the subject that
15 came in the store and committed the robbery.

16 Q And what was her reaction?

17 A She studied the subject. She took her time and
18 stared him down, and then she gave an answer with
19 approximately 80 to 90 percent certainty that it was
20 him, the clothing is not the same. That's what I
21 recall.

22 Q Does your car have tinted windows?

23 A No, they do not. Not the one I had at that time.

24 Q And this type of identification procedure, is that
25 standard?

1 **A** In these given situations where the crime is
2 committed and a subject, possible subject is located,
3 yes.

4 **Q** And this subject was located. Was it close to the
5 Exxon?

6 **A** Yes.

7 **Q** Okay. And after Ms. McGeorge had made her
8 identification, what did you do next?

9 **A** After she made her identification, Sergeant Sanders
10 informed me that we had a cab driver that was at the
11 Greyhound and that he had made mention that he heard
12 a Caucasian gentleman speak of going over and robbing
13 the Exxon. Once that information was given, I
14 advised him to go pick him up and bring him over. So
15 I did not just use the victim's identification. I
16 waited on the cabbie to come over.

17 **Q** Did you take Ms. McGeorge back to the Exxon?

18 **A** I think after the second identification we drove
19 back. Sanders went and got the other guy. But yeah
20 eventually I took her back.

21 **Q** Were you present when Sanders brought the cab driver?

22 **A** I was present when Sanders did. He was in the car
23 with the gentleman. So I don't know what Sanders
24 said to the gentleman, but I was informed that he
25 positively identified the defendant.

1 Q And a subsequently you took Ms. McGeorge back to the
2 Exxon?

3 A Correct.

4 Q Did you tell her you wanted to meet with her again?

5 A Yeah. I advised her that I wanted to meet with her
6 again but I needed to go back because we hadn't
7 searched the house. He's gone from a person of
8 interest to an actual suspect and I needed to search
9 the house for the money, the weapon, so forth. So I
10 went back to the house after dropping her off.

11 Q And did you go back to

12 A Yes, I did.

13 Q And did you search the house?

14 A Yes, I did.

15 Q Did you look for the cash?

16 A Yes, I did.

17 Q And did you look for a weapon?

18 A Yes, I did.

19 Q Were you able to find any money?

20 A No more than the six dollars. Or I don't know how
21 much it was actually. The one-dollar bills that were
22 recovered by officers was all the cash that was
23 located. I located a weapon under a cushion of a
24 couch, but it was later determined that it was not
25 the weapon she saw.

1 Q Did it match the description she gave?

2 A No, it did not.

3 Q Now let's go to your report. Back up. We'll go to
4 your report in just a second.

5 A Okay.

6 Q That night did you interview anyone else associated
7 with the case?

8 A Yes. Once the cab driver positively identified the
9 defendant, I asked Sanders to have him meet me at
10 headquarters so I can get a formal statement in
11 writing about what he observed, what he saw. And I
12 met with him that night.

13 Q And he gave you a statement?

14 A That's correct.

15 Q Did you meet with anyone else that night?

16 A No. Not that I can recall.

17 Q At any time did you take statements from any other
18 witnesses involved with this case?

19 A No, I did not. Not that night.

20 Q Did you take one from Officer Bowman?

21 A Bowman did give a statement on the 20th.

22 Q But not that night?

23 A Correct.

24 Q The 20th would have been the next day?

25 A That's correct.

1 Q Did Ms. McGeorge show up to the Columbia Police
2 Department to give you a statement?

3 A Yes. I advised Ms. McGeorge -- it started getting
4 late and what have you. They were trying to conduct
5 business, close out the store. I advised her to come
6 to my office the very next day and I would get a
7 formal statement from her.

8 Q You wanted her to go home and get some sleep?

9 A Right.

10 Q And then come back?

11 MR. JOHNSON: Your Honor, objection to leading
12 the witness.

13 THE COURT: Sustained.

14 MS. GARFIELD: Yes, ma'am.

15 Q Did you want her to come the next day?

16 A That's correct.

17 Q And did she come to the Columbia Police Department?

18 A She did. She came back the very next day, but
19 unfortunately I had a homicide that had occurred and
20 I was unable to re-interview her and get her formal
21 statement from her. A homicide takes precedence over
22 the robberies. And I was not able to get back with
23 her in reference to her statement.

24 Q So you began to work a homicide?

25 A That's correct.

1 **Q** And when did you make a case jacket? When did you
2 fill out your report?

3 **A** Sometime later. Again, because of the homicide, it
4 takes up much more time. And after we concluded that
5 homicide, I was able to go back sometime later and
6 actually do a summary report.

7 **Q** A summary?

8 **A** Yes.

9 **Q** And do you have a copy of your report before you?

10 **A** I do.

11 **Q** And, Investigator, how long is it?

12 **A** It's only a page. Well, two pages actually, the
13 front page with it.

14 **Q** Did you put all the details that you testified to
15 today into that report?

16 **A** No.

17 **Q** In fact, you actually --

18 **MR. JOHNSON:** Your Honor, objection. She's
19 leading the witness again.

20 **THE COURT:** Okay.

21 **MS. GARFIELD:** Yes, ma'am. Yes, sir.

22 **Q** If you will go down to six lines from the bottom.

23 **A** Okay.

24 **Q** At the first sentence beginning with "a yellow
25 shirt".

1 **A** Okay.

2 **Q** Can you read that statement?

3 **A** Okay. Yeah. A yellow shirt was found in one of the
4 bags. A knife was found under a cushion of the
5 living room couch. Living room chair. Sorry.

6 **Q** Were bags belonging to the defendant found in this
7 property in this

8 **A** Yes.

9 **Q** And was the yellow shirt taken from one of those
10 bags?

11 **A** No, it was not. That was an error on my behalf.

12 **Q** And this was written sometime later?

13 **A** That's correct.

14 **Q** Where was the yellow shirt found?

15 **A** The officers recovered the shirt from the restroom
16 area.

17 **Q** And how did the shirt get on the bed?

18 **A** I actually placed the shirt on the bed.

19 **Q** And what was your purpose for doing that?

20 **A** Initially, again, he wasn't a defendant; he was a
21 person of interest. The money and the shirt were
22 possible evidence of interest. And I merely just
23 placed them on the bed at that time. They later
24 became evidence.

25 **Q** Was there a request eventually for them to be

1 photographed?

2 **A** Yes. Once he was positively identified by both
3 individuals, I asked for CSI Nelson to come to the
4 scene and actually process the scene.

5 **Q** One thing I left out. Just to back up, Investigator.
6 You said you reviewed the video?

7 **A** That's correct.

8 **Q** After the robbery takes place, are there other
9 individuals in the Exxon station?

10 **A** Oh, yeah. Even in the video you can see there were
11 people coming in and didn't realize the place was
12 being robbed. One of the individuals obviously
13 observed what I observed, the hand movement, the man
14 demanding money. He backs out, backs up initially.
15 And then another person is coming in. They
16 completely back out of the store. One individual
17 remains and holds his hands up like: I had nothing
18 to do with the robbery.

19 **Q** Were any of those individuals at the Exxon when you
20 arrived?

21 **A** No. I actually tried to locate some of them. I
22 thought they may have came from the Greyhound. I
23 couldn't locate them.

24 **Q** I couldn't hear you. I'm sorry.

25 **A** I tried to locate them. I thought they may have been

1 over at the Greyhound. But I couldn't locate them.

2 Q Investigator, I'm going to show you one more picture,
3 State's Exhibit No. 24. Do you recognize that
4 photograph?

5 A Yes. That's a photograph of the defendant the night
6 of the incident.

7 Q And is that how he looked the night he was
8 apprehended out of the bathroom?

9 A That is correct.

10 Q Is that how he looks today?

11 A No. He looks much different today.

12 Q Do you recognize him in the courtroom?

13 A Yes. The gentleman sitting by his attorney in the
14 gray shirt.

15 MS. GARFIELD: Your Honor, may the record
16 reflect Investigator Thomas has identified the
17 defendant for the record?

18 THE COURT: The record shall so reflect.

19 Q Investigator Thomas, this incident occurred in
20 Richland County?

21 A Yes, it did.

22 Q In the City of Columbia?

23 A Yes, it did.

24 Q Beg the Court's indulgence. Investigator Thomas, I'm
25 going to show you State's Exhibit No. 26. Is this

1 the shirt that you put on the bed?

2 **A** Yes. That is the shirt that I placed on the bed.

3 **Q** Is it in the same condition as it was that night?

4 **A** It is.

5 **Q** It was inside out like it is here?

6 **A** Yes. It was placed into evidence exactly as it is
7 located.

8 **Q** Does this shirt look like the one you saw in the
9 video?

10 **A** It does look like the shirt I saw in the video. May
11 I look at it closer one moment?

12 **Q** What kind of shirt does it look like?

13 **A** If you look closer at the shirt, it kind of looks
14 like it has lines in it or openings like a jersey.
15 And that's why I believe she was mistaken. And it
16 has that material.

17 **Q** In fact, what is the name brand of the shirt?

18 **A** You've got me now.

19 **Q** It's little writing.

20 **A** Yeah. It's tiny. I'm sorry. I can't see it.

21 Athletic Wear. Is that what it is? Something of
22 that nature.

23 **Q** I believe it's Athletic Works.

24 **A** Okay. Athletic Works. Yeah. Forgive my eyes.

25 **Q** Thank you, Investigator Thomas. Please answer any

1 questions Mr. Johnson has for you.

2 **MR. JOHNSON:** May it please the Court, Your
3 Honor?

4 **THE COURT:** Yes.

5 CROSS EXAMINATION

6 **BY MR. JOHNSON**

7 **Q** Good morning, Investigator Thomas.

8 **A** Good morning, counselor.

9 **Q** How you doing?

10 **A** I'm doing well, sir.

11 **Q** Okay. We meet again.

12 **A** Yes, sir.

13 **Q** Let's start from the beginning. You told the jury
14 you could look at the video and you could see an
15 object in his hand?

16 **A** I couldn't tell you what the object was. But in the
17 video in the store, the pigments are better. The
18 footage is much better than what I saw in court.

19 **Q** Can you explain in the video where she gives him the
20 last piece of money how he could then hold a knife in
21 his hand, takes the money and put it in his hand at
22 the same time?

23 **A** Well, --

24 **Q** You say you saw the video.

25 **A** -- again, I -- I could do that, if you're asking that

1 question.

2 **Q** No. Could you tell me -- so -- but you did see her
3 hand him the money in the video, didn't you?

4 **A** I saw her handing him the money. It looked like he
5 was getting it with his left hand. You brought
6 attention that he may be putting something in his
7 right hand, but there was still something in his
8 hands.

9 **Q** You didn't see him reach with his right hand in the
10 video?

11 **A** I saw him moving his right hand like this in the
12 video. Yes, sir.

13 **Q** And I guess the jury can make that determination,
14 right?

15 **A** Yes, sir.

16 **Q** And then you're also telling the jury that the State
17 enhanced that video, right?

18 **A** Yeah. They tried to enhance it the best they could.
19 That's correct.

20 **Q** All right. And now you're telling the jury that the
21 video you saw in the store is better than the video
22 that the State presented to the jury today after they
23 enhanced it?

24 **A** Often the player that the video is recorded on is on
25 a device that reads better when you play it on that

1 recording. But when you make copies, the copies are
2 often worse copies than what you could actually see
3 on their monitors on their system because it's their
4 system. And I could see in great detail the
5 defendant and what he had on, his physical
6 description from their system better than what I saw
7 here in court.

8 Q And I guess -- so, in short, you just couldn't get
9 that video down here and show it to the jury today.
10 It wasn't important enough?

11 A No. In order to try to get -- you would have to have
12 their entire system and have that still in their
13 memory. I'm certain that is not possible.

14 Q All right.

15 A Yes, sir.

16 Q You are the lead investigator, right?

17 A Yes, sir.

18 Q So you gather all the information from everybody and
19 you go over it, right?

20 A I do.

21 Q You look at all the police reports and all the
22 different officers' reports. You interview
23 everybody. That's what you do as the lead
24 investigator, right?

25 A That's correct.

1 Q So you have talked to everybody involved in this
2 case?

3 A I have talked to everyone that I can recall.

4 Q The main characters. All right. You talked to
5 Officer Bowman, the one that's serving in Iraq, that
6 is in Iraq right now?

7 A Bowman, yes.

8 Q Bowman?

9 A Mm-hmm (affirmative).

10 Q And you actually was the person that -- when he wrote
11 a statement, you actually was the person that took
12 the statement, correct?

13 A Hold on one moment, counselor. Yes. He addressed
14 the statement to me, sir.

15 Q Okay. Now, in his statement he indicated that a
16 witness saw my client or the defendant with a red
17 shirt on go into the house?

18 A Do you want me to read that out or just answer the
19 question?

20 Q No. I'm asking you, isn't that what he says?

21 A Yes.

22 Q He says the defendant had a red shirt and was going
23 to the house?

24 A It says that the defendant changed into a red shirt
25 and went into a boarding house.

1 Q Went into a boarding house?

2 A Right.

3 Q Okay.

4 A That's correct.

5 Q But nobody saw -- so, therefore, he entered the house
6 with a red shirt on?

7 A Now, I do not know that. I'm just looking at one
8 line.

9 Q I'm just saying what the information you've got.

10 A No.

11 Q Because you don't really he know if my client
12 committed the crime.

13 A He is the individual that was identified by the
14 witnesses.

15 Q Based on evidence you got, right?

16 A He was the individual that I observed on the video.

17 Q Based on evidence that you got, right? Because you
18 wasn't there, right?

19 A That's correct, sir.

20 Q So you're basing that opinion on evidence that you
21 got, right?

22 A That is correct, sir.

23 Q So I'm asking you about other evidence that you got.

24 A Yes, sir.

25 Q Other evidence that you got indicates that my client

1 had a red shirt on when he went inside the boarding
2 house?

3 **A** Well, the way I read it is that he had changed into a
4 red shirt on was inside the boarding house.

5 **Q** That would indicate he had a red shirt on before he
6 went inside, right?

7 **A** No. That would indicate that he changed into a
8 shirt, sir.

9 **Q** Fine. Have it your way.

10 **A** Yes, sir.

11 **Q** But in order for him to go into the house, he had to
12 have the red shirt on, right?

13 **A** I can only state what I stated before, sir.

14 **Q** Right. So was he in the bathroom trying to change
15 back into a yellow shirt? That's what you're telling
16 the jury?

17 **A** The indication is made that he was observed changing
18 clothes in the bathroom area. That's what was
19 communicated to me by officers prior to my arrival on
20 the scene. I can only go with that information, sir.

21 **Q** But you do have information that the defendant or my
22 client has a red shirt on going into the house,
23 changed into a red shirt or whatever. But when he
24 was going to the house he had a red shirt on?

25 **A** I had information that your client changed into a red

1 shirt. The information was confirmed when I located
2 your client and he was in a red shirt. That's what I
3 had, sir.

4 **Q** All right. And he had shorts on?

5 **A** Yes, sir. He had shorts on at the time.

6 **Q** This is a diagram that I guess has been marked State
7 Exhibit 32. Could you step down here, please?

8 **A** Yes, sir.

9 **MR. JOHNSON:** Your Honor, could he?

10 **THE COURT:** Yes, he may.

11 **Q** I'm going to stand to the side so the jury can see.
12 Now, earlier the officer that drew this, he said that
13 he marked the windows with A and that the rest of the
14 house was in the front, but this was like doors going
15 into the back room and stuff.

16 **A** Okay.

17 **Q** All right. Show me or show the jury how you could
18 look into this room into the bathroom and see the
19 defendant?

20 **A** The bathroom is right here..

21 **Q** So what window would you be looking through to see
22 him?

23 **A** The bathroom wind.

24 **Q** Where? This one here?

25 **A** Right here.

1 Q There is no window there.

2 A Well, I didn't draw the diagram, counselor. The
3 bathroom is a small area. He may not have thought it
4 was necessary to put that. He just indicated the
5 bathroom. You'll have to speak to him.

6 Q So now you're telling me there is a window here?

7 A Yes, sir.

8 Q But your CSI, your own officer, said he drew all the
9 windows and made it to scale?

10 A Right. You'll observe the window while he was in the
11 bathroom, sir.

12 Q Please sit back down. In your report --

13 A Yes.

14 Q Well, let's talk about some of your characterizations
15 today.

16 A Yes.

17 Q You said that my client barricaded himself [sic] in
18 the house?

19 A Yes.

20 Q How?

21 A By locking himself in the bathroom area and refusing
22 to open the door upon request of law enforcement.

23 Q That's barricading?

24 A Yes, sir.

25 Q When you arrested my client, he had a red shirt on?

1 **A** Yes, he did.

2 **Q** And some shorts?

3 **A** Yes, sir.

4 **Q** You found two bags?

5 **A** Two bags were located, yes.

6 **Q** Did you take them into custody? Did you take the
7 bags in?

8 **A** Yes, sir.

9 **Q** You have them?

10 **A** I think we took the bags into custody. I know I took
11 property into custody.

12 **Q** I didn't see one in the evidence report.

13 **A** I think I took the wallet or something. I can't
14 remember.

15 **Q** Well, you have the reports there. You have your
16 report, don't you?

17 **A** I believe I took the wallet and the identification
18 and a cellphone.

19 **Q** So you don't have the bags?

20 **A** No.

21 **Q** Okay. And you took the wallet and all the other
22 information out the bags, right?

23 **A** I did.

24 **Q** And you're telling the jury the only thing you didn't
25 take out the bag was the yellow shirt?

1 **A** I didn't take the shirt out the bag. That's correct.

2 **Q** But you have it in your report that you took out the
3 bag?

4 **A** And I don't have it in my report that I took the
5 wallet and the cellphone. And so that was mis --

6 **Q** You don't mention the wallet or cellphone?

7 **A** That's correct.

8 **Q** I'm asking you in your report --

9 **A** And I stated that I inadequately placed that in
10 there. The wallet and the cellphone is what I
11 removed from the bag.

12 **Q** So everything else in your report --

13 **A** And I actually tagged that in myself.

14 **Q** So everything else in your report is exact and
15 correct?

16 **A** It is a summary of what transpired, sir.

17 **Q** Except for that one thing?

18 **A** I'm in error there. Yes, sir.

19 **Q** How can you be in such an error when you was the
20 person -- okay. You was the person that entered.
21 You was the person that got the yellow shirt. You
22 was the person that writes the report. You're going
23 back over what you did. How then do you want the
24 jury to believe that you just wrote: I took it out
25 the bag?

1 **A** Officers located the yellow shirt. I paid attention
2 to the defendant. Upon him being taken into custody,
3 I escorted the defendant out of the room. Observing
4 his physical appearance, it matched what I saw on the
5 video. I later went back in the room. Those items
6 were stated to have been in the restroom. I placed
7 these items -- because they were of interest to me
8 right then. He still was not a suspect. I placed
9 those items of interest on the bed and then made
10 communications so we could get the witness.

11 **Q** Okay. But the bags, one officer testified he found
12 two bags on the other side of the house?

13 **A** That's correct. Officer Sanders advised that there
14 were bags in the sunroom area.

15 **Q** So what items of interest did he find in the bathroom
16 other than the yellow shirt?

17 **A** The cash.

18 **Q** And what else?

19 **A** It wasn't until later that I searched the bags. When
20 he was identified by both witnesses as being the
21 defendant, then I initiated a search of the house and
22 I searched the bags as well.

23 **Q** Why didn't you put the shirt and the cash -- why did
24 you remove them from where they were before your CSI
25 person could take pictures of it and placed them in

1 the bag?

2 **A** At the time, counselor, the individual himself was a
3 person of interest. The items down there were items
4 of interest and I just placed them on the bed. They
5 weren't items of evidence just yet.

6 **Q** You're looking for a person in a yellow shirt?

7 **A** That's correct.

8 **Q** That's the main key to this whole case?

9 **A** Yeah. That's correct. And I believe --

10 **Q** And at that point a yellow shirt wasn't important to
11 you?

12 **A** It was an item of interest like he was a person of
13 interest.

14 **Q** So you tampered with evidence?

15 **A** It wasn't --

16 **Q** Pertinent evidence?

17 **A** It wasn't evidence yet.

18 **Q** Who makes a determination whether it's evidence or
19 not?

20 **A** I do.

21 **Q** All right. And who picked up the item?

22 **A** I did.

23 **Q** Okay.

24 **A** Once he became the defendant, then it came evidence.

25 **Q** And you want the jury to believe that you found this

1 evidence laying on the bathroom floor?

2 A Officers. Officers did.

3 Q That pertinent evidence. And officers picked this
4 item up. I mean, they're trained not to touch this
5 stuff, right?

6 A There were items of interest on the bathroom floor,
7 some cash and a t-shirt. I placed those items on the
8 bed. After -- and the individual was a person of
9 interest which was barricaded in the bathroom. I
10 walked him to the car. It wasn't until he became an
11 actual defendant by the eye witness identification
12 that he became a defendant and all things that we
13 observed from that point on became items of evidence.

14 Q Okay. Why until you have him put the yellow shirt
15 on?

16 A Have him put it on?

17 Q Yeah. You said that he was changing clothes.

18 A Right. He changed clothes. Correct.

19 Q Okay.

20 A I presented him as we picked him up out of the
21 bathroom. Again, he was merely being detained.

22 Q So that picture there, the picture -- let me make
23 sure I've got the right picture. Exhibit 24?

24 A Yes.

25 Q This is how you found him?

1 **A** That's how we found him.

2 **Q** With a red shirt on and shorts?

3 **A** Yes, sir.

4 **Q** But other than that, he fit the general description
5 of the person that robbed the store?

6 **A** Right. He looked like the individual I saw in the
7 video.

8 **Q** Okay.

9 **A** And he was positively identified by both my witnesses
10 as the individual.

11 **Q** All right. So you got a yellow shirt. You got your
12 main witness when you -- so when you did the -- why
13 was it important to have her identify him right then?
14 Why couldn't you do like a picture line-up with the
15 six pictures and have her pick the person out?

16 **A** At the time I had no way of identifying this
17 individual. He was not identified until he was
18 positively identified by the witnesses and I
19 recovered a wallet and identification from his
20 suitcase.

21 **Q** I mean, but what was the purpose of rushing -- you're
22 aware of show-up line-ups, of how --

23 **A** Yes. We often do that.

24 **Q** Okay. I'm sorry sure you do.

25 **A** Yes, sir.

1 Q But you're aware of the downfall of show-up line-ups.
2 I mean, you have a person that you have in custody,
3 in handcuffs. You have a victim that's traumatized,
4 and you're going to stand her up her there and ask
5 her ask to identify him. I mean, it's kind of
6 suggestive, isn't it?

7 A Well, counselor, this job is not a perfect job. You
8 have what you have at the time and you have to work
9 with what you have at the time. At the time we had a
10 person of interest that we had apprehended and
11 detained. We can only hold him for so long. I chose
12 as the lead investigator to have my witnesses come on
13 scene to view suspect in an illuminated situation to
14 identify him. And that was my choice.

15 Q And she had a problem identifying himself initially.
16 She said about 80 -- what did she say? About 70, 80
17 percent, 80 or 90 percent, something like that,
18 right?

19 A She stated 80 to 90 percent due to his changing of
20 the clothes.

21 Q As a matter of fact, that's why you brought the other
22 individual over to identify him, too?

23 A Any time I have any witnesses, if I had four more, I
24 would have brought them as well. I was informed of
25 the cab driver. I immediately had him go to the cab

1 driver. He positively identified the individual.

2 Q Okay. And he was 100 percent sure that was the
3 person, right?

4 A He gave no percentages. He said: That's the guy.

5 Q That's the guy, right?

6 A Yes, sir.

7 Q And let's talk about that.

8 A Yes, sir.

9 Q The cab driver said that the guy he saw had a white
10 hat on?

11 A That's correct.

12 Q All right. The video clearly showed that the person
13 that robbed the store didn't have a white hat on?

14 A The video I saw, I did not see a white hat. No, sir.

15 Q Thank you.

16 A Yes, sir.

17 Q That was kind of easy there. All right. But the
18 person you saw didn't have a white hat on, right?

19 A No, he did not, sir.

20 Q All right. And the cab driver said that the person
21 he saw, that he identified my client?

22 A That's correct.

23 Q Went into the store with a white hat on?

24 A No. The testimony I recall from the cab driver is
25 that when the individual yelled out, don't go over to

1 the Exxon; I'm about to rob it, he had a white hat
2 on. He observed the individual go to the Exxon. He
3 could not say that the individual had the hat on,
4 didn't have the hat on, but he observed him going to
5 the Exxon. That's what I recall from his testimony.

6 Q Did you find a white hat at the store?

7 A I didn't look for one. I didn't find one.

8 Q Did you find a white hat at the scene?

9 A I didn't look for a white hat, to be honest with you,
10 counselor.

11 Q Okay. Don't you think that would have been
12 pertinent?

13 A Nothing of the white hat came into play until 11:00,
14 12:00 that night when he gave that particular
15 statement.

16 Q But you don't you think it was important to check it
17 later on when you went back to check?

18 A I did not see it. Officers didn't see it.

19 Q But you have found no white hat?

20 A Didn't find a white hat, sir.

21 Q You searched the house?

22 A Yes.

23 Q You didn't find the knife that the victim alleged was
24 used in the crime, correct?

25 A I did not.

1 Q Okay. So you found no knife?

2 A I found a knife.

3 Q But you didn't find the knife --

4 A Not the one described. And I made sure to go back
5 and inquire on the description of the knife. I still
6 collected it as evidence though initially.

7 Q And there was \$360 taken?

8 A Correct.

9 Q You found no money?

10 A We found --

11 Q Six dollars?

12 A -- six dollars in U.S. currency.

13 Q And that six dollars you can't even connect to the
14 store, can you?

15 A There was six dollars in U.S. currency, counselor.

16 Q Right. Okay. No white hat, no knife, no money. You
17 have a yellow shirt?

18 A Yes, counselor.

19 Q She stated to your officer, in one of the reports
20 that you reviewed, the officer called it that she
21 stated a football jersey?

22 A Correct. She also did that on my suspect form.

23 Q Okay.

24 A Yes, sir.

25 Q And you have a yellow shirt that you had to look at

1 the things just now real close and it said something
2 about sports on it?

3 **A** Well, if you look at the shirt, it is elastic like
4 the jersey shirts. It can actually stretch. It
5 doesn't have the big holes in it, but if you examine
6 it, it could be perceived as a jersey style shirt.
7 It's not a plain white pullover t-shirt or the big
8 t-shirts you see guys wear. It's an athletic style
9 shirt which could be construed as a jersey.

10 **Q** It could also be construed as a shirt because that's
11 what you're calling it. Right?

12 **A** I'm calling it a shirt, counselor.

13 **Q** Okay. Thank you. You never saw the victim again
14 after that night. Right? Had no other meetings with
15 her?

16 **A** I made arrangements that day, couldn't make those
17 arrangements. I called her on a number of occasions
18 and we just could not get together to meet. She was
19 in transit between different job locations and some
20 other things. So --

21 **Q** So would the answer be yes, that you never saw her?

22 **A** Yes, counselor.

23 **Q** Okay. One minute, Your Honor.

24 **THE COURT:** Okay.

25 **Q** Whew, I almost forgot this one.

1 **A** Uh-oh.

2 **Q** They took fingerprints, right?

3 **A** Yes.

4 **Q** And fingerprints was -- as the officer testified,
5 first fingerprints were taken?

6 **A** That's correct.

7 **Q** And they were compared to my client?

8 **A** That's correct.

9 **Q** And they didn't match?

10 **A** Other subjects vacated the store after your client
11 vacated the store. So I wasn't surprised that the
12 prints didn't match. But they did not.

13 **Q** Other subjects vacated the store?

14 **A** If you watch the video, there --

15 **Q** Mm-hmm (affirmative). Did you compare it to any
16 other subjects?

17 **A** I didn't know who those subjects were. I tried to
18 locate them though.

19 **Q** But the fingerprints that you had didn't match my
20 client?

21 **A** They did not.

22 **Q** I've got no other questions.

23 REDIRECT EXAMINATION

24 **BY MS. GARFIELD**

25 **Q** Briefly. Investigator Thomas.

1 **A** Yes.

2 **Q** I want to ask you to look at another picture.

3 **A** Okay.

4 **Q** Picture No. 23, what is that a photograph of?

5 **A** This is a photograph of the restroom in which we
6 located the defendant. If you're looking at the
7 back, there are a set of blinds that cover the
8 window. That's the window that Officer Bowman was
9 able to see the defendant changing clothes and moving
10 around in until he cut the light off.

11 **Q** And I'll hand you also State's Exhibit No. 12. Can
12 you identify where the bathroom is in front of the
13 house?

14 **A** It would be on this side of the house here.

15 **Q** Thank you.

16 **A** Mm-hmm (affirmative).

17 **Q** You took the statement from Carl Quintyne, the cab
18 driver, after you had vacated

19 **A** Correct. After -- during the search of the house,
20 clearing and collecting all evidence, I met him back
21 at headquarters. That's correct.

22 **Q** And when did you first learn information about a
23 white cap in the description?

24 **A** It wasn't until he indicated that in his statement,
25 which was approximately 11:00 or so, 10 or 11:00 at

1 night.

2 **Q** I hand you Defense Exhibit No. 1. Do you recognize
3 what this report is?

4 **A** This is dispatch, a 911 report.

5 **Q** And can you kind of explain to the jury what
6 information goes in a dispatch report?

7 **A** The call taker indicates information given on the
8 call. She also indicates who she dispatches to the
9 call. She indicates what the victim may be quoting
10 or saying about whatever incident has been called
11 into 911.

12 **MR. JOHNSON:** Your Honor, I have an objection.
13 I had no dealing with that report during my cross. I
14 don't know if she can get into anything on the report
15 now.

16 **THE COURT:** On redirect only anything that was
17 on cross.

18 **MS. GARFIELD:** Yes, ma'am. I have a question
19 coming.

20 **THE COURT:** Okay.

21 **Q** Is there anything in that report regarding a white
22 cap?

23 **A** No.

24 **Q** When you were searching the house, did you search for
25 a white cap?

1 **A** No, I did not.

2 **Q** And why not?

3 **A** A white cap was not mentioned again until after I had
4 cleared the scene, had the defendant identified and
5 got a statement from the cab driver. And he was the
6 last person I interviewed that night.

7 **Q** Did you search the two bags?

8 **A** Yes, I did.

9 **Q** And what was your purpose for searching those bags?

10 **A** To try to get identification on the defendant. I did
11 not know his name or who he was and so forth.

12 **Q** Thank you. I have nothing further.

13 **THE COURT:** Okay. Any recross?

14 RECROSS EXAMINATION

15 **BY MR. JOHNSON**

16 **Q** Investigator.

17 **A** Yes, sir.

18 **Q** In Officer Bowman's statement, he doesn't mention a
19 white hat, does he?

20 **A** Bowman?

21 **Q** Right. Where he said that he was told -- said he
22 went into the house with a red shirt on?

23 **A** There is no mention of a white hat. Only in the
24 cabbie's statement, sir.

25 **Q** Okay. Also on that same report, the 911 report.

1 **A** Yes, sir.

2 **Q** That you was just looking at?

3 **A** Yes, sir.

4 **Q** On the front page, the description?

5 **A** Yes, sir.

6 **Q** It says sandy blonde hair, doesn't it?

7 **A** That it does.

8 **Q** And that doesn't match my client either, does it?

9 **A** Interpretation of color is by individual.

10 **Q** Well, I'm not asking you to interpret color.

11 **A** Right.

12 **Q** I'm asking you, does my client have sandy blonde

13 hair?

14 **A** He has blonde hair.

15 **Q** He has blonde hair?

16 **A** Mm-hmm (affirmative). At the time. It was a --

17 **Q** May I have a copy of the picture? Do you have the

18 picture up there?

19 **A** It was brownish blonde, whatever.

20 **Q** Well, we're going to satisfy that.

21 **A** That's fine.

22 **Q** This is his picture?

23 **A** Mm-hmm (affirmative).

24 **Q** Show it to the jury, please, after you look at it.

25 You're telling this jury that that's sandy blonde

1 hair?

2 A No. I didn't say it was sandy blonde.

3 Q What did you say?

4 A I said he has a brownish blonde. And that was -- her
5 description was sandy blonde. What I observed in the
6 video --

7 Q So it doesn't match. There is a difference between
8 blonde and brown, isn't there?

9 A Yes. There are different colors of blonde. I won't
10 get into that. Yes. Go ahead.

11 Q So her description doesn't match this on the report?

12 A The description given here --

13 Q And the description given to you on your report?

14 A -- the subject I observed in the video, it matched
15 perfectly.

16 Q I ain't asking you that.

17 A In my interpretation of his color hair.

18 Q I'm not asking you for your interpretation.

19 A Yes, sir.

20 Q I'm asking you on the report --

21 A She had sandy blonde hair.

22 Q And on the report she gave you, she said what?

23 A Sandy blonde hair.

24 Q And that doesn't match this, does it?

25 A It's blonde hair.

1 **MR. JOHNSON:** No other questions.

2 **THE COURT:** Sir, you can step down. Any other
3 witnesses by the State?

4 **MS. GARFIELD:** Your Honor, we just reserve the
5 right the call rebuttal witnesses. At this time the
6 State of South Carolina rests its case.

7 **THE COURT:** All right. That is all the evidence
8 at this time that the State will have. And as I
9 indicated to you earlier, this is the time where the
10 Court has to take up some legal matters and advise
11 the defendant of his rights to determine whether or
12 not he wishes to testify or present a case.

13 So I'm going to ask you to excuse yourselves to
14 your jury room. You can exercise any comfort needs
15 that you may wish. And we'll be with you in about 20
16 minutes. I remind you not to discuss the case.

17 (Jury out at 10:54 a.m.)

18 **THE COURT:** Mr. Kough, if you'd please stand.

19 **MR. JOHNSON:** Your Honor, before you do that, if
20 I can make my motions?

21 **THE COURT:** Sure. Okay. I apologize. Yes.

22 **MR. JOHNSON:** Your Honor, at this time I'd like
23 to a make a motion for a directed verdict of
24 acquittal on a number of reasons. The first
25 reason -- well, before I make the motion of directed

1 verdict, I guess I need to renew my objections.

2 The first objection would be to the show-up
3 line-up. I think that there was clear evidence that
4 the line-up was extremely suggestive, subjective,
5 suggestive and that it was extremely prejudicial to
6 my client the way they took him out of the car, bound
7 him in handcuffs, had officers standing there around
8 him and presented it to my client, and then had him
9 identified by the victim at that time. And the
10 victim, even with that, only gave an 80 to 90 percent
11 surety that my client was actually the person that
12 did it. So I renew my objection about the show-up
13 line-up.

14 As far as the unlawful search of the house, I
15 renew my objection concerning that as it relates to
16 the officers had time. They had the house under
17 control. There was no indication that my client
18 was -- apparently they say that they could see him
19 through the window and that they had no indication or
20 no other testimony that he was destroying any
21 evidence, doing anything harmful except being in the
22 bathroom.

23 They had the house surrounded and it was safe.
24 They had time to go get a warrant. They then
25 apparently get, as they call it, a keyholder; but a

1 keyholder that they did not identify, a keyholder
2 that they did not present to the Court, a keyholder
3 they brought the owner in here, and she testified
4 that she didn't open the door. The person that did
5 open the door, they can't even testify as to what his
6 name was. They got no identification, did nothing
7 except let somebody with a key apparently let them
8 inside the house.

9 I think that that's a clear violation of my
10 client's Constitutional rights and violates unlawful
11 search and seizure going into the house, as well as
12 the officer testified that they went into the
13 bathroom. So as a result of that, I renew my
14 objection to the search of the house.

15 Next I then would like to ask for a directed
16 verdict as it relates to my client. I do not think
17 that they have met the burden of proof or presented
18 evidence. They presented a yellow shirt. They have
19 a witness -- the only witness to the crime, the
20 victim, is alleging an 80 to 90 percent certainty.
21 And I submit to the Court that that's not sufficient
22 enough.

23 They recovered no money, no fingerprints, no
24 knife, no cigarettes, no other items. It's just a
25 yellow shirt that doesn't even really match the

1 description of what the victim gives. The victim
2 said it was a yellow football jersey. That is not a
3 football jersey. As a result, I ask for a directed
4 verdict on that.

5 If the Court does decide to go forward with the
6 case, I also then would like to request that the
7 Court, there is sufficient evidence I think -- well,
8 I guess I can make that motion later, Your Honor.
9 It's concerning a charge if we was to go forward.
10 Would you like me to make it now or wait until after
11 if my client decides to testify or not?

12 **THE COURT:** Let's do it later.

13 **MR. JOHNSON:** Okay.

14 **THE COURT:** Okay. All right. State.

15 **MS. GARFIELD:** Your Honor, I believe the State
16 has definitely produced ample competent evidence that
17 this crime occurred. We have had testimony from a
18 victim who is perceived as very credible as to what
19 occurred to her. She gave a description that does
20 match the defendant. He came in the store and did
21 present a knife. She feared for her life. She does
22 report this immediately to law enforcement.

23 We do have a video where it's clear the
24 defendant is in the video. We also have an
25 independent witness, a cab driver, who also

1 identifies the defendant shortly thereafter and
2 testified that he heard the defendant say: I am
3 going to rob the Exxon.

4 Additionally, Mr. Johnson said we have no money.
5 We did have six dollars that was recovered as well as
6 the athletic shirt. I believe at this point we're
7 arguing over semantics. Whether you call it a jersey
8 or a shirt, I believe a jersey would still be
9 classified as a shirt. I believe there's more than
10 enough evidence to send this to the jury to determine
11 the issue of guilt.

12 **THE COURT:** At the stage of directed verdict the
13 Court is not concerned with the credibility of the
14 evidence or the conflicting testimony. That would be
15 a jury issue. I just have to have whether or not
16 there is evidence. And to the extent that there is
17 some evidence in the case which I do find;
18 respectfully, the defendant's motion for directed
19 verdict is denied. And the parties can argue the
20 weight of the evidence.

21 Okay. The Court would also stand by its prior
22 rulings with respect to the show-up line-up and the
23 search.

24 Okay. All right, Mr. Kough, if you'd please
25 stand. Is it Ko (phonetic) or Koo (phonetic)?

1 **MR. KOUGH:** Ko (phonetic).

2 **THE COURT:** I apologize.

3 **MR. KOUGH:** That's all right.

4 **THE COURT:** Thank you. All right. We're at the
5 point in the trial where the State has rested. Do
6 you understand that?

7 **MR. KOUGH:** Yes, ma'am.

8 **THE COURT:** And that your counsel was able to
9 cross examine and challenge any of the evidence by
10 the State. But the State always has the burden of
11 proof in this case, and they have to prove you guilty
12 beyond a reasonable doubt and convince 12 jurors that
13 you are in fact guilty. Do you understand that?

14 **MR. KOUGH:** Yes, ma'am.

15 **THE COURT:** You are never required in our courts
16 to prove yourself innocent. Instead, the State has
17 to prove you guilty. You understand that?

18 **MR. KOUGH:** Yes, ma'am.

19 **THE COURT:** So you can stop technically right
20 now and then leave it up to the State to meet their
21 challenge of proving you guilty beyond a reasonable
22 doubt. And notice that they were not allowed to call
23 you into their case to testify because you have the
24 right against self-incrimination and the right to not
25 testify against yourself at a trial. You're aware of

1 that?

2 **MR. KOUGH:** Yes, ma'am.

3 **THE COURT:** At this point it is your decision to
4 determine whether or not you wish to testify and/or
5 put up any evidence yourself. But again, you do not
6 have to do so because the State has the burden of
7 proving you guilty, you never having to prove
8 yourself innocent. Do you understand that?

9 **MR. KOUGH:** Yes, ma'am.

10 **THE COURT:** Should you decide to take the stand
11 or put up any evidence, the witnesses, including
12 yourself, would be subject to the same rules of cross
13 examination that the witnesses that were placed upon
14 the State were. Do you understand that?

15 **MR. KOUGH:** Yes, ma'am.

16 **THE COURT:** And that would be as to witness
17 testimony as well as any of the documentary evidence
18 or other evidence that goes before a jury. All of
19 that would be challenged the same way on the defense
20 side, just as your counsel had the opportunity to
21 challenge it on the State's side. Do you understand
22 that?

23 **MR. KOUGH:** Yes, ma'am.

24 **THE COURT:** To the extent that you -- and I
25 don't know if this is the case or not -- or any of

1 your proposed witnesses have a criminal record, just
2 like you saw the one gentleman that was put up by the
3 State, those would be ripe for cross examination as
4 well. You understand that?

5 **MR. KOUGH:** Yes, ma'am.

6 **THE COURT:** And to the extent that any of the
7 witnesses have any bias or any prejudice or any
8 interest in the case, the State would bring out those
9 issues for all witnesses, including yourself. Do you
10 understand that?

11 **MR. KOUGH:** Yes, ma'am.

12 **THE COURT:** And again, you'd be subject to the
13 same rules that govern any witnesses with respect to
14 cross examination for any convictions, any issues
15 involving dishonesty. And of course the Court would
16 make its appropriate rulings on those issues. You
17 understand that?

18 **MR. KOUGH:** Yes, ma'am.

19 **THE COURT:** Have you had the opportunity to
20 discuss these issues with your attorney.

21 **MR. KOUGH:** Yes, ma'am.

22 **THE COURT:** So the Court has to make a decision
23 as to whether or not your decision to testify or not
24 is entered into freely and voluntarily. Do you feel
25 like you understand what your attorney has told you

1 as well as what the Court is telling you today?

2 **MR. KOUGH:** Yes, ma'am.

3 **THE COURT:** Do you have any questions of the
4 Court?

5 **MR. KOUGH:** No, ma'am.

6 **THE COURT:** Do you have any questions of your
7 attorney?

8 **MR. KOUGH:** No, ma'am.

9 **THE COURT:** Okay. And do you feel that anyone
10 has in any way tried the force you to testify or not
11 testify?

12 **MR. KOUGH:** No, ma'am.

13 **THE COURT:** Has anyone tried to force you to put
14 up a case or not put up a case?

15 **MR. KOUGH:** No.

16 **THE COURT:** Okay. Well, I find that your
17 information that has been presented to you seems to
18 be knowledgeable in that you don't have any questions
19 of the Court and that you understand what I'm asking
20 you. Is that correct?

21 **MR. KOUGH:** Yes, ma'am.

22 **THE COURT:** And you've also indicated you've
23 understood what your attorney has told you?

24 **MR. KOUGH:** Yes, ma'am.

25 **THE COURT:** Do you need a moment to confer with

1 your attorney to make a decision?

2 **MR. KOUGH:** No.

3 **THE COURT:** What is your decision?

4 **MR. KOUGH:** I wish to testify, ma'am.

5 **THE COURT:** Okay. All right. And what is your
6 age?

7 **MR. KOUGH:** Thirty-three.

8 **THE COURT:** And your education?

9 **MR. KOUGH:** A high school graduate, ma'am.

10 **THE COURT:** Okay. So you know how to read and
11 write?

12 **MR. KOUGH:** Certainly, ma'am.

13 **THE COURT:** And have you been working any part
14 of your life?

15 **MR. KOUGH:** Yes, ma'am.

16 **THE COURT:** And have you handled your own
17 affairs in terms of paying bills and handled your own
18 business?

19 **MR. KOUGH:** Ma'am.

20 **THE COURT:** Okay. And I'm not trying to be
21 facetious.

22 **MR. KOUGH:** No. That's fine, ma'am.

23 **THE COURT:** It's just questions I need to ask to
24 understand your competency. All right. I find that
25 your decision is entered into freely and voluntarily

1 and intelligently made with the advice of your
2 counsel. Okay?

3 **MR. KOUGH:** Yes, ma'am.

4 **THE COURT:** All right. Okay. So at this point
5 we will take a break and then the defense would have
6 the opportunity to put up their case.

7 **MR. JOHNSON:** And, Your Honor, when we come back
8 I would just have my client go to the stand so they
9 won't see his legs chains.

10 **THE COURT:** Okay. And obviously we do not want
11 the jury to be paraded with your shackles. Does the
12 State have any objections, any reason to believe that
13 Mr. --

14 **MR. JOHNSON:** Kough.

15 **THE COURT:** -- Kough is dangerous in any regard?

16 **MS. GARFIELD:** I believe he is a dangerous
17 person, but I do not object to him going on the
18 stand --

19 **THE COURT:** Okay.

20 **MS. GARFIELD:** -- before the jury comes in.

21 **THE COURT:** You will not be shackled in that
22 regard. As for all defendants, and this is only a
23 precautionary measure, I need to have a law
24 enforcement person right here by the jury, that
25 place, because that's just something I would do with

1 all persons who are currently incarcerated. So
2 you'll have one here. That should be sufficient in
3 this case. Usually we'll have one also by the jury,
4 but I think we would heighten the scrutiny if we did
5 that.

6 **MS. GARFIELD:** Your Honor, he has an extensive
7 discipline record at the jail.

8 **THE COURT:** He does?

9 **MS. GARFIELD:** Yes, ma'am.

10 **THE COURT:** Okay.

11 **MS. GARFIELD:** I would encourage --

12 **THE COURT:** That's the reason I'm going through
13 these issues.

14 **MS. GARFIELD:** -- him to have two deputies, at
15 least.

16 **THE COURT:** Okay. All right. I'll need
17 deputies. Well, you're fine. You can move your
18 position, right? Okay. So we'll have two there.
19 That's the reason I was asking those questions,
20 because I don't have any reason to know any issues
21 with respect to him.

22 **MS. GARFIELD:** Yes, ma'am.

23 **THE COURT:** Also understand, I don't expect any
24 of this to happen, but I have had to advise you of
25 your rights. Just like I was asking you about your

1 age and education, not to be sarcastic. But do you
2 understand that these deputies are armed and that
3 they can take you down should anything occur?

4 **MR. KOUGH:** Yes, ma'am.

5 **THE COURT:** All right. Okay. Anything further?

6 **MS. GARFIELD:** Your Honor, as far as a prior
7 record, I do have certified convictions from the
8 State of Michigan.

9 **THE COURT:** Okay.

10 **MS. GARFIELD:** They classify it as a retail
11 fraud. From speaking with them, my understanding is
12 it's a shoplifting.

13 **THE COURT:** Okay.

14 **MS. GARFIELD:** And as well as an aggravated
15 assault.

16 **THE COURT:** These are within ten years?

17 **MS. GARFIELD:** Yes, ma'am. That's it.

18 **THE COURT:** And, Mr. Johnson, you're aware of
19 those particular convictions?

20 **MR. JOHNSON:** I'm aware of those, Your Honor.

21 **THE COURT:** Any objections with respect to those
22 being entered, or challenged I should say?

23 **MR. JOHNSON:** The retail I would have some
24 question about. The aggravated assault, I don't.
25 I'm not sure of the --

1 **THE COURT:** Question about it or question as to
2 admissibility?

3 **MR. JOHNSON:** Question as to admissibility.

4 **THE COURT:** Okay. Well, it's a shoplifting
5 offense. So it's a crime of dishonesty. It occurred
6 within ten years. So the Court would be inclined to
7 allow it in.

8 **MR. JOHNSON:** Okay. I have no objection, Your
9 Honor.

10 **THE COURT:** Okay. You all be at ease for about
11 ten minutes or so.

12 (Whereupon, a break is taken)

13 **THE COURT:** I'll just state on the record so it
14 doesn't indicate anything that I've now finished
15 questioning him, and that, sir, is it still your
16 desire to testify, and then you can resume on so it
17 looks more natural.

18 **MR. JOHNSON:** Thank you.

19 **MS. GARFIELD:** Mr. Rogers is on his way in.

20 **THE COURT:** Okay.

21 (Pause)

22 **THE COURT:** Jurors, please.

23 (Jury in at 11:23 a.m.)

24 **THE BAILIFF:** Your Honor, the jury is present.

25 **THE COURT:** Okay. Mr. Kough, I have during the

1 break explained to you your rights with respect to
2 proceeding to trial. Is it still your desire to put
3 up a defense?

4 **MR. KOUGH:** Oh, yes, ma'am.

5 **THE COURT:** And your desire to testify?

6 **MR. KOUGH:** Yes, ma'am.

7 **THE COURT:** Since he's already on the witness
8 stand and I've re-verified that over the break, Mr.
9 Johnson, you can proceed with your case.

10 **MR. JOHNSON:** Thank you, Your Honor.

11 **THE CLERK:** Would you raise your right hand,
12 please.

13 **THE WITNESS:** Oh. Yes, ma'am.

14 RICHARD M. KOUGH, after being duly sworn,
15 testifies as follows:

16 **THE CLERK:** Thank you. State your name for the
17 record, please.

18 **THE WITNESS:** Richard Mark Kough.

19 **MR. JOHNSON:** May it please the Court, Your
20 Honor.

21 **THE COURT:** Certainly.

22 DIRECT EXAMINATION

23 **Q** Good morning, Mr. Kough.

24 **A** Good morning.

25 **Q** Mr. Kough, I'm going to need you to speak up and

1 whenever possible make sure that you speak clearly so
2 that the jury can understand you. Okay?

3 **A** Yes, sir.

4 **Q** Mr. Kough, how old are you?

5 **A** I'm 33.

6 **Q** Where are you from? Are you from South Carolina?

7 **A** No, sir. I'm from Pittsburg, Pennsylvania.

8 **Q** Pittsburg, Pennsylvania?

9 **A** Yes, sir.

10 **Q** Were you born there?

11 **A** No, sir. I was born in California.

12 **Q** California?

13 **A** Yes, sir.

14 **Q** Are you married?

15 **A** Yes, I am.

16 **Q** What's your wife's name?

17 **A** Jessica.

18 **Q** Jessica?

19 **A** Yes, sir.

20 **Q** Do you have any kids?

21 **A** No, sir.

22 **Q** No? What kind of education do you have?

23 **A** I am a high school graduate.

24 **Q** High school graduate?

25 **A** Yes, sir.

1 Q What type work do you do? I guess you were living in
2 Pennsylvania? Pittsburg?

3 A Yeah. I live 45 minutes outside Pittsburg. I live
4 in Catane, Pennsylvania. However, I'm sure the
5 majority, if any, of the jurors have probably never
6 heard of such a place, much like everybody else. So
7 I claim Pittsburg because everybody has heard of
8 Pittsburg. Unfortunately, with my line of business,
9 I am a farrier. I shoe horses. There's not a whole
10 lot of horses in Pittsburg. So I kind of live in the
11 country.

12 Q I understand. So you're a country boy?

13 A Yes, sir.

14 Q All right. Let's go back to right around July of
15 2008 when you happened to be here in South Carolina.

16 A Yes, sir.

17 Q Can you please explain to the jury what brought you
18 here to South Carolina July of 2008?

19 A My wife did. She graduated basic training at Ft.
20 Jackson. She is in the Army. And I wanted to
21 support her. So I come down here for her graduation
22 and witnessed the ceremony, spent the weekend with
23 her, and was not actually in Columbia until that day.
24 I come in to go home.

25 Q All right. You told me a story about how you met

1 your wife and how you ended up coming here. Could
2 you please tell the jury about that?

3 **A** Yeah. I was in a seminar in Michigan, a farrier
4 seminar, and I met my wife. She's lived there in
5 Michigan. And she is actually a Canadian citizen
6 that was living on a green card in the United States.
7 But we met, started dating, and eventually she moved
8 to Pennsylvania and we got married. And she decided
9 she wanted to become an American citizen but she
10 wanted to join the Army and serve for her country
11 first. And which she is doing now. After her tour
12 is over, she is going to take her citizenship test.

13 **Q** Okay. So is that the reason that you was here?

14 **A** Yes, sir.

15 **Q** For her graduation?

16 **A** Yes, sir.

17 **Q** What day did you arrive?

18 **A** I believe the 17th.

19 **Q** That would have been like the Wednesday or so before
20 this happened, Wednesday or Thursday?

21 **A** Wednesday evening. Yes, sir.

22 **Q** And how did you get here?

23 **A** A Greyhound bus.

24 **Q** Greyhound bus?

25 **A** Yes.

1 Q And where did you stay?

2 A I stayed at the Quality Inn on Two Notch Road.

3 Q The Quality Inn?

4 A Yes, sir.

5 Q And could you please tell the jury about the
6 progression of day-by-day, what went on, starting the
7 day you got here?

8 A Well, the day I got here I got off the bus on Ft.
9 Jackson and took a taxi from there to the Quality
10 Inn. It was not very eventful. I got a room, stayed
11 the evening. In the morning I woke up, showered,
12 general morning things. Excuse me. Went to Ft.
13 Jackson and stayed the day with my wife on base for
14 family day, returned to my motel room in the evening,
15 repeating my same evening habits, woke up then on
16 Friday morning and -- no. I'm sorry. Saturday
17 morning.

18 Q Well, okay.

19 A The day of graduation. Friday morning. The day of
20 graduation, Friday morning. I went -- about 7:00 in
21 the morning I went to the Army base and got to the
22 Dixon Field, I believe it is, where the graduation
23 ceremony is, got a seat there in the stands, watched
24 my wife's graduation. And then we after the
25 graduation we promptly got a taxi and went back to

1 the motel room and she got changed out and we went to
2 the Texas Roadhouse on Two Notch, ate some lunch.

3 Q And spent the rest of the day together?

4 A Yes, sir.

5 Q Okay. What happened the next day? That would have
6 been on Friday. So what happened Saturday morning?

7 A Saturday morning I checked out of the motel at around
8 11:00, a little before 11 because it was, you know,
9 check out time. I got took a taxi to the Greyhound
10 station.

11 Q What time did you get down there?

12 A I'd say about 11:30.

13 Q Okay.

14 A Whenever I got to the Greyhound station, I got out of
15 the taxi and was getting ready to get my one suitcase
16 out of the back of the trunk.

17 Q Well, let's clarify that. How many suitcases did you
18 have?

19 A I had one suitcase.

20 Q Just one suitcase?

21 A Yes.

22 Q You didn't have two?

23 A I was only here -- yes, sir. I was only here for the
24 weekend.

25 Q So you had one suitcase?

- 1 **A** Yeah. One suitcase, sir.
- 2 **Q** Okay.
- 3 **A** So as I was getting my one suitcase out, a panhandler
- 4 came up and asked if he could carry my bag for me.
- 5 **Q** What did you say? A pan --
- 6 **A** A panhandler.
- 7 **Q** Uh-huh (affirmative).
- 8 **A** Yes, sir. I believe that's the correct --
- 9 **Q** Go ahead.
- 10 **A** Okay. He asked if he could carry my bag into the
- 11 station for me. I said sure. I let him carry my bag
- 12 and gave him a dollar for his trouble. And while I
- 13 went in the station, I went to the ticket counter and
- 14 purchased a ticket to leave. At that time I found
- 15 out that I couldn't leave until 6:00 the next
- 16 morning.
- 17 **Q** Okay. How did you pay for your ticket?
- 18 **A** I paid for it with a debit card, the same way I make
- 19 all my transactions.
- 20 **Q** Okay. Did you have money in your pocket?
- 21 **A** Yeah. I had some small denominations, maybe like a
- 22 couple of 20's and a five and some one's.
- 23 **Q** How much did your ticket cost?
- 24 **A** I believe the exact price was \$156.
- 25 **Q** Okay. So then you got your ticket and stuff?

1 **A** Yes, sir.

2 **Q** Then what did you do?

3 **A** Once I found out that I couldn't leave 'til the next
4 morning, which was 11 hours -- no. I'm sorry. It
5 was more than that. It was almost 15 hours -- I
6 decided to go back to the motel room for another
7 evening. But the motel room was \$80, and I thought
8 perhaps --

9 **Q** Slow down. The motel is how much?

10 **A** It was \$80 an evening.

11 **Q** Okay.

12 **A** So I thought perhaps there was a place in town that
13 was cheaper. I had asked the panhandling gentleman
14 if he knew of a place in town or in the surrounding
15 area where I could rent a room for one evening. And
16 that is how my nightmare began on
17 He said he knew of a boarding house where I could
18 probably rent a bedroom for the night.

19 **Q** And then what did you do?

20 **A** I walked to with him where he
21 introduced me to a gentleman that lived there and I
22 thought was the owner of the house.

23 **Q** And what was his name?

24 **A** I believe his name was Sylvester.

25 **Q** Okay. And please describe Sylvester?

1 **A** African-American male, maybe in his thirties,
2 probably about six-foot-one, slim build.

3 **Q** Okay. And what kind of conversation did you have?

4 **A** I met Sylvester. I explained to him why I was in
5 South Carolina, what my dilemma was and asked him if
6 he could, you know, provide services. He answered
7 yes, he could rent me a motel or a bedroom. He
8 charged me \$20 for a bedroom for the evening, one bed
9 and a bathroom and a bath. So I, you know, paid him
10 \$20 for the room and took my bag into the room and
11 settled down in my one bed for a while.

12 Because there was several -- or there's a few
13 bedrooms in the place, but each one seemed to be like
14 its own little person. Well, it was a boarding room.
15 So everybody stayed in their own room. Nobody
16 congregated in the living room or the common areas.

17 **Q** Did you see anybody else in there while you was
18 there?

19 **A** No.

20 **Q** Okay. Now, did you have a key or something?

21 **A** No, I did not.

22 **Q** All right. About what time that was that you
23 actually went to the house?

24 **A** I'd say it was about 11:30.

25 **Q** But you say you got there --

1 **A** Yeah. I got there at 11:30. So it must have been
2 about 12.

3 **Q** Around 12?

4 **A** Yeah.

5 **Q** Okay. So you stayed at the house. Did you stay
6 there most of the afternoon? Or what did you do?
7 Did you go out anywhere or what?

8 **A** I stayed there until about 7:30'i'sh. And I went --
9 I walked to the grocery -- I got directions from
10 Sylvester where I could get some food. He gave me
11 directions to a grocery store. I walked to the
12 grocery store in Five Points and bought some
13 pierogies.

14 **Q** What kind of grocery store was it?

15 **A** It was a Food Lion.

16 **Q** A food Lion?

17 **A** Yeah.

18 **Q** Down in Five Points?

19 **A** Yes, sir.

20 **Q** And that's right past -- I guess you found out since
21 you've been in court, that's right past that Exxon
22 station that was robbed. Is that correct?

23 **A** Yeah. Now that I've been able to see the diagrams
24 and everything, it's right there on the corner to
25 where I turned to go down Harden Street, I believe it

1 is.

2 Q Okay.

3 A Which is the street that the Food Lion was on.

4 Q What kind of clothes did you have on?

5 A I had on blue silk Tarheel shorts and my black --
6 yeah, my black -- my red Ohio Buckeyes shirt.

7 Q The one that's taken in State Exhibit 24?

8 A Yeah. That would be how it looked.

9 Q Is this what you had on?

10 A Yes, sir.

11 Q Okay. At any time during that day did you have a
12 yellow shirt on?

13 A No, I did not.

14 Q So you went to the Food Lion and you purchased some
15 food. Is that correct?

16 A Yes, sir. I bought some pierogies.

17 Q What did you do next?

18 A I walked back to the boarding house.

19 Q About what time would that have been?

20 A A quarter 'til 9; by the time I returned, 10:00.

21 Q Did you see the police and stuff at the station or
22 any ruckus or anything?

23 A No. I witnessed no commotion.

24 Q You didn't see anything when you passed the -- do you
25 remember passing the station?

1 **A** No.

2 **Q** You went back to the house?

3 **A** Yes, sir.

4 **Q** And what happened then?

5 **A** I decided to get a shower. It's awful hot down here.

6 I don't know. I'm getting used to the weather now.

7 But being from Pennsylvania, I sweat. I sweat just

8 sitting around in South Carolina. It's warm down

9 here. I was pretty sweaty from taking a walk. So I

10 wanted to get a shower. And my room had a bathroom

11 in it with a shower. So I went in and took my

12 clothes off and got a shower. And then that's when

13 people tried breaking down the door in the bathroom.

14 **Q** All right. Now, the police officers said that they

15 called you or they saw you changing clothes. Do you

16 remember that?

17 **A** I heard no one call me. I heard somebody beating on

18 the door. That's whenever I got out of the shower.

19 **Q** And why didn't you go to the door to see who it was?

20 **A** Hey, I don't know who that guy was, but he was angry,

21 and I wasn't wanting to meet him.

22 **Q** Is that why you didn't go to the door?

23 **A** Yeah.

24 **Q** Okay.

25 **A** It wasn't my house. It wasn't my residence. I had

1 no idea what kind of situation. All I was thinking
2 is, my God, what have I just got myself into? Who is
3 on the other side of this door?

4 Q So what did you do?

5 A I did nothing.

6 Q You stayed in the bathroom?

7 A For a minute. And for probably about two or three
8 minutes I just stood there while this guy beat on the
9 door. Finally he made an announcement that he was a
10 police officer. I could look out through the door
11 through the crack and see that he wasn't a uniformed
12 officer. That's when I opened the door. I undid the
13 latch and opened the door. And as soon as I did
14 that, I was immediately thrown on the ground and
15 handcuffed and frisked.

16 Q So you was in the bathroom or in the bedroom?

17 A I was in the bathroom. When I opened the bathroom
18 door, I was pulled out of the bathroom and thrown
19 onto the bedroom floor.

20 Q So you opened the bathroom door?

21 A Yes. I opened the bathroom door.

22 Q What was the statement saying that you barricaded
23 yourself in the house?

24 A I -- I didn't lock the original front door. Whenever
25 I come back from the grocery store, it was locked. I

1 knocked on the door and Sylvester let me in. Now, if
2 he locked it after he let me in, I'm unaware. But I
3 did not lock that door. I didn't take any other
4 precautions to keep people from getting into the
5 house. I didn't feel that was my responsibility or
6 that I had a need to. The only reason why I locked
7 the bathroom door was for privacy while I was getting
8 my shower.

9 Q But when the police came and said it was the police,
10 what did you do?

11 A Whenever they -- when they did identify themselves as
12 police officers, undid the latch and opened the
13 bathroom door.

14 Q Now, were you trying to change clothes to get into a
15 yellow jersey or change clothes or anything like
16 that?

17 A No, sir. I was not trying to get into a yellow
18 jersey.

19 Q Where did this yellow shirt, jersey or whatever they
20 call it that the State has presented, where did that
21 come?

22 A My dull yellow shirt they have come out of my
23 suitcase.

24 Q It was inside your suitcase?

25 A It was one of -- yeah. It was one of my shirts

1 inside of my suitcase. It was removed from the
2 suitcase by somebody else, not by me.

3 **Q** So when the officer has in his report that they
4 removed the jersey, the shirt from your suitcase,
5 then that was correct?

6 **A** That is a correct statement.

7 **Q** Now, you had an opportunity -- what happened next
8 after they took you out the bathroom?

9 **A** They took me and put me in the back of an armored
10 truck, kind of a van thing. Which I sat in there
11 handcuffed with my hands behind my back. And --

12 **Q** How long did you sit in there?

13 **A** I feel like it was about 45 minutes. It was dark
14 time. Finally they opened up the doors, pulled me
15 out, stood me in a spotlight, a couple of spotlights
16 in the middle of the street, had an officer on each
17 side of me, and stood me there for maybe five
18 minutes, you know, two to five minutes, threw me back
19 into the van; about ten minutes later got me out of
20 the van again, took the photograph which I'm assuming
21 is State's evidence. I don't know which number it is
22 but the one where I'm in the Ohio shirt.

23 **Q** This one here?

24 **A** Yes.

25 **Q** State Exhibit 24?

1 **A** Yeah. May I see the picture? As a matter of fact,
2 you can see I've got my blue shorts on right there in
3 the very corner of it.

4 **MR. JOHNSON:** Your Honor, can I give this to the
5 injury, please?

6 **THE COURT:** Yes.

7 **Q** So you had blue shorts on?

8 **A** I had no blue jeans on that day, like it was
9 testified earlier by other people.

10 **Q** You had no blue jeans on?

11 **A** No. I had blue jeans in my bag, but I did not wear
12 blue jeans on that day.

13 **Q** It was a hot day that day?

14 **A** Yes, sir. It's very -- you all have a very warm
15 temperature down here.

16 **Q** Okay. Now, what happened next?

17 **A** After the picture was taken?

18 **Q** Right.

19 **A** That's when I began my year and a half stay at Alvin
20 S. Glenn Detention Center. They took me to jail.
21 And that's where I've been since waiting for this day
22 to come finally.

23 **Q** All right. Now, you viewed the video which everyone
24 is saying that's you on the video?

25 **A** Yes, sir.

1 **Q** Is that you?

2 **A** No, sir.

3 **Q** Did you see a knife on the video or anything like
4 that?

5 **A** I seen the same thing that everybody else seen. I
6 seen no knife in the video.

7 **Q** And you did not see yourself?

8 **A** No, sir.

9 **Q** Now, we have talked about it. What can you offer the
10 jury to show that that was not you in the video? Is
11 there some type of feature about you?

12 **A** Since you happened to notice it first and, I mean, a
13 lot of people do and a lot of people ask this
14 question, so maybe some of you all might be curious
15 yourselves --

16 **Q** Your Honor, could the witness at least stand right
17 where he's at, but could he stand up and bend towards
18 the jury? I need to show a feature on his head.

19 **THE COURT:** Sure.

20 **A** I have a large scar that runs the top of my head and
21 along the side. I had a -- it's from brain surgery I
22 had back in 2001. I had to have a brain tumor
23 removed and part of my brain, was the reason.

24 **Q** And would that show on your hair when you comb your
25 hair? I mean, could you cover it up with your hair?

1 **A** No. Because no hair grows in the scar area, the scar
2 tissue area. So the whole length of that question
3 mark is left hairless.

4 **Q** And --

5 **A** Excuse me.

6 **Q** You cannot see that mark in the video. Is that
7 correct?

8 **A** No, sir. I didn't. Nor did anyone else, sir.

9 **Q** Now, once again -- well, let me ask you this. The
10 person in the video bought or asked for some
11 cigarettes, right?

12 **A** Yes, sir.

13 **Q** Do you smoke?

14 **A** No, sir, I do not.

15 **Q** Was there any lighter or anything found? I mean, did
16 you have any lighter with you?

17 **A** I had no lighter, sir. No, sir.

18 **Q** And you do not smoke. Have you ever smoked in your
19 life?

20 **A** No, sir.

21 **Q** Did you have \$360 on you?

22 **A** No, sir, I did not. However, I did have a little
23 over \$200 in my bank account from my bank in Michigan
24 for which I had the debit card issued. I generally
25 do not carry large amounts of cash with me,

1 especially on vacations. This is 2009. It seems
2 like plastic is everywhere. Cash is out; plastic is
3 in. As long as you've got a debit card, you're good
4 to go.

5 **Q** Now, is there anything that I have not asked you that
6 you would like to tell the jury? Anything you would
7 like to say to the jury?

8 **A** No. The only thing I can say is that I'm just really
9 thankful today has finally come, I've had my chance
10 to come into court. It's been a long, long wait.

11 **Q** Did you rob that store?

12 **A** No. I didn't rob the store. I wouldn't rob somebody
13 like that. I'm a coward. That's why I wouldn't even
14 let the people into the bathroom whenever they was
15 beating on the door until I knew it was the police.
16 I don't know what else to say. I had nothing to do
17 with that store being robbed.

18 **MR. JOHNSON:** I have no other questions, Your
19 Honor.

20 **MS. GARFIELD:** Thank you, Your Honor.

21 CROSS EXAMINATION

22 **BY MS. GARFIELD**

23 **Q** Good afternoon, Mr. Kough.

24 **A** Good afternoon, ma'am. How are you?

25 **Q** I'm Ms. Garfield. This is the first time we've ever

1 spoken, correct?

2 A Yes, ma'am. That's correct.

3 Q You came here from Pittsburg?

4 A Yes, ma'am.

5 Q You met your wife in Michigan?

6 A Yes, ma'am.

7 Q When were you married?

8 A I was married in 2008.

9 Q What was the wedding date?

10 A May 11th.

11 Q Is that while she was in basic training?

12 A No, ma'am. That was before she left.

13 Q When did she go to basic training?

14 A She I believe left on the 25th or so of May.

15 Q Where were you married?

16 A Ma'am, Cataney, Pennsylvania.

17 Q Where is she from again?

18 A Where is she from or where did I meet her?

19 Q Where is she from?

20 A She's from Quebec.

21 Q And she is here on a green card?

22 A Oh, yes, ma'am.

23 Q But she's in the United States military?

24 A Yes, ma'am. Yeah. I was surprised as well. I

25 didn't know that they let other people from other

1 countries join their military. But I guess when
2 there's a war going on the standards are lowered.
3 They'll let anybody go die for them if they want.

4 Q Were you all -- were you residing in Pennsylvania?

5 A Yes, ma'am.

6 Q And you met your wife in Michigan?

7 A Yes, ma'am.

8 Q Did she move back to Pittsburg?

9 A Yes, ma'am.

10 Q Okay. And you came down on a Thursday. Is that
11 correct? Or a Wednesday?

12 A I come down on a Wednesday evening.

13 Q All right.

14 A I got off the bus on a Wednesday night.

15 Q And that's when you stayed at the Quality Inn?

16 A That's the very first night that I rented a motel
17 room on Two Notch. Yes, ma'am.

18 Q And then all day Thursday what did you do?

19 A I spent the day at Ft. Jackson for family day. Which
20 that entails just, you know, you meet your
21 significant other before their graduation and you can
22 go anywhere you want there on base, but they're not
23 allowed to leave base.

24 Q And that's done the day before basic training
25 graduation?

1 **A** Yes, ma'am.

2 **Q** And that's the way it always has been?

3 **A** You know, I don't know how it always is. I just know
4 how it was for that rotation's graduation.

5 **Q** Had you been down here to visit her in the past?

6 **A** No, ma'am. You're not allowed to visit during basic
7 training.

8 **Q** Isn't it true that family members can go visit people
9 on some Sundays during basic training?

10 **A** Ma'am, if that was so, I would have done so. We was
11 never provided with that opportunity.

12 **Q** That you know of?

13 **A** Correct, ma'am.

14 **Q** Okay. And so you get to the Greyhound station and
15 you realize you can't go back 'til the next morning?

16 **A** That's correct.

17 **Q** Is that your testimony?

18 **A** Yes, ma'am.

19 **Q** And is that when you get your wire transfer from
20 Western Union?

21 **A** No, ma'am.

22 **Q** When did you get that?

23 **A** I received that around 2:00 I believe.

24 **Q** So you needed money?

25 **A** Excuse me, ma'am?

1 Q You needed money?

2 A I didn't want to exceed all my debit card. If I pull
3 out more money, cash more than three times, it begins
4 to charge me and then it adds up as a -- there's only
5 like a three-time limit. My card will stop for the
6 day. So I needed to get some cash for my person to
7 carry for the trip.

8 Q And you got cash?

9 A Yes, ma'am. \$100.

10 Q And who sent you that cash?

11 A My mother.

12 Q And how much did it cost her to send you the cash?

13 A You would have to ask her, ma'am.

14 Q She is not here though, right?

15 A No, ma'am.

16 Q And then you say that this beggar on the street
17 offered to carry your bags?

18 A Bag, ma'am. One bag.

19 Q Bag. Excuse me. I apologize. And you said sure.
20 Where did he carry your bag to?

21 A Carried it from the trunk of the taxi into the
22 Greyhound station.

23 Q And then that's when you determined you couldn't go
24 back?

25 A That's when it was determined immediately that I

1 couldn't leave until 6:00 in the morning.

2 Q And that would have been 6 a.m. Sunday morning?

3 A Yes, ma'am. Correct.

4 Q And so at that time did you go back to the beggar to
5 chat with him?

6 A I walked outside and asked him. That's when I
7 engaged in a conversation with him and asked him
8 about a motel room.

9 Q And what did he tell you?

10 A He told me that he was aware of the boarding house
11 where he was sure I could rent a bedroom for the
12 evening.

13 Q Did he take you to the boarding house?

14 A Yes, ma'am.

15 Q He walked you all the way down there?

16 A Yes, ma'am.

17 Q How much money did you give him for his help?

18 A For how much? For excuse me?

19 Q How much money did you give him for helping you?

20 A I bought him a beer.

21 Q Where did you buy him a beer?

22 A Excuse me?

23 Q Where did you buy him the beer?

24 A At the Food Lion.

25 Q Okay. So did you all walk down to the Food Lion

1 first and them walk to Pine Street?

2 **A** No, ma'am. I didn't buy him a beer until after he
3 took me to the place. I bought a -- I paid for the
4 room, left my bag. At this point I realized that I
5 had a chronic problem. He wouldn't leave -- he
6 wouldn't leave my side. So he followed me to the
7 Food Lion. That's how I got directions to go to the
8 Food Lion as well.

9 **Q** Is that when you got your dinner?

10 **A** My pierogies?

11 **Q** Is that what it is?

12 **A** Yeah.

13 **Q** Is that when you got it?

14 **A** Yes, ma'am.

15 **Q** Okay. So he hung out with you from about 12:00 'til
16 about 8:30 in the night?

17 **A** That's correct, ma'am.

18 **Q** Okay. But you didn't testify to that before, did
19 you?

20 **A** Nobody asked me, ma'am.

21 **Q** I believe you testified that you just hung out in the
22 room and everybody kept to their own rooms. Isn't
23 that what you said?

24 **A** The people that lived there; yes, ma'am.

25 **Q** And you just went into your own room, right?

1 **A** Yes, ma'am. We sat there and talked.

2 **Q** Just you and the beggar?

3 **A** Ma'am, he has a name. It's Tony.

4 **Q** Okay. Tony. Okay. I'm sorry.

5 **A** I don't know if he's a beggar, if that's what he does
6 for a living.

7 **Q** Okay. On direct examination didn't you indicate that
8 a panhandler approached you?

9 **A** You're correct, ma'am. Yes, ma'am.

10 **Q** You didn't say his name was Tony, did you?

11 **A** No, I didn't. I apologize.

12 **Q** All right. So Tony, the panhandler, and you hung out
13 in this bedroom?

14 **A** Yes. Good old pals. Yes, ma'am.

15 **Q** From about 12:00 in the afternoon until about 7:30?
16 I believe that was your testimony?

17 **A** Yes, ma'am. He wouldn't leave.

18 **Q** He wouldn't leave. And that's when you were like,
19 I've got to get rid of this guy; I'm going to get him
20 a beer?

21 **A** Yes.

22 **Q** So you and Tony, the panhandler, walked to the Food
23 Lion?

24 **A** Yes, ma'am.

25 **Q** And what was your -- how did you get there? What was

1 your travel?

2 **A** We walked down Gervais Street.

3 **Q** Okay.

4 **A** Made a left at Harden..

5 **Q** Okay.

6 **A** And followed it down to the Food Lion.

7 **Q** Was the panhandler showing you how to get there?

8 **A** He's walking with me. He's not, you know, like
9 hadn't directed me. As we're walking he said, make a
10 left here. We turned left there. After you walk
11 maybe 50 feet you can see where the Food Lion is.

12 **Q** It's right there by the Exxon, right?

13 **A** It's in that vicinity.

14 **Q** So you and the panhandler, Tony, go in and you get a
15 beer. What kind of beer do you like?

16 **A** I don't drink, ma'am.

17 **Q** What kind of beer did Tony want?

18 **A** It was a 40.

19 **Q** And then what did you all do?

20 **A** Then he went his way and I walked back to the
21 boarding house.

22 **Q** Did you go back the same direction?

23 **A** Yes, ma'am.

24 **Q** Walking by the Exxon?

25 **A** Apparently, yes, ma'am.

- 1 Q Then you walked up Gervais Street?
- 2 A Yes, ma'am.
- 3 Q Then went on back over to the boarding house?
- 4 A Yes, ma'am.
- 5 Q Did you see anybody while you were walking?
- 6 A Not that I recall.
- 7 Q You indicated that you're a coward. I didn't
- 8 understand why you were saying that. Is that why you
- 9 stayed in the bathroom?
- 10 A Yes, ma'am.
- 11 Q You've been arrested before, haven't you?
- 12 A Oh, yes, ma'am.
- 13 Q In fact, you've got convictions out of the state of
- 14 Michigan, right?
- 15 A Yes, ma'am.
- 16 Q I believe you've got an aggravated assault?
- 17 A Yes, ma'am.
- 18 Q As well as a shoplifting type conviction. Is that
- 19 correct?
- 20 A Yes, ma'am.
- 21 Q Now, did you get in trouble in Michigan before you
- 22 met Jessica?
- 23 A Yes, ma'am.
- 24 Q And then you met Jessica and got married?
- 25 A Yes, ma'am.

1 Q And then went back to Pennsylvania?

2 A No, ma'am. I met Jessica. Then we moved -- she
3 moved to Pennsylvania with me.

4 Q Then you got married in Pennsylvania?

5 A Yes, ma'am.

6 Q Beg the Court's indulgence. You've been treated
7 while you've been at the jail for being in a fight as
8 well, haven't you?

9 A Yes, ma'am.

10 Q In fact, you were treated for having a cut on your
11 head, correct?

12 A Yes, ma'am.

13 Q And what kind of cut was that?

14 A A gentleman hit me with a tray and split my eye open.

15 Q Have you still got that picture?

16 A No, ma'am.

17 **THE CLERK:** It's over there, Dolly.

18 Q Can you show me where your cut is in this photograph?

19 A Of course understanding this was before the cut.

20 Q No. You've testified you had brain surgery in 2001?

21 A Oh. My brain. Yeah.

22 Q And hold it like this.

23 A This appears to be -- yeah. It's right there. Right
24 there.

25 Q You're indicating it's right there?

1 **A** Yeah. It's got a part. It's exactly where it is
2 right now today.

3 **Q** And I asked you this question not -- I'm not trying
4 to embarrass you. Okay?

5 **A** All right. I'm ready, ma'am.

6 **Q** But you do have a receding hairline. Is that
7 correct?

8 **A** You know, actually I have a complex now, thanks to
9 Investigator Thomas. I did not think I did. But now
10 I'm kind of frantic. And I certainly hope not,
11 ma'am.

12 **Q** Do you have a balding spot on the back of your head?

13 **A** Not that I'm aware of.

14 **Q** Can you please turn around and display the back of
15 your head to the jury?

16 (Witness complies)

17 **Q** And can you please face the jury and put your head
18 down like this for them?

19 (Witness complies)

20 **Q** And can you turn facing the judge and tip your head
21 back?

22 (Witness complies)

23 **Q** Thank you, Mr. Kough.

24 **A** Excuse me.

25 **Q** Why didn't you come to the door when you heard the

1 police outside?

2 **A** First of all, I didn't know that they were -- you
3 mean while I was in the bathroom?

4 **Q** Yes, sir.

5 **A** I didn't know they were police.

6 **Q** And when you got out of the shower, you put the same
7 clothes back on?

8 **A** Yes, ma'am.

9 **Q** That's what you're telling this jury today?

10 **A** Yes, ma'am.

11 **Q** Beg the Court's indulgence.

12 (Pause)

13 **A** As a matter of fact, the one officer had made a
14 comment about me being wet and wanted to know what
15 was wrong with me. And I explained that I wasn't --
16 that I had just gotten out of the shower and hadn't
17 had an opportunity to towel off. I just put my
18 clothes on.

19 **Q** Mr. Kough, is your hair wet in this picture?

20 **A** It appears to be.

21 **Q** You're telling the jury that's wet hair?

22 **A** Yes.

23 **Q** Thank you, Mr. Kough. I have no further questions.

24 **A** Yes, ma'am.

25 **THE COURT:** Any redirect?

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

2 **MS. GARFIELD:** Oh, I'm sorry. Can I ask one
3 other question?

4 **THE COURT:** Sure.

5 **Q** This is the first time you've ever told this story.
6 Is that correct?

7 **MR. JOHNSON:** Your Honor, objection. Can we
8 approach?

9 **THE COURT:** Yes.

10 (Whereupon, a bench conference is had)

11 **THE COURT:** The last question. Go ahead.
12 Withdraw your question.

13 **MS. GARFIELD:** The State withdraws the question.

14 **THE COURT:** All right. You are to disregard
15 that remark and the question.

16 REDIRECT EXAMINATION

17 **BY MR. JOHNSON**

18 **Q** Mr. Kough, there was another gentleman you said he
19 was in jail with you?

20 **A** Yes, sir.

21 **MS. GARFIELD:** Objection, Your Honor. That's
22 outside of my cross.

23 **THE COURT:** Sustained.

24 **MR. JOHNSON:** I'll withdraw it.

25 **THE COURT:** Anything further?

1 **MR. JOHNSON:** Your Honor, I do have one exhibit
2 that I would like to enter just for the jury. I
3 subpoenaed his records as far as location. I think
4 that was an issue.

5 **THE COURT:** Okay. If you all will approach.
6 (Whereupon, a bench conference is had)

7 **MR. JOHNSON:** I have no other questions, Your
8 Honor.

9 **THE COURT:** Okay. Ladies and gentlemen of
10 the -- hold on one second. You all come here one
11 second. I apologize.

12 (Whereupon, a bench conference is had)

13 **THE COURT:** Ladies and gentlemen of the jury,
14 I'm going to ask you to be excused to your room. It
15 will only be a short five-minute break. We're just
16 trying to locate a witness who was asked to come back
17 at a certain time. I would tell you not to discuss
18 the case.

19 (Jury out at 11:59 a.m.)

20 **THE COURT:** Sir, you can step down.

21 **THE WITNESS:** Yes, ma'am.

22 **THE COURT:** Mr. Johnson, will you locate your
23 other witness?

24 **MR. JOHNSON:** Yes, Your Honor. Your Honor, I
25 thought about it, and I'm not going to call her.

1 **THE COURT:** Sorry? You're going to rest on the
2 record when I bring them back in?

3 **MR. JOHNSON:** That's correct.

4 **THE COURT:** Knowing that Mr. Johnson is going to
5 rest on the record, can you formally rest now and
6 then can I deal with any motions or issues?

7 **MR. JOHNSON:** At this time, Your Honor, the
8 defense rests.

9 **THE COURT:** Okay. All right. Are there any
10 motions or legal issues to be taken up at this time?

11 **MR. JOHNSON:** Well, Your Honor, once again, I
12 would renew my motion for directed verdict. I
13 believe the State has not met its burden of proof. I
14 also renew all my other previous objections.

15 **THE COURT:** State?

16 **MS. GARFIELD:** We don't have any other motions.

17 **THE COURT:** Okay. The Court will stand by its
18 prior rulings. And at this stage there would just be
19 a jury issue as to the events of that night. And I
20 believe the State has at least put forth some
21 evidence on the issues that will be brought before
22 the jury.

23 **MR. JOHNSON:** Your Honor, I would like to make a
24 motion to add the lesser-included offense of strong
25 armed robbery. By the State not allowing -- or by

1 the Court not allowing the lesser-included on this,
2 the same way the officer testified that he could see
3 a knife, my client also testified that he looked at
4 the video and he didn't see a knife.

5 **THE COURT:** I will state on that particular
6 ground, without cutting you off on the remainder of
7 your argument, that what the officer thinks he saw or
8 not is not what's relevant. It's going to be what
9 the jury thinks they saw. The testimony that's
10 relevant for purposes of armed robbery is what the
11 victim saw and her testimony is what matters on that
12 issue.

13 **MR. JOHNSON:** I understand, Your Honor. But my
14 point is that I agree that it is up to the jury for
15 what they determine they see. But by the Court not
16 allowing a charge of strong armed robbery, the Court
17 is preventing the jury from coming to that
18 conclusion.

19 **THE COURT:** No. The jury could just say that
20 they did not see a deadly weapon and then there would
21 not be an armed robbery. They could just not
22 convict.

23 **MR. JOHNSON:** Well, no. There are three options
24 the jury would have. The jury could say that they
25 didn't believe that it was my guy and he would be

1 innocent. The jury could also say we believe that it
2 was this person but that he didn't have a weapon but
3 they won't that have charge.

4 **THE COURT:** But for armed robbery you have to
5 have a weapon or the threat of a weapon.

6 **MR. JOHNSON:** For armed robbery.

7 **THE COURT:** Right.

8 **MR. JOHNSON:** But the jury could still -- what
9 I'm saying is that by the Court deciding not to give
10 the charge on strong armed robbery to the jury, you
11 are then preventing the jury from one of their
12 options that a jury would have. A jury could still
13 look at this and say we believe it's him but we don't
14 believe that there was a weapon.

15 **THE COURT:** But then if they don't believe there
16 was a weapon, then they wouldn't be able to convict
17 of armed robbery either, because if there's not the
18 threat of a weapon or a weapon, then they can't find
19 him guilty of armed robbery.

20 **MR. JOHNSON:** Correct. But they could still
21 believe there's sufficient evidence to believe that
22 he did take the money, which would be strong armed
23 robbery. By the Court not allowing me to have a
24 charge for strong armed robbery the Court is
25 preventing the jury from one of its options that

1 should be given to the jury. It's prejudicial to my
2 client.

3 **THE COURT:** The issue at the time of offering
4 any lesser-included offense, obviously consideration
5 of the defendant's request, but then also has to do
6 it if there is evidence on the issue, that there is
7 evidence that there was not a weapon or there is
8 evidence, meaning testimony, that there is not a
9 weapon. So where do you feel like the evidence --

10 **MR. JOHNSON:** The evidence of that is the tape
11 itself. It's the interpretation of the tape. There
12 is no clear and convincing evidence that there is a
13 weapon. It's an interpretation of the person viewing
14 the tape, which it is up to the jury to determine the
15 facts.

16 **THE COURT:** Okay. But that's not evidence.
17 That's just the jury viewing the tape.

18 **MR. JOHNSON:** But it's evidence that was offered
19 by the State. It is evidence that has been presented
20 in the court and becomes evidence. That tape is
21 evidence.

22 **THE COURT:** I know. But their evidence in
23 supporting the tape is the testimony that goes with
24 it as opposed to non evidence, so to speak, like an
25 interpretation or an inference from the evidence I

1 guess is the better word I'm trying to get to, that
2 we have to have something factually presented through
3 testimony or other documentary evidence to indicate
4 an event has occurred or has not occurred, but some
5 affirmative act on that, not just look at a tape by a
6 jury and then they can choose to believe a side. The
7 sides can only be what the testimony was.

8 **MR. JOHNSON:** Well, evidence that was given
9 factually was my client testifying on the stand under
10 oath that he did not see a knife when he viewed the
11 video.

12 **THE COURT:** But, yeah, that's a perception and
13 an inference on his part.

14 **MR. JOHNSON:** It's the same perception and
15 evidence that the officer gives.

16 **THE COURT:** Yeah. But -- the State respond.

17 **MS. GARFIELD:** The armed robbery is based on
18 what the victim has testified to. The victim who was
19 there and saw a knife has given testimony the knife
20 was involved in this robbery. There have been no
21 other eye witnesses that have come forward to say he
22 robbed the place but I never saw a weapon. If that
23 were the situation, I believe the strong armed
24 robbery instruction would be proper.

25 But in this situation we have a defendant who

1 has not claimed, yes, I robbed the place but didn't
2 have a knife. He's claiming it wasn't me. Now, a
3 perception of seeing a weapon in the video by any
4 witness is something that should be admissible for
5 the jury to decide. There has been no testimony that
6 a strong armed robbery has been committed.

7 **THE COURT:** Go ahead.

8 **MR. JOHNSON:** Well, Your Honor, as I said, I
9 have no disagreement that that is a decision that the
10 jury should make, but that is one of the conclusions
11 that the jury could come to.

12 **THE COURT:** No. We're not talking about
13 conclusions that you could come to. We're talking
14 about for purposes of me presenting a lesser-included
15 offense. What evidence was there that anything else
16 occurred? For example, if someone, if we were here
17 on criminal sexual conduct and there was a rape, then
18 a defendant could testify, yes, I had sex but it was
19 consensual. That's evidence. That's testimony that
20 something different occurred but that there was still
21 an event.

22 For example, in this case, if the defendant
23 testified, I was at the store but I did not present a
24 knife, or something that is affirmative statements or
25 some type of evidence that they have before them, not

1 conclusions from the evidence.

2 **MR. JOHNSON:** I understand, Your Honor.

3 **THE COURT:** Okay. And that's what I'm trying to
4 get at. What would you perceive as evidence
5 presented at this point? And your answer to me was
6 just that he says he didn't see something on the
7 tape.

8 **MR. JOHNSON:** Well, another point of evidence is
9 that no knife was ever found.

10 **THE COURT:** Well, that's still a weakness in
11 their case that you can argue in closing. Because we
12 don't always have a murder weapon. We don't always
13 have several pieces of the puzzle with any other
14 crimes.

15 **MR. JOHNSON:** But once again, Your Honor, that
16 argument would also go to as to whether it was an
17 armed robbery or strong armed.

18 **THE COURT:** Well, the evidence in that regard is
19 just the testimony about that it happened. Whether
20 police were covering it, that's a witness in their
21 case, and that can be argued in closing. But let me
22 just look at the standard again. Anything else by
23 the State?

24 **MS. GARFIELD:** No, ma'am.

25 **THE COURT:** Okay. While we're looking at that,

1 if there's anything you all need to do to prepare for
2 closing, please do so.

3 **MS. GARFIELD:** Your Honor, at some point could
4 the clerk's office change the battery in that clock?

5 **THE COURT:** Oh, yeah. I've asked them this
6 morning.

7 **MS. GARFIELD:** Thanks. It drives me crazy.

8 **THE COURT:** Do you have anything in reply? Will
9 you be having anything?

10 **MS. GARFIELD:** No, ma'am.

11 **THE COURT:** If you need to prepare anything for
12 closing, go ahead and touch with the evidence and
13 deal with all that now.

14 (Pause)

15 **THE COURT:** I tell you what, guys. Their lunch
16 is here. So let me just let them have lunch and then
17 you all excuse yourselves, too. And do you want to
18 just come back at one something?

19 **MS. GARFIELD:** That's fine.

20 **THE COURT:** Okay. And then at that point you
21 can rest and then go straight into closing and
22 charging.

23 **THE CLERK:** So you're not going to bring them
24 back in? I can go ahead and give their food to them?

25 **THE COURT:** Yes. That's fine. Let's just do

1 that.

2 **MS. GARFIELD:** What time, Judge?

3 **THE COURT:** Let's say 1:00.

4 (Whereupon, a lunch break is taken)

5 **THE COURT:** Okay. The Court has given some
6 further consideration to some statements with respect
7 to whether the lesser-included offense should be
8 charged. And I also considered some off-the-record
9 conversations that we had at the break at the lunch.

10 The standard is whether there is any testimony
11 or evidence presented, period; just like on directed
12 verdict, whether it's conflicting or not. The video
13 is in evidence from which the jury could infer guilty
14 or innocence on armed robbery and/or strong armed
15 robbery. And then by the defendant testifying and
16 saying, although it wasn't me, I don't see a knife,
17 there is testimony on the record. So I'm going to
18 have to let it in, especially since it's the
19 defendant's request as well.

20 For me to do anything else is me jumping into
21 the province of the jury to suggest what they should
22 believe or not believe, because once the video is in,
23 they get to determine what they see or not see.
24 That's evidence. And then once the defendant
25 testified to say I don't see it, just like when the

1 officer testified and the victim testified and said,
2 I do see it, that's up to the jury. So that will be
3 the Court's ruling. And I will tender to you an
4 instruction on strong armed robbery for your review.

5 **MS. GARFIELD:** And let the record reflect the
6 State strongly, adamantly objects.

7 **THE COURT:** Okay. Understood.

8 **MR. JOHNSON:** Can't we all get along?

9 **THE COURT:** I must say Charlie has been very
10 friendly and I appreciate it.

11 (Pause)

12 **THE COURT:** All right. Anything else need to be
13 placed on the record before we have our jurors?

14 **MR. JOHNSON:** Yes, Your Honor. Your Honor, when
15 the State was cross examining my client, the State's
16 last question I think was something of the nature of:
17 Is this the first time you've ever told this story?
18 I made an objection at that time. I believe that the
19 Court did sustain my objection.

20 However, I think for the record I need to make a
21 formal objection and ask that at the very least that
22 the Court -- at the very least if the Court doesn't
23 grant a -- that the Court either grant me a mistrial
24 or the Court make a curative instruction to the jury.

25 **THE COURT:** Okay. At the time the Court did

1 make a curative instruction to the jury. If I
2 recall, I said: Objection sustained. The jury was
3 to totally disregard the question and any comments.
4 Okay.

5 **MR. JOHNSON:** And for the record, Your Honor, I
6 just wanted to note my objection.

7 **THE COURT:** Okay. Thank you. Anything further
8 by the State?

9 **MS. GARFIELD:** No, ma'am.

10 **THE COURT:** All right. Are all the jurors
11 present?

12 **THE BAILIFF:** Yes, ma'am.

13 **THE COURT:** Okay. We're ready to proceed.

14 (Jury in at 1:10 p.m.)

15 **THE BAILIFF:** All the jurors are present, Your
16 Honor.

17 **THE COURT:** Thank you, ladies and gentlemen of
18 the jury. At this time does the defendant have any
19 additional testimony or other evidence it wishes to
20 place into the record?

21 **MR. JOHNSON:** The defendant rests, Your Honor.

22 **THE COURT:** Okay. And the defense rested on the
23 record outside the jury's presence, and I've already
24 taken up what those legal issues would be at the
25 conclusion of a trial. So we are now ready to

1 proceed with the closing arguments. This trial has
2 concluded.

3 In closing arguments the parties are able to
4 refresh your memory about what testimony and other
5 evidence was entered into the record. But as I
6 stated to you at the beginning, what the attorneys
7 say to you is not testimony or evidence. You should
8 recall what was presented at the witness stand as
9 well as what will be presented to you. However, they
10 are able to give you some remarks and of course try
11 to persuade you to their side of the case.

12 Thank you for listening very attentively
13 throughout the trial. And on behalf of the
14 attorneys, we wish to thank you for that as well.
15 And we are now at the conclusion of the case. And I
16 would ask you for just as much attention at this
17 time.

18 State, you may proceed with closing arguments.

19 **MS. GARFIELD:** Thank you, Your Honor. May it
20 please the Court. Ladies and gentlemen, on Tuesday
21 morning, which was yesterday, The State of South
22 Carolina through Andrew Rogers came to you and said
23 that the defendant, Richard Kough, was guilty of
24 armed robbery, that that man with that hand held a
25 knife and pointed it at the victim, Tonya McGeorge,

1 while she was working at the Corner Pantry at the
2 Exxon on the corner of Harden and Gervais above Five
3 Points.

4 It is our burden to prove to you that Mr. Kough
5 committed this terroristic act. And I submit to you
6 that we have. At this point in time I get the
7 opportunity to argue to you and to go over the law in
8 this case. Give me a moment to set up.

9 Mr. Kough has been charged with armed robbery
10 and it is our job to prove to you he committed the
11 elements of this offense. The judge is going to give
12 you instructions on the law at the conclusion of the
13 attorneys arguing to you. So if I say anything
14 differently than the judge tells you, please take the
15 word of the judge. She is the ruler of the law and
16 she will instruct you the law to follow throughout
17 your deliberation process.

18 Richard Kough is charged with armed robbery.
19 And in order to be convicted of armed robbery in the
20 state of South Carolina you must prove the person
21 took property from the presence of another by means
22 of force or intimidation while armed with a deadly
23 weapon or purporting to be armed with a deadly
24 weapon.

25 The judge will also instruct you the definitions

1 of deadly weapon. There are several things that our
2 Legislature has determined meets the criteria to be a
3 deadly weapon. And one of those criteria involves a
4 knife.

5 The State has proved to you -- and I'm going to
6 go through each witness -- but we have proved to you
7 the elements of armed robbery. Definitely cash was
8 taken from the Exxon gas station in the presence and
9 from Tonya McGeorge, and she was definitely more than
10 intimidated. She was in fear of her life while the
11 defendant was armed with a knife.

12 Now, there is many other areas of the law which
13 you can consider while you'll be deliberating. There
14 are two types of evidence in any case. There is
15 direct evidence. And that is evidence that you hear
16 from the witness stand, the testimony that came out
17 of a person's mouth. You can evaluate how that
18 person relays to you anything they see, hear, feel,
19 touch. Everything they perceived they're relaying to
20 you. And that is what we call direct evidence.

21 There is also something called circumstantial
22 evidence. That is evidence that is used to infer
23 something from circumstances. One example I like to
24 use for circumstantial evidence is if we all go to
25 sleep tonight and all this, of course it's quite rare

1 in South Carolina, and we take up tomorrow and
2 there's snow on the ground, then we can infer that it
3 snowed overnight. The snow on the ground would be
4 considered circumstantial evidence. Both of these
5 types of evidence are considered completely equal
6 under the law.

7 In this case the judge is also going to instruct
8 you on a lesser-included charge of what we call
9 strong armed robbery. And essentially, that is the
10 same thing as armed robbery without the use of a
11 weapon. Because there has been evidence in this case
12 from the defendant that when the video was viewed he
13 did not see a weapon, the judge will instruct you on
14 the charge of armed robbery. I will go more into
15 that as I go through our witnesses.

16 You will also be given a jury instruction on eye
17 witness testimony. In this situation we had a direct
18 eye witness to the crime. That's Tonya McGeorge.
19 And while you consider her testimony in your
20 deliberations, these are things that you can consider
21 in evaluating credibility. Did she have an
22 opportunity to view the defendant at the time of the
23 crime? What was her degree of attention? What was
24 the accuracy of her description of the defendant?
25 What was her level of certainty, and what was the

1 time between the crime and the identification?

2 These are also factors that you will be able to
3 consider when evaluating Carl Quintyne's testimony,
4 the cab driver. These are factors you can keep in
5 mind when you deliberate. We'll go over that also
6 more in detail.

7 Reasonable doubt. It's the most talked about
8 phrase you hear in criminal justice dramas. I'm
9 going to read this out to you. Proof beyond a
10 reasonable doubt is proof that leaves you firmly
11 convinced of the defendant's guilt. There are few
12 things in this world that we know with absolute
13 certainty, and in criminal cases the law does not
14 require proof that overcomes every possible doubt.

15 If based on your consideration of the evidence
16 you are firmly convinced that the defendant is guilty
17 of the crime charged, you must find him guilty. If,
18 on the other hand, you think there is a real
19 possibility that he is not guilty, you must give him
20 the benefit of the doubt and find him not guilty. I
21 believe this is the most important instruction you as
22 a jury should be given because it is this charge that
23 makes our criminal justice system work.

24 I've been doing this job now for 12 years, and I
25 can honestly say I'm one of the few people I know

1 that I wake up in the morning and I'm glad to go and
2 do my job. I believe in what we do.

3 And, ladies and gentlemen, if you believe this
4 man did not do it, you must find him not guilty. You
5 must put him back in the streets, because that's what
6 makes our courtroom work. But if you find the
7 evidence beyond a reasonable doubt; not any doubt,
8 but a reasonable doubt -- and the judge will instruct
9 you that reasonable doubt consists of hesitation to
10 act -- then you must find him guilty.

11 Now, while you're determining whether or not he
12 is guilty, we must go through each witness. And
13 through these witnesses you've got to determine their
14 credibility. And this comes from your perception,
15 your common sense. What was the demeanor of the
16 witness on the stand? Was the witness forthright or
17 hesitant? Was the testimony of the witness
18 consistent? Was the testimony of the witness
19 corroborated, meaning somebody else said something or
20 there was other evidence to support what that witness
21 was saying? And did the witness have a reason to be
22 biased or prejudiced? That I'd like to put a big
23 star beside. Did the witness have a reason to be
24 biased or prejudiced?

25 With that, let's talk about our witnesses.

1 Showing you what has been marked as State's Exhibits
2 1-A through 1-G, the first witness that testified
3 before you, Tonya McGeorge, mother of three, at the
4 time was a clerk at the Exxon, had not been really
5 working at this particular location but was asked to
6 come in and help to open.

7 I believe you all saw how this case has affected
8 Tonya. Before July of 2009 she had no idea what it
9 would feel like to be a victim of such a violent
10 crime. But on that day her world changed. And it
11 will forever be changed. Almost a year and a half
12 later she still takes the stand, became very visually
13 upset in relaying to you the events that occurred.
14 The State will submit to you that those were tears of
15 credibility, tears of truthfulness.

16 And she shared with you how a man, a white male
17 with sandy blonde or sandy brown hair; it's a matter
18 of semantics at this point, came into the store
19 wearing a yellow shirt or jersey; again, a matter of
20 semantics; and he held a knife up to her and he told
21 her this was a robbery. I believe this is a
22 stick-up, something like that, and told her to give
23 him the money.

24 And the thoughts that flashed through her mind
25 were her three babies. And I can't imagine her

1 having to stand there and imagine leaving her
2 children, whether she was going to be harmed, hurt or
3 possibly worse.

4 And she knew she was going to do what the robber
5 said. And she took the bills out one-by-one and
6 handed them to him. And why did she do this?
7 Because she wanted to get a good look at him. She
8 said she wanted to be able to tell police as much
9 information so they could catch this person so that
10 this person wouldn't terrorize someone else.

11 Tonya McGeorge has no reason to make up
12 anything. She did not ask to be a victim of this
13 heinous crime. She did not ask to have to come to
14 this courtroom for three days and re-live this
15 nightmare to all of you.

16 Whether or not it's sandy brown or sandy blonde
17 hair, I really believe it's semantics. But let me
18 submit this to you all. She says she does not give a
19 one hundred percent identification because of the
20 lighting. The lighting is clearly different between
21 inside a heavily illuminated, fluorescent-lighted
22 convenience store and out on the street with a
23 floodlight flashing orange on you.

24 I submit to you, ladies and gentlemen, that when
25 she is in the Exxon station and the fluorescent

1 lights are up ahead of you, his hair may have seemed
2 lighter to her than it did outside in the dark.
3 That's just something for you to think about.

4 The next witness that testifies is Mr. Carl
5 Quintyne. He was the cab driver that was across the
6 street at the Greyhound station. I will show you
7 State's Exhibit No. 25, the aerial photograph. This
8 is the Exxon station. The entrance into the Exxon
9 station is right there, as testified to before. And
10 over here is where the cab stand is. And that is
11 where Carl Quintyne is. That is where he is at work
12 trying to make a living, trying to give cab fares
13 from the Greyhound station. He testified to you he
14 has four children to support.

15 And he sees this white male come inbetween his
16 car and say: I am going to rob the Exxon station.
17 And Carl told you at first he almost grinned. He was
18 like, I thought it was a joke. But Carl watches him
19 cross the street, cross Gervais Street, go on over to
20 the Exxon station. And next thing he knows, just
21 minutes later a Columbia Police Department officer
22 drops by and then another and then another and then
23 another. And Carl Quintyne is thinking, he really
24 robbed the place.

25 Well, Carl then leaves and goes and takes a cab

1 fare, comes back, and Sergeant Taurus Sanders is
2 sitting there waiting on him. Sergeant Sanders goes
3 up to him and says, do you mind coming with me?
4 We've got a suspect. I understand you observed him
5 previously. Can you come over with us and take a
6 look at him?

7 Carl obliges. He takes time away from his work.
8 He cooperates with law enforcement and goes and looks
9 at him. And what does Carl Quintyne say on the
10 stand? I never forget a face. And he said as soon
11 as he saw him, that's him, but he's changed clothes.

12 Later on he goes back to the Columbia Police
13 Department. And Investigator Thomas has finished
14 searching the Pine Street residence and securing it.
15 They go back to the Columbia Police Department and he
16 gives a statement. And the defense put this
17 statement in. It's Defense Exhibit No. 2.

18 Carl Quintyne in his handwriting indicates: On
19 July 18th, 2008, somewhere between the hours of 8 and
20 9:00 p.m., a gentleman, about five-six to five-eight
21 wearing a yellow t-shirt and white hat walked past my
22 cab as I was backing into the stand and uttered, am
23 going to rob the store. Everyone needs to leave from
24 around here.

25 He walked across the Gervais Street to the gas

1 station across the Greyhound and entered that store.
2 In parentheses he has (gas station). About five to
3 ten minutes later I saw a City of Columbia cop car
4 approach the Greyhound bus, then another and another
5 until there were about six to seven cars.

6 When I came outside the Greyhound I found out
7 that this gentleman actually robbed the store. I
8 spoke to a few officers and told them what I heard
9 and they went off looking for him. I left the
10 Greyhound on a cab fare and when I returned there was
11 an officer waiting for me. He transported me to
12 where they were holding the same gentleman that
13 walked past me where I ID'd him to that person who
14 said -- I ID'd him to be that person who said, I am
15 going to rob that store.

16 Why would Carl Quintyne have any reason to make
17 this up? He is a cabbie across the street just
18 trying to make a living. He doesn't care about
19 Richard Kough. He doesn't know Tonya McGeorge. He
20 has no reason to make anything up.

21 And on that note, Mr. Johnson made a big to-do
22 about the fact that Carl Quintyne says the man was
23 wearing a cap. Well, if he was lying, wouldn't he
24 make sure everybody is consistent and say the exact
25 same thing? He wrote down and told the officer after

1 the show-up what he saw. Investigator Thomas nor any
2 other police officer knew that information;
3 therefore, did not look for another white cap. I'll
4 talk about that a little bit more.

5 You also heard from Lisa Taylor, the district
6 manager at the Exxon. She just testifies to you all
7 that she gets there late, she gets in the car with
8 Tonya, she is there to support her and tells you all
9 that Tonya sat there, looked at him good and said was
10 80, 90 percent sure that that was the person and that
11 Tonya had indicated he had changed clothes.

12 Again, she has no reason to lie. And again, if
13 she were going to lie and try to make the case
14 better, she'd say, oh, Tonya said it just like that,
15 that's him. She'd make Tonya out to be more
16 confident than she really was. But Lisa has no
17 reason to lie. Even though Mr. Johnson kept trying
18 to say or get her to say that Tonya had said
19 70 percent, he kept lowering the percentages. But
20 all of the witnesses, Tonya and Lisa, stuck 80 to
21 90 percent. It wasn't 70 to 80. It wasn't
22 65 percent. 80 to 90 percent. And Tonya was adamant
23 the only reason it wasn't 100 percent is because the
24 lighting was different.

25 She was 80 to 90 percent sure that this man

1 entered the Exxon station. And while she turned
2 around to get cigarettes, he pulls a knife and
3 threatens her to get money.

4 The next officer that responds is Katrina
5 Eastwood of the City of Columbia police department.
6 Currently she is on light duty having surgery for a
7 work-related injury. She reports exactly what the
8 victim tells her which is consistent with what Tonya
9 had said all along and told the 911 operator, with
10 the exception of sandy brown, sandy blonde. I'm not
11 going to go into that any more.

12 The next officer, Sergeant Taurus Sanders.
13 Sergeant Sanders I believe is a class act officer.
14 He was patrolling the region he is assigned to. He
15 goes to He makes sure that there
16 are other officers, eight to ten officers surrounding
17 the house. He gets permission from a keyholder. He
18 does not give his name, but at the time the name of
19 the keyholder was not very important to him. He is
20 trying to find a man who has just robbed a woman.

21 He goes into the house and he secures it. He
22 sees the defendant in the bathroom; State's Exhibit
23 No. 23, in this bathroom. He indicates other
24 officers have seen the defendant through the window.
25 He's changing clothes. The defendant is brought

1 outside. Sergeant Taurus Sanders sees the infamous
2 yellow jersey on the floor.

3 You also heard from Paul Nelson, ID tech. He is
4 a real crime scene investigator, not like the ones
5 you see on TV. He can't find a piece of hair and
6 immediately get a photograph to match it or anything
7 like that. He processes the scene. He photographs
8 the scene. He takes a fingerprint from the door. It
9 does not match the defendant. He indicates to you
10 that this is a fresh fingerprint. He indicates to
11 you that other people have come in and out of the
12 store.

13 You can see on the video that there are two to
14 three customers that come in while this robbery is in
15 process and they leave after the defendant leaves. I
16 submit to you that fingerprint belongs to one of
17 them. But as Investigator Thomas discussed, by the
18 time law enforcement all got there those customers
19 had left. So there is no way to compare it to those
20 individuals.

21 He tells you that it's impossible basically to
22 swab for DNA at such a location. He then goes to the
23 house. He collects the t-shirt; he collects the six
24 dollar bills that are also found on the floor; and he
25 photographs the scene. Mr. Johnson wanted to attack

1 his credibility through another witness. I show you
2 State's Exhibit No. 32. Because Investigator Nelson
3 had testified that the letters A corresponding on
4 this diagram represent a window and that there is no
5 window drawn in the bathroom. Even though clearly in
6 the photograph, State's Exhibit No. 23, there is a
7 window where the officers could have viewed in it.

8 Beg your indulgence. You also heard from the
9 owner of [REDACTED] located right here. She
10 indicates she lives on that street. She is the
11 owner. It's been a boarding house for some time and
12 she tells you she's never rented to a white male and
13 she also testified that the people living at that
14 location, the tenants, were not permitted to have
15 roommates, though they could have overnight guests.
16 However, she'd never seen the defendant in the area.

17 She also gives a description of the tenant. She
18 names him as Sylvester Roberson that gives permission
19 to enter the home. It's the same description as the
20 person that Investigator Thomas and Sergeant Sanders
21 described to you all.

22 Mr. Johnson made a great big deal on cross
23 examination with both of them about how they did not
24 get consent from this person. I'm sorry. Didn't get
25 any sort of written consent, didn't check his

1 driver's license, nothing of that nature. But even
2 then the defendant gets on the stand and says, yeah,
3 Sylvester is the one that let me in the house. So
4 that's not even an issue for argument at this point.

5 Sylvester let them in the house, told them it
6 was okay to go inside, found the defendant with the
7 clothing and the money on the floor.

8 Now I come to Billy Kirkland. And let's be
9 forthright about Billy Kirkland. In and of itself,
10 Billy Kirkland's record is offensive. However, he
11 took the stand and he told you what his record was.
12 He has nothing to gain from testifying in this case.
13 All of his charges, although how heinous and
14 deceptive they may be, are closed.

15 He claims that he's clean. He certainly
16 appeared clean on the stand. And he seems to be
17 trying to get by and do the right thing. But,
18 regardless, he voluntarily sends Columbia Police
19 Department this letter, State's Exhibit No. 35. And
20 he read the letter, and I'm going to read it one more
21 time. And you'll have this to take back with you.

22 Sir, I have spent some time with an inmate named
23 Richard Kough. He is in here for armed robbery.
24 There are some things I feel you might need to know.
25 Subject Kough asked me to be an alibi for him and

1 asked me to write a statement. I refused. However,
2 he did get someone here to do it for him. I got the
3 name of the inmate that did a statement for him.
4 Also Kough confided in me that he is guilty of the
5 charge. I am willing to tell you all I know under
6 one condition. I must be picked up from jail and
7 taken to the Columbia Police Department. I will
8 not -- not is underlined twice -- talk to anyone
9 while here at jail. I want to be picked up only for
10 my statement to you. I want a good word to the judge
11 in General Sessions court that I be allowed to go to
12 drug rehab. Plus, I do smoke, and I would welcome a
13 cig. For these two requests, I'll tell all and
14 testify if needed.

15 At the time the man wanted help fighting a drug
16 addiction and he wanted a cigarette. But yesterday
17 when he came in here, it was on his own volition. No
18 one was forcing him to be here. He came and had to
19 tell strangers of his convicted past. But he did so.
20 And it is what it is, ladies and gentlemen.

21 Jail, there's a lot of bad people in it.
22 Richard Kough made him a witness. The State didn't.
23 He has absolutely no beef in this game.

24 And finally I want to talk about Investigator
25 Arthur L. Thomas. He was the lead investigator on

1 this case, one of ten in the City of Columbia, one of
2 ten investigators that's assigned to work all major
3 crimes and homicides in our city.

4 He goes to the Exxon station. He immediately
5 knows that there will be video. He reviews the
6 video. He testifies that he gets a better
7 description than the video showed him here. And he
8 testifies it makes sense. The more you make copies
9 of something the worse the quality is going to be.
10 And we don't have the system that the Exxon station
11 has to review it.

12 He gets a good description. He is meeting with
13 the victim when he gets a call that Officer Bowman
14 who is now believed to be in Iraq has gotten
15 information from someone on Pine Street that a person
16 matching the description that has been sent out on
17 the dispatch from Tonya McGeorge calling 911 has been
18 found.

19 So Investigator Thomas goes over to Pine Street,
20 to that same house. You all will have all these
21 pictures back for your deliberation. He goes inside
22 where he's met with Sergeant Taurus Sanders. He goes
23 inside, testifies how the house is surrounded by law
24 enforcement for their own safety, for the safety of
25 anyone that may be in the house. All they know is

1 they have got an armed robber on the loose. They go
2 inside, and in the bathroom the defendant is found.

3 Now, there are discrepancies. Taurus Sanders
4 says it was a latched lock and it was flipped open
5 with a credit card. Investigator Thomas remembers
6 someone opening it up with a coat hanger. Who cares?
7 The door was locked. The defendant was inside a
8 locked door and he was not responding to law
9 enforcement knocking on the door.

10 He is brought out. Investigator Thomas picks up
11 the money, picks up the shirt, puts it on the bed for
12 it to be photographed by Investigator Nelson.
13 Investigator Thomas then goes back and gets Ms.
14 McGeorge and takes her to the scene. He tells her,
15 we have a suspect; I'd like for you to look at him.
16 He does not tell her this is the guy that did it. He
17 does not coach her in any way. Ms. McGeorge tells
18 him, this is the guy that did it. I am 80 to
19 90 percent sure. He's changed his clothes.

20 Investigator Thomas is in there. And Sanders,
21 Sergeant Sanders brings the cabbie, Carl Quintyne,
22 back. He is there when Carl Quintyne makes his
23 identification. Investigator Thomas goes back to the
24 City of Columbia Police Department, takes a statement
25 of Carl Quintyne, takes a statement of Officer

1 Bowman.

2 He sets up an appointment with Tonya McGeorge to
3 come back the next day. But unfortunately a homicide
4 occurs in the City of Columbia and he has to turn his
5 focus to investigating that case. And while he
6 wishes he could have, I submit to you he wishes he
7 could have gone back and closed up those holes and
8 written more detail in his report, he has to now
9 focus on a murderer, a murderer that's on the loose
10 in the City of Columbia.

11 While he wishes he could go back and put more
12 details in that report, he knows that he's got a
13 victim that ID'd him. He knows he's got an
14 independent witness who not only ID'd him but also
15 heard him say I'm going to rob the store that was
16 robbed minutes later. Investigator Thomas knows that
17 the shirt that he saw in the video is found on the
18 floor. He knows there is some quantity of cash on
19 the floor. But he has to focus on the homicide
20 investigation.

21 Mr. Johnson tried to get Investigator Thomas to
22 indicate problems he had in the case. He tried to
23 put down Investigator Nelson for not labeling a
24 window. He tried to attack Sergeant Sanders. Ladies
25 and gentlemen, these are City of Columbia Police

1 Department officers. And the citizens of this city
2 and this county should be proud that we have people
3 like Katrina Eastwood, like Paul Nelson, like Arthur
4 Thomas, like Taurus Sanders, like Daniel Bowman who
5 are protecting us. They are the people that stand
6 between us and the people that try to hurt us and our
7 families. They are the reasons we can sleep at
8 night. Tonya McGeorge is protected because of these
9 individuals.

10 Let's talk about this t-shirt. You're going to
11 be able to see the video. And you see the man in the
12 video. You see Richard Kough in the video wearing
13 this yellow shirt found exactly -- I mean, submitted
14 to you exactly the way it was when it was picked up,
15 inside out, as if someone has just taken it off.

16 There's a big discussion: Is this a jersey? Is
17 this a shirt? I submit to you, ladies and gentlemen,
18 a shirt is a shirt is a shirt. A turtle neck is a
19 shirt. A sweater is a shirt. A blouse is a shirt.
20 A jersey is a shirt.

21 When you turn it inside out, you can see it has
22 more of a jersey fabric type and it has those little
23 holes that Tonya McGeorge was describing. In opening
24 Mr. Johnson said it's a yellow shirt like anybody
25 would have. This is not common. Everybody does not

1 have one of these bright yellow shirts in their
2 closets. And if we were talking about a USC t-shirt,
3 sure. Or Clemson. I don't want to offend anyone.
4 We're talking about a yellow shirt. Richard Kough
5 wasn't banking on getting caught so quick.

6 Let's talk about Mr. Kough. He wants you to
7 believe he came down here for his wife's graduation
8 but he had to stay an extra day because he couldn't
9 get a ticket. He's smooth. He comes across very
10 smooth.

11 He also wants you to believe that on that
12 Saturday in July in a town he doesn't know he bonded
13 with a panhandler named Tony and that he and Tony
14 hung out at a boarding house. At first he says he
15 goes to the bedroom just to be by himself because
16 that's the way this boarding house was. Then on
17 cross he now gives us this revelation that he's been
18 hanging out all day with Tony. And he wants you to
19 believe that he and Tony are just chillin' out in
20 somebody else's bedroom, referring to State's Exhibit
21 21. But Tony wouldn't leave. I mean, he'd only been
22 there for seven and a half hours.

23 So he and Tony leave the boarding house, walk
24 down Pine Street, walk down Gervais Street like
25 you're going back towards the Capitol, take a right

1 at the Exxon. Which the Exxon he really didn't
2 notice even though it's sort of really big and out
3 there on the corner and walks down to Food Lion.
4 There's testimony the Food Lion is right about here.

5 And he buys him a beer. And that's the only way
6 he can get him to leave him alone, is to buy him a
7 beer. Why didn't he just stop at the Exxon and buy
8 him a beer I don't know. But I guess that would put
9 him the Exxon. And, see, he's trying to make you all
10 believe he wouldn't go there, he hadn't been there.

11 And then he goes and gets himself some pierogi
12 for supper. And then he's walking back, walks back
13 up Harden Street, up Gervais Street with his pierogi,
14 walks up Pine Street back in the boarding house, and
15 he is hot. So he's going to take a shower in this
16 place he'd never been there before.

17 He takes his clothes off and he's taking a
18 shower and he gets out and he's wanting you to
19 believe he's all soaking wet and the police are
20 knocking, but he wasn't going to open that door
21 because he is a coward. But his hair is not wet,
22 ladies and gentlemen.

23 And then he puts back on the same sweaty
24 clothes. He testified to you all about his perfuse
25 sweat issues. But he puts the shirt back on that he

1 has been sweating in all day, even though he's got
2 other clothes in the bag.

3 Ladies and gentlemen, he wants you to believe
4 that story. He wants you to believe he didn't
5 rob the Exxon. Right now Richard Kough is presumed
6 innocent. The presumption of innocence I like to
7 think of is like a big cloak over someone. But as
8 you heard testimony from the stand, each witness as
9 they left the stand pulled a piece of that cloak off.

10 Tonya McGeorge, Lisa Taylor, Carl Quintyne,
11 Katrina Eastwood, Taurus Sanders, Paul Nelson, Billy
12 Kirkland, Investigator A. L. Thomas, each of them,
13 Margaret Thomas Land, each of them as they left that
14 witness stand pulled a piece of that cloak of
15 innocence off of Richard Kough. And it's now
16 revealed. Richard Kough is now revealed to be a
17 guilty man.

18 Ladies and gentlemen, I ask you, you have a very
19 important job. Everybody in this courtroom has had a
20 job. It has been our job to prove to you this case
21 beyond a reasonable doubt. Mr. Johnson has done an
22 incredible job representing his client. The judge
23 has had a job refereeing the lawyers. That day Tonya
24 McGeorge had a job working at the Exxon station.
25 Carl Quintyne had a job working as a taxi cab driver.

1 All the police officers had a job and did their job.
2 Richard Kough stole. I ask you now to do your
3 job. Do not feel sorry for Richard Kough but find
4 him guilty of armed robbery and send a message to
5 Richard Kough that we are not going to tolerate him
6 coming to our community and terrorizing our people.
7 Thank you.

8 **THE COURT:** Thank you. Defense.

9 **MR. JOHNSON:** Your Honor, may we approach?

10 **THE COURT:** Yes.

11 (Whereupon, a bench conference is had)

12 **THE COURT:** All right. Thank you all, counsel.
13 We'll take up those matters outside of the jury's
14 presence. But we'll proceed with the closing
15 argument at this time.

16 **MR. JOHNSON:** Thank you, Your Honor. May it
17 please the Court. Good afternoon, ladies and
18 gentlemen. I want to thank you for being here and
19 taking your time to listen to this case. It is very
20 important not only to the State but also to my
21 client. And it's your job that you are sworn to do,
22 and I respect you for doing it.

23 Let me clarify something. I am not accusing
24 anybody from the State of lying. I'm not accusing
25 anybody from the State intentionally doing anything.

1 I know basically all those people over. They are
2 honorable people. They work hard. They do their
3 job.

4 When I was in the military, I was in the Navy.
5 I worked on a carrier. Everybody had to do their
6 jobs. One of the first things we learned was that
7 you have to be careful and pay attention to details
8 because not paying attention to details will kill
9 you. Something that you said, oh, well, that doesn't
10 matter, it's just grammatics, blonde, brown, a brown
11 cable, a light brown cable; pick the wrong cable,
12 you're dead.

13 Details are important. Do not let the State
14 fool you. If a detail matches with what the police
15 or the State are trying to prove to you, then it's
16 pertinent. If it don't match it, let's just forget
17 it, let's just move on; that doesn't mean something.
18 I'm telling you it means something. It should mean
19 something to each and every one of you. Because
20 that's the only way you can determine the truth.

21 The State has no right or no 100 percent ability
22 to be truthful no more than my client. The only way
23 you can determine who is telling the truth is because
24 of details. Details matter. That's what this whole
25 case is about.

1 I'm not accusing anyone of lying intentionally
2 or hurting anybody. I am accusing them of not paying
3 attention to details, the details that then allow
4 them to bring my client in here, accuse him of armed
5 robbery, convict him on details that they don't have.

6 They have to prove the case. It's not my client
7 that has to prove he is innocent. The State has to
8 prove he is guilty. That's what this whole thing is
9 about. That's what justice is about. That's why
10 they tell you when he walks in this courtroom he is
11 innocent. He is held at a standard because when you
12 mess with people's freedom, when you mess with the
13 ability to take their freedom, their rights and
14 things away from them, you have to have high
15 standards. Because without those standards we're in
16 chaos.

17 Where they can come in, everybody that's
18 sitting, everybody that ever worked in their life
19 have seen people that have done shanty work. They
20 didn't pay attention to details. They were lazy.
21 They didn't feel like doing it. They were busy.
22 Their children were sick. They left their job. They
23 had to go home early. And then who would care?

24 A person cooking a hamburger would drop a
25 hamburger on the floor, pick it up and put it right

1 back on the grill and say, well, fire will kill it,
2 and then hand it out to someone. Don't care. They
3 ain't got time. That's what the State is telling
4 you. He is guilty.

5 He sees this witness one time that night.
6 Within a matter of three hours the case is closed.
7 He did it, locked it up, put him away. Roughly three
8 hours, case closed.

9 The CSI guy, remember? He said he didn't look
10 for any other evidence. He didn't go back to try to
11 find anything else. All he wanted was a yellow
12 shirt. I am not trying to prove anybody is
13 intentionally lying or do anything like that. I am
14 saying they didn't do their job. Their job,
15 regardless of how hard it is, is isn't done until the
16 job is done. If you can't do your job, give it to
17 somebody else that can do it.

18 Being a policeman in Columbia, any city in this
19 country, is one of the hardest jobs in the world, but
20 it's still a job. They still have to do it. They
21 don't get excuses. If they can't handle it, let
22 somebody else do it. Don't do it. But then don't
23 come into court and because you didn't do your job
24 explain it away when you're trying to take this man's
25 freedom. It don't work like that. Or at least it

1 shouldn't work like that.

2 You as the jury do your job. Your job is to
3 look at the evidence to make a determination. And,
4 yes, it's not easy. It would be very hard to have in
5 your mind that I let a guilty person go home. But it
6 should also be just as hard to have in your mind that
7 I sent an innocent person to jail because I didn't do
8 my job. That's what this case is about. That's all
9 it's ever been about. I am doing my job.

10 Now, let's talk about that. Witness number one,
11 the victim. She saw a white male she said five-two
12 to five-five with, she described it as sandy blonde
13 hair. That's not grammatics. That's what she said.
14 I didn't make it up. I didn't bring it out. It's in
15 the paperwork. It's in her statement. Take it back
16 there and look at it.

17 If she was wrong about her description, she
18 could be equally wrong about her identification.
19 That's what that's about. Your mind, your soul, when
20 you are serious about what you're doing, it won't let
21 you lie. When she looked at him she didn't say, I'm
22 positive that's him. She said, well, maybe 80,
23 90 percent. I didn't make that up. She said it.
24 There is no positive identification. That alone is
25 reasonable doubt.

1 That's what reasonable doubt is, when reasonable
2 people look at the evidence and after looking at the
3 evidence you have doubt. She looked at the evidence,
4 looked at the witness [sic], viewed him and had doubt
5 that she couldn't say I positively identified you.
6 She tried to reason it and say, well, maybe he
7 changed clothes. They keep saying that, changed
8 clothes.

9 There is evidence that when he went in the house
10 he was wearing a red shirt and shorts. So now they
11 want you to believe he went into the house to change
12 clothes into a yellow shirt? Come on now. Think
13 about this. He didn't have any bags at the station.
14 She said that he ran, he left the station. I mean,
15 when he left the gas station he didn't have any bags.
16 What? He pulled it out of his sock? Where did he
17 get the yellow shirt from or the red shirt to change
18 from a yellow shirt to a red shirt? Where is all of
19 this money? Where is all these items? He had
20 somebody out there waiting for him? Is there is an
21 accomplice? There is no indication about that.

22 They just want you to forget about all that.
23 But that's part of their job. They've got to explain
24 all that to you. And they can't. They had someone
25 that fits the description. That's all they were

1 concerned with. They have all these people that
2 they've got all this information from. There is a
3 witness that told them where this gentleman was.
4 What's their name? Who was it? They can't tell you.
5 Do you see him here today? Did you see him during
6 the trial? They don't have him.

7 The person that had the key, they'd like to call
8 him a keyholder. What is that? That could be a
9 thief. Somebody let them in the house. We just take
10 it for granted that that's what happened. They have
11 no name. If it was a person that lived in the house,
12 they found the owner, where is the person who lived
13 in the house? Don't have him. Don't even have a
14 name. They just want you to make assumptions, make
15 assumptions. But when you're dealing with people's
16 lives, you as a jury can't make assumptions. You can
17 only make your decision based on the facts as it was
18 given to you. And I submit they gave you no facts.

19 As the CSI Investigator said, the only thing out
20 of all this evidence; remember, I asked him. And
21 believe me, I was not trying to discredit him. He is
22 about the most honest of any of the officers that
23 came here. But he just told the truth as it was. He
24 didn't try to shade it to the right. He didn't try
25 to shade it to the left. He said, that's what I got,

1 that's what's there. I said, of all this evidence,
2 what's connecting my client? He said the yellow
3 shirt.

4 All of this, they took two days, brought all of
5 this out to you, presented all these witness. They
6 got a yellow shirt. And they want you to convict him
7 for that.

8 She said that there was a knife. You're going
9 to have the video. You can look at it. Look at it.
10 You can see his hands on the desk. There is no
11 knife. I'm not saying that she is intentionally
12 lying about it. People get scared. When they're
13 thinking a robbery, they get scared. Your mind tells
14 you things. You know, this man might hurt me. He's
15 got a knife. He's got a gun. Or you can see a bulge
16 in someone's pocket and just believe it. It happens
17 that way. Your mind tells you all kind of things
18 when you're under stress.

19 There is someone that robbed her. She was
20 robbed. She has been through a lot that she should
21 not have to go through. I am not here saying that I
22 don't care. I care a lot. The point is, arrest
23 someone, but arrest the right person, not just
24 anybody.

25 To give her closure from finding my client

1 guilty would start another nightmare for my client,
2 being found guilty of something he didn't do. That's
3 not right. The State has to prove he did it.
4 They're asking you to make assumptions that he did
5 it. That's different.

6 The second person was Lisa Taylor, the district
7 manager. She came up. She told you that there was
8 about \$360 taken, which they didn't find. She told
9 you that she got there some 40 minutes after the
10 crime when they went to then look at my client. And
11 this is how he appeared.

12 They made a big thing about his hair is not wet.
13 Well, when they took this picture, it was at least an
14 hour, an hour and a half after he was taken out of
15 the shower. Your hair wouldn't be wet. He's
16 standing outside. It could be damp. But you can't
17 tell nothing. You can't tell that by this picture.
18 But they're making it sound like it is seconds or
19 minutes.

20 Now, remember this. This is very important.
21 They actually arrested my client within 15 minutes of
22 this robbery. 15 minutes. So within 15 minutes of
23 the robbery they had arrested someone. What happened
24 to the money? Where is the \$360? They found six
25 dollars. And, believe me, if there was \$360 there,

1 it would be laying on this table because that would
2 be evidence that he committed the crime.

3 Where is the knife? If they had found a knife,
4 it would be on this table because that would be
5 evidence that he committed the crime. Where are the
6 cigarettes? They would have it on this table because
7 that would be evidence that he committed the crime.
8 They would have a lighter on that table to prove that
9 he smoked cigarettes. That would be evidence. Where
10 is the evidence?

11 They want to tell you we didn't have time. It's
12 just out there. Well, I can't help that. If you
13 don't do your job, don't come and blame me when you
14 don't do your job. Because they are supposed to show
15 you evidence to convict my client. They haven't
16 shown you any.

17 The cab driver, I am not saying he's lying. But
18 they only want you to believe some of the things he
19 said. One important thing, and it was very
20 important, details; he said the person had a white
21 hat on that made the statement. He said he watched
22 that person walk to the Exxon station and go into the
23 Exxon station.

24 Within -- maybe I'm missing something, but if
25 I've got a white hat on on the outside and I walk

1 through the door and the camera picks me up in the
2 door, I've got a white hat on. There's no white hat,
3 no picture of the person that robbed the store having
4 a white hat on.

5 So that tells me two things. The person he saw
6 was not the person that robbed the store. And take
7 it a little further; if he was right and that was my
8 client with the white hat on, he didn't rob the
9 store. If it wasn't my client with the white hat on,
10 he still wasn't the person he saw that said that I'm
11 going to rob the store.

12 That's the only two logical, reasonable
13 conclusions you can come to. Either he wasn't the
14 one that robbed the store because there wasn't no
15 white hat on, or he wasn't -- if he didn't have a
16 white hat on, then he wasn't the one to say, I'm
17 going to rob the store. You can't have both.

18 Plus, they're talking about this time, within
19 minutes of him saying that the store was robbed,
20 that's not true. The cab driver got up there and
21 said it could be anywhere -- remember what he said.
22 It could be anywhere between 8 or 9:00, an hour gap.
23 But see, we use terms. We use terms like a few
24 minutes. A few minutes to me means three, four, five
25 minutes. A few minutes to that cab driver meant an

1 hour.

2 But because they didn't pay attention to
3 details, they made assumptions as to what he meant
4 when he said a few minutes. I asked him. Remember
5 what he said on the stand. Between 8 and 9. The
6 store was not robbed until 8:54 or 8:45. So he could
7 easily have seen somebody saying, I'm going to rob
8 the store, with a white hat on walk into that store
9 and leave. All they had to do was get the tape to
10 see if somebody walked into the store with a white
11 hat on. Did you see it? They didn't pay attention
12 to details. That's what this whole case is about.

13 The next person was the first officer on the
14 scene, Officer Eastwood. Now, it's very important
15 what she said. She said that the victim was nervous
16 and excited. Which is understandable. She was
17 robbed. She was scared. But she said the victim
18 told her sandy blonde hair and also said that the
19 person had a football jersey on. They want you to
20 make the jump that that jersey or that shirt -- now,
21 they've been calling it a shirt. It only became a
22 jersey when I proved that she said jersey. Now it's
23 a jersey.

24 But the shirt that they found, the yellow shirt
25 is now a football jersey. Attention to details

1 again. She told the person, the first officer on the
2 scene that it was a football jersey. What that means
3 is that it might have not been a football jersey. It
4 might have been a football jersey. But it means that
5 she was confused. That's the bottom line. It means
6 that the witness was confused as to what she saw.

7 Her being confused would mean that maybe she
8 didn't see the person as clearly as she believes she
9 did. Her being confused means that it's possible
10 that she could see my client and believe that was the
11 person. Because the police had him. We're going to
12 get to that part in a minute.

13 It is very easy to transfer intent on an
14 individual. Very easy. You're scared. You give a
15 description. The police get somebody that fits the
16 description. They stand them up at 10:30 at night in
17 the dark. Remember what she said. It was a real
18 dark. She was scared. They put the man in cuffs,
19 bring him out of a paddy wagon, stand him up and
20 shine lights on him.

21 What's she going to say? She don't want to be
22 wrong. It's the police. It's the people that
23 protect you. It's the people that you put your faith
24 in to do the right thing. It's the people that you
25 can't believe would tell a lie. It is the people

1 that you believe are the most honorable people
2 because they protect you. You want to believe them.
3 You want to believe that they are good at their job
4 and that that person is the person.

5 So you say, well, yeah, that's it. But then you
6 hesitate. You say, well, 80, 90 percent that's him.
7 Maybe it's his clothes. I can't put my finger right
8 on it. Something just ain't right. Maybe it's his
9 shirt. But I think that's him. They say, okay, case
10 closed, let's go on and move on to something else.
11 That's what they did.

12 Sergeant Sanders, once again, I'm not trying to
13 discredit what Sergeant Sanders said. Sergeant
14 Sanders worked very hard. He is also a good police
15 officer. But his involvement in it was very limited.
16 He didn't physically arrest my client. Remember the
17 whole thing about the door, going in and out the door
18 and they had to wait for a keyholder? You've seen
19 police kick in people's doors and things like that.
20 That's because they have the right to go inside.

21 The officers knew that under the circumstances
22 they didn't have the legal right or they deceived
23 themselves for having the legal right to go inside.
24 They either had to get a warrant or get permission.
25 Which they did. Or they say they did. But they was

1 in such a rush to get inside, they didn't bother to
2 even get the name of the person that let them in?
3 That's why the person is not here today. They
4 couldn't tell you who that person was. But that's
5 important. This man had a right to be inside. He
6 didn't have to open the door.

7 You are given Constitutional rights. We love to
8 say that, America, you have rights that are protected
9 by the Constitution. The only time everybody will
10 ever criticize you about using those rights is when
11 you don't do what they want you to do. The police
12 want you to believe that because he used his
13 Constitutional rights to say that he didn't have to
14 open that door that that makes him guilty. I say
15 that makes him a United States citizen acting upon
16 the rights that was given to him by the Constitution.
17 That doesn't make him guilty.

18 And for them to come in court now and tell you
19 to do that, that's like throwing dirt on the
20 Constitution. That was his right. If they had the
21 right to go inside, believe me, they would not have
22 waited.

23 Officer Sanders said that he saw two suitcases.
24 And he was honest with you. He said he couldn't say
25 that the two suitcases even belonged to my client.

1 They don't even have the suitcases. They didn't even
2 take them into evidence. Nobody really can tell you
3 where those suitcases was. They would like to tell
4 you they was in another room.

5 They could have been in the bedroom where my
6 client said they was. That would make more sense.
7 Why would you leave things in a room, a suitcase in a
8 room, in another room when you're in a bedroom in the
9 bathroom changing clothes?

10 They had no problem with putting all the clothes
11 they took out of the bag on the bed, which we're
12 going to talk about that as well. Remember the
13 police officer said that it's their protocol that you
14 don't touch anything? You leave it where it is. And
15 then the CSI person comes in and takes pictures and
16 then moves it.

17 These are experienced officers. Why do you then
18 move it from the bathroom and put it on the bed if
19 the yellow shirt was in the bathroom? The officer
20 stated that in his own statement that he took the
21 shirt out of the bag. Then he wants to come back and
22 tell you, well, it's a mistake. Just forget it.

23 That doesn't make sense. This is the lead
24 officer. This is the most senior officer they've
25 got. He's filling out his report and he said a

1 yellow shirt is taken out of the bag. Everything
2 else in the bag is on the bed. But they want you to
3 believe that the only thing on the bed that didn't
4 come out the bag is the yellow shirt. But that
5 doesn't make sense.

6 Does it mean that he went back in the bathroom
7 to change into the yellow shirt? Because the
8 evidence that they presented said he had a red shirt
9 on when he went into the house.

10 The only thing that makes sense is that they
11 went into his bag, went through the bags, found a
12 yellow shirt, spread it out on the bed. That's the
13 only thing that makes logical sense.

14 They found no money nowhere in the house. Six
15 dollars. Found no knife, no cigarettes, nothing else
16 in the house. Also fingerprints. If they had found
17 fingerprints, they would be in here telling you that
18 because of our advanced technique and all these
19 different things that we have, we got him. This is
20 his fingerprints. Because they don't find
21 fingerprints, they gave you all these reasons of why
22 they didn't find -- that the fingerprints didn't
23 match, that somebody else could have touched the
24 door, somebody else could have rubbed the
25 fingerprints. They give you all these excuses.

1 But you know what? They left out the main,
2 number one reason as to why the fingerprints didn't
3 match. And they always do that. He didn't do it.
4 It wasn't him. That's what lack of fingerprints also
5 shows. It shows guilt and it shows innocence.
6 Everything else in the middle is just gray. But they
7 never mentioned that. Because it doesn't help their
8 case to say that it shows that he might have not
9 touched the door, that he might have not been the one
10 to rob the store.

11 Officer Nelson which was a CSI guy, I asked him:
12 Did you find a knife? No. Fingerprints. Did the
13 fingerprints match? He found fingerprints.
14 Remember? That's why you never ask a question you
15 don't know the answer to. Because the prosecutor
16 tried to ask him, well, are these prints old or are
17 they like this? And he said no. He said they was
18 fresh. But they wasn't his. He answered it
19 honestly. He just told the truth.

20 No white hat, no pack of Newports, no lighter,
21 no money. All they have is a yellow shirt and a
22 maybe description by a victim who was traumatized.
23 That's it. That's their whole case. No more; no
24 less.

25 Investigator Thomas. Investigator Thomas is

1 just like anybody else in this courtroom. He wasn't
2 at the scene when it happened. He don't know who did
3 it. He only collected the evidence and presented it
4 to you. His opinion as to the guilt or innocence of
5 my client is not worth the paper it's written on,
6 because you are the jury and you make that
7 determination as to the guilt or innocence of my
8 client.

9 His job is to give you the evidence that he
10 collected. And that is what he did. Which was a
11 yellow t-shirt and a maybe identification by the
12 victim. That's all you've got.

13 He didn't even take the time to see the victim
14 any more after that night because he was busy. I
15 understand that. He is a busy man. But because he's
16 busy, should that take away from my client's ability
17 to defend himself or take away from my client's
18 ability to be proven innocent of something he didn't
19 do? If they don't do their job, it's not my client's
20 fault. If they don't go back and look to details,
21 it's not my client's fault. But he shouldn't be
22 harmed for it either. He shouldn't be harmed for it.

23 The last witness, the person that said that my
24 client confessed, this yellow piece of paper is the
25 paper that is the letter he wrote. You will take it

1 back to the jury room with you. I'm not trying to
2 change the evidence. Read it. Look at it. Look in
3 this corner where he does a reference as to what
4 robbery he's talking about. He wrote on here Food
5 Lion.

6 He admitted that he is a drug addict, a
7 crackhead. I called him that because that's what he
8 is. He was in jail trying to find a way to get out.
9 If that person that's sitting here, he is a
10 crackhead, he is a child molester, and the State is
11 wanting to bring him in here, put him on the stand
12 and present him to you as being a credible witness.
13 The only reason they did it because they don't have
14 nothing else. That is something that they have got
15 to the point that they have to bring him in to have
16 something.

17 He can't even remember yesterday but he's
18 telling you something that happened back in July. He
19 says on the stand that my client didn't talk to him
20 directly. He heard him talking to other people. In
21 the letter here, read it, he will say that my client
22 talked to him direct and told him.

23 Once again, it's about looking to details. When
24 I started I asked you to look at this case as a way
25 of a scavager hunt, to look for the truth. You pick

1 through it. You've got to pick through this stuff.
2 You've got to pick through stuff that makes sense,
3 stuff that don't make sense, and you've got to pull
4 the truth out of it.

5 I believe that if you pick through it and take
6 your time and look at it and uphold the oath that you
7 took that my client is innocent, the State must prove
8 him guilty. He doesn't have to prove himself
9 innocent. The State must prove him guilty beyond a
10 reasonable doubt.

11 My belief is what a reasonable doubt is -- the
12 judge will tell you in her instructions to you what
13 the law interpretation of reasonable doubt is. And
14 you have to go by what the judge says. My personal
15 interpretation of what reasonable doubt is is that
16 after you have looked at all this evidence, after you
17 have considered it and took your time and thought
18 about it, if reasonable persons such as yourselves
19 have doubt, that's a reasonable doubt. There's no
20 rocket science to it. There's no 50 percent,
21 25 percent, 30 percent. It's reasonable doubt,
22 reasonable people having doubts about the guilt or
23 innocence, the guilt of my client. That's reasonable
24 doubt.

25 Now, there's three possibilities of a decision

1 that you're going to have in this case. There are
2 three options that the judge is going to give you.
3 One is guilty of armed robbery, basically saying that
4 you believe that my client was the person that broke
5 into the store based on the evidence that he was the
6 person that broke into the store and robbed a lady
7 and that he was armed with a weapon, a knife.

8 The other choice you're going to have is that
9 you believe that that was my client that robbed the
10 store but there was no weapon. That's what they call
11 strong armed robbery, that there is no proof given to
12 you that there is strong armed. Such as the lack of,
13 if you could see it on the thing that the person
14 didn't have a knife, that's considered strong armed.
15 That's going to be a second option given to you.

16 The final one and the one that I think and
17 believe that you should come to after looking at the
18 evidence because the State have not proven my client
19 guilty of that charge is one of not guilty based that
20 there is no evidence presented to you by the State
21 that my client committed the crime.

22 I believe if you take your time and you do your
23 job, which is to look at the evidence, give it
24 serious consideration, that you will come to the same
25 conclusion that my client is not guilty of these

1 charges and return a verdict of not guilty. Thank
2 you.

3 **THE COURT:** Thank you. Does the State have
4 anything further?

5 **MS. GARFIELD:** Yes, Your Honor. I'll be brief,
6 Your Honor. May it please the Court?

7 **THE COURT:** Yes.

8 **MS. GARFIELD:** Mr. Johnson said don't let the
9 State fool you. I submit to you, don't let Richard
10 Kough fool you. The State of South Carolina submits
11 to all of you that Richard Kough is a very
12 intelligent and conniving man. He had this robbery
13 well planned out.

14 What brought him to South Carolina really, we'll
15 never know. But what we do know is he was at the
16 Greyhound station and for whatever reason he needed
17 some money. And he yells out to the cab driver, to
18 all the other people at the Greyhound station: I'm
19 going to rob the Exxon. Everybody stay away. I need
20 some money.

21 Ladies and gentlemen, I submit to you he was
22 wearing that yellow shirt and he was wearing a white
23 cap and he crossed the street. And he has got his
24 wheels in motion. And he goes, let the party begin,
25 I'm going to ditch the hat. That weakens the

1 identification. And then he goes into the store.

2 And this time I refer to State's Exhibit No. 28
3 in evidence and State's Exhibit 25. First 25. He's
4 over here at the Greyhound station. He says to the
5 cabbie, I'm going to rob the store. He walks across
6 the street, somewhere along the way ditches the hat
7 and enters the store.

8 I'm now going to refer to State's Exhibit 28,
9 and I want you to focus on the lower right screen.
10 I'm sorry. 29. State's Exhibit 29. And, Mr.
11 Rogers, I'll ask if you'll play it and pause it when
12 I ask you to.

13 (Video is played)

14 **MS. GARFIELD:** Here you can see Tonya physically
15 working behind the counter. She is waiting on
16 several customers that come into the store. It's
17 very busy on a Saturday night.

18 The defendant has entered the store. You can
19 see him sort of hanging out in the background while
20 other customers come in and out. I submit to you
21 he's making sure everybody leaves. As the customers
22 come in, he allows them to get in front of him. He's
23 continuing to let people get in front of him. Again,
24 letting someone else get in front of him. Pause it.

25 And while it's blurry, you can see -- I mean,

1 this with no disrespect, but you can see the
2 defendant's bald spot, the same bald spot that
3 Richard Kough showed you from that stand earlier
4 today.

5 Please continue. Now pause it. He may or may
6 not smoke, but Richard Kough knows the cigarettes
7 were behind the counter. He knows that Tonya
8 McGeorge or the clerk has to turn around to get the
9 cigarettes. So that's his perfect opportunity to
10 pull out a knife. She goes up to get the cigarettes,
11 turns back around.

12 Continue. Pause it. You can hear him, while
13 it's faint, this is a stick-up or hold-up. He's got
14 a knife in his arm. He's got it down low. He's
15 holding it so she can see it to put her in fear.

16 Go ahead. He's putting the money into his
17 pocket with his left hand, continuing to hold the
18 knife, shoving the knife forward while he's grabbing
19 the money.

20 Pause. Back up just a little bit. And I submit
21 to you, ladies and gentlemen, that yellow shirt is
22 the same shirt, the shirt that's found on the floor
23 of the bathroom where Richard Kough is found not
24 responding to the police officers. You can put that
25 down.

1 Richard Kough now leaves. He's not familiar
2 with the area. He hangs a right out of the gas
3 station, as Tonya reports, going towards the right.
4 She calls 911. You've got the 911 report where the
5 first thing she tells, Corner Pantry, white male,
6 armed with a knife, sandy blonde hair, last seen
7 running toward the Food Lion wearing yellow colored
8 shirt and blue jeans. He takes off running.

9 As she is relaying that to the 911 operator, the
10 911 operator is relaying that to dispatch. And every
11 City of Columbia Police Department officer who has a
12 Walkie-Talkie on their shoulder like Sergeant Sanders
13 had is hearing this broadcast. And immediately the
14 area around the Exxon station becomes saturated.
15 Investigator Thomas explained to us that the area
16 back here behind the Exxon becomes saturated, over
17 here, over here, and then even down towards the Food
18 Lion area, which would be all in this area, becomes
19 saturated.

20 Blue lights begin to come on. Sirens are being
21 heard. Richard Kough is on foot. He hears them. He
22 knows he's going to be caught. He ditches the knife
23 somewhere along his path. He's either running
24 directly down Gervais Street towards Pine or he takes
25 a right. The Exxon is over here. Is that right?

1 He goes down Harden, up Senate Street which is
2 right across from the building beside the Food Lion,
3 up Senate Street a block, and he's on Pine. He's
4 running one of those two paths, the only two paths to
5 the boarding house. He ditches the gun [sic]. He
6 gets to the boarding house and he knows he's got to
7 change his appearance.

8 He goes in the bathroom, goes inside the house,
9 takes the blue jeans off and puts on some shorts.
10 Then he goes in the bathroom and barricades himself,
11 locking the door, takes off this yellow shirt to put
12 on the Buckeye red t-shirt.

13 The police get there. He is not banking on them
14 getting there so fast. They find the yellow shirt at
15 his feet. While a description had not gone out to
16 stress so much on the blue jeans, the blue jeans are
17 left. You can see them laying on the bed in Exhibit
18 No. 21.

19 Richard Kough is eventually arrested. He admits
20 to you he's been in trouble with law enforcement
21 before. He goes down to Alvin S. Glenn Detention
22 Center. He tells you he is glad this day has finally
23 come so he can take the stand and tell you what's
24 happened.

25 He's the only person that looks at that.

1 videotape and says there is not a knife. So not only
2 does he want you to believe that he is not the person
3 that robs the Exxon; he also wants you to believe
4 that whoever really did it didn't have a knife. He
5 is the only person. Tonya McGeorge says there was a
6 knife. Investigator Thomas saw the video the first
7 time at the Exxon. He can see a knife.

8 I submit to you, ladies and gentlemen, a knife
9 was reflected in his hand. I submit to you, ladies
10 and gentlemen, that's his voice on the videotape
11 telling Tonya to hurry up; come on, come on, come on,
12 come on, come on.

13 He has been in jail waiting on this case, if my
14 calculations are correct, for 508 days. He has had a
15 long time to come up with a story that he presented
16 to you all today. He initially was going to try for
17 an alibi. That's what Billy Kirkland says, Billy
18 Kirkland who makes a reference of an armed robbery at
19 the Food Lion. If he was lying, he'd at least get
20 the business right. The story he came up with for
21 you today he's been thinking about for a long time.
22 Don't let Richard Kough fool you. Thank you.

23 **THE COURT:** Thank you, ladies and gentlemen of
24 the jury. I'm going to excuse you to your jury room
25 for just a very short break, and then the Court will

1 have to read you the jury instructions. And that may
2 take 15 or 20 minutes. So I'll let you have a very
3 quick break right now before we proceed on. I remind
4 you not to discuss the case until it's handed to you.

5 (Jury out at 2:46 p.m.)

6 **THE COURT:** Okay. Any issues that the parties
7 need to take up with the Court?

8 **MR. JOHNSON:** Yes, Your Honor. Your Honor, I
9 would like to put on the record that I did approach
10 the Court after the State initially, I think it was
11 the charge on the law, that I made the Court aware
12 that I had objections as to a statement made by the
13 State where I believe -- if this is not exact, this
14 is as close as I could get to it -- that the State
15 said, if you believe that he did not do it, you must
16 find him innocent and that if you believe that he did
17 do it, then you should find him guilty.

18 It is my belief that that statement shifted the
19 burden from the State proving that my client was
20 guilty to my client having to prove that he was
21 innocent. And as a result that that was a violation
22 and that as a result I requested a mistrial at the
23 time.

24 Then the Court indicated to me that it did not
25 agree with me, I guess that you would issue a

1 curative instruction. And I guess we need to make
2 that part of the record, that I did object at that
3 time.

4 **THE COURT:** All right. Thank you.

5 **MS. GARFIELD:** If I can just briefly respond,
6 Judge.

7 **THE COURT:** Absolutely.

8 **MS. GARFIELD:** First of all, if I did say that,
9 it's my apologies to the Court and to the defendant
10 as well as Mr. Johnson. I did not intend to do say
11 that. However, I do not believe it is a problem
12 because I did not say the defendant has to prove
13 himself innocent. I simply said if you do not
14 believe he did it, you must find him innocent. I am
15 instructing them to find him innocent. I, however,
16 did not mean to do anything harmful for the record.

17 I do believe the proper way to cure it is a
18 curative instruction. And I did say in my opening,
19 whatever the judge says, go with what the judge says,
20 not what I say. So when you do read that instruction
21 to the jury, you can even indicate Ms. Garfield may
22 have said innocent, or however you wish to handle
23 that I believe would be appropriate.

24 **THE COURT:** Okay. I believe that the jury
25 instructions will be able to take care of this.

1 Because throughout closing, throughout the opening
2 statements and throughout various times in the trial
3 I did indicate to the jurors that nothing the
4 attorneys say is evidence, that they should listen to
5 everything from the stand.

6 Now, mind you, when you're giving them more of
7 an instruction, they're not looking at that as
8 evidence or something they should consider. So I
9 will make at the appropriate time in reading my
10 instructions some emphasis on that point, that what
11 the actual instructions would be to them; and,
12 therefore, respectfully deny the mistrial motion.

13 **MR. ROGERS:** And, Your Honor, if I could have
14 just a second to confer with co-counsel?

15 **THE COURT:** Sure.

16 (Pause)

17 **MS. GARFIELD:** Nothing further from the State.

18 **THE COURT:** Nothing further?

19 **MS. GARFIELD:** No, ma'am.

20 **THE COURT:** Okay. And then if you all will look
21 at the verdict forms.

22 (Whereupon, a bench conference is had)

23 **THE COURT:** Jurors, please.

24 (Jury in at 2:57 p.m.)

25 **THE BAILIFF:** Your Honor, the jury is present.

1 **THE COURT:** Thank you. Ladies and gentlemen of
2 the jury, we are now ready to conclude the trial with
3 respect to me giving you your jury instructions. As
4 is always my instruction, the jury charge needs to be
5 in the province of the jury, and no one needs to
6 leave the courtroom, interrupting, coming in or out.
7 So I'm going to ask that the doors be secured. If
8 you do not plan on staying throughout the entire
9 instruction, then you need to leave at this time.

10 Okay. Please direct your attention to me. I
11 just want to remind you that a defendant is never
12 required to prove himself innocent. Instead, the
13 State has the burden of proving the defendant guilty
14 beyond a reasonable doubt. So to the extent that by
15 the defendant putting himself up for testimony or
16 presenting any type of case, or even the defense
17 counsel cross examining, that in no way shifts the
18 burden to the defendant. The defendant is only
19 required -- excuse me. The State is only required to
20 prove the defendant guilty; but, again, the defendant
21 is never required to prove himself innocent. So to
22 the extent that there has been any misstatements to
23 make you think that that's not clear in your mind, I
24 want to re-instruct you in that regard.

25 Now, Defendant Richard Kough is charged with

1 armed robbery. Now, Mr. Foreperson and members of
2 the jury, you have heard the evidence and the
3 arguments of all parties. I will now explain to you
4 the law which applies to this action.

5 I remind you that during this trial you and I
6 have certain duties to perform. As the trial judge,
7 it is my responsibility to preside over the trial of
8 this case, and I have the duty to rule on the
9 admissibility of the evidence offered during this
10 trial.

11 You are to consider only the competent evidence
12 before you. If there was any testimony ordered
13 stricken from the record in this case during the
14 trial, you must disregard that testimony. You are to
15 consider only the testimony which has been presented
16 from this witness stand and any exhibits which have
17 been made a part of the record in this case and any
18 stipulations of counsel.

19 A stipulation is an agreement, admission or
20 concession made in judicial proceedings by the
21 parties or their attorneys. Stipulations are binding
22 upon those who make them. A stipulation is an
23 agreement or an understanding. The Court and jury
24 must accept stipulations as binding upon the party.
25 Therefore, if counsel for the parties have stipulated

1 to any fact or any fact has been admitted by counsel,
2 you are to regard that fact as being conclusively
3 proved as to the party or parties making the
4 stipulation or admission.

5 I have the additional duty to charge you with
6 the law applicable to this case. As the presiding
7 judge, I am the sole judge of the law of this case,
8 and it is your duty as jurors to accept and apply the
9 law as I now state it to you. If you already have an
10 idea as to what the law is or what the law ought to
11 be and it does not agree with what I now tell you the
12 law is, you must abandon your prior ideas because you
13 are sworn to accept the law and apply the law exactly
14 as I state it to you.

15 In every case tried in this court before a jury
16 the jury is the sole and exclusive judge of the facts
17 in a case. The trial judge cannot intimate, state,
18 comment on or make any statement to a trial jury
19 about the facts in a case. You, the jury, are the
20 sole judge of the facts in this case. Therefore, you
21 are not to infer that I have any opinion about the
22 facts in this case from what I have said during the
23 progress of this trial in ruling upon the
24 admissibility of evidence or otherwise or anything
25 that I say now during the course of this instruction

1 to you.

2 The law does not allow me to have an opinion
3 about the facts in this case. This is a matter
4 solely for you, the jury, to determine. As jurors,
5 it is your duty to determine the effect, value,
6 weight and truth of the evidence presented during
7 this trial.

8 The indictment charges the defendant with the
9 offense of armed robbery. I remind you that the fact
10 that a defendant has been arrested, charged and
11 indicted in this case is not evidence and cannot be
12 considered by you as evidence of guilt in this case,
13 nor does it create any presumption or inference of
14 guilt.

15 The indictment is simply the formal written
16 instrument which contains the charge made against the
17 defendant. It is merely the formal document by which
18 this case is brought into this court. The defendant
19 has pled not guilty to the indictment. Therefore,
20 the burden is on the State to prove the defendant
21 guilty beyond a reasonable doubt.

22 It is a fundamental rule of law that no matter
23 how grave or serious the offense with which a
24 criminal defendant is charged, the defendant is
25 presumed innocent unless and until the State has

1 established guilt beyond a reasonable doubt.

2 The presumption of innocence is a substantial
3 right to which every defendant is entitled. A person
4 charged with committing a criminal offense in South
5 Carolina is never required to prove himself innocent.
6 This presumption of innocence is legal proof of
7 innocence. The presumption of innocence remains with
8 the defendant at all times throughout the trial
9 proceeding and it does not end when you begin your
10 deliberations. It accompanies the defendant until
11 you reach a verdict of guilt based on the evidence
12 before you satisfying you beyond a reasonable doubt.

13 Therefore, this presumption of innocence is like
14 a robe of righteousness placed about the shoulders of
15 a defendant that remains with the defendant until it
16 has been stripped from a defendant by evidence
17 satisfying you of a defendant's guilt beyond a
18 reasonable doubt.

19 The defendant is charged with armed robbery.
20 The State must prove all elements of the offense
21 beyond a reasonable doubt. The State must first
22 prove beyond a reasonable doubt that the defendant
23 committed robbery, meaning he took personal property
24 from the persons or immediate presence of another
25 person.

1 Property is in the presence of a person if it is
2 within the person's reach, inspection, observation or
3 control so that the person could, if not overcome
4 with violence or prevented by fear, keep possession
5 of the property.

6 Robbery is basically larceny compounded or
7 aggravated by intimidation or force in the taking of
8 the property from the person or in the presence of
9 another.

10 The State must also prove beyond a reasonable
11 doubt that the defendant took or carried away the
12 property of another against the owner's will or
13 without his or her consent with the intent to
14 permanently deprive the owner of the property and to
15 keep the property for the defendant's own use.

16 The slightest removal of the property or the
17 complete possession of the property even for an
18 instant by the defendant is sufficient to show a
19 taking and carrying away of the property.

20 The property must have been taken with violence
21 or by putting the owner of the property in fear of
22 violence. This violence must be actual personal
23 violence or the threat of it. The degree of force is
24 immaterial so long as such force or threat of force
25 is actually sufficient to overcome the victim's

1 resistance. This violence or intimidation must
2 either proceed or be contemporaneous with the taking
3 of the property.

4 Finally, the State must prove beyond a
5 reasonable doubt that the defendant was armed with a
6 deadly weapon during the robbery. A deadly weapon is
7 any article, instrument or substance which is likely
8 to cause death or great bodily harm. Whether an
9 instrument has been used a deadly weapon depends on
10 the facts and circumstances of each case.

11 The following are examples of instruments which
12 may be deadly weapons: A pistol, a shotgun, a rifle,
13 a dirk, a dagger, a knife, a slingshot, metal
14 knuckles, a razor, gasoline, a fire bomb or Molotov
15 cocktail, and lighter fluid. A gun may be a deadly
16 weapon even if it is not operating.

17 If you find that the State has failed to prove
18 that the defendant was armed with a deadly weapon,
19 you may then consider whether the State has proved
20 beyond a reasonable doubt that the defendant
21 committed strong armed robbery which is a
22 lesser-included offense of armed robbery.

23 To prove strong armed robbery the State must
24 prove beyond a reasonable doubt all of the elements
25 that I have just explained except that the defendant

1 was armed with a deadly weapon.

2 In order to prove strong armed robbery the State
3 must prove beyond a reasonable doubt that the
4 defendant took the personal property from the person
5 or presence of another person without that person's
6 consent and carried it away.

7 Property is in the possession of a person again
8 if it is within the person's reach, inspection,
9 observation or control so that the person could, if
10 not overcome with violence or prevented by fear,
11 retain possession of the property.

12 The State must show that the defendant carried
13 the property away with the intent to permanently
14 deprive the owner of the property and to convert the
15 property to the defendant's own use.

16 The slightest removal of the property or the
17 complete possession of the property even for an
18 instant by the defendant is sufficient to show a
19 taking and carrying away of the property.

20 The taking and carrying away of the property
21 must have been done with force or by putting the
22 owner of the property in fear of violence. The
23 element of force in the offense of strong armed
24 robbery may be either actual or constructive. Actual
25 force implies physical violence. Constructive force

1 includes all demonstrations of force, menaces and all
2 other means by which the person robbed is put in fear
3 sufficient to overcome the free exercise of the
4 person's will or prevent resistance of the taking of
5 the property.

6 Regardless of how slight the cause creating the
7 fear is or by whatever circumstances the taking is
8 accomplished, if the transaction is accompanied by
9 circumstances of terror, such as threatening by word
10 or gesture as in the common, everyday experiences of
11 life are likely to create an apprehension of fear and
12 induce a person to give up the property, then the
13 person is placed in fear.

14 Further, the violence or intimidation must
15 either precede or be contemporaneous with the taking
16 of the property. Motive is not an element of armed
17 robbery or strong armed robbery. And, therefore, the
18 State need not prove motive to support an armed
19 robbery or strong armed robbery conviction. Although
20 the State is not required to prove motive, any
21 existing evidence of motive may be considered by you
22 in determining whether there was criminal intent to
23 commit armed robbery or strong armed robbery.

24 To establish criminal liability, criminal intent
25 is required. In the law criminal intent is a state

1 of mind which operates jointly with an act or
2 omission to constitute the commission of a crime.
3 Criminal intent is a mental state of conscious
4 wrongdoing.

5 Criminal intent must be proven by the State
6 beyond a reasonable doubt. Criminal intent includes
7 those consequences which represent the very purpose
8 of which an act is done or are known to be
9 substantially certain to result regardless of one's
10 desire.

11 Intent may be shown by acts and conduct of the
12 defendant and other circumstances from which you may
13 naturally and reasonably infer intent. Criminal
14 intent is always a matter that must be determined by
15 the jury from the circumstances surrounding the
16 situation. There is no way to prove intent to a
17 mathematical certainty. There is no way medical
18 science can dissect a person's brain and determine
19 what the person had in mind. So the law says that
20 criminal intent may be inferred from the
21 circumstances shown to have existed.

22 This is how you make a determination of whether
23 or not the element requiring intent was present. It
24 is not necessary to establish intent by direct and
25 positive evidence, but intent may be established by

1 inference in the same way as any other fact, by
2 taking into consideration the acts of the parties and
3 all the facts and circumstances of the case.

4 If facts are proved beyond a reasonable doubt
5 sufficient to raise an inference of intent to your
6 satisfaction, this inference would be simply an
7 evidentiary fact to be taken into consideration by
8 you, the jury, along with other evidence in the case,
9 and you may give it such weight as you determine it
10 should receive.

11 An issue in this case is the identification of
12 the defendant as the person who committed the crime
13 charged. The State has proved the burden of --
14 excuse me. The State has the burden of proving
15 identity beyond a reasonable doubt. You must be
16 satisfied beyond a reasonable doubt of the accuracy
17 of the identification of a defendant before you may
18 convict the defendant.

19 Identification testimony is an expression of
20 belief or impression by a witness. You must
21 determine the accuracy of the identification of the
22 defendant. You must consider the believability of
23 each identification witness in the same way as any
24 other witness.

25 You may consider whether the witness had an

1 adequate opportunity to observe the offender at the
2 time of the offense and thereafter make an
3 identification. This will be affected by things like
4 how long or short a time was available, how far or
5 close the witness was, the lighting conditions and
6 whether the witness had the chance to see or know the
7 person in the past.

8 Once again, I instruct you the burden of proof
9 on the State extends to every element of the crime
10 charged, and this specifically includes the burden of
11 proving beyond a reasonable doubt the identity of the
12 defendant as the person who committed the crime. If
13 after examining the testimony you have a reasonable
14 doubt as to the accuracy of the identification, you
15 must find that defendant not guilty.

16 The State has the burden of proving the
17 defendant guilty beyond a reasonable doubt. The
18 State is required to prove every element of the
19 charged offense by evidence which satisfies each of
20 you of the guilt of the defendant beyond a reasonable
21 doubt.

22 The defendant is not required to prove his
23 innocence. The burden of proving a defendant guilty
24 beyond a reasonable doubt always remains upon The
25 State of South Carolina.

1 Some of you may have served as jurors in civil
2 cases where you were told that it only necessary to
3 prove that a fact is more likely true than not true,
4 such as the greater weight or preponderance of the
5 evidence. In criminal cases the State's proof must
6 be more powerful than that. It must be beyond a
7 reasonable doubt.

8 A reasonable doubt is the kind of doubt that
9 would cause a reasonable person to hesitate to act.
10 The term "reasonable doubt" should be given its plain
11 and ordinary meaning. There are very few things in
12 this world that we know with absolute certainty, and
13 in criminal cases the law does not require proof that
14 overcomes every possible doubt.

15 If based on your consideration of the evidence
16 you are firmly convinced that the defendant is guilty
17 of the crime charged, you must find him guilty. If
18 on the other hand you conclude there is a real
19 possibility that he is not guilty, you must give the
20 particular defendant the benefit of the doubt and
21 find that defendant not guilty.

22 There are two types of evidence generally
23 presented during a trial: Direct evidence and
24 circumstantial evidence. Direct evidence is the
25 testimony of a person who asserts or claims to have

1 actual knowledge of a fact, such as an eye witness.
2 It is evidence that immediately establishes the main
3 fact to be proved.

4 Circumstantial evidence is proof of a chain of
5 facts and circumstances indicating the existence of a
6 fact. The law makes absolutely in distinction
7 between the weight or value to be given to either
8 direct or circumstantial evidence, nor is a greater
9 degree of certainty required of circumstantial
10 evidence than of direct evidence.

11 You should weigh all the evidence in the case.
12 After weighing all the evidence, if you are not
13 convinced of the guilt of the defendant beyond a
14 reasonable doubt, you must find the defendant not
15 guilty. If on the other hand after weighing all the
16 evidence you are convinced of the guilt of the
17 defendant beyond a reasonable doubt, you must find
18 the defendant guilty.

19 Necessarily you must determine the credibility
20 of witnesses who have testified in this case.
21 Credibility simply means believability. It becomes
22 your duty as jurors to analyze and to evaluate the
23 evidence and determine which evidence convinces you
24 of its truth.

25 In determining the credibility of witnesses who

1 have testified in this case, you may believe one
2 witness over several other witnesses or several
3 witnesses over one witness. You may believe only a
4 part of the testimony of a witness and reject the
5 remaining part of the testimony of that same witness.

6 You may believe the testimony of a witness in
7 its entirety or reject the testimony of a witness in
8 its entirety. You may consider whether any witness
9 has exhibited to you any interest, bias, prejudice or
10 other motive in this case. You may also consider the
11 appearance and manner of a witness on the witness
12 stand.

13 The rules of evidence ordinarily do not permit
14 witnesses to testify to opinions or conclusions. An
15 exception to this rule exists for witnesses we call
16 expert witnesses. A witness who by education and
17 experience has become expert in some art, science,
18 profession or calling may state an opinion as to the
19 relevant and material matter in which the witness
20 claims to be an expert and may also state the reasons
21 for the opinion.

22 You should consider any expert opinion received
23 in evidence in this case and, like any other
24 evidence, give it the weight you think it deserves.
25 If you decide that the opinion of an expert witness

1 is not based on sufficient education and experience
2 or if you conclude that the reasons given in support
3 of the opinion are not sound or that the opinion is
4 outweighed by other evidence, you may disregard the
5 opinion entirely.

6 An expert witness's testimony is to be given no
7 greater weight than that of other witnesses simply
8 because the witness is an expert. Further, you are
9 not required to accept an expert's opinion even
10 though it is not contradicted.

11 The testimony of a witness may be discredited or
12 impeached by showing that he or she previously made
13 statements that are inconsistent with his or her
14 present-day testimony. The earlier contradictory
15 statements are admissible only to impeach the
16 credibility of the witness and not to establish the
17 truth of the statements.

18 It is the province of you, the jury, to
19 determine the credibility if any to be given the
20 testimony of a witness that you have determined to
21 have given a prior inconsistent statement.

22 There has been evidence presented that witnesses
23 have made prior statements which are not consistent
24 with the witness's present testimony. You may use
25 this evidence to decide whether to believe the

1 witness. You may also use evidence of the earlier
2 contradictory statements to determine the truth of
3 those statements.

4 It is up to you to decide whether to believe the
5 earlier statements or the testimony given at trial.
6 If a witness is shown to have knowingly testified
7 untruthfully concerning any matter, material matter,
8 you may consider this in determining whether you
9 trust the witness's testimony as to other matters.
10 You may reject all testimony of that witness or give
11 all or part of the testimony the weight you think it
12 deserves.

13 A person who has a past criminal record is
14 competent to testify during a trial. A past record
15 does not affect the ability of that witness to
16 testify. The past record may be considered by you,
17 if at all, in determining the witness's
18 believability. Remember you are the sole judges of
19 the facts in the case and of the believability of any
20 and all of the witnesses.

21 I instruct you and emphasize that the fact that
22 a defendant did not testify in this case is not a
23 factor to be considered by you in any way in your
24 deliberations and in your consideration of the
25 question of the guilt or the innocence of the

1 defendant.

2 **MS. GARFIELD:** Judge, the defendant did testify.

3 **THE COURT:** I apologize. I apologize. Thank
4 you. I apologize. Okay. And then finally, your
5 verdict cannot be based on sympathy, passion,
6 prejudice, emotion or any other consideration not
7 evidence in this case.

8 It is mandated that your verdict be unanimous.
9 That means that every juror must agree on the jury
10 verdict. There cannot be any split or divided vote
11 in any form or fashion, such as eleven to one, ten
12 the two or nine to three. Each of you must agree.
13 Please do not sign the verdict form until every
14 single juror agrees.

15 With respect to the verdict form, particularly
16 directing it to the foreperson, you will be
17 responsible for going over the verdict form with the
18 jurors and signing it and dating it. On the verdict
19 form we have, as to the charge of armed robbery, we,
20 the jury, unanimously find the defendant guilty; or
21 as to the charge of strong armed robbery, we, the
22 jury, unanimously find the defendant guilty; or we,
23 the jury, unanimously find the defendant not guilty.

24 So obviously that are three different options
25 for your consideration. These are in no special

1 order. It is up to you as to how you wish to
2 consider and view all the evidence. That is within
3 the province of you as the jurors.

4 Now I am going to direct you to go to your jury
5 room. You are not to begin your deliberations until
6 we send in the verdict form as well as all of the
7 evidence. Thank you all, and I remind you not to
8 discuss the case.

9 And one other just note. I did have juror
10 number 136 indicate whether or not we could go past
11 5. Right now this case will be handed to you. You
12 all make up your minds as to how you wish to
13 deliberate. If we need to come back and do some more
14 in the morning, that is totally up to you. Thank
15 you.

16 **MS. GARFIELD:** Your Honor, will you instruct the
17 alternates?

18 **THE COURT:** One moment. Alternates, you need to
19 go until I release you. I just need to make sure
20 there is no issues with the attorneys first.

21 (Jury out at 3:20 p.m.)

22 **THE COURT:** All right. Any issues with the
23 attorneys?

24 **MS. GARFIELD:** None from the State.

25 **MR. JOHNSON:** Nothing from the defense, Your

1 Honor.

2 **THE COURT:** Okay. And if you all would check
3 the evidence, please. You can bring the alternates
4 out.

5 (Pause)

6 (Whereupon, the alternates are excused from the
7 case by the Court)

8 (Jury deliberating at approximately 3:25 p.m.)

9 **THE COURT:** Yes. The jurors had a note about
10 wanting to see the video. And so you all think it is
11 better that they come here?

12 **MR. JOHNSON:** I think it is, Your Honor, because
13 they --

14 **THE COURT:** Okay. And I will advise them that
15 they can stop it wherever they wish to or what have
16 you because we don't want to be in the province of
17 their mind, their thinking, their gestures, any of
18 that. So I personally believe that I'm going to let
19 them come in here and I'm going to ask everybody to
20 leave the courtroom.

21 **MS. GARFIELD:** That's fine. That's what I was
22 going to suggest.

23 **THE COURT:** And then that way they can stop and
24 turn and nobody is trying to zoom in on where they
25 exactly stop and what that means and all that kind of

1 stuff.

2 **MR. JOHNSON:** Well, the only problem is if they
3 can't run it.

4 **MS. GARFIELD:** Well, it's just a matter of
5 clicking it on the computer.

6 **THE COURT:** Is there an independent person who
7 can run the machine?

8 **ACE:** Somebody out of our office?

9 **MS. GARFIELD:** If anybody on the jury has
10 computer skills --

11 **MR. JOHNSON:** I think you can ask them though do
12 they just want to see it again or do they want to
13 stop it. If they just want to see it again --

14 **MR. ROGERS:** Your Honor, we can queue it up. If
15 there's only one of the three that they want to watch
16 I can --

17 **THE COURT:** The question is, if this will help
18 you all: How can we view the video? Can we have a
19 monitor to look at CD?

20 **MS. GARFIELD:** I think they should be allowed to
21 look at it as much as they want to.

22 **MR. JOHNSON:** Well, I've got a laptop here that
23 I'm sure I don't have any of you all's stuff on it.

24 **MS. GARFIELD:** Your Honor, we've just got
25 obviously videos from other crimes on there.

1 **THE COURT:** Well, you have other clips, too.

2 **MR. JOHNSON:** No. But the video, I don't have
3 any clips on there.

4 **THE COURT:** They said video and CD. Is that the
5 same thing?

6 **MS. GARFIELD:** It's the same thing.

7 **MR. ROGERS:** I think it's kind of like a shirt
8 or a jersey.

9 **MR. JOHNSON:** I can see them play it on my
10 laptop. They can use mine.

11 **MS. GARFIELD:** You can. We have installed a
12 special program on ours.

13 **THE COURT:** Okay. This is what I'll do because
14 I still would like everybody to be out of the room.
15 I'll have -- well, --

16 **MS. GARFIELD:** See if somebody is computer
17 savvy. It's just a matter of clicking it.

18 **THE COURT:** I'll see that.

19 **MR. ROGERS:** Your Honor, if there's one
20 particular individual CD, I can set that up for them.
21 And then they can just rewind and it play it or
22 whatever.

23 **MR. JOHNSON:** And then we can show the jury and
24 then leave.

25 **MR. ROGERS:** That won't be difficult for them.

1 It's just when you start switching out CD's, it adds
2 some extra steps to it.

3 **THE COURT:** I hate to send a note back that says
4 is there a particular CD because then again it zooms
5 in on their thought process and what they want. We
6 should offer the whole thing to them and maybe we
7 just sit here. I'll inquire whether or not there's
8 anybody computer savvy and we would all leave the
9 courtroom. All right. Very quickly, let me deal
10 with you. Let me do this. Bring the foreperson out,
11 and I'm just going to let him know we've got this
12 information so that he can inquire about anybody's
13 computer skills.

14 **MR. JOHNSON:** Your Honor, I think my client has
15 to be here.

16 **THE COURT:** Oh.

17 **THE BAILIFF:** Just stop right there, sir.
18 That's fine.

19 **THE COURT:** Don't worry about it.

20 **MR. JOHNSON:** I mean, when you bring him out, I
21 think my client has to be here.

22 **THE COURT:** Yeah.

23 **ACE:** Do you want me to run see if they're
24 getting him?

25 **MR. JOHNSON:** They say they're going to get him

1 now.

2 **THE COURT:** Hold on. Hold on.

3 **MR. ROGERS:** Your Honor, can we approach for a
4 second?

5 **THE COURT:** Yes. Approach.

6 (Whereupon, a bench conference is had)

7 (Whereupon, the foreman enters the courtroom)

8 **THE COURT:** Step out one second, because
9 somebody on the second trial needed to talk to me
10 about one quick moment. Sorry.

11 (Whereupon, the foreman exits the courtroom)

12 (Whereupon, a break is taken)

13 **THE COURT:** Okay. We ready? Foreperson,
14 please.

15 (Whereupon, the foreman enters the courtroom)

16 **THE COURT:** Mr. Foreperson, I apologize for all
17 of that. I'm chief judge of criminal court, and so
18 I've got lots of lawyers tugging at me sometimes, and
19 this just happened to be one of those times for me to
20 set up the next set of trials.

21 I did get your note indicating: How can we view
22 video and can we have a monitor to look at CD? We
23 have a couple of options here. We don't personally,
24 as the judge and then all the lawyers understand
25 this, we never want to invade the province of the

1 jury, your thought process, what you're thinking.

2 So there is a couple of options. One is to
3 bring you all back and then just play it and then you
4 all indicate wherever you want to stop it. The other
5 way is if there is somebody who is computer literate
6 within the jury, we all leave the courtroom and just
7 let you come in here and review what you want to see
8 or not and then go back to your jury room when you're
9 complete with that. And so would you like to --

10 **FOREPERSON:** Let me go back and check that.

11 **THE COURT:** Please do that. Okay. Thank you.
12 The reason is because it's all set up up here. It
13 would be too difficult to come in there.

14 **FOREPERSON:** That's fine. I'll let you know.

15 **THE COURT:** Okay. Thank you.

16 **MR. ROGERS:** Your Honor, when he shows up for
17 his answer, is it okay to just bring him on in?

18 **THE COURT:** Yeah.

19 **THE BAILIFF:** When he comes back with his
20 answer?

21 **THE COURT:** Yeah.

22 (Foreman enters the courtroom)

23 **THE COURT:** Yes, Mr. Foreperson. What is the
24 jury's decision?

25 **FOREPERSON:** We would prefer to come in here.

1 We have someone who can control the computer and that
2 allows us to view what we want to view.

3 **THE COURT:** In private, correct?

4 **JUROR:** In private.

5 **THE COURT:** Okay. That's fine. I'm going to
6 ask all persons to excuse themselves from the
7 courtroom, allow the jury to come in and then go back
8 in there for your deliberations.

9 **THE BAILIFF:** Your Honor, bring them in?

10 **THE CLERK:** Wait.

11 **THE COURT:** No. Not yet.

12 (Pause)

13 (Whereupon, the jury enters the courtroom at
14 approximately 4:20 p.m. and sees the videotape)

15 (Whereupon, a break is taken)

16 **THE COURT:** I'm ready for the jurors. Are you
17 all ready so I can release them?

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

19 **THE COURT:** Okay. Jurors, please.

20 (Jury in at 4:52 p.m.)

21 **THE BAILIFF:** Your Honor, the jury is present.

22 **THE COURT:** Okay. Ladies and gentlemen of the
23 jury, I received another note that you'd rather leave
24 today and come back and reconvene in the morning.
25 That is quite fine with the Court because we do want

1 to you give careful and deliberate consideration to
2 this case. That will be fine.

3 I just needed to put it on the record to release
4 you. So you are released for the evening. I remind
5 you not to discuss the case. Do not look at any news
6 media accounts or anything. Do not discuss it among
7 each other because you should be deliberating as a
8 unified group.

9 Do not continue any form of deliberations about
10 this case at all until you all arrive in the morning.
11 And you have requested at 10:00. So that's fine.
12 You'll be reporting directly to your room and then
13 the foreperson will tell you when to begin your
14 deliberations. You all have a safe evening, and
15 thank you so much for your attention throughout the
16 trial.

17 **FOREPERSON:** Thank you.

18 (WHEREUPON, Court's Exhibit No. 4 is marked for
19 identification.)

20 **THE COURT:** Any issues with the parties on this
21 case?

22 **MS. GARFIELD:** None from the State.

23 **THE COURT:** Okay. You all can leave cellphone
24 numbers with my clerk and then we'll just contact you
25 when we know of anything.

1 (Whereupon, the proceedings are concluded for
2 the day, to be reconvened tomorrow morning)
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1 Thursday, December 10, 2009

2 (WHEREUPON, Court's Exhibit No. 5 is marked for
3 identification.)

4 (WHEREUPON, Court's Exhibit No. 6 is marked for
5 identification.)

6 **THE COURT:** One matter. Ms. Garfield. Mr.
7 Johnson is here. And where is the client? Okay. I
8 can't do it until your client comes up. But if you
9 all would approach, trial people.

10 (Whereupon, a bench conference is had)

11 (Whereupon, a break is taken)

12 **THE COURT:** All right. In the matter of State
13 vs. Richard Kough.

14 **COURT REPORTER:** Quiet, please.

15 **THE COURT:** Order in the court. The jury had
16 come back and just requested to see the video again.
17 And I have gone ahead and made arrangements for them
18 to be in the other courtroom right next to here. All
19 the equipment was taken over there. And then they
20 are in there alone, as we did yesterday. So I just
21 want to place that on the record, that they are
22 viewing the video now. And then I'll just be in
23 further communication with you all once I know
24 anything else.

25 **MR. JOHNSON:** Thank you, Your Honor.

1 **MS. GARFIELD:** Thank you.

2 **THE COURT:** We will take a break at this point.

3 (Whereupon, a break is taken)

4 **THE COURT:** Where is Mr. Johnson?

5 **MR. JOHNSON:** I'm right here, Your Honor.

6 **THE COURT:** Okay. For purposes of the record
7 though, is that going to mess you up?

8 **COURT REPORTER:** No.

9 **THE COURT:** For purposes of the record, I've got
10 two juror notes. One is: Can we get a definition of
11 strong armed robbery? The other note says: Is it
12 possible to get written testimony of the proceedings,
13 transcript, specifically the clerk and Investigator
14 Thomas?

15 It will be the Court's thoughts that I will just
16 attach a copy of the strong armed robbery charge
17 because I cannot give them anything more than what
18 they ask, and then to also note to them that the
19 testimony will have to be played in court. The
20 testimony has not been transcribed. Let us know when
21 you are ready to hear testimony.

22 **MS. GARFIELD:** And you already put on the record
23 this morning that they requested the video, right?
24 Did we do that?

25 **THE COURT:** Yes. Just go ahead and take that in

1 and then I'll send the armed robbery back in.

2 (Pause)

3 (WHEREUPON, Court's Exhibit No. 7 is marked for
4 identification.)

5 **THE COURT:** Are you all ready for the jurors?

6 **MR. JOHNSON:** Yes, Your Honor.

7 **MS. GARFIELD:** Yes, ma'am.

8 **THE COURT:** Okay.

9 (Jury in at 12:32 p.m.)

10 (WHEREUPON, Court's Exhibit No. 8 is marked for
11 identification.)

12 **THE CLERK:** They were out in the hallway and
13 then they started discussing whether, well, who needs
14 to hear all of it? And I said, I told the foreperson
15 that if you need to, you can stop it at any time that
16 you've heard enough. He said, well, what if we want
17 to hear specific parts? I said, well, if it comes to
18 that, then you need to write it down because the
19 court reporter has to find it all. And I sent them
20 back in the jury room.

21 **THE COURT:** Okay. Thank you.

22 **COURT REPORTER:** And, Your Honor, if they just
23 want to hear specific parts, I can maybe read it back
24 from my notes.

25 **THE COURT:** Okay.

1 **COURT REPORTER:** That would be probably an
2 easier thing to do for me than trying to find it on
3 the digital recording if it's pieces-parts.

4 **THE COURT:** Okay. Well, regardless, at this
5 time his instruction is okay because you still have
6 to find it.

7 **COURT REPORTER:** Yes.

8 **THE COURT:** But we can do it that way.

9 (Pause)

10 **THE COURT:** It just says: Jury changed our
11 request for hearing testimony. And I assume that
12 means they don't want to hear any. You all can be at
13 ease.

14 (WHEREUPON, Court's Exhibit No. 9 is marked for
15 identification.)

16 (Whereupon, a lunch break is taken)

17 (WHEREUPON, Court's Exhibit No. 10 is marked for
18 identification.)

19 **THE COURT:** Now the jury has sent a note
20 indicating that they had not wanted the testimony in
21 the interim. So I could have heard from everybody
22 else. But now they sent a note saying: We would
23 like to hear cashier/clerk testimony only from start
24 'til question mark.

25 And so I am going to bring them in for purposes

1 of hearing that testimony and just advise them that
2 they could stop it whenever they wish and then go
3 back to their deliberations.

4 That testimony in total was only about 36
5 minutes. So that will just kind of give you an idea
6 for whose are in the courtroom waiting on other
7 matters.

8 **MS. GARFIELD:** And I thank the clerk's office
9 for the clock.

10 **THE COURT:** All right. You all ready?

11 **MR. JOHNSON:** Yes, Your Honor.

12 **THE COURT:** The State ready?

13 **MS. GARFIELD:** She has just gone to the
14 bathroom.

15 **MR. ROGERS:** Our victim just stepped out. Since
16 they're listening to her testimony, can we wait a
17 second?

18 **THE COURT:** Yes. Yes. I didn't see her gone.
19 That's okay.

20 (Pause)

21 **MS. GARFIELD:** Your Honor, we're ready.

22 **THE COURT:** Okay. Jurors, please.

23 (Jury in at 1:41 p.m.)

24 **THE BAILIFF:** All the jurors are present, Your
25 Honor.

1 **THE COURT:** Thank you. Ladies and gentlemen,
2 you have requested to hear the cashier/clerk's
3 testimony. Our court reporter is set up. And while
4 she is on real time, the reason we couldn't give you
5 the written instructions is because she has to clean
6 up all the editing. So it's best for you to just
7 hear it yourselves. You should indicate at any point
8 in which you're done, and then she will stop it and
9 then you all can go back to your deliberations.

10 You all didn't know this, for attorneys, but
11 they also just handed me a note asking for the
12 definition of armed robbery. As I sent the written
13 instruction back for strong armed robbery, I'll just
14 send that back with you into your jury room as well.

15 Madam Court Reporter, are you ready to proceed?

16 **COURT REPORTER:** Yes, ma'am.

17 **THE COURT:** Thank you.

18 (Whereupon, some of the testimony of Tonya
19 McGeorge is played for the jury)

20 **FOREPERSON:** Judge, we have heard enough.

21 (Whereupon, the testimony stopped being played
22 at the point of the following question and answer:

23 "Q And in the last few days have you had an
24 opportunity to review that videotape?

25 "A I have.)

1 **THE COURT:** Okay. Thank you very much. You all
2 can be excused to your jury room.

3 **FOREPERSON:** Thank you.

4 (Jury out at 2:00 p.m.)

5 **THE COURT:** Bailiff, this is the armed robbery
6 jury charge that I'm handing to take back with them.
7 Thank you. Any issues with the trial? Okay. Thank
8 you. We're now off of the trial.

9 (Whereupon, a break is taken)

10 (WHEREUPON, Court's Exhibit No. 11 is marked for
11 identification.)

12 **THE COURT:** All right. I understand that the
13 jurors have a verdict. Is that correct, Mr. Bailiff?

14 **THE BAILIFF:** Yes, ma'am.

15 **THE COURT:** Are the parties ready to receive the
16 verdict?

17 **MS. GARFIELD:** The State's ready.

18 **MR. JOHNSON:** The defense is ready, Your Honor.

19 **THE COURT:** Thank you. Jurors, please.

20 (Jury in at 2:50 p.m.)

21 **THE BAILIFF:** All the jury is present, Your
22 Honor.

23 **THE COURT:** Mr. Foreman, have you and the fellow
24 members of your jury reached a verdict?

25 **FOREPERSON:** Yes, we have.

1 **THE COURT:** Thank you. If you will please hand
2 it to the bailiff.

3 (Foreman complies)

4 **THE COURT:** Madam Clerk, would you please
5 publish the verdict.

6 **THE CLERK:** Yes, Your Honor. State of South
7 Carolina, in the County of Richland, in the Court of
8 General Sessions, indictment number 2009-GS-40-6661,
9 State of South Carolina vs. Richard Kough; as to the
10 charge of armed robbery, we, the jury, unanimously
11 find the defendant guilty, signed Nicholas Montanez.
12 Mr. Foreman, is this your verdict and the verdict of
13 the entire jury?

14 **MR. FOREPERSON:** Yes, it is.

15 **THE CLERK:** Thank you.

16 **MR. JOHNSON:** Your Honor, will you poll the
17 jury, please?

18 **THE COURT:** Yes.

19 **THE CLERK:** Ladies and gentlemen of the jury
20 panel, I'm going to call your number, and I'm going
21 to ask each of you two questions. If you would
22 answer yes or no to each question. Number 136, was
23 this your verdict?

24 **JUROR:** Yes.

25 **THE CLERK:** Is it still your verdict?

1 *JUROR:* Yes.

2 *THE CLERK:* Number 261, was this your verdict?

3 *JUROR:* Yes.

4 *THE CLERK:* Is it still your verdict?

5 *JUROR:* Yes.

6 *THE CLERK:* Number 301, was this your verdict?

7 *JUROR:* Yes, it was.

8 *THE CLERK:* Is it still your verdict?

9 *JUROR:* Yes.

10 *THE CLERK:* Number 182, was this your verdict?

11 *JUROR:* Yes.

12 *THE CLERK:* Is it still your verdict?

13 *JUROR:* Yes.

14 *THE CLERK:* Number 55, was this your verdict?

15 *JUROR:* Yes.

16 *THE CLERK:* Is it still your verdict?

17 *JUROR:* Yes.

18 *THE CLERK:* Number 74, was this your verdict?

19 *JUROR:* Yes.

20 *THE CLERK:* Is it still your verdict?

21 *JUROR:* Yes.

22 *THE CLERK:* Number 246, was this your verdict?

23 *JUROR:* Yes.

24 *THE CLERK:* Is it still your verdict?

25 *JUROR:* Yes.

1 **THE COURT:** Number 25, was this your verdict?
2 **JUROR:** Yes.
3 **THE CLERK:** Is it still your verdict?
4 **JUROR:** Yes.
5 **THE CLERK:** Number 79, was this your verdict?
6 **JUROR:** Yes.
7 **THE CLERK:** Is it still your verdict?
8 **JUROR:** Yes.
9 **THE CLERK:** Number 176, was this your verdict?
10 **JUROR:** Yes.
11 **THE CLERK:** Is it still your verdict?
12 **JUROR:** Yes.
13 **THE COURT:** Number 217, was this your verdict?
14 **JUROR:** Yes.
15 **THE CLERK:** Is it still your verdict?
16 **JUROR:** Yes.
17 **THE CLERK:** Number 219, was this your verdict?
18 **JUROR:** Yes.
19 **THE CLERK:** Is it still your verdict?
20 **JUROR:** Yes.
21 **THE CLERK:** The jury has been polled, Your
22 Honor.
23 **THE COURT:** Thank you.
24 **MR. JOHNSON:** Thank you.
25 **THE COURT:** Okay. Ladies and gentlemen of the

1 jury, thank you so much for your time. This was a
2 wonderful time for you all this week, and I really
3 appreciate your hard efforts and your sincere
4 deliberations in this matter.

5 This will conclude your jury service for the
6 week. I do want you to know that at the jury trial
7 sometimes people will call you and ask how you
8 reached a decision, because as you're aware, nobody
9 invades the province of the jury.

10 It is totally up to you as to whether or not you
11 wish to speak with anyone. But it's all right and
12 it's very appropriate for them to call you. I don't
13 believe that anyone would harass you, but to the
14 extent that you felt like you got harassed, then let
15 the Clerk of Court's office know and we will surely
16 handle it appropriately.

17 Thank you again so much for your service, and I
18 wish you all well and a good holiday season. Take
19 care.

20 (Whereupon, the jury is excused from the trial)

21 **THE COURT:** All right. I'll give the parties a
22 chance to get the paperwork done and proceed to
23 sentencing. We'll take a short break while you all
24 do that.

25 (Whereupon, a break is taken)

1 **THE COURT:** Okay. The Court's ready.

2 **MS. GARFIELD:** Your Honor, may it please the
3 Court. I will at this time address the defendant's
4 prior record. From the state of Pennsylvania he does
5 have a 1996 conviction shown for receiving stolen
6 property; 1996, theft by unlawful taking; 1997, it
7 appears some sort of drug conviction; 19 -- I'm
8 sorry. 2001, a disorderly conduct; and 2003, a drug
9 conviction.

10 Your Honor, his rap sheet is quite lengthy, and
11 while it is out of state, it's hard to completely
12 understand. I was able to determine that he had an
13 armed robbery charge in the state of Pennsylvania
14 that --

15 **MR. JOHNSON:** Your Honor, I object to those.
16 All those charges she's talking about now have been
17 dismissed. He does not have a conviction for armed
18 robbery.

19 **MS. GARFIELD:** I wasn't going to say he had a
20 conviction, Judge.

21 **MR. JOHNSON:** Well, that's why I'm objecting to
22 it, Your Honor.

23 **MS. GARFIELD:** It was dismissed, as well as
24 another one in the state of Michigan.

25 **MR. JOHNSON:** So I want to object to her making

1 any comment about any charges that's been dismissed.

2 **THE COURT:** Both of those were dismissed?

3 **MS. GARFIELD:** That's correct. I know that one
4 was in the course of a jury trial --

5 **MR. JOHNSON:** Your Honor, once again, I object
6 to any comment about it. They've been dismissed.
7 The Court shouldn't be able to take that into
8 consideration.

9 **THE COURT:** Do we know that for sure or --

10 **MR. JOHNSON:** Yes.

11 **MS. GARFIELD:** Yes, ma'am.

12 **THE COURT:** Okay. So what you've given me is
13 what he's got?

14 **MS. GARFIELD:** That's correct. As well as I
15 just think it's something for Your Honor to consider
16 while sentencing.

17 **MR. JOHNSON:** Your Honor.

18 **THE COURT:** Let her finish. I don't even know
19 what she's going to say yet.

20 **MS. GARFIELD:** He has had numerous discipline
21 reports while he has been incarcerated, most of which
22 he was given lock-down for, one of which he spit into
23 another inmate's face. Another time he did attack a
24 jailer as well. Those are things I just think Your
25 Honor should consider.

1 I think that Mr. Kough, as I said in my closing,
2 is an intelligent and conniving man. I still stand
3 by that. I believe that he has certainly tried to
4 pull the wool over everybody's eyes, and that's why I
5 think this prior record is something you should
6 definitely consider, especially since you did get to
7 observe him one-on-one when he testified. And at the
8 appropriate time our victim, Ms. McGeorge, would like
9 to address the Court.

10 **THE COURT:** Okay. All right. As to those
11 particular offenses, do you disagree with any of
12 those offenses?

13 **MR. JOHNSON:** The ones that he was convicted of,
14 Your Honor, we have no problem with. The Court has
15 been aware of that before. So, no, we have no
16 problem with those.

17 **THE COURT:** Okay. All right. Ms. McGeorge,
18 I'll be happy to hear from you.

19 **MS. MCGEORGE:** This has been a very emotional
20 time for me. Two years ago I was a happy person. I
21 was somebody that lived life to the fullest. My
22 children knew me as the kind of woman that didn't
23 worry. And since this has happened to me I have
24 become the type of person that I worry about every
25 little thing. I watch over my shoulder everywhere I

1 go. I take into account my surroundings more than I
2 ever had before because this was something I never
3 thought would happen.

4 As a result, the man that I've been married to
5 for 16 years has become very overprotective to the
6 point to where he doesn't want me on the job. And we
7 lost two homes. We are currently living in a motel
8 because he just became employed again after two
9 years.

10 So my children have a very uprooted life at the
11 moment. And I want to get some normalcy back. And I
12 feel that this is a first step. I'm raising three
13 young, very impressionable young women, wonderful
14 young women. And I had to show them that this was my
15 way of defending myself from what happened and that
16 they have a right to defend themselves and stand up
17 for themselves. And I feel that this is going to do
18 what I set out to do.

19 When people come and they have a plan to hurt
20 someone, they don't take into account that that
21 person is the not the only person that they're
22 hurting. They don't take into account, don't realize
23 that their actions are going to impact. I have a
24 mother, a brother, a father. I have a husband and
25 three children that this has completely impacted

1 their lives 100 percent, as much as it has mine.

2 My mother calls me three to four times a day
3 just to make sure she knows where I'm at. My father
4 calls me on a regular basis to make sure I'm okay.
5 My brother has become the most protective brother
6 that I have ever known. And I'm the older sister.
7 I'm supposed to be protecting him, and he is
8 protecting me.

9 My husband is a loving man, and his family is
10 the most important thing in the world. And he felt
11 guilty that he wasn't there to take care of me to
12 protect me from this happening to me. And now even
13 after 16 years I cannot get out of his sight for more
14 than 20 or 30 minutes at the time without him calling
15 me to find out if I'm okay. So this is something
16 that has impacted my entire family. And that's all I
17 have to say.

18 **THE COURT:** Thank you, ma'am.

19 **MS. GARFIELD:** Your Honor, you also heard in his
20 examination he does have convictions in the state of
21 Michigan, retail fraud and an aggravated assault.
22 When I spoke with the clerk's office in Michigan, it
23 does appear there is a warrant outstanding for him at
24 this time. He has failed to pay some sort of fine.
25 And I do believe he's still on parole in the state of

1 Pennsylvania.

2 **THE COURT:** In the State of where?

3 **MS. GARFIELD:** Pennsylvania.

4 **THE COURT:** Okay. So were any of these other
5 offenses for which you've told me there were
6 convictions, those did occur in Pennsylvania?

7 **MS. GARFIELD:** The first set that I gave you,
8 the stolen property, theft, disorderly conduct and
9 the drug offenses were all in the state of
10 Pennsylvania.

11 **JUROR:** Okay.

12 **MS. GARFIELD:** The retail fraud and the
13 aggravated assault were in the state of Michigan.

14 **THE COURT:** Okay. Thank you. All right. Mr.
15 Johnson.

16 **MR. JOHNSON:** Thank you, Your Honor. Your
17 Honor, as you heard, my client is 33 years old. He
18 is married. His wife is in the military. He has no
19 kids. He was employed in Pennsylvania when he came
20 down here for that weekend to visit his wife. He has
21 no family or any members here in South Carolina. He
22 has an older -- he has a mother and a father who are
23 elderly. He tells me I think they're in their
24 seventies.

25 **MR. KOUGH:** In their eighties.

1 **MR. JOHNSON:** In their eighties. And I think it
2 best if I would just let my client address the Court,
3 Your Honor.

4 **THE COURT:** Okay.

5 **MR. KOUGH:** As Ms. McGeorge stated about me
6 impacting her life, as far outreaching as it was,
7 that was not a consideration in my mind. And I wish
8 to take this time to apologize to Ms. McGeorge.
9 Unfortunately, words is all I can offer, just
10 condolences. There's nothing I can say or do any
11 further to make things better for her other than
12 accept your sentence, and hopefully that will close
13 something for her.

14 And of course I'd love to beg the Court for
15 mercy at this time, and may the judge pass the
16 sentence that she seems necessary.

17 **THE COURT:** Anything further from the defense?

18 **MR. JOHNSON:** I have nothing further, Your
19 Honor.

20 **THE COURT:** Anything from the State?

21 **MS. GARFIELD:** No, ma'am.

22 (Pause)

23 **THE COURT:** The '96 Pennsylvania was theft by
24 what?

25 **MS. GARFIELD:** Unlawful taking.

1 **MR. JOHNSON:** And, Your Honor, those were
2 misdemeanor charges.

3 **THE COURT:** Okay. He's been incarcerated since
4 what date?

5 **MS. GARFIELD:** July 19th, 2008.

6 **THE COURT:** For indictment number
7 2009-GS-40-6661, Mr. Richard Kough, you are hereby
8 sentenced to the Department of Corrections for the
9 offense of armed robbery to a period of 16 years.
10 You'll get credit for time served since July 19th,
11 2008.

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

13 **MS. GARFIELD:** Thank you, Your Honor.

14 **INVESTIGATOR THOMAS:** Thank you, Your Honor.

15 (Whereupon, the proceedings are concluded)

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CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Jenny H. Williams, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Richland County, South Carolina, on the 7th, 8th, 9th and 10th days of December, 2009.

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

February 10, 2010

Jenny H. Williams

Jenny H. Williams, Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Michelle J. Childs, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICHARD KOUGH,

APPELLANT

FINAL BRIEF OF APPELLANT

LANELLE CANTEY DURANT
Appellate Defender

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

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in admitting the out-of-court identification of appellant by the cashier-victim and the cab driver when the identification procedure was unduly suggestive and unreliable because appellant was removed from a police car in handcuffs in view of the witnesses; his clothing did not match the description of the robber's clothing; he had no weapon; and the victim was not 100% sure he was the robber?
2. Did the trial court err in admitting the evidence seized during the illegal search of the house when the police did not have a search warrant and relied on a person who provided the key to the house when the police did not identify the person or confirm the person was a legitimate key holder?

STATEMENT OF THE CASE

On June 17, 2008, the Richland County Grand Jury indicted Richard Kough on the charge of armed robbery (AR). On December 7 – 10, 2009, Kough proceeded to trial before the Honorable J. Michelle Childs and a jury. The jury returned a verdict of guilty as indicted. Judge Childs sentenced Kough to sixteen years imprisonment. Kough's attorney filed a notice of appeal. This appeal follows.

ARGUMENT

1.

The trial court erred in admitting the out-of-court identification of appellant by the cashier-victim and the cab driver when the identification procedure was unduly suggestive and unreliable because appellant was removed from a police car in handcuffs in view of the witnesses; his clothing did not match the description of the robber's clothing; he had no weapon; and the victim was not 100% sure he was the robber.

On July 19, 2008, Tonya McGeorge was working the closing shift from 2:00 until 10:00 at the Corner Pantry located at the Exxon Station on the corner of Gervais and Harden Streets in Columbia. Around 8:30 P.M., she observed a man walk into the store which was "slightly busy" at the time as there were other people in the store. He walked to the drink cooler and then waited in line until he got to the counter where he asked for a pack of Newport cigarettes. R.3, ll. 21 – 25; R.4, ll. 1 – 25; R.5, ll. 1 – 25; R.6, ll. 1 – 12.

She testified that he was wearing a yellow type football jersey and blue jeans. R.6, ll. 13 – 15. When he reached the counter, he asked for the cigarettes, gave her a \$20 bill, and then produced a knife and asked for all of the cash in the cash register. R.6, ll. 16 – 25. She gave him the cash at which time he left and went right down Gervais Street. R.7, ll. 1 – 6; R.8, ll. 23 – 25; R.9, ll. 1 – 4.

Ms. McGeorge claimed she observed him in order to remember as much information as possible to provide to 911 when she called. R.7, ll. 7 – 14. In the description she gave to Investigator Thomas after the incident, she stated the following:

A male, a white male approximately 23 to 35 years of age, five-foot-two to five-foot-five, fair complexion, sandy blonde hair, medium voice, stocky build, wearing a yellow jersey,

jeans, with a weapon as a knife, right-handed, on foot out of
- and he went out of the door in the direction of the right.

R.7, ll. 15 - 25; R.8, ll. 16 - 24.

The store had a video operating during the incident which produced three tapes which were played for the jury. R.187, ll. 19 - 24.

Ms. McGeorge stated that a female police officer arrived first and she gave the officer a description of the robber. Then Investigator Arthur Thomas arrived to interview her. As he was taking a statement from her, he received a call that "they had caught the suspect." Investigator Thomas left the store. Lisa Taylor, Ms. McGeorge's supervisor, arrived. R.17, ll. 1 - 25; R.18, ll. 1 - 25; R.19, ll. 1 - 22.

Investigator Thomas returned and took her and Lisa Taylor in a patrol car to identify the suspect. R.19, ll. 11 - 25; R.20, ll. 1 - 7; R.21, ll. 1 - 7. He took her to a house in an area which was very dark and not well lit. R.20, ll. 13 - 25. She identified the suspect who "had changed from a yellow top into a red jersey." She "believed" he had the other characteristics she described. She remained in the patrol car on the street and the suspect was in front of the house. He was in the custody of the police. R.21, ll. 1 - 25.

She told Investigator Thomas that she was 80 to 90 percent sure that the suspect was the robber. She had some hesitation because of the difference in the lighting and the difference in his clothing. She said she identified him by flashlight which she explained was a bright Halogen type light someone else was shining as she stayed in the patrol car. The procedure took about two minutes. R.22, ll. 1 - 25; R.23, ll. 1 - 3; R.24, ll. 18 - 25.

During this pretrial hearing, Ms. McGeorge testified on cross examination, that it was dark outside as it was about 8:30 when the incident occurred. She admitted that the

entire time for her observation of the robber was about fifteen seconds, and that she was "shaken up." R.26, ll. 1 – 25.

During the identification procedure, she was in the back seat of the patrol car and was about ten feet from the suspect. She admitted that she was not 100% sure that night that the suspect was the robber, but she was sure when she saw him in court. R.27, ll. 1 – 1 – 25; R.28, ll. 1 – 25; R.29, ll. 1 – 23. However, she had testified earlier that he looked different in the courtroom than he did the night of the incident. He had a haircut, was wearing glasses, was clean shaven, and was thinner. R.24, ll. 23 – 25; R.25, ll. 1 – 12.

Officer Taurus Sanders testified that he was present at the identification which he said occurred about thirty to thirty-five minutes after the call went out. R.40, ll. 3 – 25; R.50, ll. 20 – 25; R.51, ll. 1 – 2. He said the suspect was sitting in the back of a police car when the clerk (victim) arrived. They took him out of the car, and put him in front of the police car and shined the spotlight on him. He was handcuffed behind him, and there were police officers on each side of him. R.51, ll. 3 – 16.

Investigator Arthur Thomas testified on direct that he viewed the video and that the suspect had a receding hairline and bald spot in the "back top" of his head. R.63, ll. 16 – 25; R.64, ll. 1 – 10. He took the clerk to the show-up of the suspect, but she told him that the suspect had changed clothes from a yellow shirt to a red shirt, and changed from the pants he was wearing into jeans. R.71, ll. 20 – 25; R.

Investigator Thomas testified on cross that once he and the clerk arrived at the house, he took the suspect out of the police car and placed him in front of the police vehicle and turned the vehicle headlights on him. He said the area was "well illuminated by alley lights and vehicle headlights." R.77, ll. 21 – 25; R.78, ll. 1 – 24. He admitted that the

clerk was not 100% sure the suspect was the robber because the clothing did not match. He said her statement was that she was only 80 to 90 % sure. R.79, ll. 1 – 25; R.80, ll. 1 – 4.

The clerk, Ms. McGeorge, said in the courtroom that the robber had sandy brown hair. On cross, defense counsel told her that the 911 report had that she described the robber as having sandy blonde hair which she admitted. She said she made a mistake. R.206, ll. 7 – 25; R.207, ll. 1 – 25. She testified that at the show-up identification, she was not close enough to notice his hair color to realize what color his hair was at the time as she was in the patrol car the whole time. R.210, ll. 1 – 23.

The state called Carl Quintyne who was a cab driver parked at the Greyhound bus station on the night of the incident. R.81, ll. 18 – 25; R.82, ll. 1 – 10; R.83, ll. 1 – 12. Around 8:30 or 9:00 that night, he was sitting in his cab when a young man walked up and said he was going to rob the store across the street which was the Exxon station. He said the man walked across the street, and a few minutes later, he saw officers over by the store. R.82, ll. 9 – 25; R.83, ll. 1 – 7.

Quintyne was asked to describe the young man he saw, and he said that it was the man “sitting over there” in the courtroom but that he did not look like the description of the suspect anymore. He said the young man he saw in July 2008 was wearing a yellow shirt, had bushy hair which was not blonde and not brown and about five-six or five-eight. R.82, ll. 19 – 24; R.84, ll. 1 – 13.

A police officer came to the Greyhound and was waiting on him when he returned from a fare. The officer took him to view the suspect in the police car. They went to a house on Pine Street which was across from the Fish Fry restaurant on Gervais Street. R.86, ll. 13 – 25; R.87, ll. 1 – 25; R.88, ll. 1 – 25; R.90, ll. 1 – 11.

Quintyne said the suspect came out and he told the police he was the young man who said he was going to rob the store. However, the suspect was wearing different clothes as he had on a red shirt. R.29, ll. 17 – 25; R.91, ll. 1 – 6.

On cross examination, Quintyne admitted that he did not see the young man rob the store but only knew that after he went in the store, the police arrived. However, he did not know if the young man robbed the store. R.96, ll. 7 – 25; R.97, ll. 1 – 16.

Officer Taurus Sanders testified that dispatch received the call from the cabbie initially so he had gone to the Greyhound to talk to the cab driver. R.51, ll. 17 – 25; R.52, ll. 1 – 4. After the show-up identification when Ms. McGeorge was not 100% sure, he decided to bring the cab driver for possible identification. He returned to the Greyhound station and took the cab driver to view the suspect. R.52, ll. 5 – 25.

The same procedure was used in this show-up as was used with the clerk. The suspect was brought to the front of the police car and lights were shined on him. The cab driver remained in the police car which was parked about 15 to 20 feet away. The cab driver said that the suspect was the person he saw except that the clothes were different. R.53, ll. 1 – 25.

Defense counsel argued that both of the show-up identifications were suggestive and should be suppressed. His argument was that the main witness, the alleged victim-clerk, was not 100% sure. The fact that he was in custody and taken out of the police car in front of her in handcuffs gave the impression he was the robber which was extremely suggestive. The identification was within 30 minutes of the robbery which also gave the impression that this must be the robber, but she still was not sure. The state presented no evidence that he

changed clothes. He argued that the same suggestive procedure was used with the second witness, the cab driver. R.124, ll. 6 – 25; R.125, ll. 1 – 25.

In his directed verdict motion, defense counsel again argued against the show-up identification as being suggestive, subjective and extremely prejudicial to Kough. R.441, ll. 1 – 13.

Single person show-up identifications are particularly disfavored in the law. Stovall v. Denno, 388 U.S. 293 (1967). A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification. Id.

In Neil v. Biggers, 409 U.S. 188 (1972) the United States Supreme Court identified a two-pronged inquiry to determine the admissibility of an out-of-court identification: (1) a court must first determine whether the identification process was unduly suggestive; and (2) next it must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Neil v. Biggers cites five factors to determine reliability of an identification: (1) opportunity of witness to view criminal at time of crime (2) witness' degree of attention (3) accuracy of witness's prior description of criminal (4) level of certainty by witness at time of confrontation (5) length of time between crime and confrontation. Neil v. Biggers supra.

In State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000), the Supreme Court found that the show-up procedure was unduly suggestive, and remanded the case for a new trial. In Moore, the witness, who was a neighbor to the house being burglarized and who saw the two burglars and spoke to them, was brought to a location where two individuals, wearing clothing similar to that described by the witness, were surrounded by uniformed police

officers. The Court found that the show-up procedure was unduly suggestive. The Court cited Stovall v. Denno, *supra*, which held that single person show-ups are particularly disfavored in the law. The Court also wrote that an eyewitness identification which is unreliable because of suggestive line-up procedures was constitutionally inadmissible as a matter of law.

The decision to admit an eyewitness identification is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion, or the commission of prejudicial legal error. State v. Govan, 372 S.C. 552, 643 S.E.2d 92 (Ct. App. 2007). In State v. Govan, *Id.*, the Court of Appeals ruled that the show-up identification was not unduly suggestive where the suspect in the armed robbery stood outside a police vehicle and the witness was inside a second police car; it was near the scene of the crime shortly after the crime; the suspect had not had time to alter his looks or dispose of evidence.

State v. Govan, *Id.*, is distinguished from Kough's case because in Govan a police officer saw the suspect drop a paper bag full of money and the suspect was still in possession of his gun when he was apprehended, and he was wearing the same clothing as the robber was described wearing.

In State v. Brown, 356 S.C. 496, 589 S.E.2d 781 (Ct. App. 2003), the Court of Appeals held that the show-up identification was admissible and reliable although the procedure was suggestive where the police took the witness to view the suspect whom the witness had observed from his apartment across the street rob the pharmacy. The Court held that the identification was reliable because witness said he "was absolutely certain" the defendant was the robber, and the lighting was sufficient, and there was a brief time between the crime and the show-up.

Kough's case is distinguished from State v. Brown, Id. because the clerk witness was not 100% certain he was the robber, and Kough was wearing different clothing.

Kough's case should be reversed because the show-up identifications were unduly suggestive.

ARGUMENT

II.

The trial court erred in admitting the evidence seized during the illegal search of the house when the police did not have a search warrant and relied on a person who provided the key to the house when the police did not identify the person or confirm the person was a legitimate key holder.

Investigator Arthur Thomas testified that while he was looking at the video in the store, he received a call that a suspect matching the description was seen entering a house at which was about one and one-half blocks from the Exxon Station. He then proceeded to the house. R.65, ll. 1 – 25; R.66, ll. 1 – 3.

Officer Taurus Sanders testified that he proceeded to the house on Pine Street when he received the call. Approximately eight to twelve officers arrived at the house. R.42, ll. 1 – 25; R.43, ll. 1 – 25; R.44, ll. 1 – 12. He and Officer Turner knocked on the door but no one answered. One of the other officers was looking into the bathroom of the house and saw a white male changing clothes. He said it was very dark as there was only one street light. R.44, ll. 11 – 25; R.45, ll. 1 – 5.

They were able to gain entry into the house through a neighbor who said she knew how to contact the owner. This neighbor returned shortly and said she could not locate the owner but found a guy “who lives in the area that has a room.” This man did appear with a key to the house and gave the officers consent to enter the house. Officer Sanders said the man was a resident of the boarding house, and had control and a key which worked. R.45, ll. 22 – 25; R.46, ll. 1 – 21.

Sanders entered the house along with other officers and arrested the suspect. There was clothing and money on the bathroom floor. Neither he nor any of his officers took a statement from the man who provided the key. He was only identified as a black man in his thirties. R.47, ll. 1 – 25; R.48, ll. 1 – 25; R.49, ll. 1 – 25.

Investigator Thomas testified that the man with the key or the keyholder, told him he stayed at the residence. This man also told him that a white male visited the area and left some bags in the house. R.68, ll. 5 – 25. Investigator Thomas admitted on cross examination that the police did not have a search warrant for the house and that was the reason they did not just enter right away. There were no signs of forced entry so the police could not justify entering. R.75, ll. 1 – 25. He also admitted that based on what the key holder told them, the white male in the house had permission to be in the house. R.76, ll. 1 – 7.

Investigator Thomas was not sure of the name of the person who provided the key because they did not get his name at the time of the incident. He could only say that the man said he lived there and had a key. He did not verify the information. R.76, ll. 14 – 25; R.77, ll. 1 – 17.

Investigator Thomas stated that he saw the clothing and money on the bathroom floor and that he put them on the bed so that his CSI officer could photograph them. R.69, ll. 1 – 25; R.70, ll. 1 – 9.

Paul J. Nelson, the police investigator with the crime scene unit, admitted that the police tampered with or moved the evidence, including the yellow shirt and money, to the bed. He said they never found the \$350 that was alleged to be taken from the Exxon. R.111, ll. 24 – 25; R.112, ll. 1 – 25; R.113, ll. 1 – 8.

Defense counsel questioned Investigator Thomas about his case summary report of this incident which stated that a yellow shirt was found in one of the two bags in the house and a knife was found on the floor under a chair in the living room. Investigator Thomas admitted that his report did say that he found the yellow shirt in one of the bags. He also admitted that there was nothing in his report about finding a yellow shirt on the floor of the bathroom. R.155, ll. 18 – 25; R.156, ll. 1 – 25; R.157, ll. 1 – 25.

The clerk, Tonya McGeorge, testified on cross examination that she called the yellow shirt a shirt during court testimony and said she had never called it a football jersey. She said it was a jersey type shirt based on the way it fit. She described the difference in a shirt and a jersey being that a jersey has holes you can see through like mesh material. However, she testified that the robber was wearing a yellow shirt. She admitted that she wrote jersey on her statement. R. 218, ll. 5 – 25; R.219, ll. 1 – 25; R.220, ll. 1 – 25; R.221, ll. 1 – 25; R.222, ll. 1 – 22.

Defense counsel argued that any evidence seized from the search of the house should be suppressed because the search was illegal. Counsel argued that the police did not have a search warrant and they did not confirm that the person with the key was a resident of the house. The police just assumed that what the key holder told them was true. R.126, ll. 1 – 25; R.127, ll. 1 – 16; R.137, ll. 11 – 25; R.138, ll. 1 – 25; R.139, ll. 1 – 19..

In his directed verdict motion, defense counsel again argued that the search of the house violated his client's Constitutional rights and he objected to the evidence from the search of the house. He argued that the yellow shirt did not match the description given by the clerk as she described it as a yellow football jersey and the shirt recovered was not a

football jersey. No fingerprints were recovered. R.440, ll. 22 – 25; R.442, ll. 1 – 25; R.443, ll. 1 – 4. The judge denied his motion. R.444, ll. 12 – 23.

Richard Kough testified and told the jury that he was from Pittsburgh and was in South Carolina because his wife was in the military and completed her training at Fort Jackson. He was here for family day and graduation. R.445, ll. 18 – 25; R.446, ll. 1 – 25; R.447, ll. 1 – 25; R.448, ll. 1 – 25; R.449, ll. 1 – 25. He was at the bus station and bought a ticket to return home but could not leave until the next day. Therefore, he found the room at the boarding house at 1212 Pine Street which he learned about from someone on the street. A man named Sylvester told him he could rent a room at the house for the night which he did. He knew nothing about the incident until the police knocked down the bathroom door. R.450, ll. 1 – 25; R.451, ll. 1 – 25; R.452, ll. 1 – 25; R.453, ll. 1 – 24.

He did not answer the door when the police knocked because he was in a strange place and did not know it was the police. R.454, ll. 1 – 25; R.455, ll. 1 – 25; R.456, ll. 1 – 25; R.457, ll. 1 – 25. He said the yellow shirt was in his suitcase. R.458, ll. 1 – 25; R.459, ll. 1 – 25; R.460, ll. 1 – 25.

Kough denied robbing the store. R.463, ll. 5 – 20.

Evidence obtained as a result of an unlawful search constitutes a violation of the Fourth Amendment and is inadmissible at trial. State v. Flowers, 360 S.C. 1, 598 S.E.2d 725 (Ct. App. 2004); citing State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999).

Appellate standard of review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding, and the appellate court may only reverse where there is clear error. State v. Nelson, *supra*, citing State v. Green, 341 S.C. 214, 532 S.E.2d 896 (Ct. App. 2000).

Third party consent may be given by one who has common authority over or some other sufficient relationship to the premises or effects being searched. State v. Moultrie, 271 S.C. 526, 248 S.E.2d 486; citing United States v. Matlock, 415 U.S. 164 (1974).

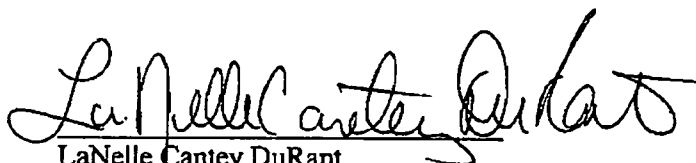
The record failed to establish this requirement. In State v. Moultrie, *supra*, the Supreme Court ruled that a landlord may not validly consent to a search of a tenant's room. The Supreme Court also held that a hotel manager may not effectively consent to a search of a guest's room. State v. Moultrie, *supra*.

Kough testified that he rented the room; therefore, he was a tenant. The alleged keyholder could not give consent to search the room which Kough had rented. Therefore, the evidence seized from the illegal search should be suppressed.

CONCLUSION

Based on the above, the conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in cursive script, reading "LaNelle Cantey DuRant".

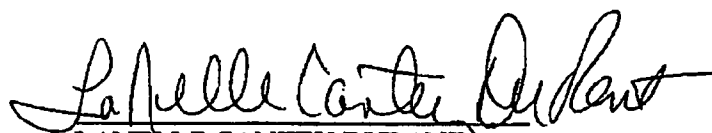
LaNelle Cantey DuRant
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This 30th day of November, 2010.

CERTIFICATE OF COUNSEL

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



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Michelle J. Childs, Circuit Court Judge

THE STATE,

RESPONDENT,

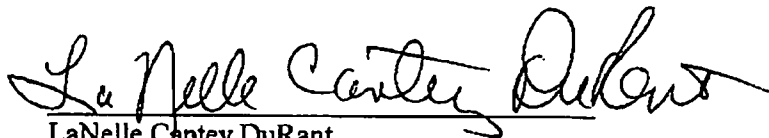
V.

RICHARD KOUGH,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 30th day of November, 2010.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of November, 2010.



(L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable J. Michelle Childs, Circuit Court Judge

THE STATE,.....Respondent,

v.

RICHARD M. KOUGH,.....Appellant.

FINAL BRIEF OF RESPONDENT

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Other Authorities:

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STATEMENT OF ISSUES ON APPEAL

I.

The trial judge properly admitted the pre-trial identification evidence because the show-up procedure was not unduly suggestive and the identifications were sufficiently independently reliable based on the totality of the circumstances.

II.

The trial judge properly denied Appellant's suppression motion because the officers' search of the residence was performed with consent from a party with apparent authority over the premises, the evidence was discovered in plain view, and exigent circumstances justified the search regardless of any obtained consent. Furthermore, regardless of the trial judge's ruling, Appellant did not possess the capacity to challenge the search under the Fourth Amendment because he was not a tenant or an invited social guest and had no legitimate expectation of privacy.

III.

Regardless of the issues raised by Appellant on appeal, any trial error was harmless due to the overwhelming evidence of guilt presented during trial and Appellant's apology and admission of guilt during sentencing proceedings, which eliminated any remaining doubt regarding his guilt for the offense and rendered further review unnecessary.

STATEMENT OF THE CASE

Appellant Richard M. Kough was arrested following an investigation into the armed robbery of a convenience store. In June of 2009, Appellant was indicted by the Richland County grand jury for one count of armed robbery. A jury trial was commenced in the Richland County court of general sessions on December 7, 2009, with the Honorable J. Michelle Childs, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. The trial judge sentenced Appellant to a term of imprisonment of sixteen (16) years. Appellant subsequently filed a timely notice of appeal.

STATEMENT OF FACTS

Around 8:30 p.m. on the evening of July 19, 2008, Carl Quintyne, a taxi driver, backed his taxi cab into the cab stand at the Greyhound bus station on the corner of Gervais Street. (R. pp. 245-246; p. 248). As he backed his taxi into the parking spot, a man walked by his cab exclaiming he was going to rob the gas station across the street and everyone needed to get out of the area. (R. p. 246). The man was a white male with blonde to brownish hair wearing a yellow shirt. (R. p. 247). Quintyne thought the man's comments were a joke and watched him cross the street and enter the convenience store. (R. p. 247).

Tonya McGeorge, a cashier, was working in the convenience store and gas station at the corner of Gervais Street and Harden Street on that evening. (R. p. 176). Between 8:30 p.m. and 8:45 p.m., she noticed a man enter the store wearing a bright yellow shirt. (R. p. 178). The store was moderately busy at the time, and she watched the man walk around the store and wait for the other customers to complete their transactions. (R. pp. 178-179). The man approached the counter, requested a pack of cigarettes, and paid her with a twenty dollar bill. (R. p. 179). As she retrieved his change, the man suddenly pulled a knife and demanded the cash from the store's register. (R. p. 179). Fearing she would be hurt if she did not comply, McGeorge gave the man the money from the cash register. (R. pp. 179-180). However, McGeorge paid close attention to his appearance so she would be able to describe the man to law enforcement. (R. p. 179). She was able to look directly at the man in the good lighting of the store. (R. p. 180). After the robber fled with the money, McGeorge immediately called 911 and watched from the window to see what direction the robber fled in. (R. p. 180). She was able to describe the robber to

the 911 operator, and officers from the City of Columbia Police Department responded to the store within two to three minutes. (R. p. 191).

Officer Katrina Eastwood was the first officer to arrive at the scene. (R. p. 268; p. 272). She spoke with McGeorge, received a description of the suspect, and reported it over the radio to other officers. (R. p. 273). Officer Eastwood relayed the following description of the robber: white male, between 5'2" to 5'5" tall, weighing approximately 170 to 180 lbs., between 28 and 35 years old, wearing a yellow football jersey, with sandy brown hair, and a low profile haircut. (R. p. 274). Subsequently, Investigator Arthur Thomas, a major crimes investigator, arrived at the scene and conducted a more thorough interview with McGeorge. (R. pp. 276-277; p. 384; p. 387).

Sergeant Taurus Sanders was on patrol when he received the report of the armed robbery along with a description of the suspect and the direction he was observed fleeing in after the robbery. (R. p. 287; p. 289). Sergeant Sanders drove to the neighborhood area adjacent to the store and arrived within a minute of receiving the report of the robbery. (R. pp. 289-290). He responded to a residence located on Pine Street, which was slightly more than a block away from the scene of the crime, after another officer received word the suspect was seen entering the house. (R. p. 293; p. 294). Sergeant Sanders arrived at the same time as several other officers, and they approached the house and knocked on the door. (R. pp. 293-294). No one answered from inside the home. (R. p. 294). The officers surrounded the house, and one of the officers observed a white male changing his shirt in the bathroom area with the lights on inside. (R. p. 295; p. 297). The officers commanded the individual to exit the house, and the man turned off the interior

lights in response. (R. p. 296). The officers then attempted to locate a resident with a key through a next-door neighbor. (R. p. 296).

Subsequently, the officers located one of the tenants of the house who was in possession of a key. (R. p. 297). The individual, described as a black male in his mid-thirties to early-forties, gave the officers permission to search the residence and unlocked the door. (R. pp. 297-298). The officers entered the residence and cleared the home. (R. p. 298). They attempted to open the bathroom door, discovered it was locked, and commanded the person inside to open the door. (R. p. 300). The person inside did not respond, forcing the officers to pick the hook latch to unlock the door. (R. p. 300). The officers then entered the bathroom, discovered Appellant Richard M. Kough inside, and detained him. (R. pp. 300-301). After securing Appellant, the officers observed a yellow shirt and several dollar bills in the bathroom floor. (R. p. 301).

Within ten minutes of Appellant's arrest and approximately thirty-five to forty minutes after the robbery, McGeorge, along with the manager from her store, was brought from the convenience store to identify the suspect. (R. pp. 235-236; p. 303; p. 324). Officers positioned Appellant in front of the patrol car, and he was illuminated with halogen spotlights. (R. p. 304). McGeorge indicated she was 80% to 90% sure Appellant was the robber, but she noted he was wearing different clothes at the time of the show-up.¹ (R. p. 197; p. 406). Shortly thereafter, dispatch notified Sergeant Sanders a cab driver had reported an incident involving a man telling him to stay away from the convenience store because he was going to rob it. (R. pp. 51-52). Sergeant Sanders

¹At the time of his detention, Appellant was wearing a bright red shirt. (R. p. 403).

picked up the cab driver, Quintyne, within ten to fifteen minutes and brought him to the residence to identify the suspect. (R. p. 251; p. 307). Quintyne identified Appellant as the man who told him he was going to rob the store while noting Appellant changed his clothing before the identification. (R. p. 252; p. 307). Quintyne was very certain of his identification. (R. p. 308).

Subsequently, prior to trial, Appellant moved to suppress the show-up identification evidence and the evidence obtained in the search of the residence where he was discovered, and the trial judge conducted an identification and suppression hearing. (R. pp. 2-3). During the hearing, McGeorge recounted the circumstances of the robbery and of the show-up identification. (R. pp. 6-7). She indicated she was scared during the robbery, which lasted approximately ten to fifteen seconds, but she took time to observe the robber because she wanted to obtain as much information as she could for law enforcement. (R. p. 7; p. 26). McGeorge gave the following description of the suspect: "[A] white male approximately 23 to 35 years of age, five-foot-two to five-foot-five, fair complexion, sandy blonde hair, medium voice, stocky build, wearing a yellow jersey, jeans, with a weapon as a knife, right-handed[.]" (R. p. 8). McGeorge noted she watched the suspect as he fled from the store. (R. p. 15). McGeorge testified she subsequently drove a very short distance with an officer to identify the suspect. (R. pp. 20-21). She indicated she viewed Appellant for approximately two minutes from a distance of less than ten feet. (R. p. 24; p. 27). She remained in the patrol car and viewed Appellant, who was in front of the house and was in custody.² (R. p. 21). McGeorge stated

²Later during the pre-trial hearing, Sergeant Sanders testified Appellant's arms were handcuffed behind him and Appellant had officers on either side during the show-up procedure. (R. p. 51).

Appellant had changed from the yellow top into a red jersey, but he matched the other characteristics of her description. (R. p. 21). She testified she was 80% to 90% sure of the identification at the time, and her hesitation was due to the difference in the lighting and the change in the clothing.³ (R. p. 22). However, McGeorge further testified she had no doubt about the identification after seeing Appellant in court and was sure, but not 100% sure, at the time of the show-up identification. (R. p. 29).

Quintyne also testified regarding the show-up identification. (R. p. 87). Quintyne testified an officer took him to a nearby house, and Appellant was presented for him to view. (R. pp. 89-90). Quintyne indicated he then identified Appellant. (R. p. 90). However, Quintyne testified Appellant was wearing a yellow shirt when he made the statement and had changed into a red shirt at the time of the identification. (R. pp. 91-92).

At the conclusion of the hearing, Appellant sought the suppression of the show-up identification evidence on the grounds it was extremely suggestive. (R. pp. 124-125). The trial judge ruled the identifications of both McGeorge and Quintyne were admissible based on the totality of the circumstances. (R. p. 143).

Additionally, Appellant also argued for the suppression of the evidence seized in the search on the grounds the officers did not have a right to enter the residence because the officers did not have a search warrant and did not verify the identity of the party who gave consent to enter the home. During the pre-trial hearing, multiple witnesses testified about the search of the home. Sergeant Sanders testified he was notified a suspect was

³Additionally, McGeorge testified there were no suggestions made regarding the suspect during the show-up procedure. (R. p. 30). The manager from her store confirmed the officers did not make any suggestions to McGeorge at the time of the identification. (R. pp. 36-37).

observed going into a house on Pine Street approximately a block and a half from the convenience store. (R. p. 42). He arrived within ten minutes, and officers surrounded the residence. (R. p. 43). Sergeant Sanders indicated they knocked on the door and received no response before observing a white male in the bathroom. (R. pp. 44-45). Sergeant Sanders testified he then spoke with a neighbor in an effort to locate the home owner. (R. pp. 45-46). The neighbor located a man who rented a room in the house and possessed a key. (R. p. 46). Sergeant Sanders testified the man, who was a resident with a working key and control, gave verbal consent for them to enter the home and let them in. (R. p. 46). After receiving consent, the officers cleared the house room by room before discovering Appellant in the bathroom. (R. pp. 47-49). Sergeant Sanders testified clothing and money were discovered on the bathroom floor and some luggage was discovered in a open room. (R. pp. 48-49).

Margaret Land testified she owned several houses on Pine Street, including the residence where Appellant was arrested. (R. pp. 58-59). She testified she was renting two of the rooms in the home, but she had never rented a room to a white male. (R. pp. 59-60). She further indicated she never heard of Appellant, never saw him before, and did not rent a room to him. (R. pp. 60-61). She testified the tenants of the boarding house were not allowed to have roommates but could have guests. (R. p. 61).

Investigator Thomas testified he went to the house on Pine Street after receiving word a suspect was inside. (R. p. 65). After arriving, he spoke to an individual with a key who stated he stayed at the residence and had knowledge of the area. (R. p. 68; p. 77). The man indicated a white male had visited the area and asked to store some bags inside. (R. p. 68). However, he informed the officers the white male was not a resident

and did not stay at the home. (R. p. 68). The man then provided a key and consent to enter, and the officers cleared the house. (R. pp. 68-69). Investigator Thomas testified Appellant barricaded himself in the bathroom before officers picked the lock. (R. p. 69; p. 73). Inside, Investigator Thomas observed clothing and money on the bathroom floor, and the evidence was subsequently moved to the bed. (R. pp. 69-70). He testified the recovered yellow shirt looked like the shirt he observed in the surveillance video and matched the description of the shirt given by the victim. (R. p. 71).

Subsequently, an issue arose as to where the clothing and money were actually discovered. (R. pp. 144-145). Sergeant Sanders and Investigator Thomas clarified their earlier testimony from the pre-trial hearing. (R. p. 148; p. 157). Sergeant Sanders indicated the suitcases, which had travel tags, were located in a sunroom. (R. p. 150). They were not located in a bedroom or the bathroom. (R. pp. 150-151). Sergeant Sanders further indicated the yellow shirt and dollar bills were located in plain view on the bathroom floor. (R. p. 152). Investigator Thomas testified he mistakenly indicated the yellow shirt was located in a bag in his report. (R. pp. 157-158). He noted he found the yellow shirt on the floor and moved it to the bed. (R. p. 161). He further testified he searched the bag and found a wallet and cell phone inside.⁴ (R. p. 160).

At the conclusion of the pre-trial testimony, Appellant argued he had an expectation of privacy in the bags and in the room in the boarding home. (R. pp. 164-165). The trial judge denied the suppression motion, finding the officers had consent to enter the home based on the apparent authority of the consenting tenant. (R. pp. 171-

⁴Neither the wallet nor the phone was introduced into evidence during trial.

172). The trial judge further found: "Once they're in, then the arguments about plain view and hot pursuit I think would follow." (R. p. 172).

Subsequently, during trial, McGeorge recounted her experiences on the night of the robbery. (R. p. 178). McGeorge testified about identifying Appellant during the show-up procedure shortly after the robbery over Appellant's objection. (R. pp. 196-198). She also identified Appellant from a photograph taken after his arrest. (R. p. 198). She then definitively identified Appellant in court as the robber. (R. p. 200; p. 222). She further clarified the robber's yellow shirt was not mesh but fit like a jersey. (R. p. 221). Quintyne also identified Appellant in court as the individual who stated he was going to rob the convenience store and testified about identifying Appellant from the show-up procedure. (R. p. 246; p. 252). Appellant did not object to Quintyne's testimony.

Several officers also testified during trial, recounting the circumstances of the investigation into the robbery. Sergeant Sanders detailed Appellant's arrest in the bathroom and the discovery of the yellow shirt and dollar bills on the floor. (R. pp. 300-301). Investigator Thomas indicated he was able to clearly identify Appellant's receding hairline and bald spot from the surveillance footage. (R. pp. 387-388). Investigator Paul Nelson of the crime scene unit testified he collected fingerprints from the convenience store and did not find a match for Appellant. (R. p. 327; pp. 331-332). He further indicated he collected several dollar bills and a yellow shirt from a bed in the residence where Appellant was arrested. (R. pp. 345-346). The yellow shirt was introduced into evidence over Appellant's objection. (R. p. 347).

Additionally, William Kirkland testified about a conversation he had with Appellant while he was incarcerated at the detention center. (R. p. 364; p. 366).

Kirkland stated he overheard Appellant ask two other inmates to help him in his case by providing statements he was not in the Five Points area at the time of the robbery. (R. pp. 366-367). Kirkland indicated he was offered no promises or rewards in exchange for his testimony, but he conceded he had multiple convictions. (R. pp. 371-372).

Subsequently, Appellant testified in his own defense. (R. p. 446). Appellant indicated he was a farrier from Pittsburgh, Pennsylvania. (R. pp. 446-447). Appellant testified he came to Columbia for his wife's graduation from basic training at Fort Jackson. (R. p. 447). After the graduation ceremony, Appellant stated he went to the bus station and purchased a return ticket for the next morning. (R. p. 451). He testified a panhandler advised him he could rent a room in a house on Pine Street, and he rented a room there for \$20 for the night. (R. pp. 452-453). He stated he went to a grocery store in Five Points around 7:30 p.m. while wearing his "blue silk Tarheel shorts and my black - yeah, my black - my red Ohio Buckeyes shirt." (R. pp. 454-455). Appellant testified he then returned to the boarding house around 10:00 p.m. and undressed for a shower. (R. pp. 455-456). He stated people then tried to break down the bathroom door. (R. p. 456). Appellant indicated he initially did not open the door because he was afraid, but he eventually undid the latch before being thrown to the ground and arrested. (R. pp. 456-457). Appellant asserted he never wore a yellow shirt that day, but he conceded he had a "dull" yellow shirt in his suitcase. (R. p. 455; p. 458). He further testified he did not rob the store. (R. p. 463).

At the conclusion of trial, Appellant was convicted as charged. (R. p. 480).

During sentencing, Appellant addressed the Court, stating:

As Ms. McGeorge stated about me impacting her life, as far outreaching as it was, that was not a consideration in my mind. And I wish to take this time to apologize to Ms. McGeorge. Unfortunately, words is all I can offer, just condolences. There's nothing I can say or do any further to make things better for her other than accept your sentence, and hopefully, that will close something for her.

(R. p. 487). The trial judge then sentenced Appellant to a term of imprisonment of sixteen years. (R. p. 488).

ARGUMENT

I.

The trial judge properly admitted the pre-trial identification evidence because the show-up procedure was not unduly suggestive and the identifications were sufficiently independently reliable based on the totality of the circumstances.

Appellant contends the trial judge erred in admitting the out-of-court identifications of Appellant by two witnesses, asserting the identification procedure was unduly suggestive and unreliable. The show-up procedure was not unduly suggestive as it occurred in close proximity to the scene of the crime shortly after the armed robbery. Regardless, the identifications were admissible based on their reliability under the totality of the circumstances. The trial judge properly admitted the identification evidence, and no abuse of discretion occurred. Appellant's conviction should be affirmed.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission or exclusion of identification evidence falls within the trial judge's discretion and will not be disturbed on appeal without an abuse of discretion or an error of law. State v. Govan, 373 S.C. 552, 556, 643 S.E.2d 92, 94 (Cl. App. 2007).

Single person show-ups are disfavored because they are inherently suggestive. State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Cl. App. 1999). However, identifications obtained from show-ups are not automatically excluded and may be admissible if found to be sufficiently reliable. Id. In State v. Brown, 356 S.C. 496, 503-

504, 589 S.E.2d 781, 785 (Cl. App. 2003), the Court of Appeals thoroughly analyzed the show-up identification procedure:

“ ‘[A] showup may be proper where it occurs shortly after the alleged crime, near the scene of the crime, as the witness’ memory is still fresh, and the subject has not had time to alter his looks or dispose of evidence, and the showup may expedite the release of innocent suspects, and enable the police to determine whether to continue searching.’ ” The closer in time and place to the scene of the crime, the less objectionable is a showup. A show-up may be proper even though the police refer to a suspect as a suspect, and even though the suspect is handcuffed or is in the presence of the police. Although show-ups have been upheld by the Court, these situations usually involve either extenuating circumstances or are very close in time to the crime.

Single person show-ups are disfavored because they are suggestive by their nature. However, an identification may be reliable under the totality of the circumstances even when a suggestive procedure has been used. Suggestiveness alone does not mandate the exclusion of evidence. Reliability is the linchpin in determining the admissibility of identification testimony.

(citations omitted).

There is a two-prong inquiry involved in determining the admissibility of an out-of-court identification. See Neil v. Biggers, 409 U.S. 188, 199-200 (1972) (outlining the necessary inquiry regarding out-of-court identifications and the factors to be weighed when determining reliability). This inquiry involves first ascertaining whether the identification process was unduly suggestive, and then determining whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Govan, 372 S.C. at 558, 643 S.E.2d at 95. “The in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a significantly substantial likelihood of irreparable misidentification.”

Id.

The reliability of an identification is determined by the facts of the case. State v. Scipio, 283 S.C. 124, 127, 322 S.E.2d 15, 17 (1984). To determine whether the procedure was unduly suggestive, the Court must look to: (1) the proximity in time to the alleged crime; (2) proximity in location to the crime; (3) the freshness of the witness's memory; (4) whether the suspect had time to alter his looks or dispose of evidence; and (5) whether the show-up will expedite the release of innocent suspects and enable further investigation. Govan, 372 S.C. at 558-559, 643 S.E.2d at 95. However, "[s]uggestiveness alone does not mandate the exclusion of evidence." State v. Patterson, 337 S.C. 215, 229, 522 S.E.2d 845, 852 (1999).

Even if the show-up is found to be unduly suggestive, the identification may still be admissible if the State can prove by clear and convincing evidence the procedure is reliable. Govan, 372 S.C. at 559, 643 S.E.2d at 95-96. To determine whether the identification is reliable, the Court must look to: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the amount of time between the crime and the identification. Id. at 559, 643 S.E.2d at 96.

In State v. Mansfield, 343 S.C. 66, 69-70, 538 S.E.2d 257, 259 (Cl. App. 2000), a neighbor viewed Mansfield attempting to break into an adjacent home. The neighbor looked right at Mansfield's face, observed him in the middle of the afternoon, and properly described Mansfield's height, race, skin tone, and shirt. Id. However, he described Mansfield as wearing white shorts, tennis shoes, and having plaits in his hair. Id. Mansfield was actually wearing gray sweat pants pushed up to the knees, boots, and

had an afro. Id. at 70-71, 538 S.E.2d at 259. The neighbor was certain of his identification of Mansfield. Id. at 80, 538 S.E.2d at 264. Notwithstanding the suggestiveness of the show-up procedure, the Court of Appeals found the identification reliable based on a totality of the circumstances and allowed the admission of both the show-up identification and the in-court identification. Id. at 79-80, 538 S.E.2d at 263-264. The circumstances supporting reliability included: (1) the witness' heightened attention; (2) the witness' good opportunity to view the suspect in good lighting; (3) the certainty of the witness in the identification; (3) the general consistency in the witness' description even though there were slight discrepancies in the description of the hair and clothing; and (4) the short time difference of less than an hour between the crime and show-up. Id.

In State v. Govan, 372 S.C. at 555, 643 S.E.2d at 94, Govan moved for the trial judge to suppress both his show-up identification and the resulting in-court identification. The robbery victim described Govan as a black man in a long black jacket and black hat. Id. About forty-five minutes after the crime, police apprehended Govan after seeing him abandon a brown paper bag containing money. Id. at 556, 643 S.E.2d at 94. The victim was brought to the scene of Govan's detention and identified him as the perpetrator. Id. On appeal, the Court of Appeals found the identification was not unduly suggestive because it occurred near the scene of the crime shortly after its commission. Id. at 558-559, 643 S.E.2d at 95. Furthermore, even if the procedure was unduly suggestive, the Court found the identification was reliable because the victim viewed Govan in a well-lit building from close proximity, the victim had heightened attention due to the circumstances, the show-up occurred shortly after the crime, and the victim was certain

about the identification. Id. at 559-560, 643 S.E.2d at 96. Under the totality of the circumstances, the Court found the show-up was not unduly suggestive and was reliable. Id. at 560, 643 S.E.2d at 96.

In the case sub judice, the show-up identification evidence and subsequent in-court identifications were properly admitted. Initially, the show-up procedure employed in this case, while suggestive, was not unduly suggestive. The show-up identifications occurred within thirty-five to forty minutes of the robbery and shortly after Appellant was apprehended. Additionally, the show-up procedure was performed while the witnesses' memories were still fresh and occurred in close proximity to the location of the crime, with the residence only a little over a block from the scene of the robbery. Furthermore, it was necessary to aid in the release of potentially-innocent suspects. The only factors supporting a finding of suggestiveness are the facts Appellant was in handcuffs, was surrounded by officers, and had an opportunity to change his clothing before the identifications. However, these factors are insufficient to outweigh the promptness of the show-up procedure, its close proximity in time and place to the robbery, the freshness of both witnesses' memories, and the necessity of the show-up procedure to the investigation. Therefore, weighing the suggestiveness factors, the show-up procedure was not overly or unduly suggestive.

However, even if the show-up procedure employed was unduly suggestive, the resulting identifications were reliable under the totality of the circumstances and were admissible. McGorge and Quintyne both had excellent opportunities to view Appellant, and both witnesses' attention was focused on Appellant. Quintyne noticed Appellant walk by his cab after Appellant made a surprising statement about intending to commit a

robbery, and he continued to watch Appellant as he entered the convenience store. McGeorge noticed Appellant enter her store based on his bright clothing, and her attention was heightened and focused during the robbery because she consciously made an effort to memorize as many details about Appellant's appearance as she could. McGeorge viewed Appellant in close proximity and in good lighting during the robbery as he stood directly in front of her at the check-out counter. Additionally, both McGeorge and Quintyne were very certain in their identifications of Appellant. No evidence was presented suggesting any uncertainty in Quintyne's identification, and McGeorge stated she was 80% to 90% certain of her identification. McGeorge also testified she had no doubt Appellant was the armed robber after viewing him in the courtroom. Furthermore, Appellant and McGeorge's descriptions of the suspects were generally consistent with Appellant's appearance aside from his change in clothing. See Mansfield, 343 S.C. at 79-80, 538 S.E.2d at 264 (finding a witness' description accurate on the whole even though the suspect's hair, shoes, and pants were different than described); State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Cl. App. 1993) (affirming the trial judge's admission of identification evidence where the witness described the robber as wearing a ski jacket and cap but the suspect he identified was not wearing those items at the time of the show-up procedure). Finally, and critically, the show-up procedure was performed only thirty-five to forty minutes after the crime in very close proximity to the convenience store. Therefore, based on the totality of the circumstances, the identification evidence was reliable and admissible even if the show-up procedure was unduly suggestive.

Under the totality of the circumstances, McGeorge and Quintyne's out-of-court identifications of Appellant were reliable and admissible. The circumstances of

Appellant's case are very similar to the circumstances of the show-up procedures employed in Mansfield and Govan. Just as in those cases, the witnesses' identifications of Appellant were not impermissibly tainted by any inherent suggestiveness in the show-up procedure employed. See Govan, 372 S.C. at 559-560, 643 S.E.2d at 96 (finding a witness' pre-trial identification to be admissible where the witness viewed the robber with heightened attention in a well-lit building while immediately next to and in direct contact with the robber, the suspect's appearance was consistent with the witness' description, the witness expressed certainty in the identification, and the show-up procedure occurred forty-five minutes after the robbery); Mansfield, 343 S.C. at 78, 538 S.E.2d at 263 ("Notwithstanding the suggestive nature of the identification procedure employed by police in this case, Diamond's identification of Mansfield was reliable in light of the totality of the circumstances."). The show-up procedure used in Appellant's case was not unduly suggestive and was sufficiently reliable regardless of any suggestiveness. Therefore, the trial judge committed no error in admitting the identifications.⁵ See, e.g., Johnson, 311 S.C. at 134-135, 427 S.E.2d at 719 ("We hold that the evidence supports the factual findings of the judge on the suggestiveness of the show-up and, therefore, the trial judge did not err or abuse his discretion in admitting the testimony."). Appellant's conviction should be affirmed.

⁵Furthermore, in addition to the witnesses' testimony about the pre-trial show-up identifications of Appellant, both McGeorge and Quintyne made in-court identifications of Appellant during trial. (R. p. 200; p. 246). On appeal, Appellant has not challenged the admission of the in-court identifications. Therefore, Appellant abandoned any issue with the in-court identifications. See State v. Jones, 273 S.C. 723, 726, 259 S.E.2d 120, 122 (1979) ("Exceptions not argued in appellants' brief are deemed abandoned."). As the evidence related to the pre-trial identifications was merely cumulative to the unchallenged in-court identifications of Appellant, any error in the admission of the show-up evidence was entirely harmless. See State v. Griffin, 339 S.C. 74, 77-78, 528 S.E.2d 668, 670 (2000) ("There is no reversible error in the admission of evidence that is cumulative to other evidence properly admitted.").

II.

The trial judge properly denied Appellant's suppression motion because the officers' search of the residence was performed with consent from a party with apparent authority over the premises, the evidence was discovered in plain view, and exigent circumstances justified the search regardless of any obtained consent. Furthermore, regardless of the trial judge's ruling, Appellant did not possess the capacity to challenge the search under the Fourth Amendment because he was not a tenant or an invited social guest and had no legitimate expectation of privacy.

Appellant maintains the trial judge erred in not suppressing the evidence recovered in the search of the Pine Street residence. Appellant asserts the search was illegal because the officers did not have valid consent to search based on the fact he was a tenant. The trial judge properly refused to suppress the evidence because the officers had consent to search the home from a person with apparent authority over the residence and the evidence was discovered in plain view. Furthermore, the search was further justified by exigent circumstances. The officers' actions in searching the home were entirely reasonable. Therefore, the evidence recovered in the search was properly admitted at trial, and the trial judge's ruling is supported by the evidence. Additionally, regardless of the trial judge's ruling on the admissibility of the evidence, Appellant did not have the capacity to challenge the constitutionality of the search because he did not have a legitimate expectation of privacy in the home. For these reasons, Appellant's conviction should be affirmed.

A. General Law Related to Searches and Seizures

In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Cl. App. 2004). The appellate court will not reverse merely because it would have reached a

different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Cl. App. 2009). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). The appellate court must affirm the trial court if there is any evidence in the record to support the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Cl. App. 2005).

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This guarantee protects against unreasonable searches and seizures, including those involving only a brief detention. Pichardo, 367 S.C. at 97, 623 S.E.2d at 847. However, "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" United States v. Mendenhall, 446 U.S. 544, 553-554 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)).

Any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). The well-settled rule is warrantless searches are unreasonable per se unless they fall under an exception to the Fourth Amendment's warrant requirement. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) search incident to a lawful arrest; (2) "hot pursuit"; (3) stop and frisk; (4) the automobile exception; (5) the "plain view" doctrine; and (6) consent. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981).

Additionally, exigent circumstances can justify a warrantless search of a home which would otherwise be unreasonable. State v. Herring, 387 S.C. 201, 209, 692 S.E.2d 490, 494 (2009).

B. Consent and Plain View

A warrantless search may be justified based on consent obtained from a third party. Flowers, 360 S.C. at 5, 598 S.E.2d at 728. In order to give consent, the third party must have "common authority over or some other sufficient relationship to the premises or effects being searched." Id.; see United States v. Matlock, 415 U.S. 164, 171 (1974) ("These cases at least make clear that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or sufficient relationship to the premises or effects sought to be inspected."). "Common authority is defined as mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable for officers to believe the person granting consent has the authority to do so." State v. Laux, 344 S.C. 374, 376, 544 S.E.2d 276, 277 (2001).

Landlords and hotel managers may not validly consent to a search of a tenant or hotel guest's room. State v. Moultrie, 271 S.C. 526, 529, 248 S.E.2d 486, 487-488 (1978). However, where no landlord-tenant relationship exists, a host can validly consent to a search of premises occupied by a guest. Id. at 529, 248 S.E.2d at 488. Guests assume the risk home residents will allow others into the premises. Bailey, 276 S.C. at 36, 274 S.E.2d at 915-916.

Furthermore, even if officers receive consent from a person who does not have actual authority to grant it, the consent may be valid if it is based upon apparent authority. Laux, 344 S.C. at 377, 544 S.E.2d at 277. If the circumstances are such that it is objectively reasonable for the officers to believe the consenting party has actual authority over the premises, the officers can reasonably rely on that party's consent. Illinois v. Rodriguez, 497 U.S. 177, 188 (1990). Our courts have concluded "the police should be allowed to rely on the consent of the owner and on the general appearances of the situation." Moultrie, 271 S.C. at 529, 248 S.E.2d at 488.

In the case at bar, it was objectively reasonable for the officers to rely on the consent from the person identifying himself as a tenant. The tenant was located with the assistance of a next-door neighbor. The tenant possessed a key to the house, had knowledge of the area, and was able to unlock the door for the officers. He further informed the officers a person had earlier asked for permission to leave his bags, and the officers discovered luggage inside of the home. These facts, particularly the tenant's possession of a working key, made it reasonable for the officers to believe the tenant was a resident of the house and had authority to consent to a search.

Based on the information available to the officers, it was objectively reasonable for them to rely on the assurances and consent of the keyholder. See Laux, 344 S.C. at 379, 544 S.E.2d at 278 ("We hold it was objectively reasonable for officers to conclude Cooke had apparent authority to consent to the search of the residence."); Bailey, 276 S.C. at 37, 274 S.E.2d at 916 ("Under the circumstances it was reasonable for the officers to believe and the inference is amply supported that the resident had authority to consent to the search[.]"). The fact Appellant contends he was renting a room in the residence

does not negate the officers' objectively reasonable reliance on the consent from a third party with apparent authority, especially in light of the fact Appellant's testimony was entirely unsubstantiated. See Moultrie, 271 S.C. at 529, 248 S.E.2d at 488 ("In this case there is no evidence that appellant was renting the room he shared with the owner's daughter. We hold that where no landlord-tenant situation exists, a host can validly consent to a search of the premises occupied by a guest."). The officers properly relied on valid consent to search the residence, and any evidence they discovered was properly found in plain view. See State v. Beckham, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999) ("Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence."). The trial judge properly admitted the evidence based on consent and the plain view doctrine, and her ruling was supported by the evidence. See State v. Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004) ("On appeal from a suppression hearing, this court is bound by the circuit court's factual findings if any evidence supports the findings."). Appellant's conviction should be affirmed.

C. Exigent Circumstances

The exigent circumstances doctrine permits law enforcement officers to act without a search warrant where the exigencies of the situation make the officers' course of action immediately imperative. Id. at 351, 592 S.E.2d at 348. "The exigent circumstances doctrine provides an exception to the Fourth Amendment's protection against warrantless searches, but only where, from an objective standard, a compelling need for official action and no time to secure a warrant exist." Id. "A fairly perceived

need to act on the spot may justify entry and search under the exigent circumstances exception to the warrant requirement.” Herring, 387 S.C. at 210, 692 S.E.2d at 494. Exigent circumstances justifying a warrantless search include an imminent risk of flight from the suspect or a risk of danger to officers or others. Id. at 210, 692 S.E.2d at 494-495. The imminent destruction of evidence can also constitute exigent circumstances permitting a warrantless search. State v. Simmons, 384 S.C. 145, 174, 682 S.E.2d 19, 34 (Cl. App. 2009).

In Warden v. Hayden, 387 U.S. 294, 298 (1967), the United States Supreme Court considered whether the search of a residence in which a suspected armed robber was believed to have fled to was justified by the exigencies of the situation. Officers were alerted by a cab driver that an armed robbery suspect ran into a particular residence. Id. at 297. The officers responded to the scene within five minutes, entered the home, and searched for the suspect. Id. at 298. Hayden challenged the lawfulness of the search, and the Supreme Court found the search was reasonable and justified. Id. The Court concluded:

The police were informed that an armed robbery had taken place, and that the suspect had entered 2111 Cocoa Lane less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.

Id. at 298-299.

The facts of Appellant's case present circumstances very similar to the exigencies in Hayden justifying a warrantless search. Officers arrived at the Pine Street residence within minutes of receiving word a suspect in an armed robbery was observed running inside. Due to the fact the suspect was known to be armed and had just fled into a residence, the officers were permitted to act immediately based on the exigent need to secure the suspect and ensure he did not flee, destroy evidence, or gain access to other weapons which could pose a grave danger to the officers or others. The circumstances presented a compelling need for immediate police action. The fact the officers exercised restraint and caution in attempting to locate a consenting tenant before entering the home did not eliminate the exigencies of the situation or their authority to enter. Therefore, the officers were justified in entering the home and searching for Appellant regardless of whether they had valid consent based on the exigent circumstances. The officers' actions were entirely reasonable and prudent, and the search was proper. See State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977) ("It is only unreasonable searches and seizures that are prohibited."). Appellant's conviction should be affirmed.

D. Capacity to Challenge Under the Fourth Amendment

A criminal defendant asserting a challenge to an allegedly unreasonable search and seizure must establish his own personal Fourth Amendment rights were violated. State v. McKnight, 291 S.C. 110, 114, 352 S.E.2d 471, 473 (1987). "[C]apacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Rakas v. Illinois, 439 U.S. 128, 143 (1978) (citing Katz v. United States, 389 U.S. 347, 353 (1967)). A subjective

expectation of privacy can be considered legitimate if it is one society accepts and recognizes as reasonable. Minnesota v. Olsen, 495 U.S. 91, 95-96 (1990). House guests have been recognized as having a legitimate expectation of privacy in a host's home. Id. at 98.

In the present case, Appellant did not have capacity to challenge the search of the Pine Street residence because he had no legitimate expectation of privacy in the home. The owner of the home testified she had never seen Appellant before, had never rented a room to him, and was the only person with the authority to do so. The officers testified they spoke to a person with a key claiming to be a tenant in the home, and he informed them Appellant was not a resident or guest. The tenant merely told the officers Appellant had asked to store some bags in the home. Subsequently, Appellant asserted he was a renter and had paid one of the other tenants to allow him to stay in one of the bedrooms for the night. However, Appellant conceded he did not have a key to the house and did not present any testimony from any other parties supporting his claims.

Appellant was not a renter, tenant, or guest in the home. Instead, he had only been permitted to temporarily store some luggage inside. Therefore, he had no privacy interest in the rooms of the house, including in the bedroom or bathroom where he and the seized evidence were located. Without a legitimate expectation of privacy in the home or areas searched, Appellant did not have the requisite capacity to challenge the search on Fourth Amendment grounds. See Bailey, 276 S.C. at 36, 274 S.E.2d at 915-916 ("[Bailey] had no possessory or privacy interests in the premises. As a guest, he assumed the risk that the home resident would allow others into the area." (citations omitted)). Appellant's conviction should be affirmed.

III.

Regardless of the issues raised by Appellant on appeal, any trial error was harmless due to the overwhelming evidence of guilt presented during trial and Appellant's apology and admission of guilt during sentencing proceedings, which eliminated any remaining doubt regarding his guilt for the offense and rendered further review unnecessary.

Although Appellant contends the trial judge erred in denying his motions to suppress the identification evidence and the evidence recovered during the search of the residence, any trial error was harmless in light of the overwhelming evidence of guilt and Appellant's candid admissions during sentencing. The evidence presented during trial overwhelmingly established Appellant's guilt for the armed robbery. In addition to this evidence, Appellant eliminated any need for further review with his statements during the sentencing proceedings. Appellant apologized to the victim and indicated he was not concerned with the impact of his actions at the time of the incident. Based on Appellant's candid statements, no question remained regarding his guilt or innocence. Therefore, further review of the issues raised on appeal is unnecessary. Appellant's conviction should be affirmed.

Error without prejudice does not warrant reversal on appeal. State v. McWee, 322 S.C. 387, 393, 472 S.E.2d 235, 239 (1996). Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). An admission of improper evidence is considered harmless when it is merely cumulative to other properly admitted evidence. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978). "When guilt has been conclusively proven by competent

evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). When overwhelming evidence of guilt has been established, any trial error may be harmless. State v. Gathers, 295 S.C. 476, 480-481, 369 S.E.2d 140, 143 (1988).

In Appellant's case, overwhelming evidence of guilt was presented in addition to the allegedly objectionable evidence. Appellant was positively and definitively identified in court by both McGeorge and Quintyne, and Appellant has not challenged the in-court identifications on appeal. Additionally, Investigator Thomas identified Appellant by his distinctive bald spot from the surveillance footage taken during the robbery. Furthermore, Appellant was arrested shortly after the robbery hiding in the bathroom of a home a little over a block away. When officers observed Appellant in the bathroom through a window and commanded him to exit the home, Appellant responded by turning off the interior lights. He then remained in the bathroom until officers were forced to pick the lock on the bathroom door. The unchallenged identifications of Appellant as the robber coupled with his efforts to evade detection and capture by law enforcement constituted overwhelming evidence of his guilt for the offense. Also, the State presented the testimony of a fellow inmate who overheard Appellant attempting to fabricate an alibi defense prior to trial, which further supports the other evidence of his guilt.

Furthermore, regardless of the strength of the evidence in the case, Appellant removed any lingering doubt about his guilt when he apologized to the victim during sentencing and explained how he was not concerned with the impact of his actions at the time of their commission. After McGeorge stressed the subsequent negative impact the

robbery had on her life, Appellant apologized to her and candidly stated the impact on her life "was not a consideration in [his] mind." (R. p. 487). Therefore, based on Appellant's apology and candid admissions during the sentencing proceedings, any potential uncertainty regarding his guilt or innocence was eliminated. See Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) ("[R]eview of a trial error is unnecessary where a defendant admits in open court after his conviction that he is guilty."); State v. Sroka, 267 S.C. 664, 665, 230 S.E.2d 816, 817 (1976) ("Any doubt about the correctness of this conclusion is eliminated by the admission of appellant in open court, after conviction and during the pre-sentence inquiry by the trial judge, that he participated in the robbery with a sawed-off shotgun. Further review of the record, therefore, is rendered unnecessary."); State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) (finding an alleged trial error to be harmless based on overwhelming evidence of guilt and Wiley's apology in open court during sentencing proceedings). Due to the overwhelming evidence of guilt and Appellant's admissions, any trial error was entirely harmless. Appellant's conviction should be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

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Chief Deputy Attorney General

SALLEY W. ELLIOTT
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ATTORNEYS FOR RESPONDENT

November 15, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Richland County
Honorable J. Michelle Childs, Circuit Court Judge

THE STATE,

Respondent,

vs.

RICHARD M. KOUGH,

Appellant.

CERTIFICATE OF COUNSEL

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

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ATTORNEYS FOR RESPONDENT

November 15, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Richland County
Honorable J. Michelle Childs, Circuit Court Judge

THE STATE,

Respondent,

vs.

RICHARD M. KOUGH,

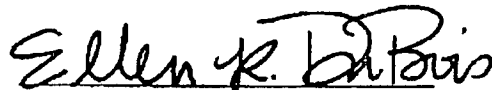
Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle Cante DuRant, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 15th day of November, 2010.



ELLEN R. DuBOIS
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2011 WL 11735793

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Court of Appeals of South Carolina.

The STATE, Respondent,
sv.Richard KOUGH, Appellant.

No. 2011-UP-501.

|
Heard Oct. 18, 2011.|
Decided Nov. 9, 2011.Appeal from Richland County; J. Michelle Childs, Circuit
Court Judge.

Attorneys and Law Firms

Appellate Defender Lanelle Cantey Durant and Assistant
Appellate Defender Breen Stevens, both of Columbia, for
Appellant.Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, Assistant Deputy Attorney
General Salley W. Elliott, and Assistant Attorney General
Mark Farthing, all of Columbia, for Respondent.

Opinion

PER CURIAM.

*1 Richard Kough appeals his conviction of armed robbery, arguing the trial court erred in admitting out-of-court identifications and evidence seized during an allegedly illegal search. We affirm pursuant to Rule 220(b)(1), SCACR, and the following:

1. Regarding the out-of-court identifications: *See Neil v. Biggers*, 409 U.S. 188, 199–200 (1972) (setting forth a two-prong test to determine whether an identification is reliable,

including a review of whether the identification process was unduly suggestive and a determination, if unduly suggestive, of whether the identification was nonetheless so reliable that no substantial likelihood of misidentification existed); *id.* (listing the factors to consider in determining reliability: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation); *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) (stating the decision to admit an eyewitness identification is in the trial court's discretion and will not be disturbed on appeal absent an abuse of discretion).

2. Regarding the admission of evidence obtained during the search: *See State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (“When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling.”); *State v. Laux*, 344 S.C. 374, 376, 544 S.E.2d 276, 277 (2001) (stating the test of whether a third party may grant valid consent to search is “whether the third party possesses common authority over or has some other sufficient relationship to the premises or effects searched.”); *id.* at 377, 544 S.E.2d at 277 (finding consent to a search may be valid based on apparent authority and a police officer's reasonable belief that the person authorizing the search has the authority to do so); *see also Warden v. Hayden*, 387 U.S. 294, 296–99 (1967) (applying the exigent circumstances exception to the warrant requirement in similar circumstances where armed robber was seen by witnesses entering a house, police arrived within minutes, police were admitted into the house by a person with apparent authority over the premises, and incriminating items were found during a search).

AFFIRMED.

SHORT, WILLIAMS and GEATHERS, JJ., concur.

All Citations

Not Reported in S.E.2d, 2011 WL 11735793



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The South Carolina Court of Appeals

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November 28, 2011

REMITTITUR

The Honorable Jeanette W. McBride
1701 Main Street, Room 205
PO Box 2766
Columbia, SC 29202

Re: The State v. Kough, Richard
2008-GS-40-06661

Dear Mrs. McBride:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

The Exhibits being returned are: State's Exhibits #29 (Video), #30 (Video), and #31 (Video), State's Exhibit #7 (Photograph), State's Exhibit # 18 (Photograph), State's Exhibit #21 (Photograph), State's Exhibit #24, (Photograph). Please sign attached copy of this letter and return to acknowledge receipt of these items.

Sincerely,

Renee S. Johnson
Renee S. Johnson
Case Specialist II

VCA
TAG/tj

cc: Appellate Defender Lanelle Cantey Durant
Assistant Appellate Defender Breen Stevens
Assistant Attorney General Mark Farthing

Receipt Acknowledgement:

Name: _____ Date: _____

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF RichlandRichard Mark Kough #338426
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

2011C P400876
IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legally 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 a note 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 R.K. Lee Cr. I. Broad River C.I.
2. Name and location of Court which imposed sentence Richland County Circuit Court, Columbia S.
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) 2008-GS-40-6661
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) December, 10, 2009.
 - (b) Sixteen years

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina State Court Of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. November, 19. 2011
- 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) _____
- (b) N/A
- (c) N/A
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective Assistance Of Counsel: 6TH Amendment Right
 (b) Violation of 14TH Amendment, Right to fair trial.
 (c) Ineffective Assistance of Appellate Counsel: violation of 6TH Amendment

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

- (a) See attached. Pages 1-10. Re: Page 3, Question 11a.
 (b) See attached. Page 1- . Re: Page 3, Question 11b.
 (c) Appellate counsel failed to argue 6TH & 14TH Amendment Violations

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? NO
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
 (d) any other petitions, motions or applications in this or any other Court? NO

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

(a) the specific nature thereof:

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

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

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

(c) the disposition thereof:

- i. _____
 ii. _____
 iii. _____

Attached, Re: Page 3, Question 11.2.
6TH Amendment Right Violation/Effective Assistance
of
Counsel.

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

- (a). Trial Counsels failure to investigate & challenge defendant's competency despite defendant's repeated request to do so to each of the representing attorney's listed on page # 5. Q-18/(a). Constituted ineffective assistance
- i. Miah Leddy. 1701 Main Street / P.O. Box 192, Columbia, SC. 29201
 - ii. Tynika Adams Claxton. P.O. Box 50, Blythewood, SC. 29016
 - iii. Charlie Johnson. 1911 Pickens Street, Columbia, SC. 29201

(b). Trial Counsel, Charile Thonson, failed to adequately argue motion to suppress evidence obtained in violation of defendant's Forth Amendment Rights.

- i. Trial Counsel, Charlie Thonson, failed to call witnesses at suppression hearing.
- ii. Trial Counsel, Charlie Thonson, failed to investigate Tynika A. Claxton, and consult with defendant about facts of moving for suppression of identification testimony.
- iii. Trial Counsel, Charlie Thonson, failed to adequately prepare defendant's case by not interviewing, or subpoenaing a witness who would have substantially corroborated Kough's // Defendant's // testimony material to Forth Amendmet Right Violation, ~~by~~ illegally seizing evidence, which Kough through his trial counsel. Continued.

- iii. moved to have suppressed. The suppression of the material evidence would have undoubtedly lead to a favorable outcome in Defendant's case. Defendant supplied the witness' name to trial counsel well in advance to any court proceedings. Defendant also informed his trial counsel of the exact nature of said witness' testimony.
- iiii. Trial counsel, Charlie Thonson failed to obtain a continuance for the purpose of producing / locating / interviewing two separate witnesses. Both of which would've independently, or separately substantiate defendant's claim / testimony that defendant was not only a socially invited guest, but was in fact a tenant at the boarding house where defendant was located, and evidence was illegally seized in Violation of defendant's Fourth Amendment Rights.
- ▼
- v. Trial counsel, Charlie Thonson failed to seek a continuance to interview state's witnesses.
- vi. Trial Counsel, Charlie Thonson, failed to move for a continuance of trial so that he could prepare for trial.
- vii. Trial counsel, Charlie Thonson's overall performance, failure to prepare for trial, properly cross-examine government's witnesses, impeach government's witnesses with inconsistent prior statements, and failed to call corroborating / continued:

VIII. Continued:

witnesses to defendant's support of testimony deprived defendant.

VIII. Trial Counsel's Tynika A. Claxton & Charlie Thonson. failed to conduct a pretrial investigation, and failed to interview prosecution's witnesses, and also prevented the defendant from doing so. A pretrial investigation in a criminal case provides the basis foundation on which most defense rest, and is a critical stage of lawyer's performance.

X. Trial Counsels Tynika A. Claxton & Charlie Thonson failed to conduct pretrial investigations, interview witnesses other than the defendant, even though the defendant had provided the names of witnesses to counsels.

XI. Trial Counsels Tynika A. Claxton & Charlie Thonson failed to investigate and locate individual that last seen the defendant.

XII. Trial Counsel Charlie Thonson's complete failure to investigate potentially corroborating witnesses can hardly be considered a tactical decision. Counsel's failure to interview the proposed witnesses / Continued:

XII. Continued:

is troublesome. Had trial counsel interviewed the witnesses, his decision not to call them would have been protected from an ineffective assistance of counsel claim as a tactical litigation decision. The complete failure to investigate potentially corroborating witnesses however, can never be considered a tactical decision. As the Supreme Court noted in Strickland, "[counsel has the duty to make reasonable investigations, or to make a reasonable decision that makes particular investigations unnecessary.]"

XIII. Trial Counsel's, Tynika A. Claxton & Charlie Thonson failures to hire an investigator to track down potential witnesses, amounted to ineffective assistance of counsel.

XIIII. Trial counsels, Tynika A. Claxton & Charlie Thonson failed to retain an investigator to interview witnesses

XV. Trial counsel, Charlie Thonson failed to present a coherent argument to the Judge, and Jury based on defense of Police fabrication & purgery despite available evidence to support the claim, and the defendant's repeated requests to counsel to do so.

R.K.

XVI. Trial counsel Charlie Thonson, verbally assaulted defendant, and used racial comments towards defendant as well as told racial jokes to defendant during trial, as well as sharing said racial jokes with the Solicitors during recesses. Counsel also threatened to compromise defendant's rights.

XVII. Trial counsel, Charlie Thonson failed to argue that defendant was only guilty of Strong Armed Robbery despite the fact that it was the defendant's trial counsel who moved for the Court to instruct the jury, and to include the lesser charge of Strong Armed Robbery, which the Trial Judge did do upon defense Counsel's insistence.

XVIII. Trial counsel, Charlie Thonson failed to move for a modification of the verdict for a conviction on a lesser included charge for which he was the one who argued, and won for the Judge to instruct on a lesser included charge of Strong Armed Robbery.

XIX. Trial counsels, Tynika A. Claxton, and Charlie Thonson both had, and failed a duty to investigate leads affecting the credibility of witnesses which would serve to bolster their client's credibility and undercut the State's witnesses testimony.

XX. Defense Counsels Micah Leddy, Tynika A. Claxton and Charlie Thonson all failed to investigate and secure records from a hospital & mental institution which would have shown a valid defense of insanity, despite defendant's verbal, written request to each counsel to do so.

XXI. Defense Counsels Micah Leddy, Tynika A. Claxton and Charlie Thonson failed to conduct investigations into defendant's mental illness, and to investigate insanity defense, despite defendant's oral, and written request to each to do so.

XXII. Trial counsels ^{Tynika A. Claxton &} Charlie Thonson failed to investigate possible insanity defense which caused counsels not to move for a competency hearing despite defendant's request to do so.

XXIII. Defense Counsels, Micah Leddy, Tynika A. Claxton and Charlie Thonson all failed to investigate defendant's mental health history despite defendant's oral, and written requests to each to do so.

XXIV. Defense counsels, Micah Leddy, Tynika A. Claxton, and Charlie Thonson all failed to investigate possible insanity defense which caused all three counsels not to move for a competency hearing, amounted to/Continu

XXIII. Continued: Counsels failure to advise defendant of affirmative insanity defense.

XXV. Defense Counsels, Micah Leddy, Tynika A. Claxton, and Charlie Thonson all failed to contest the defendant's competence at defendant's repeated request, constituted preformance below the objective standard of reasonableness. Further, Counsels failures to challenge the defendant's incompetence amounted to abdication of counsels duty to hold the government to it's burden to prove the defendant competent. The defense counsels knew that the defendant's competence was in serious question. So much so that one defense counsel, Tynika A. Claxton withdrew her representation of the defendant.

XXVI. Defense counsels, Micah Leddy, Tynika A. Claxton, and Charlie Thonson all failed to request a competency hearing despite the fact that all three knew that defendant has previous mental record.

XXVII. Defense counsels, Micah Leddy, Tynika A. Claxton and Charlie Thonson failed to investigate the defendant's mental illnesses which they were aware of the fact that defendant suffered from, thereby failed to alert Court, and prosecutors of defendant's mental history, and problems, a factor that may have affected plea negotiations, and sentence, Constituted ineffective assistance of Counsel.

- XXVIII. Trial counsel, Charlie Thonson failed to secure independent psychological analysis of defendant, and present evidence that defendant had a mental condition during the time ^{R.K.} the crime was committed.
- XXVIII. Trial counsel Charlie Thonson failed to raise issue that the defendant was mentally incompetent to stand trial, and move for a continuance to have a neurological evaluation.
- XXIX. Defense counsels failed to seek assistance of psychiatrist, or to investigate an insanity defense. Micah Leddy, Tynika A. Claxton, and Charlie Thonson.
- XXXI. Trial counsel, Charlie Thonson failed to retain an independent psychiatrist in order to present evidence during sentencing ^{R.K.} ~~phase~~ phase despite prior knowledge of defendant's mental illnesses.
- XXXII. Trial counsel, Charlie Thonson had a duty to familiarize himself with regard to the specific scientific area in which an expert is needed. However he need not become an expert himself, but must ^{R.K.} ~~must~~ conduct a minimal amount of back-ground work in order that he
Continues

xxxii. Continued:

may intelligently move the court for the need of an expert. Counsel failed to perform his duty in this regard despite the fact that an expert should have been called on regarding the defendant's mental health/competency, which was in serious doubt.

xxxiii. Trial counsel, Charlie Thonson failed to raise jury issue that violated fair cross-section requirement and recommending change of "not guilty" plea, to plea of "not guilty by reason of insanity."

xxxiiii. Trial counsel, Charlie Thonson failed to investigate expert's opinion.

xxxv. Trial counsel, Charlie Thonson failed to subpoena certain witnesses at the government's expense on behalf of his indigent client.

xxxvi. Trial counsel, Charlie Thonson, and defense counsels, Micah Leddy, and Tynika Claxton all failed to investigate an insanity defense, which had no strategic value.

- xxxvii. Trial counsel, Charlie Thonson failed to present mitigating evidence of defendant's mental disease, and or, defects.
- xxxviii. Trial counsel, Charlie Thonson failed to obtain an expert to prepare a social history.
- xxxviii. Trial counsel, Charlie Thonson failed to secure an expert on drug use, who would have cast serious doubt on the State's witnesses' credibility, who had drug, as well as mentally related problems. Trial Counsel knew of State witness "William Kirkland's" drug problems well in advance of trial through Rule 5. material that included a letter from Mr. Kirkland informing the State of his desire to testify against the defendant in exchange for help with his drug problems". Trial Counsel went on to question Mr. Kirkland in trial about his admitted drug problems, and went as far as to call Mr. Kirkland a crack-head while he was on the stand.

xxxx.

1. Trial counsel, Charlie Thonson failed to object to Detect Arthur L. Thomas' hearsay testimony regarding his in court testimony where he states that he, and he also viewed video footage of the alleged crime where he testifies that he saw a weapon in the defendant's hand where no weapon was visible on the video footage that was shown to the jury. Trial counsel also failed to object a second time when ^(Sic) ~~Det~~ Detective Arthur L. Thomas again offers hearsay testimony to support his in-court I.D. of defendant at trial by once again telling the jury that he viewed video footage of the alleged crime that only he was able to view a year and a half earlier, but was not available for the jury's viewing, or defense's cross-examination at trial.
11. Trial counsel, Charlie Thonson failed once again to object to hearsay testimony offered at defendant's trial ^(Sic) ~~by~~ by Detective Arthur L. Thomas, and SGT. Taurus D. Sanders' testimony regarding statements made by an unidentified black gentleman referred to throughout defendant's trial as a "Key Holder." His alleged statements were used against the defendant at trial despite the fact that the State never provided the alleged key holder's name to the defense, or make the alleged man available for cross-examination.

^{sic} III. Trial counsel, Charlie Thonson failed to object to hearsay testimony provided by SGT. Taurus D. Sanders, and Det. Arthur L. Thomas regarding an officer Bowman who was not at court to testify, or cross-examine.

IV. Trial counsel, Charlie Thonson failed to object to prosecutor misconduct when he said nothing when solicitors called William Kirkland to the stand when both trial counsel, and Solicitors had prior knowledge that the state's witness was going to commit ^{sic} perjury.

V. Trial counsel Charlie Thonson failed to object to Tonya McGeorge's, and Carl Quintyne's in court I.D. of the defendant after trial court had already moved the court to suppress their out of court I.D.'s

VI. Trial Counsel failed to object to Carl Quintyne's out of court I.D. of defendant when Mr. Quintyne made clear that he I.D.'s the wrong suspect the night of the alleged crime via, his testimony of the line-up process the night of alleged crime.

iv. N/A

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) 6TH Amendment Violation. Appellate counsels did not raise claim.

(b) 14TH Amendment Violation. Appellate counsels did not raise the claim.

(c) _____

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

- (a) your arraignment and plea? Yes
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? ~~Yes~~ N/A
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. Micah Leddy / 1701 Main Street / P.O. Box 192 / Columbia, SC, 29201
- ii. Tynika Adams Cloxton / P.O. Box 50 / Blythewood / SC, 29016
- iii. Charlie Johnson / 1911 Pickens Street / Columbia, SC, 29201
- See attached:
- (b) the proceedings at which each such attorney represented you:
- i. Arraignment & Plea, Pre-Trial.
- ii. Plea & Pre-Trial.
- iii. Trial & Sentencing
19. State clearly the relief you seek in filing this application:
Reverse of Conviction & Remand For New Trial.
20. Are you now under sentence from any other court that you have not challenged?
NO

Attached: Re: Page 5, Question 18. (a.)

IV. LaNelle Cantey DuRant & Breen Stevens: 1330 Lady Street,
Suite 401/Columbia, South Carolina. 29211-1589.

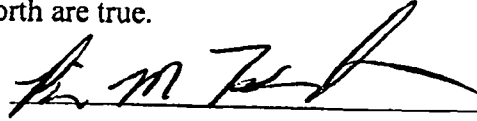
STATE OF SOUTH CAROLINA

County of

)
)
)

VERIFICATION

I, , being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.



SWORN to and subscribed before me this 20th
day of December, 2011.

Susan H. Fry (L.S.)
Notary Public

My Commission Expires
March 5, 2018

My Commission Expires: _____

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
KOUGH Richard M -	)	2011CP4008760
# 00338426,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

The Respondent, making its Return to the application for post conviction relief (PCR) filed December 27, 2011, would respectfully show this Court:¹

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. The Applicant was represented by Charlie Johnson, Esquire. On December 10, 2009, following a trial, the Applicant was sentenced by The Honorable J. Michelle Childs. The Applicant had been indicted and/or convicted of the following:

¹

<http://www4.rcgov.us/publicindex/PICaseDetails.aspx?County=40+&Casenum=2011CP4008760&CourtType=G&CaseType=Civil&CourtAgency=40002>

KOUGH Richard M - State's Return - (2011CP4008760)

Page 1 of 5

Armed Robbery - (2009-GS-40-6661). According to SCDC, the Applicant is currently serving the following sentence:

Offender Type Adult-straight Sentence Offense Armed Robbery Sentence Start Date 07/19/2008
Sentence Length 16 YRS, 0 MOS, 0 DYS Admission Date 12/15/2009 Committing County
 Richland Location Broad River Projected Release Date 02/19/2022 Projected Parole Eligibility
 02/25/2022 Supervised Furlough Eligibility Not Eligible Sex Offender Registry No

2

II.

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

Direct Appeal

The Applicant appealed his conviction and/or sentence. The appeal was unsuccessful and the Remittitur was dated November 28, 2011.

The application for post conviction relief (PCR) was filed December 27, 2011.

² <https://sword.doc.state.sc.us/scdc-public/inmateDetails.do?id=+00338426>

III.

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

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

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

IV.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied. The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis

that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held. The Respondent will coordinate with the Applicant's attorney who is, according to the Respondent's file, TBT, Esquire regarding when the hearing should be set.³

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

January 3, 2012

³ The current PCR Roster for the 5th Circuit is available at <http://www.scag.gov/criminal-litigation/postconvictionrelief>

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

KOUGH Richard M -
00338426,

2011CP4008760

Applicant,

v.

CERTIFICATE OF SERVICE

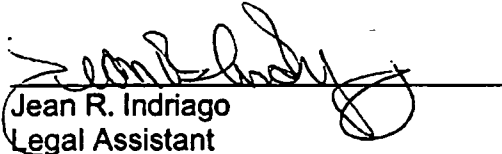
State of South Carolina,

Respondent.

1. I am an employee of the Respondent in the above-captioned action.
1. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
2. I have this day served a copy of the a letter in the above-captioned matter on the following person(s) by routing the same to the United States mail, postage prepaid:

**KOUGH Richard M, 338426 - Broad River Correctional Institution, 4460
Broad River Road, Columbia, SC 29210**

DATED January 9, 2012.


Jean R. Indriago
Legal Assistant

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

RICHARD M. KOUGH, 338426

Applicant

STATE OF SOUTH CAROLINA

Respondent,

IN THE COMMON PLEAS COURT

DOCKET NO.: 2011-CP-40-8760

AMENDMENT TO
POST CONVICTION RELIEF
APPLICATION

RICHLAND COUNTY
FILED
2015 MAY 14 AM 10:22
JEANETTE W. MCBRIDE
C.C.P. & G.S.

The Applicant through undersigned Counsel wishes to Amend his Application for Post Conviction Relief filed on December 27, 2011, as follows:

INEFFECTIVE ASSISTANCE OF COUNSEL

Motion to Suppress the identifications was made my Trial Attorney, yet he failed to notice, through Court testimony, that the Applicant was not viewed by either witness.

See Trial Transcript Page 15, line 14-23, page 63, line 20-23, page 64, line 6-9, page 34, line 20-22, page 140, line 23-24, page 66, line 3-8 and page 281, line 12-13.

The fact that Applicant's Trial Attorney missed this fact or failed to act upon it proves his ineffectiveness as Trial Counsel as this was his Motion to Suppress.

RESPECTFULLY SUBMITTED ON BEHALF OF
APPLICANT, Richard M. Kough


Charles T. Brooks, III
Attorney for Applicant
309 Broad Street
Post Office Box 3512
Sumter, S. C. 29150
(803) 418-5708

May 11, 2015

1 STATE OF SOUTH CAROLINA

2 COUNTY OF RICHLAND

CIRCUIT COURT
2011-CP-40-08760

3
4
5 RICHARD M. KOUGH,
Applicant,

6 -vs-

TRANSCRIPT OF RECORD

7 STATE OF SOUTH CAROLINA,
8 Respondent.

9
10 Post-Conviction Relief Hearing

11 Heard on Thursday, August 27, 2015

12 Columbia, South Carolina

13
14 BEFORE:

15 THE HONORABLE TANYA A. GEE

16
17
18 APPEARANCES:

19 Counsel on Behalf of the Applicant:
Charles T. Brooks, III, Esq.

20 Counsel on Behalf of the Respondent, State of SC:
21 J. Clayton Mitchell, Esq.

22
23 Cheri L. Young, RPR
24 Circuit Court Reporter
P O Box 5232
25 Aiken, SC 29803-5232

EXAMINATION INDEX

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(NO EXHIBITS IDENTIFIED/INTRODUCED.)

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1 ON THURSDAY, AUGUST 27, 2015 AT 9:51 A.M.:

2 MR. MITCHELL: Judge, may it please the
3 Court.

4 THE COURT: Yes, sir.

5 MR. MITCHELL: This is Richard Kough versus
6 the State of South Carolina, 2011-CP-40-08760.
7 Mr. Kough was indicted, I believe, in 2009. He
8 was tried December of 2009. He was sentenced by
9 Judge Childs. He was sentenced to 16 years on an
10 armed robbery.

11 There was an appeal taken in that case and
12 it was affirmed by the Court of Appeals.

13 This application was filed December 27th of
14 2011, where Mr. Kough has alleged various aspects
15 of ineffective assistance of counsel. I note
16 Mr. Kough is present here today represented by
17 Mr. Charles Brooks, and I'll turn it over to him
18 at this time.

19 THE COURT: All right. Mr. Brooks?

20 MR. BROOKS: Judge, if you're ready, we do
21 have one expert witness that I'll go ahead and
22 call first, Dr. Tora Brawley.

23 THE COURT: If you would go ahead before we
24 begin and just lay out the issues you're raising
25 on PCR.

1 MR. BROOKS: Okay.

2 THE COURT: And then we'll go ahead and
3 hear your testimony.

4 MR. BROOKS: All right.

5 Judge, I'll try to be brief in this
6 recitation. My client does have quite a bit.
7 One, I'll tell you right off the bat was whether
8 he was criminally responsible and competent to
9 stand trial. That's why Dr. Tora Brawley is
10 here.

11 THE COURT: Okay.

12 MR. BROOKS: The rest of the issues are
13 trial counsel's failure to investigate; trial
14 counsel failed to bring out the issues in regard
15 to Mr. Kough's mental status; trial counsel
16 failed to suppress evidence in regards to fourth
17 amendment; trial counsel's failure to call
18 witnesses at the suppression hearing.

19 He feels that Mr. Johnson was not
20 adequately prepared as his trial counsel. He
21 indicated that in his PCR that Mr. Johnson failed
22 to seek continuances, interview State's witnesses
23 against him.

24 THE COURT: Failure to seek continuances,
25 is that --

1 MR. BROOKS: Correct. In order to
2 interview the State's witnesses.

3 THE COURT: Okay.

4 MR. BROOKS: And, Judge, not to be
5 redundant but one of the issues in regards to
6 trial counsel's failure to interview witnesses,
7 failed to hire an investigator to properly
8 investigate the case. He indicates that
9 Mr. Johnson verbally assaulted him and made
10 improper comments and jokes which basically gave
11 Mr. Kough a serious doubt as to whether or not
12 Mr. Johnson was taking his case serious.

13 THE APPLICANT: KKK matter.

14 MR. BROOKS: (Conferring with client.)

15 THE APPLICANT: Sorry. Apologize.

16 MR. BROOKS: Mr. Johnson failed to argue in
17 mitigation or for a lesser-included offense in
18 regards to whether or not this should have been a
19 strong arm robbery. Obviously there's a huge
20 difference in being found guilty of armed robbery
21 versus strong arm robbery.

22 THE APPLICANT: I'm sorry. Go ahead. I'm
23 sorry.

24 MR. BROOKS: When you hear from
25 Dr. Brawley, some of what you are seeing now will

1 probably be better explained.

2 THE COURT: Okay.

3 MR. BROOKS: Judge, we indicate failure to
4 get hospital and mental records. I think that
5 goes towards the --

6 THE COURT: Competency.

7 MR. BROOKS: -- competency challenges.
8 And, Judge, I didn't say it before but I alluded
9 to it. We talked about the mental competency
10 issues, whether or not that would actually apply
11 to the insanity defense.

12 Trial counsel failed to object to hearsay
13 testimony, failed to object to prosecutor
14 misconduct, failed to object to the victim
15 witness's identification. And that's basically
16 summarizing.

17 THE COURT: Okay.

18 MR. BROOKS: We talked about a lot of
19 pages, but I tried to summarize it for you.

20 THE COURT: All right. Thank you. Before
21 we begin the testimony, I know you want to call
22 up an expert, but if I could go ahead and have
23 Mr -- is it pronounced coe?

24 THE APPLICANT: Yes, ma'am.

25 THE COURT: If you can stand and raise your

1 right hand, sir. You can go ahead and swear him
2 in.

3 (Applicant placed under oath.)

4 THE COURT: Mr. Kough, I just have a couple
5 of questions for you. I want to make sure that
6 you understand this is your post-conviction
7 relief hearing today.

8 THE APPLICANT: Yes, ma'am.

9 THE COURT: And do you understand that
10 today when you come before me I really have two
11 options. One, I could deny your request for
12 post-conviction relief which would just mean that
13 you go back to where you're incarcerated and you
14 would serve out the rest of your sentence.

15 THE APPLICANT: Yes, ma'am.

16 THE COURT: Okay. So you understand that?

17 THE APPLICANT: Yes, ma'am.

18 THE COURT: And I believe we were just
19 looking on your SCDC profile. It looks like your
20 projected release date is February 19th, 2022?

21 THE APPLICANT: Yes, ma'am.

22 THE COURT: Okay. And if I were to grant
23 your PCR application what we would do is we would
24 go back from scratch. Do you understand that?
25 You would start --

1 THE APPLICANT: Yes.

2 THE COURT: -- completely over.

3 THE APPLICANT: Yes.

4 THE COURT: I just want to make sure that
5 you understand that it's not a situation where I
6 can say that there is -- this should have been
7 strong arm robbery and you deserve less time.
8 You would just go straight back and there would
9 be -- and you would --

10 THE APPLICANT: My understanding is I would
11 return to county and it would be just as if I had
12 just been arrested again --

13 THE COURT: Your understanding is correct.

14 THE APPLICANT: -- from the preliminary up
15 to the trial. I certainly would love to have a
16 new trial, yes, ma'am. I certainly understand
17 that. Thank you.

18 THE COURT: Okay. Very good. I just
19 wanted to make sure before we started that you
20 understood that.

21 THE APPLICANT: Yes, ma'am.

22 THE COURT: We'll go ahead.

23 MR. BROOKS: I had talked to him about that
24 numerous times, Judge.

25 THE COURT: Very good. Thank you.

TORA BRAWLEY - DIRECT BY BROOKS

1 MR. BROOKS: You can have a seat.

2 I call Dr. Tora Brawley to the stand.

3 TORA BRAWLEY, having been duly sworn, was
4 examined and testified as follows:

5 THE BAILIFF: Have a seat. Speak and spell
6 your last name.

7 THE WITNESS: B-R-A-W-L-E-Y.

8 MR. BROOKS: Ready, Judge?

9 THE COURT: Yes, sir.

10 DIRECT EXAMINATION

11 BY MR. BROOKS:

12 Q. Dr. Brawley, how are you today?

13 A. I'm fine. Thank you.

14 Q. Can you tell us what it is that you do?

15 A. I'm a clinical neuropsychologist. I evaluate brain
16 function with a series of tests.

17 Q. And what -- can you give us a little information
18 about your educational backgrounds?

19 A. My bachelor's degree is from the University of
20 Texas at Austin. I have a master's, a Ph.D. from the
21 California School of Professional psychology. I did a
22 pre-doctoral internship at Baylor College of Medicine. I
23 did a postdoctoral internship at Duke University Medical
24 Center. Currently in private practice. Was with the
25 Department of Mental Health for four years here in the

TORA BRAWLEY - DIRECT BY BROOKS

1 forensic services. Was on the faculty of USC in the
2 Department of Neuropsychiatry for about 13 years.

3 Q. Okay. And have you testified in court before?

4 A. I have.

5 Q. And have you been qualified as an expert before in
6 court?

7 A. I have.

8 Q. In what field have you qualified as an expert in
9 court before?

10 A. South Carolina doesn't recognize the subspecialty
11 of neuropsychology so they -- in clinical psychology.

12 Q. And that's the field that you've been deemed an
13 expert to testify in?

14 A. That I'm licensed in, yes, sir.

15 Q. And you have any idea how many times you've
16 testified in court in South Carolina before? And I know
17 that's maybe a large number. Just sort of a --

18 A. Over 40.

19 Q. Okay. Over 40 times?

20 A. Yes, sir.

21 Q. Okay. Your Honor, I would submit Dr. Brawley as an
22 expert in clinical psychology.

23 A. Yes.

24 THE COURT: All right. Any objection?

25 MR. MITCHELL: No objection to that.

TORA BRAWLEY - DIRECT BY BROOKS

1 THE COURT: All right. She is so
2 qualified.

3 BY MR. BROOKS:

4 Q. Dr. Brawley, did you have an opportunity to meet
5 and evaluate Mr. Kough?

6 A. I did.

7 Q. And, can you tell us about that?

8 A. This case was a little bit unusual for me. I was
9 initially contacted by the attorney as the first one to
10 go in and evaluate. Usually they're seen by a forensic
11 psychiatrist first.

12 But the attorney contacted me. It was not
13 Mr. Brooks. It was a different attorney. Contacted me
14 and told me about his medical history. He's had a
15 temporal lobectomy, a hippocampal excision for seizure
16 control. And he said that he was having a little bit of
17 trouble working with Mr. Kough, that he was impulsive, he
18 would jump around and wanted me to go in and do a battery
19 of tests on him. So I did go in and do a battery of
20 tests on him.

21 Q. Before you say -- you said temporal?

22 A. Lobectomy. That means part of his brain was
23 removed.

24 Q. Oh, okay. You know, people like me, I might not
25 understand all that medical terminology. I'm going to

TORA BRAWLEY - DIRECT BY BROOKS

1 ask you what is that? He had a piece of his brain
2 removed?

3 A. He had a tumor that was discovered incidentally at
4 age 14. And at that time they felt like it was benign
5 but then several years later it started to grow and cause
6 seizures. And he could not control the seizures with the
7 use of medication. So the next step is to go in and to
8 remove the tumor and also the part of the brain that's
9 causing the seizures.

10 Q. Now the part of the brain they removed, is it fair
11 to say that that had something to do with impulse
12 control?

13 A. The technical part that they removed, it's -- they
14 did a hippocampal excision. They removed part of the
15 right temporal lobe and did what they call an
16 amygdalohippocampectomy

17 A-M-Y-G-D-A-L-O-H-I-P-P-O-C-A-M-P-E-C-T-O-M-Y.

18 Basically the amygdalohypocampus are the parts of
19 your brain that are responsible for many things, memory,
20 things like that, in the temporal lobe too but also for
21 regulation of emotion.

22 Q. Now did -- prior counsel didn't give you any
23 information on the crime that Mr. Kough was convicted of?

24 A. No. I don't assess competency or capacity or
25 criminal responsibility. I go in to do a battery of

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1 tests. So after I did my tests and had some pretty
2 significant findings with him, I recommended to Mr. Tesh
3 that he bring in a forensic psychiatrist.

4 Q. Now -- so, what is technically your evaluation of
5 Mr. Kough in the condition he's in now?

6 A. Well, on -- based on my battery of tests and my
7 summary impressions from my report, he has significant
8 organic deficits in several areas: Memory; frontal lobe
9 functioning, which is our impulse control; motor
10 functioning; and he had noted asymmetry in his
11 intellectual functioning with his verbal being 103 and
12 his performance being 81. So that's considered
13 statistically and clinically significant and correlates
14 with that portion of his brain being removed.

15 Q. Okay. And in your experience and expertise, do you
16 think that that's something his lawyer should know prior
17 to any disposition of his case?

18 A. That needs to be fully, fully explored to see if it
19 -- I mean, it may or may not impact on those issues, but
20 it definitely should be fully explored.

21 Q. Okay. And, is there anything else you need to add
22 about your evaluation of Mr. Kough that you haven't told
23 the Court?

24 A. I also included, in my battery of tests, tests that
25 look at effort for malingerer. So the tests are very

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1 dependent on effort. He passed all of those with flying
2 colors. He was giving me good effort. He wasn't trying
3 to exaggerate or malingering any of his deficits. He was
4 cooperative and the information that he gave me on
5 clinical interview corresponded significantly with the
6 findings that I have. Things like him saying that -- and
7 I have some quotes in my report that he felt -- after the
8 surgery he felt super reckless. And that after the
9 surgery he'd say, "I lost a couple intellectual points, I
10 would do crazy things and then realize later I shouldn't
11 have done that."

12 So, you know, and that corresponds with the type of
13 surgery that he had.

14 Q. And so basically in layman's terms, Mr. Kough has a
15 problem with impulse control and being reckless as a
16 result of his condition?

17 A. He certainly can, yes.

18 Q. And, do you think that that's something that, in
19 your opinion, that the Court should know before giving
20 any type of sentence?

21 A. I think it should be fully evaluated, yes.

22 Q. Okay. And that's why you recommended having a
23 forensic psychiatrist --

24 A. I did.

25 Q. -- evaluate him? Okay. Is there anything else we

TORA BRAWLEY - CROSS BY MITCHELL

1 need to add about Mr. Kough's situation?

2 A. I don't believe so.

3 Q. Okay. I'll turn it over to Mr. Mitchell.

4 THE COURT: All right. Mr. Mitchell?

5 CROSS-EXAMINATION

6 BY MR. MITCHELL:

7 Q. Good morning, Dr. Brawley.

8 A. Good morning.

9 Q. Nice to have you here today.

10 You testified you did not give any opinion on
11 whether he was competent at the trial, correct?

12 A. I don't assess those. I just assess cognitive
13 functioning.

14 Q. So you don't assess competency or criminal
15 responsibility, correct?

16 A. Correct.

17 Q. Okay. So your conclusions you draw here are just
18 based on your examining him, I guess, in 2013; is that
19 right?

20 A. Yes.

21 Q. Okay. And the date your report, what's that?

22 A. The date of that evaluation was 10-11-2015.

23 Q. Okay. How long did you spend with him?

24 A. I spent between three and four hours with him at
25 Lieber.

TORA BRAWLEY - CROSS BY MITCHELL

1 Q. Have you reviewed the transcript of this case file?

2 A. No, I have not.

3 Q. Okay. So I guess the main conclusion you draw is
4 that he is functioning on a lower intellectual level than
5 average. Is that fair to say?

6 A. If you're talking about strictly IQ, his verbal IQ
7 is in the average range. Performance is in the
8 low-average range. His performance IQ is in the low
9 range. There are other areas that I listed in my report
10 where he is at the first percentile which means out of
11 100 people the same age, all of them, 99 are going to do
12 better than he. And I listed those areas. He has
13 multiple areas where he's the first or second percentile
14 for his functioning. So my testimony is that he's got
15 impaired brain functioning.

16 Q. And, this would go towards irritability,
17 behavioral, like the report says; is that right?

18 A. Yes.

19 Q. Now, the cause of this would have been from the
20 surgery he had or the problems he had at a much younger
21 age; is that right?

22 A. He could have had these problems for a long time
23 and then they were just exacerbated by the surgery, you
24 know. There's no way to tell, but the discrepancy in his
25 IQ certainly corresponds with that surgery.

1 Q. The surgery was, when, in 2001; correct?

2 A. Yes.

3 Q. Okay.

4 A. At the University of Pittsburgh?

5 Q. Gotcha. You have no knowledge if this was brought
6 up at trial or not?

7 A. It was indicated to me by Mr. Tesh but it was not,
8 but I did not review those transcripts. And when I
9 recommended to Mr. Tesh to bring in a forensic
10 psychiatrist, he said he didn't think he could obtain
11 funding for that. So.

12 MR. MITCHELL: No further questions. Thank
13 you.

14 THE COURT: All right. Any redirect?

15 MR. BROOKS: No, ma'am.

16 THE COURT: All right. Thank you.

17 THE WITNESS: Thank you.

18 THE COURT: Doctor, you may step down.

19 THE WITNESS: May I be excused?

20 THE COURT: You may, unless there's an
21 objection.

22 MR. BROOKS: I was going to ask. No
23 objection that she be excused.

24 MR. MITCHELL: No objection.

25 THE COURT: All right. You may be excused.

RICHARD M KOUGH - DIRECT BY BROOKS

1 MR. BROOKS: If you are ready, I would call
2 Mr. Kough to the stand.

3 THE COURT: Mr. Kough, if you would please
4 step forward.

5 RICHARD M. KOUGH, having been duly sworn,
6 was examined and testified as follows:

7 MR. BROOKS: Are you ready, Judge?

8 THE COURT: I am. Go ahead. You're still
9 under oath, Mr. Kough.

10 THE APPLICANT: Yes, ma'am.

11 DIRECT EXAMINATION

12 BY MR. BROOKS:

13 Q. Mr. Kough, just before we begin, Dr. Brawley, she
14 accurately talked about what your medical history was?

15 A. Yeah.

16 Q. Okay.

17 A. Yes.

18 Q. You've always been a bit impulsive?

19 A. Since they took a significant-sized part of my
20 brain out, yes, sir.

21 Q. All right. Now, on this case, we just -- what you
22 want to be here for, I'm going to ask you a couple little
23 background questions, kind of what the Judge alluded to.
24 But you and I talked about this a great deal on the phone
25 and I want to make sure you, this is what you want to do.

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1 You'll max out in 2022. That's approximately six --

2 A. Seven years.

3 Q. Six or seven years. And if we convince Judge Gee
4 here today to give you a new trial you can go back and
5 face armed robbery which carries 30 years.

6 A. (Nods head.)

7 Q. Which, based on your sentence, that's an additional
8 14 that you got?

9 A. (Nods head.)

10 Q. Do you understand that?

11 A. Yes.

12 Q. So you understand there's some things at risk here?

13 A. Yes.

14 Q. Do you understand that?

15 A. Certainly.

16 Q. And you told me, just like you told the Judge here
17 today, you still want to go forward and roll the dice?

18 A. Yes, sir. I don't know about the dice part but,
19 yes, I would love to go forward with this.

20 Q. I always say roll the dice so that people know this
21 and --

22 A. I'm sorry. I guess it's a little more important to
23 me than dice rolling. I'm sorry.

24 Q. Obviously. I understand. I just want to make sure
25 so everybody would understand.

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1 A. Sorry. Sorry.

2 Q. Okay. Now you had Charlie Johnson represent you;
3 is that right?

4 A. Represent -- yeah, yeah.

5 Q. He was your court-appointed attorney?

6 A. He was there. He was there.

7 Q. Okay. And you brought this action saying that
8 there was some deficiencies in his representation of you,
9 some things he left out or didn't do, right?

10 A. Yeah.

11 Q. Okay. Now, one of those things you said is he
12 didn't really properly investigate your case.

13 A. Yes.

14 Q. Can you tell the Court a little more detail about
15 why you think he didn't investigate your case?

16 A. Okay. I'm sorry. Where can we start? Oh. How
17 about, so in my trial -- I was arrested at a boarding
18 home where I secured a nice rank. So basically the motel
19 or boarding, anyway I paid rent to stay there for the
20 night.

21 Now, the officers as they testified they were given
22 access into the house after a significant period of time
23 where they couldn't enter because the door was locked by
24 a mysterious black man with no name that just let them
25 in. And that, that they didn't have probable cause to

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1 come in the house.

2 But anyways and then this mysterious black man just
3 wasn't available for trial. One of my key things, a
4 gentleman I met took me to that house and witnessed me
5 paying the gentleman their rent. Now since I rented the
6 bedroom that I was in and that's where my belongings were
7 found, the officers come in there without a warrant,
8 supposedly let in by a mysterious man that was never
9 identified or brought to court and they seized evidence
10 out of the room that I rented.

11 Q. Okay.

12 A. That would make that inadmissible because they were
13 illegally seized.

14 If my lawyer would have contacted that witness and
15 at least asked the man if he wanted to come to court to
16 testify rather than not contact him at all, the man very
17 well may have come and gave testimony at the suppression
18 hearing that, yeah, I -- when the gentleman said he
19 wanted to rent a room I took him to a boarding house,
20 introduced him to a man that lived there, he paid rent
21 and then I went on my way.

22 I gave my lawyer his name but furthermore he never
23 finds him. He's a registered sex offender. There's a
24 database that these men have to supply their address
25 where they live. And at the time he -- for a time he was

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1 in the county jail or, well, yeah, Richland County Jail.
2 He couldn't be found there.

3 But my lawyer made no effort to talk to him let
4 alone find him.

5 Oh. Then there was the gentleman, the gentleman I
6 paid the rent to in the house. He never tried to talk to
7 that man to see if he was willing to give any kind of
8 testimony irregardless of my paying rent which then again
9 would have constituted fourth amendment rights of illegal
10 search and seizure seeing how they were let in by this,
11 once again, unidentified, mysterious black man.

12 Q. The stuff that you just described, that would have
13 gone to the suppression hearing?

14 A. The suppression hearing that he had -- that had no
15 witnesses or case, precedent cases argued. It was just
16 like Jesse James. They were shooting off dead but it
17 didn't work out so well for him. The Judge just shot him
18 down.

19 Q. All right. Now, you also said something about
20 strong arm robbery and armed robbery. You were telling
21 me a few minutes ago. You want to go ahead and tell the
22 Court about that?

23 A. Yeah. And if I'm wrong about this let me apologize
24 right from the beginning. I'm certainly not a lawyer. I
25 shoe horses for a living but, okay, so we go through this

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1 trial. And through the whole trial my lawyer,
2 Mr. Johnson over there, argues that I'm just not that
3 guy. I'm not a 250-pound, five-foot-two, blond-haired
4 man that robbed this lady she testified about. Good
5 point. I loved that you mentioned that. Of course he's
6 forgot that all of us white people look alike so that's
7 probably why the jury was confused.

8 But at the very end of the trial, after all the
9 testimony is done and over my lawyer says, "I have a
10 motion that the jury be read a new charge." I only had
11 one charge at this point, armed robbery. And he wants --
12 "I think that they should deliberate on the second charge
13 of strong arm robbery."

14 Well, wait a minute. That just increased my chance
15 of conviction by 50 percent because now I have two
16 charges instead of one. And it would almost been a great
17 idea if he would have argued during the trial that, you
18 know what, yeah, okay, my client went in there and he did
19 that but what he didn't have was a weapon, which there
20 was never, and, and, sure, he robbed that store and he
21 did, but he didn't have a weapon so it's not armed
22 robbery. It's strong arm robbery, ladies and gentlemen.
23 Yeah, no. None of that was mentioned.

24 The jury --just gave this new nifty charge which,
25 once again, it increased my chances of conviction by 50

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1 percent. That just didn't seem normal to me. Maybe I've
2 watched too much CSI or something. I don't know.

3 Q. Okay. Now, you said something else about
4 Mr. Johnson failed to object to some hearsay witnesses or
5 hearsay testimony.

6 A. Oh, yeah. Like, once -- to get back to the
7 mysterious unidentified black man, the officers were
8 allowed to say what this man told them. They repeatedly
9 testified about what this unidentified, unseen, untalked-
10 to-man said to them, but he was never -- there wasn't a
11 statement from him, a written statement. There was no
12 person to come say, okay, I'm the guy that said that.

13 And then there was witnesses that supposedly seen a
14 man matching my description because the guy was white
15 that went into this house, but yet the officers are
16 allowed to testify about that but the witness wasn't
17 brought to testify that I'm the one, that said "I seen
18 this guy go in there." It was just a cop's word, whatever
19 story they wanted to tell and nobody backed up. They
20 just told the stories the other people told.

21 Once again, I don't know. This seems much
22 different than on TV.

23 Q. I understand. Now, you also said that Mr. Johnson
24 verbally assaulted you in his representation?

25 A. This was a bit awkward. Here we are. And

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1 Charlie's a really nice guy. Come to see me at the jail
2 all the time. He did that, yeah. He did that.

3 So here we are at trial. The clerk is testifying
4 but my lawyer he told me, he, he, he sees something I
5 don't. He grabs the little yellow pad there and he's
6 furiously scrawling. That's my lawyer. Look at him go.
7 I'm glad I got a lawyer. I don't know what he knows but,
8 boy. So he hands me the tablet. What's that. I'm not
9 too bright, right, but I'm looking. And I seen me a
10 piece of -- well, I see a pizza with four slices of pizza
11 on it. There's a piece at the 12, the three, the six and
12 nine o'clock position. The other pieces been eaten.
13 Apparently each piece of pizza has two pieces of
14 pepperoni on it. That's the best I could come up with
15 was that.

16 I don't know, but if this is the key to me going
17 back to Pennsylvania I'm all for it. What is it,
18 Charlie. He says, "that's the last that a black man sees
19 when you and three of your KKK friends throws his black
20 ass in a well." (Makes sound.) I'm going to prison. I
21 look at the black judge, black jury, black solicitor, I'm
22 going, yeah, I'm all done, yeah, yeah, yeah.

23 But the solicitor thought it was a great joke too
24 whenever Charlie showed it to him.

25 This was at my trial. Really? Help.

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1 Q. Okay. All right.

2 A. Oh, yeah. Wait a minute. I never throwed anybody
3 in a well, black or white. And I don't have a hood.

4 Q. Okay. I understand.

5 A. Sorry.

6 Q. I want to make sure I don't miss anything.

7 A. (Makes noise.)

8 Q. Is there anything else that we need to tell the
9 Court?

10 A. Well, you know, on Ms. Brawley as far as, you know,
11 my lawyer maybe not knowing or knowing that I had a
12 mental condition prior to. Boy, if he didn't know how
13 could he raise something he didn't know about.

14 I sent copies of a letter that I got from the
15 public defender's office from this county to Mr. Tesh.
16 And I don't know if he forwarded that. He forwarded that
17 file to you?

18 Q. Yes, sir.

19 A. Nifty how that works because I was thinking when
20 the public defender's office conflicted me out they
21 forwarded that file to the next lawyer. And then when
22 the next lawyer quit. It eventually ended up with
23 Mr. Johnson.

24 Now I'm sure they had a slew of work but anyways,
25 there's a letter in there and there's even a photocopy of

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1 the envelope that I mailed it in saying, look here,
2 Mr. Leady, who was my public defender, my very first
3 lawyer. I have undergone some -- oh, a brain surgery. I
4 had a significant portion of my brain removed. I feel I
5 have some mental competency issues. Here's the name of
6 the hospital it happened at. Here's the name of some
7 mental institutions that I have been in and treated so
8 you can obtain records and get familiar with this
9 because, boy, you know, we may need to present this to
10 the Court. And maybe the Court needs to know about this.

11 And, boy, when he come to see me he thought that
12 was a real nifty idea. But then he left and I got
13 another lawyer and she thought it was a great idea. And
14 then she left and then there was a few lawyers I got
15 letters and never met them.

16 Then I finally got Mr. Johnson. Apparently he
17 didn't think it was such a nifty idea because he never
18 mentioned it at the trial or sentencing phase or, you
19 know.

20 Q. Okay. Now one of the things you talk about is
21 Mr. Johnson didn't investigate the credibility of the
22 witnesses used against you?

23 A. Well, yeah. The gentleman that was at the same
24 jail I was in was never housed in the pod with me. And
25 I'm not from South Carolina. I just come down here for

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1 the weekend to visit my wife in Fort Jackson before she
2 went to Iraq. I'm from Pennsylvania. I don't know
3 people here at all.

4 This guy writes a letter. This is what I really
5 don't get. This man writes a letter to the Columbia
6 Police Department, Mr. William Kirkland. And, he
7 apparently he seen some CSI things too where he got a
8 pretty good idea how you write an official letter. He
9 even has an R-E on top of the letter. Regarding what.
10 The Food Lion robbery. The Food Lion grocery store
11 robbery. Boy. Okay.

12 And in this letter he goes on to explain he has met
13 this fellow, me, Richard Kough, in the Richland County
14 Jail. And I think in the letter he says he -- I either
15 confessed to him or he says he overheard me confess that
16 I robbed the grocery store. And then when he testified
17 he changed his testimony from -- to overhearing it where
18 -- anyway he lied again.

19 But the whole thing is, I'm not nor was I ever
20 charged with robbing a grocery store. I was charged with
21 robbing a gas station. About 10 of them could have fit
22 in this grocery store that had never been robbed. But he
23 forwarded this letter to the police department. The
24 police department looked at it and said, hum, a Food lion
25 grocery robbery. Let's go talk to this guy.

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1 And they came and they take me to the police
2 department because he said he wanted to smoke a cigarette
3 and get something to eat and he couldn't do that at the
4 county. He needed -- he was a crack head and he needed
5 help with rehab. Oh, and he was a child molester and
6 (unintelligible) his community supervision. Boy, he sure
7 would like to get back on the street for testifying.
8 Okay. Come pick me up. We'll do that.

9 So he's interviewed by the police. He tells the
10 police, oh, yeah, boy that fellow, he confessed to
11 robbing the grocery store. Yep, the grocery store. And
12 the police being the smart people they are said, okay.
13 They forward that to the solicitor's office. The
14 solicitor reads through the -- sees the letter because
15 the letter was in my discovery regarding Food Lion
16 grocery store. Says nothing about the Exxon gas station.
17 I think we can put this guy on the stand. He seems like
18 he's got something to say to the jury.

19 Okay. So I see Mr. Johnson. He shows me the
20 letter. This was in my discovery. Hey, Charlie, what
21 about the top part there. The top part. Yeah. That
22 part that says the Food Lion. Golly. Yeah, that's not
23 Exxon. Oh yeah. You don't think maybe let's let him get
24 on the stand, perhaps we should maybe stop this before it
25 gets out of control.

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1 Now you know what. They're just going to put him
2 on the stand. That's just how terrible their case is.
3 Don't you worry. Yeah. We're going to get these guys.

4 And so, yeah, without objection he got to get on
5 the stand. And he testified away about the robbery at
6 the Food Lion grocery store. And then my, like, my
7 lawyer, no, no, Charlie going to blow him out of the
8 water on this on. He's, like, you realize we're not here
9 for a Food Lion grocery store, right.

10 The dude goes (makes face). Well, uh, that's what
11 I heard. Yeah, no. But, you know. And then Charlie
12 also knows enough to go ahead. And by the way, what dorm
13 was you in when you met Mr. Kough. Fox trot dorm, that
14 dorm. And now Charlie had the house, the jail housing
15 records that showed I was never in that dorm but
16 apparently he thought it was just good enough to tell the
17 Judge I wasn't in there.

18 And let's not submit that document to the Court.
19 That's not just my lawyers word. It's an official
20 document saying I never lived, I never housed with that
21 man. We never met.

22 That's kosher. This is America.

23 Q. Now one of the things you raised was Mr. Johnson
24 failed to object to victim-witness identification of you?

25 A. Boy, you know, yes. Seeing that they never

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1 identified me.. They identified a man standing about a
2 hundred yards away from me. If you read my trial
3 transcript which I think you have and you agree. But
4 they never even looked at me. So they very well may have
5 identified the man that robbed that store which very well
6 may explain why at the trial the victim, you know, that
7 guy don't look like the fellow that robbed me but, boy,
8 in my heart I know it must be because here we are at
9 trial.

10 And then the other witness was, like, well, yeah,
11 he don't look like the fellow that I remember, I
12 overheard say such-and-such but, well, he's white.

13 Okay. I'm lying. Maybe he probably didn't say that.
14 My bad. But it just, huh, I mean, yeah, so I'm not five
15 foot two, 250 pound, blond-haired guy.

16 And, yeah, he filed the motion to suppress that
17 identification but yet never mentioned that, hey, my
18 witness was never even identified. This other guy over
19 here was.

20 Q. Okay.

21 A. That's good. I mean, we can do that here.

22 Q. I understand.

23 A. I don't. Help.

24 Q. Let me ask you this, Mr. Kough.

25 A. Yeah.

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1 Q. Was there ever any plea negotiations that you
2 remember or recall?

3 A. Yeah, yeah. Boy, that was nifty. Originally they
4 offered me strong arm robbery with the recommendation of
5 the max, 15 years.

6 And, well, yeah, see, going back to my TV
7 experience. Innocent people don't go to jail. Well,
8 we're going to trial. Yeah, no. That would be just -- I
9 mean, at the time I'm thinking that would be a disgrace
10 to my wife who's at war right now. No, no, no, no. No,
11 I didn't do this, man. I mean, we got to go to trial.

12 And, then there was -- and this wasn't made to
13 Mr. Johnson. This was made to the lawyer prior to
14 Mr. Johnson, Ms. Tynika Claxton. She come at me and she
15 said, well, you know, "I looked at your mental health
16 records. I see where you're on some mental health --
17 wait. I'm sorry. She looked at my Alvin S. Glenn
18 medical health records, not Pittsburgh. Okay. "I see
19 you're on some mental health medications. You're having
20 some impulse control problems there. You've been through
21 some mishaps. I think, you know, the solicitor has
22 agreed to stand silent if you plead guilty to strong arm
23 robbery. And I can make recommendation for time
24 served."

25 I think at that time I almost had a year and a half

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1 in. More than likely. I'm like, yeah, time served,
2 boy. Get back to my -- get back home. Get back home.
3 Get out of this mess. All right. Yeah, the heck with
4 integrity and pride. Let's go. It's been long enough.
5 I need to get back home.

6 Two weeks later I got a letter from Mr. Johnson.
7 He was my lawyer. I said, wait a minute. I thought -- I
8 thought I was going to -- okay. He comes sees me. That
9 was -- at least he come sees me. We're talking. I'm
10 like, well, hey, you know, I was talking to Ms. Claxton.
11 Last time I seen her she offered me this stand-silent-
12 plead-guilty thing. I'm like, you know, you want mercy.
13 Uncle, whatever. I give. Let's do that.

14 Then I'm talking to you. He said, well, hell, let
15 me give her a holler and see what's going on. I just got
16 this and I'm just coming to meet you. Tell you I'm in.
17 Okay. Great. As a matter of fact, I'll probably be back
18 this afternoon or the next day. Okay. Yeah.

19 Boy, I didn't see Mr. Johnson for a few days. I'm
20 thinking, okay, that's not so good on my behalf. But,
21 okay. So he comes back and he's, like, well, not so
22 good. I mean, what you mean. He said, well, I told
23 them, you know, about the strong arm robbery and stand
24 silent and I guess, sure, we do that.

25 But before I got -- I could get my stuff together

RICHARD M KOUGH - DIRECT BY BROOKS

1 to get out the office, get in the car to come see you,
2 tell you that that they said cool, they called me back
3 and said, yeah, never mind. No. We're not going to do
4 that.

5 And so, I just went ahead with Mr. Johnson's
6 representation. We're going to go to trial. We're going
7 to show you guys, you know, what's going on here. This
8 is going to work for us. Innocent people don't go to
9 prison. Not so much.

10 Q. Is there anything else you want to tell the Judge
11 that we haven't covered here on these issues you raised?

12 A. No. You maybe have an idea or two?

13 Q. I'm just asking.

14 A. I'm asking you. I don't know. Once again, I shoe
15 horses, I don't know.

16 Q. Is there anything else you want to tell her that we
17 haven't covered?

18 A. Not that I can think of. No, I'm sorry. I don't
19 know.

20 Q. That's all right. That's all right. And you still
21 want your new trial?

22 A. Oh, please.

23 Q. Okay.

24 THE COURT: Mr. Mitchell, any cross?

25 MR. BROOKS: Answer some questions of him.

CHARLIE JAY JOHNSON, JR - DIRECT BY BROOKS

1 THE APPLICANT: Certainly.

2 MR. MITCHELL: No questions for this
3 witness, Your Honor.

4 THE COURT: All right. You may step down.

5 THE APPLICANT: Okay, okay.

6 MR. BROOKS: We'll call Charlie Johnson to
7 the stand.

8 THE COURT: All right.

9 CHARLIE JAY JOHNSON, JR., having been duly
10 sworn, was examined and testified as follows:

11 THE COURT: Please have a seat and say your
12 name for the court reporter and spell it.

13 THE WITNESS: Charlie Jay Johnson, Jr.
14 C-H-A-R-L-I-E Jay, J-A-Y Johnson, Jr.

15 DIRECT EXAMINATION

16 BY MR. BROOKS:

17 Q. Mr. Johnson, how are you today?

18 A. Doing good.

19 Q. You were appointed to represent Mr. Kough?

20 A. Yes, I was.

21 Q. And y'all went to trial?

22 A. Yes, we did.

23 Q. Can you give a brief summary of what the State's
24 case was against him?

25 A. The State's case against Mr. Kough was there was a

CHARLIE JAY JOHNSON, JR - DIRECT BY BROOKS

1 video which indicated an individual in the store that
2 appeared to be Mr. Kough. It didn't show his face
3 directly but it was an individual that appeared to meet
4 the description of Mr. Kough.

5 The video of the store, there was two
6 eyewitnesses. There was the individual in the store that
7 was robbed that identified Mr. Kough as the person that
8 robbed her. Then there was a taxicab driver who
9 identified Mr. Kough as the person who told him when he
10 got off the bus at the bus station to -- don't go to the
11 gas station, that he was getting ready to rob the gas
12 station.

13 Q. Okay.

14 A. And a few minutes later the gas station was robbed.

15 Q. Now, do you recall how long you had been on
16 Mr. Kough's case?

17 A. I don't recall how long in months but I know that I
18 met with Mr. Kough on numerous occasions after I got the
19 case. I think I was, like, the fifth or sixth lawyer.

20 Q. Okay. And were there ever any plea negotiations
21 when you were involved?

22 A. There was a plea negotiation where there was an
23 offer to go from -- there was some question about if you
24 could view the knife or a weapon in his hand. So there
25 was some plea negotiations, they would agree to a strong

CHARLIE JAY JOHNSON, JR - DIRECT BY BROOKS

1 arm. But because of their case, they offered strong arm
2 which carries up to 15, I explained to Mr. Kough that if
3 he took the charge, if he got the worst of the 15 years,
4 he would probably be looking at doing about seven and a
5 half years in jail.

6 I told him that if a judge would give him less then
7 he'd be looking at less time. I also went over the
8 evidence with Mr. Kough and explained to him that if we
9 went to trial and he was convicted and found guilty of
10 armed robbery that he would be looking at a mandatory 10
11 years up to, I think, 20 or 25 years, and that he would
12 have to do 85 percent.

13 I explained to him that I wasn't there, that there
14 was strong evidence that he was there. If he told me
15 that he wasn't there that I believed him. And that if he
16 wants to go to trial that would be fine, but I would do
17 whatever he wanted to do.

18 Q. Were you aware of his mental medical history in
19 regards to his having a piece of his brain removed?

20 A. I was aware of that. He made me aware of that. I
21 did not see that as an issue because I had no problem
22 communicating with Mr. Kough. I had no problem
23 explaining to him what was going on, and had no problem
24 with him. I felt that I didn't have any problem, that he
25 understood right from wrong at that time. So I did not

CHARLIE JAY JOHNSON, JR - DIRECT BY BROOKS

1 feel that his mental condition was relevant as related to
2 me in that particular instance because I had no
3 indication that his mental condition had anything to do
4 with anything that he did.

5 Q. Did you hire an investigator in this case?

6 A. There was no need. I actually investigated it
7 myself personally. I went to the scene which was right
8 downtown, the bus station. The place where he was found
9 which was a house which was a block or so away from where
10 the robbery occurred. So everything was within five, six
11 miles of here. So, there was no need for that.

12 I interviewed every witness myself personally. I
13 interviewed the officers personally. I went back and
14 forth with Mr. Kough and went over the evidence seven to
15 eight, nine times that I visited with him. And I made
16 sure that he understood everything.

17 Q. Did you ever try to suppress the things that were
18 taken out of his residence?

19 A. We had a suppression hearing that was held, I think
20 the transcript would indicate it. That we had a
21 suppression hearing prior to even picking the jury that
22 we started the hearing. I think the State put up every
23 witness that they were going to put up in the case as
24 related to it.

25 Q. In the suppression hearing?

CHARLIE JAY JOHNSON, JR - DIRECT BY BROOKS

1 A. In the suppression hearing where I made my argument
2 to suppress the evidence. The witness that was robbed
3 indicated that he had been -- initially she said she was
4 80 to 90 percent sure, which I asked the Court to
5 consider that that was not a positive identification.

6 When she came to court she then changed her story
7 to say that she was positive it was him, but I got her to
8 admit on the record that at that time she said she was 80
9 to 90 percent sure. The Court ruled against me and said
10 that the evidence would come in.

11 Q. That suppression hearing, that dealt with
12 identification as well as the things taken from -- seized
13 from this residence?

14 A. That's correct because it was brought up that --
15 how they got into the, actually got into the location.
16 It was a boarding house, I think. And there was some
17 question about whether they had proper permission to go
18 inside.

19 But the Court ruled that there was sufficient
20 evidence that they would -- that they were allowed to go
21 inside once she questioned the officers.

22 Q. Okay.

23 MR. BROOKS: Beg the Court's indulgence,
24 Your Honor.

25 THE COURT: Okay.

CHARLIE JAY JOHNSON, JR - CROSS BY MITCHELL

1 MR. BROOKS: (Conferring with client.) No
2 other questions.

3 THE COURT: All right. Mr. Mitchell?
4

5 CROSS-EXAMINATION

6 BY MR. MITCHELL:

7 Q. Good morning, Mr. Johnson.

8 A. Good morning.

9 Q. Thanks for being here today. How long have you
10 been practicing law?

11 A. About 20 years.

12 Q. Is the majority of that in criminal defense?

13 A. Ninety-nine percent.

14 Q. Have you recently retired?

15 A. Semi-retired. I haven't closed all my cases yet
16 but hopefully within the next year and a half.

17 Q. So you were appointed on this case here; is that
18 right?

19 A. Yes.

20 Q. And you were not his first attorney?

21 A. No. As he said, I think I was about his fifth or
22 sixth attorney.

23 Q. So he had been through some priors?

24 A. As a matter of fact, I was -- I was actually called
25 and asked if I would take the case.

CHARLIE JAY JOHNSON, JR - CROSS BY MITCHELL

1 Q. All right. Let's start with the competency. Did
2 you have any issues communicating with Mr. Kough?

3 A. No, I did not.

4 Q. So you had no reason to question his competency,
5 did you?

6 A. No.

7 Q. Now you saw him here today. Was he -- was his
8 personality and, I guess, actions a little bit different
9 back then or was it maybe the same?

10 A. Today he appeared to be a little sluggish in his
11 speech, different than back then. But, as I said, I had
12 no problem communicating with him. We actually got along
13 pretty good. We talked. I had no problems.

14 I explained to him -- as I said, I explained to him
15 that if we went forward with a trial that there was
16 either two things going to happen: They were either
17 going to find him innocent and he was going home; or they
18 were going to find him guilty and they were going to take
19 him out the back door.

20 Q. So he understood the charges against him in your
21 opinion?

22 A. He understood.

23 Q. You had conversations back and forth about how to
24 challenge certain pieces of the State's case?

25 A. I did. As I said, I met with him. I don't have my

CHARLIE JAY JOHNSON, JR - CROSS BY MITCHELL

1 records here but I met with him at least, over eight to
2 10 times prior to trial. I mean, I took it seriously.
3 His life was on the line. It doesn't pay me as a defense
4 attorney, and I'm not a public defender so I'm not
5 getting paid on a monthly basis. I'm a private
6 attorney. It doesn't pay me if my clients are convicted,
7 nobody would hire me. So I always try to do my best.

8 Q. During his plea negotiations, he had turned down a
9 strong arm robbery plea offer; is that right?

10 A. Yes, he did.

11 Q. What was that for; do you remember? Was that 15
12 years?

13 A. I told him the maximum -- if he pled straight up to
14 a strong arm, I think at that time the max you could get
15 for strong arm robbery was, either, I think it was 15
16 years.

17 Q. Okay. And you were arguing -- well, in your
18 negotiations with the State you were saying that this was
19 a strong arm case, not an armed robbery because whether
20 he had a knife or not was an issue?

21 A. Right. And they knew that it was an issue. You
22 couldn't actually see a knife in the video, but because
23 of the testimony of the -- of the witness who was robbed,
24 there could be some questions. And as I said, this case
25 had been going on for a while. And I think the State

CHARLIE JAY JOHNSON, JR - CROSS BY MITCHELL

1 wanted to move it so they agreed to take a reduction if
2 he would plead.

3 Q. Okay. So he rejected that?

4 A. Yes, he did.

5 Q. Now staying on the strong arm, you requested that
6 as a jury charge; is that right?

7 A. Well, when you have a trial if there is any
8 evidence whatsoever of a lesser-included offense then you
9 have a right to have that offense included. Once again,
10 in my attempt to try to reduce the amount of time that he
11 was facing, I think it would be negligent on my part not
12 to include the lesser-included offense because sometimes
13 you have a jury -- my years of experience with juries are
14 sometime they get hung up on whether there's a conviction
15 or acquittal, and sometime they kind of what they call
16 split the baby.

17 And if you have a lesser-included offense, a lot of
18 time the juries take the lesser-included offense because
19 it's a way out for them. And that also give me the
20 opportunity to reduce -- he looked at it as giving a
21 50/50 chance of increasing his ability to be convicted.
22 I looked at it as an ability to reduce his liability into
23 what he was looking at. Instead of mandatory 10 to 25
24 years for armed robbery, if he got strong arm he would be
25 looking at roughly about seven years.

CHARLIE JAY JOHNSON, JR - CROSS BY MITCHELL

1 Q. Now, and you said if there's any evidence presented
2 that would show the lesser included should be charged, I
3 think what Judge Childs relied on was that it was his own
4 testimony you could not see a knife in the video; is that
5 right?

6 A. Correct.

7 Q. You know, that he wasn't there but then he
8 testified that he didn't see a knife in the video and
9 that's what Judge Childs relied on in giving that charge?

10 A. Right. We made a point to put that, that there was
11 no evidence you could see a knife in the video and that
12 there was some question about that. And once you make
13 that a part of the evidence, then you have a right to
14 request the lesser-included offense.

15 So that was part of the strategy. And I also
16 explained that to him.

17 Q. The State was pretty upset with that ruling, would
18 you agree?

19 A. Yeah. They was upset about it but it was the
20 ruling.

21 Q. So identification, I guess, there was a Neal V
22 Biggers hearing; is that right?

23 A. There was.

24 Q. And the State put up about every witness that would
25 testify in the trial?

CHARLIE JAY JOHNSON, JR - CROSS BY MITCHELL

1 A. We basically heard the whole trial prior to even
2 starting the trial. And after hearing all the evidence
3 the State was going to put up, I still asked him -- the
4 State still offered that plea. And he still said he
5 wanted to go forward.

6 Q. This was even -- this was after the suppression
7 hearing?

8 A. After the suppression hearing, prior to starting
9 the trial.

10 Q. You really hit on the victim's -- she said she was
11 80 to 90 percent sure. You focused on that pretty hard
12 and that it should be suppressed because that was not a
13 positive ID; is that correct?

14 A. I mean, that's what we had. The victim said when
15 they did the show-up lineup that she was 80 to 90 percent
16 sure. And I argued to the Court that that was not
17 sufficient evidence to have probable cause to arrest my
18 client, and that any evidence obtained after that ID
19 should be suppressed. And the Court ruled against me but
20 it was preserved for appeal.

21 Q. You also challenged the search of the, I guess
22 boarding house; is that right?

23 A. Yes, I did. I argued basically that they didn't
24 have, that the person that gave them the key, they could
25 not prove who that person was. And that without that

CHARLIE JAY JOHNSON, JR - CROSS BY MITCHELL

1 person having authority to give them the key, that they
2 shouldn't have the right to do a search without a search
3 warrant.

4 Once again it was ruled against me.

5 Q. And he would have had an expectation of privacy in
6 that room in that he had paid some rent for it?

7 A. But that was also preserved for appeal. And I'm
8 assuming that when he went and had his appeal that that
9 was one of the issues that was brought up in his appeal.

10 Q. I'll move to, I guess, the jailhouse witness. You
11 cross-examined him fairly thoroughly. You pointed out
12 his prior convictions; is that right?

13 A. Correct.

14 Q. He was convicted of CSC, maybe some drug charges;
15 is that right?

16 A. Correct.

17 Q. Okay. And his whole deal was he had the wrong --
18 he's saying this was a Bi-Lo robbery. He came to them
19 saying, "I know something about a Bi-Lo robbery," and it
20 ended up not being like that; isn't that right?

21 A. That's correct. And I brought that out, you know,
22 on cross-examination that he was giving evidence that
23 Mr. Kough had confessed to a Bi-Lo robbery. And I
24 attempted to bring out to the jury that basically he was
25 lying, that he was telling them information about stuff

CHARLIE JAY JOHNSON, JR - CROSS BY MITCHELL

1 that we was not -- that we were not on trial for.

2 Q. Mr. Kough does have a scar on his head from that
3 surgery that we talked about earlier; is that right?

4 A. I -- if you say so. I don't remember.

5 Q. Do you recall if that was brought out by
6 Ms. Garfield during the trial?

7 A. If it's in the transcript then yes, but I don't
8 remember.

9 Q. So you think you got along pretty well with
10 Mr. Kough?

11 A. I didn't, didn't have any problem getting along
12 with him. I explained everything to him. He told me he
13 understood when I explained to him what he was facing if
14 he was convicted. And that -- and my opinion to him was
15 that under the evidence that it would be my opinion that
16 he took the plea. He told me that he didn't want to take
17 the plea. He wanted to go to trial. So I told him I
18 would do the best I could for him. And that's what I
19 did.

20 MR. MITCHELL: No further questions. Thank
21 you, Mr. Johnson.

22 THE COURT: Any redirect?

23 MR. BROOKS: No, ma'am.

24 THE COURT: All right, sir. You may step
25 down. Thank you.

1 THE WITNESS: Thank you, Your Honor.

2 MR. BROOKS: Judge, that's the Applicant's
3 case. I do want to put one thing on the record.

4 THE COURT: Okay.

5 MR. BROOKS: You've heard Dr. Brawley talk
6 about the forensic psychiatrist. We did hire
7 Dr. Martin, Thomas Martin, through the Indigent
8 Defense money. Dr. Martin met with him.
9 Dr. Martin informed me that he couldn't -- he
10 would not be helpful in terms of testimony.

11 I figured you might have that question. I
12 just wanted to put that on the record.

13 THE COURT: I appreciate you letting me
14 know. I did have that question, and I'm glad to
15 know that you followed up on that suggestion.
16 Thank you.

17 MR. BROOKS: Yes, ma'am.

18 THE COURT: Anything further from the
19 State?

20 MR. MITCHELL: No witnesses for the State,
21 Your Honor.

22 THE COURT: Is there any summations that
23 anyone would like to give?

24 MR. BROOKS: Yes, ma'am.

25 Basically, Judge, you heard from my

1 client. You heard the testimony. We've
2 highlighted what we feel was the deficiencies the
3 trial counsel made. In light of that, even
4 though it may sound a bit incredible for a
5 gentleman to want to go back and face 14 years,
6 he expressed to me he understands the risk. He
7 wants that new trial.

8 And based on the deficiencies that we've
9 highlighted through Mr. Johnson's testimony as
10 well as my client's testimony, he should be
11 granted a new trial.

12 THE COURT: Okay. Thank you very much.

13 Well, prior to this hearing I had the
14 opportunity to read through this transcript which
15 is two volumes long. I read through the
16 application, the return, and I listened carefully
17 today to the arguments. And I feel comfortable
18 ruling from the bench on this and I would ask
19 Mr. Mitchell to please prepare an order within 30
20 days.

21 First of all, I find that Mr. Kough was
22 competent to stand trial. We had testimony from
23 an expert to -- who could not testify as to his
24 competency but had some concerns based on his,
25 the testing she had done.

1 However, mental competency to stand trial
2 is merely someone's ability to understand the
3 charges against him and assist in his defense.
4 And based on Mr. Kough's testimony before me
5 today and based on Mr. Johnson's testimony about
6 Mr. Kough at the time of the trial, I find as a
7 fact that Mr. Kough did have that ability, that
8 he does understand what he was charged with. He
9 could explain to me from the stand specific
10 details about his trial and different strategy
11 points.

12 And so I find that there was no deficiency
13 by Mr. Johnson with regard to not having a
14 competency evaluation prior to trial.

15 On all the other other issues that were
16 raised, I again find that Mr. Johnson's
17 performance was not deficient. In fact, he not
18 only met but he exceeded the prevailing
19 professional norms for an attorney. There was a
20 thorough investigation done in this case. He
21 made appropriate motions throughout this trial.
22 He made appropriate objections. He had preserved
23 issues for appeal. And I find that Mr. Johnson
24 gave credible testimony from the stand.

25 And again, Mr. Mitchell, if you would

1 prepare that order within 30 days, please.

2 MR. MITCHELL: Yes, ma'am. Thank you.

3 THE COURT: All right. Thank you very
4 much.

5 MR. BROOKS: Thank you, Judge.

6 MR. JOHNSON: Thank you, Your Honor.

7 THE COURT: Thank you.

8 END OF CASE: 11:15 A.M.

9 ***

10 CERTIFICATE OF REPORTER

11 STATE OF SOUTH CAROLINA)

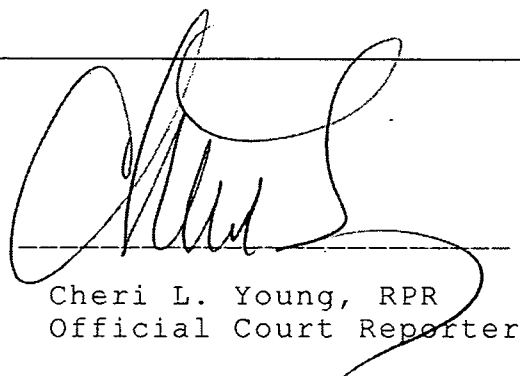
12 COUNTY OF AIKEN)

13 I, Cheri L. Young, Registered Professional Reporter
14 and Official Court Reporter for the State of South
15 Carolina, Second Circuit-At Large, do hereby certify that
16 the foregoing proceedings were written stenographically
17 by me using computer-aided translation; further, that the
18 foregoing is a true, accurate and complete record, to the
19 best of my skill and ability, of all the proceedings had
20 and evidence introduced in the hearing of the captioned
21 case, relative to appeal, in the Court of Common Pleas
22 for Richland County, on the 27th day of August, 2015.

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

25 I have hereunder set my hand this 9th day of

1 February, 2016.

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4 Cheri L. Young, RPR
5 Official Court Reporter
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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Richard M. Kough, #338426,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2011-CP-40-08760

ORDER OF DISMISSAL

2015 NOV -3 PM 4:23

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed December 27, 2011. Respondent made its Return on January 10, 2011, requesting an evidentiary hearing be convened. Jared H. Garraux, Esquire was appointed by the Richland County Clerk of Court to represent Applicant. A Petition for Substitution of Counsel was filed on February 7, 2012, where Adam S. Tesh, Esquire, took over representation by Order filed on February 7, 2012. Counsel Tesh was then relieved and Charles T. Brooks, III, Esquire was substituted as counsel. An evidentiary hearing was held on August 27, 2015, at the Richland County Courthouse. Applicant was present and represented by Counsel Brooks. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying were Applicant's counsel, Charlie J. Johnson, Jr., Esquire, (Counsel), and Dr. Tora L. Brawley. This Court had before it the Richland County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, and the transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted at

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the June 2009 term of the Court of General Sessions for Richland County for armed robbery (2009-GS-40-6661). Applicant was represented by Counsel Johnson. Applicant proceeded to trial on December 7, 2009. He was convicted as indicted. The Honorable J. Michelle Childs sentenced Applicant to sixteen (16) years' imprisonment.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed the Applicant's conviction. State v. Kough, No. 2011-UP-501 (filed November 9, 2011). The Remittitur was issued on November 28, 2011.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

- I. Ineffective assistance of trial counsel in
 - a. Failing to have Applicant evaluated for criminal responsibility and competency;
 - b. Failing to investigate;
 - c. Failing to effectively challenge law enforcement's search and seizures;
 - d. Failing to effectively challenge the victim witness's identification of Applicant; and
 - e. Failure to request a jury instruction on the lesser included offense of strong armed robbery.

II. APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in the 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, 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. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, appellate records, records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds counsel's testimony to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Ineffective Assistance of Trial Counsel

Failure to have Applicant evaluated for criminal responsibility and competency

Applicant alleges Counsel was ineffective for failing to have Applicant properly evaluated. Dr. Tora Brawley was qualified as an expert in clinical neuropsychology by the Court. She testified that she had met with and evaluated Applicant previously. She testified that Applicant had issues with seizure control and that he had part of his brain removed due to a tumor at the age of fourteen (14). She testified this would likely affect Applicant's behavior and impulse control. She testified she did not examine Applicant for his competency to stand trial or to examine whether he should be criminally responsible. Applicant testified as to the defense strategy in that they wanted to convince the jury that he did not have a weapon and therefore could not be convicted of armed robbery. Applicant also testified that he was offered a plea deal of fifteen (15) years' to strong armed robbery. Counsel testified he was aware of the issues testified to by Dr. Brawley. Counsel testified that he believed Applicant understood all of his rights and had no questions as to his competency to stand trial. He also did not have any problem communicating with Applicant. He noted he got along fairly well with Applicant and that they were able to form a defense strategy in hopes of being acquitted of armed robbery.

This Court finds the Applicant has failed to carry his burden of proving that a reasonable probability exists that he would have been found incompetent at the time of his guilty plea. A defendant must be mentally competent to stand trial to assist counsel in his defense. Drope v. Missouri, 420 U.S. 62 (1975). In every criminal case, it is presumed the defendant is sane. State v. Milian-Hernandez, 287 S.C. 183, 336 S.E.2d 476 (1985). Insanity is an affirmative defense to a prosecution for a crime. Id. South Carolina has adopted the M'Naghten test to determine insanity. State v. Lewis, 328 S.C. 273, 277-78, 494 S.E.2d 115, 117 (1997). A defendant is

insane if, at the time of the commission of the act constituting the offense, as a result of mental disease or defect, he lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong. Id.; see S.C. Code Ann. § 17-24-10(A) (Supp.1996).

A defendant must be mentally competent to stand trial to assist counsel in his defense. Drope v. Missouri, 420 U.S. 62 (1975). In determining if counsel is ineffective for failing to request a competency hearing, an applicant must show that a reasonable probability exists that he would be found incompetent at the time of this trial or plea. Jeter v. State, 308 S.C.230, 417 S.E.2d 594 (1992). Counsel may reasonably rely on his own perceptions in deciding if a client is competent to stand trial. Id.

This Court finds Applicant has failed to present any evidence showing he would have been found incompetent at the time of his trial had he been evaluated for competency at that time. The record is void of any indication that Applicant was unable to assist counsel in his defense. Applicant was able to effectively communicate with Counsel and took an active role in his defense, including making the decision to testify. This Court finds credible Counsel's perceptions that Applicant understood his advice, assisted in his defense, and was able to communicate effectively with Counsel. While Dr. Brawley was able to offer testimony as to Applicant's behavioral problems and to the possible causes therefrom, she was not able to present the Court with credible evidence as to Applicant's alleged lack of mental capacity or competency. This allegation is wholly without merit, and Applicant has failed to carry his burden of proving counsel was ineffective for failing to have the Applicant evaluated.

Failure to investigate

Applicant further alleges that Counsel was ineffective for failing to investigate the identity of the man who allowed law enforcement into the house where Applicant was found. This allegation rests entirely on speculation because the tenant was not produced at the hearing to allow the Court to judge the relevance of his testimony. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) ("failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result."). Applicant failed to present any evidence to this Court as to how any evidence regarding the tenant could have changed the result of the trial.

Failure to effectively challenge law enforcement's search and seizure

Applicant further alleges Counsel was ineffective in failing to effectively challenge law enforcement's search of the house where Applicant was located. Counsel testified he did challenge the search, and the record reflects Counsel made a motion to suppress all evidence stemming from law enforcement's search done at the house. (Trial Tr. p. 177 – p. 178; 182-92; 215-223). There was an extensive argument over whether Applicant had an expectation of privacy in the room where he and his belongings were found. The trial court denied the motion to suppress and ruled that the police had a reasonable belief that the tenant had a common and apparent authority to enter the house by virtue of the key. (Trial Tr. p. 222, line 8 – p. 223, line 21). This Court finds Counsel made the appropriate motion and argument. This Court further finds that this issue was preserved for appellate review. This allegation is denied and dismissed with prejudice.

Failure to effectively challenge the victim and cabbie's identification of Applicant

Applicant alleges Counsel was ineffective in failing to effectively challenge the victim and the cabbie's identification of Applicant. Counsel testified a Biggers¹ hearing was held where the State put up a number of witnesses. Counsel testified he thoroughly argued that the victim and the cabbie's identification of Applicant should be suppressed. The record confirms Counsel's assertions. (Trial Tr. p. 175 – 76; p. 178-82; p. 194, lines 6-12). Counsel argued that the show-up identification was unduly suggestive and that it should be deemed inadmissible. The trial court found that while a show up identification is generally suggestive, when viewed under the totality of the circumstances, the identifications were admissible. This Court finds Counsel made the appropriate objection, preserved the issue for appellate review, and his performance was not deficient. This allegation is dismissed with prejudice.

Failure to request a jury instruction on the lesser included offense of strong armed robbery

Finally, Applicant alleges Counsel was ineffective for failing to request a jury instruction on the lesser included offense of strong armed robbery. (Trial Tr. p. 583, line 23 – p. 589, line 24; p. 591, line 5 – p. 592, line 10). Counsel argued that there was evidence presented to support a verdict for the lesser included offense of strong armed robbery. The trial court agreed and did in fact charge the jury with strong armed robbery. (Trial Tr. p. 655, line 17 – p. 656, line 6). This allegation is without merit. It is denied and dismissed with prejudice.

All Other Allegations

As to any and all allegations that were raised in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

¹ Neil v. Biggers, 409 U.S. 188 (1972).

JRG

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 3rd day of November, 2015.


TANYA A. GEE
Presiding Judge

Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNT OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

RICHARD M. KOUGH, #338426

2011-CP-40-08760

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

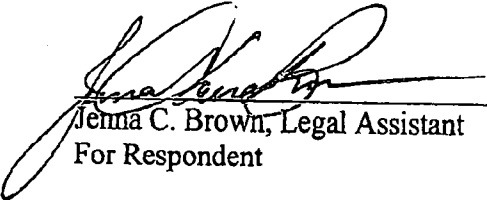
STATE OF SOUTH CAROLINA,

Respondent.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Order of Dismissal** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Charles T. Brooks, III, Esquire
The Brooks Law Office, LLC
PO Box 3512
Sumter, SC 29151

DATED this 5th day of November, 2015


Jenna C. Brown, Legal Assistant
For Respondent

WITNESSES

(s) A.L. THOMAS - CPD ✓

DOCKET NO. 2009-GS-40-6661

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

JUNE TERM 2009

87

THE STATE
VS.

RICHARD KOUGH

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED
JAN 20 2010
C.C.C. PLS.
RICHLAND COUNTY
SOUTH CAROLINA

ACTION OF GRAND JURY

TRUE BILL

Person of Grand Jury
Date: JUN 18 2009

VERDICT

Indictment for

ARMED ROBBERY
SC Code: 16-11-330(A)
CDR Code: 0139
Class FEL-A(V)

Richard M. Montanez
Representative of Petit Jury
Date: 12/10/09

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

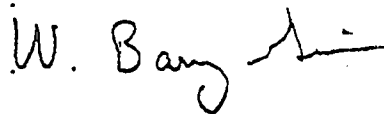
INDICTMENT

At a Court of General Sessions, convened on June 17, 2009, the Grand Jurors of Richland County present upon their oath:

ARMED ROBBERY

That Richard Kough did in Richland County on or about July 19, 2008, commit a robbery by feloniously taking from the person or presence of Tonya McGeorge, by means of force or intimidation goods or monies belonging to Corner Pantry, being described as US Currency, with the intent to deprive the owner permanently of such property, while armed with a pistol, rifle, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by actions or words, that he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon. All in violation of SC Code of Laws § 16-11-330(A).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



WARREN B. GIESE, SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF
STATESouth CarolinaRichard M. Kough

AKA:

Race:

W

Sex:

M

Age:

33

DOB:

SS#:

Address:

City, State, Zip:

DL#

SID#

In disposition of the said indictment comes now the Defendant who was

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2009 -GS- 40 -66661

A/W#:

K 357961

Date of Offense:

July 19, 2009

S.C. Code §:

16-11-330 (A)

CDR Code #:

0139

SENTENCE SHEET

TO: Armed Robbery ☒ CONVICTED OF or ☐ PLEADSIn violation of § 16-11-330 (A) of the S.C. Code of Laws, bearing CDR Code # 0139NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45The charge is: ☒ As indicted, ☐ Lesser included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST

Solicitor General 74194 SC Bar # 74194Defendant Richard M. KoughAttorney for Defendant Charles J. JohnsonSC Bar # 9001WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center,for a determinate term of 16 days/months/years or ☐ under the Youthful Offender Act not to exceed yearsand/or to pay a fine of \$; provided that upon the service of days/months/years and or payment of \$; plus costs and assessments as applicable, the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-85 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedPTUP Total: \$ plus 20% fee: \$ days/hours Public Service EmploymentPayment Terms: Obtain GED ☐☐ Set by SCDPPPS Attend Voc. Rehab. Or Job Corp. Recipient: May serve W/E beginning Substance Abuse Counseling ☐

*Fine:

\$14-1-206 (Assessments 107.5%)	\$	_____
\$14-1-211 (A)(1)(Conv. Surcharge)	\$100	\$
\$14-1-211 (A)(2)(DUI Surcharge)	\$100	\$
\$56-5-2995 (DUI Assessment)	\$12	\$
\$56-1-286 (DUI Breath Test)	\$25	\$
\$47.12 (Public Def/Prob)	\$500	\$
\$14-1-212 (Law Enforce. Funding)	\$25	\$
\$14-1-213 (Drug Court Surcharge)	\$100	\$
\$50-21-114 (BUI Breath Test Fee)	\$30	\$
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
\$90.7(SCCJA Surcharge)	\$5	\$
3% to County (if paid in installments)		\$
TOTAL		\$

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:Jeanette W. McBride (S)
WilliamPresiding Judge J. ChrisJudge Code: 21-76Sentence Date: 12-10-09