

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County

Honorable John C. Hayes, Circuit Court Judge

EUGENE THOMAS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002304

APPENDIX

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S.C. SUPREME COURT

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

) COURT OF GENERAL SESSIONS
) 2009-GS-23-09349; 09350
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ORIGINAL

STATE OF SOUTH CAROLINA

PLAINTIFF)

vs.

) TRANSCRIPT OF RECORD.
)
)

EUGENE THOMAS

DEFENDANT)

September 10-11, 2012
Greenville, South Carolina

B E F O R E:

THE HONORABLE R. MARKLEY DENNIS, Judge; and a jury.

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

JENNIFER TESSITORE, ESQ.
Attorney for the State

SCOTT ROBINSON, ESQ.
Attorney for the Defendant

APRIL HERRON
Official Court Reporter

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September 10, 2012

1

2

THE COURT: What's the status of the first case?

3

4

MS. TESSITORE: Your Honor, the State's prepared to go forward.

5

THE COURT: Okay.

6

7

MR. ROBINSON: Defense is ready as well, Your Honor.

8

9

THE COURT: Very well. So he directed you to reject the offer?

10

11

MR. ROBINSON: Yeah, I'd like to put that on the record.

12

13

THE COURT: I definitely am going to put it on the record, that's why I'm just asking you beforehand.

14

MR. ROBINSON: Thank you, Judge.

15

THE COURT: No problem.

16

All right, you're Eugene Thomas?

17

MR. THOMAS: Yes, sir.

18

THE COURT: He can remain seated, thank you.

19

20

All right, Mr. Thomas, we're ready to start with your case.

21

22

I understand the State's going forward with armed robbery, is that correct, Solicitor?

23

24

25

MS. TESSITORE: Your Honor, the State is going forward on the armed robbery as well as the two other charges, burglary, third degree and the possession of a

1 weapon during the commission of a violent crime.

2 THE COURT: Very well. And as I understand
3 notice has been served of life without parole.

4 MS. TESSITORE: Yes, sir and I'll pass that up
5 to the Court.

6 THE COURT: All right, Mr. Thomas, I had a
7 status conference with your attorneys this morning and we
8 discussed the offer that has been extended to you. And I
9 want to place that on the record simply to make sure that
10 you received the offer. I'm sure that you have but I've
11 had a situation in the past in my career that gave me
12 concern that the Defendant may not have really understood
13 and had received the offer. But we talked about it and
14 the State had said for purposes of this case, that if you
15 chose to enter a guilty plea, and that only would be under
16 some circumstances I'll was talk about in just a moment,
17 that they would withdraw the life without parole. Which
18 as I understand talking with your lawyer, that he was
19 going to discuss with you what we call an Alford plea.
20 Which basically said to accept the benefit of a bargain
21 and avoid possible consequences. That offer has been
22 extended to you, sir?

23 MR. THOMAS: Yes, sir.

24 THE COURT: And you understand the offer?

25 MR. THOMAS: Yes, sir.

1 THE COURT: And you have instructed your lawyer
2 to reject that offer?

3 MR. THOMAS: Yes, sir.

4 THE COURT: All right, very well, that's fine.
5 And you understand, therefore, that if the jury convicts
6 you of the crime of armed robbery, that my options would
7 be life without parole?

8 MR. THOMAS: Yes, sir.

9 THE COURT: Okay. Thank you, very much.

10 All right, are there any matters of law that we
11 need to address at this point?

12 MS. TESSITORE: Yes, Your Honor, on behalf of
13 the State, we do have some. Well, the first being the
14 motion in limine regarding some third party guilt that may
15 come up. And I don't know if, Your Honor, wants to
16 address that now or we should go forward with the jury--

17 THE COURT: Well the jury panel had about 15
18 minutes is what we have. So if we can do it in 15 minutes
19 that's fine. If not, we'll pick the jury then we'll do it
20 at the appropriate time.

21 MS. TESSITORE: Your Honor, if it would please
22 the Court to go ahead and pick the jury but just not have
23 -them sworn.

24 THE COURT: Not going to swear them.

25 MS. TESSITORE: Then we will have a photo array

1 hearing as well as, I believe, a suppression hearing on
2 items that were found.

3 THE COURT: How long do you anticipate all of
4 that to take?

5 MR. ROBINSON: Your Honor, I have several
6 suppression motions.

7 THE COURT: Okay.

8 MR. ROBINSON: Basically regarding the line-up
9 and different manners of the plan of suppressing on behalf
10 of Mr. Thomas. Time wise, I don't know, may take a little
11 longer, I don't know, depending on the testimony.

12 MS. TESSITORE: Maybe if we had time, Your
13 Honor, maybe just have the jury come back after lunch.

14 THE COURT: Well I'm going to do that, that's no
15 problem.

16 MS. TESSITORE: Okay. But--

17 THE COURT: I just with -- what I'm just trying
18 to figure I want to make sure the court staff gets a lunch
19 and just how long to give the jury. But we'll see when we
20 select them where we are. That's fine.

21 MS. TESSITORE: I think we have three witnesses
22 that would probably be...

23 THE COURT: Okay. Other than that, anything
24 else? That you know of that needs to be addressed? Any
25 other legal matters?

1 MS. TESSITORE: I don't think so.

2 THE COURT: What are your motions to suppress?

3 MR. ROBINSON: Your Honor, the motion to
4 suppress go to the line-up in this case. There was a
5 photo line-up that was done. We believe that it was
6 extremely suggestive, very -- it happened obviously the
7 testimony part of this--

8 THE COURT: Sure, I understand. So you want to
9 suppress to identification of the line-up.

10 MR. ROBINSON: Yes. And as far as the
11 fingerprints, there was some fingerprints taken at the
12 scene, then about a while later they got some other
13 fingerprints. And I'm concerned about those fingerprints
14 in this matter. And also as well as far in limine keeping
15 out testimony regarding other arrests and so forth that
16 they made in this case.

17 THE COURT: Other arrests of whom?

18 MR. ROBINSON: They went to the hotel room at
19 some point, motel. And they got a thing of dice and a
20 loaded gun, a loaded gun that they're trying to connect to
21 this guy saying it was the same type of gun. And
22 fingerprints are the same fingerprints taken from a door
23 at the scene. The linkage is kind of really speculative
24 at best. I would like to suppress anything with regards
25 to that at this point. Any sort of testimony that would

1 indicate how they went about getting the pictures from the
2 line-up in this case. I'm very concerned about that as
3 far as if the prosecution puts up anything that would have
4 the jury believe that this Defendant had a prior record or
5 that he was -- as far as why they have this picture of
6 him.

7 THE COURT: Well I assume, first of all,
8 concerning that is you're not going to ask any questions
9 about where they got the pictures. I doubt very seriously
10 the State's going to say we got it from the mug shot.
11 I've never heard that testimony given before so I would
12 think that that really is in your hands more than it is
13 the State's hands.

14 MR. ROBINSON: Of course, Your Honor, of course.

15 THE COURT: So anyway, that's fine.

16 MS. TESSITORE: Just on the issue, Your Honor, I
17 think what Mr. Robinson is getting to, the photo that was
18 actually used in the photo array was the photo that had
19 been recently taken within about a month.

20 THE COURT: It doesn't matter if it's not unduly
21 suggestive to have being in custody.

22 MS. TESSITORE: Correct. And we do have a
23 redacted photo array so that I was going to go over that
24 with the Court as well. We have one, as far as the photo
25 array and suppression hearing, the original, obviously,

1 that has been brought to court. But in the event that the
2 word Mug Shot being on the photo array and--

3 THE COURT: Solicitor, I can help you. If I
4 find it to be unduly suggestive, I'm not going to let you
5 redact it.

6 MS. TESSITORE: No, no, no. Assuming that the
7 Court finds that it is not unduly suggestive, and that the
8 identification--

9 THE COURT: What would the redacted one have
10 anything to do with that then?

11 MS. TESSITORE: Just as far as going to the
12 jury, Your Honor.

13 THE COURT: I'm losing you but maybe it will be
14 clear once I see it so that's fine, that's okay. All
15 right.

16 All right, we'll be ready to do that as soon
17 as -- the witnesses are ready to go as soon as we pick the
18 jury?

19 MS. TESSITORE: Yes, Your Honor.

20 THE COURT: Okay, that's fine. All right, we'll
21 be at ease then for a few moments until the jury panel
22 comes up. You submitted voir dire?

23 The State have any voir dire?

24 MS. TESSITORE: No, Your Honor.

25 THE COURT: Okay.

1 (WHEREUPON, the jury venire entered the
2 courtroom.)

3 THE COURT: Good morning, ladies and gentlemen.
4 As I mentioned to you, we're now going to go into the
5 qualifications of the case we have this morning. The
6 dispute that I have before me is framed by these two
7 documents that I hold in my hand. They are what they
8 appear to you to be pieces of paper. They're called
9 Indictments. And this means just the formal charges or
10 accusations that the State is making against Mr. Eugene
11 Thomas. First I'd like to introduce to you this morning
12 Mr. Eugene Thomas, he's seated at the table to my right.

13 Mr. Thomas, good morning. If you'd please stand
14 and face the jury panel for me. Mr. Eugene Thomas.

15 Thank you, Mr. Thomas, you may take your seat.

16 Are there any members of the jury panel related
17 by blood or marriage, have any business dealings with
18 socially, casually or acquainted with, have any connection
19 with Mr. Thomas? If so, please stand. Thank you, there
20 are none.

21 Mr. Thomas is represented by Mr. Robinson. If
22 you would identify yourself and your law firm, please,
23 sir.

24 MR. ROBINSON: Thank you, Judge.

25 Good morning, my name is Scott Robinson and I

1 practice in Greenville. And this is my assistant Lisa
2 Neito.

3 THE COURT: Your assistant's name again is?

4 MR. ROBINSON: Lisa Neito (ph).

5 THE COURT: Neito?

6 MR. ROBINSON: Yes, sir.

7 THE COURT: Is she an attorney as well?

8 MR. ROBINSON: She's an assistant.

9 THE COURT: That's fine, just in framing the
10 question.

11 MR. ROBINSON: Yes, sir.

12 THE COURT: Are there any members of the jury
13 panel related by blood or marriage, have any business
14 dealings with socially, casually or acquainted with either
15 Ms. Neito or Mr. Robinson or ever been represented by Mr.
16 Robinson or his law firm? If so, please stand. Thank
17 you, there appear to be none.

18 The State is represented in this matter by
19 Ms Tessitore.

20 If you would identify yourself and anyone who
21 would be assisting you, please.

22 MS. TESSITORE: Thank you, Your Honor, may it
23 please the Court. My name is Jennifer Tessitore and I'm
24 an Assistant Solicitor with the 13th Judicial Circuit.
25 And assisting me is Renee Kelly, she is my investigator

1 and works in the Solicitor's Office. And Detective Collis
2 Flavell with the Greenville County Police Department.

3 THE COURT: Are there any members of the jury
4 panel related by blood or marriage, have any business
5 dealings with socially, casually or acquainted with
6 Ms. Tessitore or Ms. Kelly, ever been represented by
7 Ms. Tessitore? If so, please stand. Thank you, there
8 appear to be none.

9 I'm going to identify a number of persons,
10 ladies and gentlemen, and ask if you're related by blood
11 or marriage, have any business dealings with socially,
12 casually or acquainted with these individuals, you need to
13 stand and share that information with the Court. Michael
14 Gordon, Officer J. Calvin Bradley with the Greenville
15 Police Department, Doug Smith with the forensic division
16 at the Department of Public Safety, Chris Gary, Jennifer
17 Hallex, Greg Byrum, Investigator Collis Flavell with the
18 Greenville Police Department, Officer Mike Aiken, also
19 with the Greenville Police Department, forensics office,
20 Jonathan Hamilton, Kara Bennick, Mike Petersen, also with
21 the Greenville Department of Public Safety Forensic
22 Division. Yvonne McBee, Sherry Dennis, Melvin Coleman,
23 Anthony Sexton, Darlene Gordon, Troy Sitton, Fernanzer
24 Lewis, Demeco Thomason, Karen Cruell, Jimmy Austin, Frank
25 Mansell, Kianna Cruell or Lucy Earley. Any of those?

1 Thank you, there appear to be none.

2 What I will share with you now, ladies and
3 gentlemen, is what's alleged in these two Indictments. It
4 is not evidence but I need to ask you certain questions
5 about this dispute. So in order to do that I have see
6 what they've alleged to have occurred. It's alleged in
7 one of the Indictments that Mr. Thomas did in Greenville
8 County, on or about the 22nd day of July, 2009, while
9 armed with a deadly weapon and while alleging either by
10 actions or words, he was armed while using the
11 representation of a deadly weapon or any object which a
12 person present during the commission of a robbery believed
13 to be a deadly weapon, did take by means of force or
14 intimidation, goods or money described as a lottery ticket
15 from the person of Michael Gordon. Which was allegedly
16 violative of the statute, creating the crime of armed
17 robbery.

18 It's also alleged that he did on that day
19 display a handgun during the commission of a violent
20 crime, allegedly an armed robbery. Also in violation of
21 the statute that describes that conduct. It is further
22 alleged that on that date that he did willfully and
23 unlawfully entered an apartment located at [REDACTED]
24 [REDACTED] in Greenville without the consent and with the
25 intent to commit a crime therein. Which violates the

1 statute setting forth the conduct known as -- criminal
2 conduct known as burglary in the third degree.

3 Share that with you to find out if any member of
4 the jury panel has read anything, heard anything, you have
5 any prior knowledge of this dispute. If so, please,
6 stand. Thank you, there appear to be none.

7 Are there any members of the jury panel that
8 live near -- now or formally live near [REDACTED]
9 [REDACTED] in Greenville? If so, please, stand. Thank you,
10 there appear to be none.

11 The three crimes as mentioned are armed robbery,
12 possession of a weapon during the commission of a violent
13 crime and burglary, third degree. Is there anything about
14 the nature of these disputes that you, because of
15 something that may have occurred to you or family member
16 or close personal friend, some strong philosophy you have,
17 anything that you can think of that's occurred in your
18 lifetime that would effect or influence your ability to
19 fairly and impartially apply your common sense, your sense
20 of logic and reason in analyzing the evidence, then once
21 deciding the true facts, then taking the law as I give it
22 to you and applying that fairly and impartially to the
23 facts. If you feel there is something, please stand.
24 Thank you, there appear to be none.

25 Are there any members of the jury panel that

1 now, formally, either you or a member of your family are
2 connected with law enforcement in any capacity? If so,
3 please stand.

4 Yes, ma'am, your name and number, please.

5 PROSPECTIVE JUROR: My name?

6 THE COURT: Yes.

7 PROSPECTIVE JUROR: Danette Williamson. My
8 number is 145. My brother-in-law is a corporal or
9 lieutenant with Greenville City.

10 THE COURT: Okay, would that effect --

11 PROSPECTIVE JUROR: His name is Brad Lusk.

12 THE COURT: Brad Lusk?

13 PROSPECTIVE JUROR: Yes.

14 THE COURT: He's with the Greenville Police
15 Department?

16 PROSPECTIVE JUROR: Yes, he is.

17 THE COURT: And he's what relation to you?

18 PROSPECTIVE JUROR: He's my brother-in-law. And
19 also I have two nephews. Well they're in North Carolina
20 but they're also in law enforcement.

21 THE COURT: I'm going to excuse you from
22 participation in this dispute out of an abundance of
23 caution, ma'am. You may go back down --

24 Do they go back down to the jury assembly room?

25 THE CLERK: Yes, sir, please.

1 THE COURT: If you would return to the jury
2 assembly room, please.

3 PROSPECTIVE JUROR: Yes, Wayne Vasilenko, 135.
4 My son-in-law is a State Trooper.

5 THE COURT: What that effect or influence you in
6 this dispute?

7 PROSPECTIVE JUROR: No.

8 THE COURT: Would you base your decision on the
9 evidence and the law and would that decision be fair to
10 both sides?

11 PROSPECTIVE JUROR: Yes, sir.

12 THE COURT: You may be seated, thank you, sir.
13 Yes, sir.

14 PROSPECTIVE JUROR: Charles Ingram number 74.
15 My wife's an attorney with DSS.

16 THE COURT: Would that influence or effect your
17 in this dispute, sir?

18 PROSPECTIVE JUROR: No, sir.

19 THE COURT: Would you base your decision on the
20 evidence and the law and would that decision be fair to
21 both sides?

22 PROSPECTIVE JUROR: Yes, sir.

23 THE COURT: Thank you, sir, you may take your
24 seat.

25 Yes, ma'am.

1 PROSPECTIVE JUROR: Might be juror 110. I'm not
2 sure if you need to know this or not but my sister-in-law
3 is a nurse at a correctional facility.

4 THE COURT: Would that effect or influence you
5 in anyway in this dispute?

6 PROSPECTIVE JUROR: No, sir.

7 THE COURT: Would base your decision on the
8 evidence and the law and would your decision be fair to
9 both sides?

10 PROSPECTIVE JUROR: Yes.

11 THE COURT: Thank you, very much. You may be
12 seated.

13 Are there any members of the jury panel, members
14 of your immediate family that ever been involved in a
15 crime, either you were the victim of a crime or you were
16 accused of a crime or you were a witness for either side,
17 had any connection or involvement? If so, please, stand.

18 Ask you to come forward, talk -- if I can get
19 out of this chair. Talk by the Court Reporter.

20 Attorneys may approach as well.

21 MS. TESSITORE: Thank you, Your Honor.

22 THE COURT: If you would stand right here, face
23 the Court Reporter right here.

24 PROSPECTIVE JUROR: You said any crime?

25 THE COURT: Yes. I'll ask you to turn this way.

1 You can come stand right by me and face this lovely lady.

2 PROSPECTIVE JUROR: Okay.

3 THE COURT: Okay, now tell me about it.

4 PROSPECTIVE JUROR: I was, I guess, an almost
5 victim of an assault while running.

6 THE COURT: Okay, was there someone arrested for
7 that?

8 PROSPECTIVE JUROR: No.

9 THE COURT: Would that effect or influence you
10 in any way in this dispute?

11 PROSPECTIVE JUROR: No.

12 THE COURT: You would be able to set that aside
13 and apply your common sense, your sense of logic and
14 reason fairly and impartially and your decision would be
15 based on the evidence and the law and fair to both sides?

16 PROSPECTIVE JUROR: Yes, sir.

17 THE COURT: Any additional questions from either
18 one?

19 MS. TESSITORE: Not from the State.

20 THE COURT: Thank you, ma'am, your number again?

21 PROSPECTIVE JUROR: Twenty-nine.

22 THE COURT: Number 29 will remain. Okay.

23 Your name and number, please.

24 PROSPECTIVE JUROR: Gayle Merritt, 97.

25 THE COURT: All right, yes, ma'am.

1 PROSPECTIVE JUROR: Our home was broken into
2 about 25 years ago. We were not present.

3 THE COURT: Okay. Was anyone arrested for that
4 offense?

5 PROSPECTIVE JUROR: Yes.

6 THE COURT: Was that prosecuted in this county?

7 PROSPECTIVE JUROR: No.

8 THE COURT: Were you involved in the prosecution
9 of the case in any way?

10 PROSPECTIVE JUROR: No.

11 THE COURT: Would that in any way effect or
12 influence you in this dispute, ma'am?

13 PROSPECTIVE JUROR: No.

14 THE COURT: You can set that aside and base the
15 decision on the evidence and the law in this case alone
16 and would be fair to both sides?

17 PROSPECTIVE JUROR: Yes.

18 THE COURT: Any additional questions from either
19 side?

20 MS. TESSITORE: No.

21 MR. ROBINSON: No, sir.

22 THE COURT: Thank you.

23 Number 97 will remain.

24 Your name and number, please.

25 PROSPECTIVE JUROR: Brian Doiron, number 43. I

1 was accused of check fraud and the charges were dismissed.

2 THE COURT: Did that charge originate out of
3 Greenville County?

4 PROSPECTIVE JUROR: Yes.

5 THE COURT: And this solicitor's office handled
6 it?

7 PROSPECTIVE JUROR: Yes, sir.

8 THE COURT: Would that effect or influence you
9 in this dispute, sir?

10 PROSPECTIVE JUROR: No.

11 THE COURT: Would you base your decision on the
12 evidence and the law and be fair to both sides?

13 PROSPECTIVE JUROR: Yes.

14 THE COURT: Thank you.

15 Number 43 will remain.

16 Thank you, sir.

17 Give me your name and number, please.

18 PROSPECTIVE JUROR: Keisha Isaac, number 75.

19 THE COURT: Okay.

20 PROSPECTIVE JUROR: Clarity on your question.

21 THE COURT: Sure.

22 PROSPECTIVE JUROR: Did you ask if anyone was
23 currently involved in a criminal or...

24 THE COURT: Now or formally.

25 PROSPECTIVE JUROR: I'm not personally involved,

1 my husband is involved in a -- he was the victim of an
2 armed robbery with threat of death and was robbed. He's
3 currently involved in this case. Right now it has not
4 come to court yet but.

5 THE COURT: Is it being handled by this office?

6 PROSPECTIVE JUROR: No, I don't believe so.
7 Greenville County.

8 THE COURT: Okay, Greenville County.

9 PROSPECTIVE JUROR: Yes.

10 THE COURT: All right. How long ago did that
11 happen?

12 PROSPECTIVE JUROR: The incident?

13 THE COURT: (The Court nods.)

14 PROSPECTIVE JUROR: In January, about January.

15 THE COURT: So and you're very involved in
16 supporting him?

17 PROSPECTIVE JUROR: I've not actually been
18 involved in this case at all.

19 THE COURT: Would that effect you in this
20 dispute?

21 PROSPECTIVE JUROR: No, sir.

22 THE COURT: Can you set that aside and make a
23 promise to both sides that it would not influence your
24 decision?

25 PROSPECTIVE JUROR: Yes, I can.

1 THE COURT: And base your decision on the
2 evidence and the law?

3 PROSPECTIVE JUROR: Yes, sir.

4 THE COURT: Any further questions?

5 MR. ROBINSON: No, sir.

6 MS. TESSITORE: (Ms. Tessitore shook her head.)

7 THE COURT: Thank you.

8 Number 75 will remain.

9 Name and number, please.

10 PROSPECTIVE JUROR: Kenneth Crenshaw, number 34.

11 THE COURT: Yes, sir.

12 PROSPECTIVE JUROR: I witnessed a police chase.

13 THE COURT: Okay.

14 PROSPECTIVE JUROR: I seen an assailant draw an
15 automatic pistol and attempted fire on the police.

16 THE COURT: Recently?

17 PROSPECTIVE JUROR: That was in 1995.

18 THE COURT: Would that in anyway effect or
19 influence you in this dispute, sir?

20 PROSPECTIVE JUROR: No.

21 THE COURT: Would you base your decision on the
22 evidence and the law and would you be fair to both sides,
23 sir?

24 PROSPECTIVE JUROR: Yes, sir.

25 THE COURT: Thank you, you may take your seat.

1 Number 34 will remain.

2 Yes, ma'am.

3 PROSPECTIVE JUROR: I'm foggy, I forget.

4 THE WITNESS: That's no problem.

5 PROSPECTIVE JUROR: My husband had a utility
6 trailer stolen from our yard earlier this year.

7 THE COURT: Okay.

8 PROSPECTIVE JUROR: And it was recovered. And I
9 think the case is pending but...

10 THE COURT: Would that effect you in any way in
11 this dispute?

12 PROSPECTIVE JUROR: No.

13 THE COURT: You again, base your decision on the
14 evidence and the law and would be fair to both sides?

15 PROSPECTIVE JUROR: Yes.

16 THE COURT: Your name and number again?

17 PROSPECTIVE JUROR: Gayle Merritt, 97.

18 THE COURT: Thank you.

19 Are there any others? Thank you, there appear
20 to be none.

21 Any other specific questions from the State?

22 MS. TESSITORE: Not from the State?

23 THE COURT: Any other specific questions from
24 Mr. Thomas?

25 MR. ROBINSON: Just the proposed voir dire

1 question.

2 THE COURT: I answered indirectly every one of
3 those or directly. You point to one that I missed.

4 MR. ROBINSON: I have no more.

5 THE COURT: Okay. Thank you.

6 Ladies and gentlemen, the last question that I
7 have for you is this, excuse me for turning my back on
8 you. As I mentioned to you when I was qualifying you,
9 you -- those of you that would be selected, after the
10 selection process is completed, at the appropriate time
11 raise your hand. And you'll promise to the Court, to the
12 State and Mr. Thomas, the attorneys, that you will at the
13 appropriate time apply your common sense, your sense of
14 logic and reason and fairly and impartially analyze the
15 evidence, testimony and exhibits and decide what you
16 believe to be the true facts. And then once decided, take
17 the law that I give to you and apply fairly and
18 impartially to those facts. Is there anything you heard
19 in here this morning about this dispute that would give
20 you any concern about your ability to make that
21 commitment? If so, please stand. Thank you, very much.

22 What will happen now, your names are going to be
23 called --

24 You have them come and stand in front of here?

25 THE CLERK: Yes, sir.

1 THE COURT: Come stand where I'm facing, each
2 side can excuse a person -- or the State can excuse five,
3 Mr. Thomas can excuse 10. We'll go through the process.
4 If each side says Seat or swear the juror, then you'll
5 take your seat in the jury box. If they say, Excuse the
6 juror, then take your seat again. Don't take offense at
7 that if that should happen. That's just the way the
8 process works, doesn't mean anything. So we'll go through
9 to process until we have impaneled our 12 jurors and two
10 alternates. So thank you, very much and I'll turn it over
11 to the clerk now and you follow her instructions.

12 THE CLERK: Juror 113, Stacy Phillips. If
13 you'd, please, bring your things with you. Thank you,
14 Ms. Phillips.

15 (Stacy Phillips, a white female, came forward.)

16 What says the State?

17 MS. TESSITORE: Please present the juror.

18 THE CLERK: What says the Defense? I beg your
19 pardon?

20 MR. ROBINSON: Please excuse this juror.

21 THE CLERK: All right, Ms. Phillips, you need to
22 return to your seat, you have been excused from this case.

23 Juror 115, Michael Reeder.

24 (Michael Reeder, a black male, came forward.)

25 What says the State?

1 MS. TESSITORE: Please present the juror.

2 THE CLERK: What says the Defendant?

3 MR. ROBINSON: Please seat the juror.

4 MR. CLARKSON: Mr. Reeder, please have a seat in
5 the jury box.

6 Juror 127, Matthew Smith.

7 (Matthew Smith, a white male, came forward.)

8 What says the State?

9 MS. TESSITORE: Please present the juror.

10 THE CLERK: What says the Defense?

11 MR. ROBINSON: Please excuse this juror.

12 THE CLERK: All right, Mr. Smith, you may be
13 seated, you have been excused from this case.

14 Juror number 43, Brian Doiron.

15 (Brian Doiron, a white male, came forward.)

16 What says the State?

17 MS. TESSITORE: Please present the juror.

18 THE CLERK: What says the Defendant?

19 MR. ROBINSON: Please excuse this juror.

20 THE CLERK: All right, sir, please be seated you
21 have been excused from this case.

22 Juror number 129, Vincent Sordello.

23 (Vincent Sordello, a white male, came forward.)

24 What says the State?

25 MS. TESSITORE: Please excuse the juror.

1 THE CLERK: All right, sir, please be seated.
2 You have been excused from this case.

3 Juror number 75, Keisha Isaac.

4 (Keisha Isaac, a white female, came forward.)

5 What says the State?

6 MS. TESSITORE: Please present the juror.

7 THE CLERK: What says the Defendant?

8 MR. ROBINSON: Please excuse this juror.

9 THE CLERK: All right, Ms. Isaac, please have a
10 seat.

11 Number 149, Kevin Wright.

12 (Kevin Wright, a white male, came forward.)

13 What says the State?

14 MS. TESSITORE: Please present the juror.

15 THE CLERK: What says the Defendant?

16 MR. ROBINSON: Please seat this juror.

17 THE CLERK: Mr. Wright, please, have a seat in
18 the jury box.

19 Juror 46, Pamela Dunlap.

20 (Pamela Dunlap, a white female, came forward.)

21 What says the State?

22 MS. TESSITORE: Please present the juror.

23 THE CLERK: What says the Defendant?

24 MR. ROBINSON: Seat the juror.

25 THE CLERK: Ms. Dunlap, please have a seat in

1 the jury box.

2 Juror 48, Suzanne Emmel.

3 (Suzanne Emmel, a white female, came forward.)

4 What says the State?

5 MS. TESSITORE: Please present the juror.

6 THE CLERK: What says the defendant?

7 MR. ROBINSON: Please seat this juror.

8 THE CLERK: Ms. Emmel, please have a seat in the
9 jury box.

10 Juror 153, Stuart Mcalister.

11 (Stuart Mcalister, a white male, came forward.)

12 What says the State?

13 MS. TESSITORE: Please present the juror.

14 THE CLERK: What says the Defendant?

15 MR. ROBINSON: Excuse this juror.

16 THE CLERK: All right, sir, you may be seated,
17 you have been excused from this case.

18 Juror 31, Marvin Cook.

19 (Marvin Cook, a white male, came forward.)

20 What says the State?

21 MS. TESSITORE: Please excuse the juror.

22 THE CLERK: All right, sir, you may be seated,
23 you have been excused from this case.

24 Juror 135, Wayne Vasilenko.

25 (Wayne Vasilenko, a white male, came forward.)

1 What says the State?

2 MS. TESSITORE: Please present the juror.

3 THE CLERK: What says the Defendant?

4 MR. ROBINSON: Please excuse this juror.

5 THE CLERK: All right, sir, please be seated,

6 you have been excused from this case.

7 Juror number 84, Katherine Kawa.

8 (Katherine Kawa, a white female, came forward.)

9 What says the State?

10 MS. TESSITORE: Please present the juror.

11 THE CLERK: What says the Defendant?

12 MR. ROBINSON: Please excuse this juror.

13 THE CLERK: All right, ma'am, please be seated,

14 you have been excused from this case.

15 Juror 73, Geris Humphries.

16 (Geris Humphries, a white male, came forward.)

17 What says the State?

18 MS. TESSITORE: Please excuse the juror.

19 THE CLERK: All right, sir, please be seated,

20 you have been excused from this case.

21 Juror 34, Kenneth Crenshaw.

22 (Kenneth Crenshaw, a white male, came forward.)

23 What says the State?

24 MS. TESSITORE: Please present the juror.

25 THE CLERK: What says the Defendant?

1 MR. ROBINSON: Please excuse this juror.

2 THE CLERK: All right, sir, please be seated,
3 you have been excused from this case.

4 Juror 118, Josue Rivera.

5 (Josue Rivera, a white male, came forward.)

6 What says the State?

7 MS. TESSITORE: Please present the juror.

8 THE CLERK: What says the Defendant?

9 MR. ROBINSON: Seat the juror.

10 THE CLERK: Mr. Rivera, please have a seat in
11 the jury box.

12 Juror 29, Shannon Cole.

13 (Shannon Cole, a white female, came forward.)

14 What says the State?

15 MS. TESSITORE: Please present the juror.

16 THE CLERK: What says the Defendant?

17 MR. ROBINSON: Please excuse the juror.

18 THE CLERK: All right, Ms. Cole, please have a
19 seat, you have been excused in this case.

20 THE COURT: Defendant has one strike remaining.

21 THE CLERK: Juror 100, Veronica Miller.

22 (Veronica Miller, a white female, came forward.)

23 What says the State?

24 MS. TESSITORE: Please present the juror.

25 THE CLERK: What says the Defendant?

1 MR. ROBINSON: Please seat the juror.

2 THE CLERK: All right, ma'am, please have a seat
3 in the jury box.

4 Juror 85, Daniel Koenig.

5 (Daniel Koenig, a white male, came forward.)

6 What says the state?

7 MS. TESSITORE: Please present the juror.

8 THE CLERK: What says the Defendant?

9 MR. ROBINSON: Please seat the juror.

10 THE CLERK: Sir, please, have a seat in the jury
11 box.

12 Juror 50, James Fender.

13 (James Fender, a white male, came forward.)

14 What says the State?

15 MS. TESSITORE: Please present the juror.

16 THE CLERK: What says the Defendant?

17 MR. ROBINSON: Please seat the juror.

18 THE CLERK: Sir, please have a seat in the jury
19 box.

20 Juror 110, Oonagh Panosian.

21 (Oonagh Panosian, a white female, came forward.)

22 What says the State?

23 MS. TESSITORE: Please present the juror.

24 THE CLERK: What says the Defendant?

25 MR. ROBINSON: Please seat the juror.

1 THE CLERK: Ma'am, please, have a seat in the
2 jury box.

3 Juror 151, Daniel Cantrell.

4 (Daniel Cantrell, a white male, came forward.)

5 What says the State?

6 MS. TESSITORE: Please present the juror.

7 THE CLERK: What says the Defendant?

8 MR. ROBINSON: Please seat the juror.

9 THE CLERK: Mr. Cantrell, please, have a seat in
10 the jury box.

11 Juror 66, William Hathaway.

12 (William Hathaway, a white male, came forward.)

13 What says the State?

14 MS. TESSITORE: Please present the juror.

15 THE CLERK: What says the Defendant?

16 MR. ROBINSON: Please seat the juror.

17 THE CLERK: Mr. Hathaway, please, have a seat in
18 the jury box.

19 Juror 123, Surya Sailors.

20 (Surya Sailors, an Indian female, came forward.)

21 What says the State?

22 MS. TESSITORE: Please present the juror.

23 THE CLERK: What says the Defendant?

24 MR. ROBINSON: Please excuse the juror from the
25 trial of this case.

1 THE CLERK: All right, Ms. Sailors, you may be
2 seated, you have been excused from this case.

3 THE COURT: The defense has excused his strikes.

4 THE CLERK: Juror 130, Jarelle Springer.

5 (Jarelle Springer, a black male, came forward.)

6 What says the State?

7 MS. TESSITORE: Please excuse the juror.

8 THE CLERK: All right, sir, you may be seated,
9 you have been excused from this case.

10 Juror 18, Brian Burger.

11 (Brian Burger, a white male, came forward.)

12 What says the State?

13 MS. TESSITORE: Please present the juror.

14 THE CLERK: What say the Defendant?

15 MR. ROBINSON: Please seat the juror.

16 THE CLERK: Sir, please, have a seat in the jury
17 box.

18 THE COURT: Okay, let's select two alternates,
19 please.

20 THE CLERK: Juror 108--

21 THE COURT: Strikes are one and two.

22 THE CLERK: Deborah Ochoa.

23 (Deborah Ochoa, a white female, came forward.)

24 What says the State?

25 MS. GOODE: Please present the juror.

1 THE CLERK: What says the Defendant?

2 MR. ROBINSON: Excuse this juror.

3 THE CLERK: All right, Ms. Ochoa, please be
4 seated.

5 Juror 23, Jo Ann Carter.

6 (Jo Ann Carter, a black female, came forward.)

7 What says the State?

8 MS. TESSITORE: Please present the juror.

9 THE CLERK: What says the Defendant?

10 MR. ROBINSON: Please seat the juror.

11 THE COURT: All right, ma'am, please be seated
12 in the jury box. Alternate one.

13 Strikes for alternate two will be one and two.

14 THE CLERK: Juror 101, Corey Mims.

15 (Corey Mims, a black male, came forward.)

16 What says the State?

17 MS. TESSITORE: Please excuse the juror.

18 THE CLERK: All right, sir, please be seated.

19 You have been excused from this case.

20 Juror 126, Keith Sherwood.

21 (Keith Sherwood, a white male, came forward.)

22 What says the State?

23 MS. TESSITORE: Please present the juror.

24 THE CLERK: What says the Defendant?

25 MR. ROBINSON: Please excuse the juror.

1 THE CLERK: All right, sir, you may be seated.
2 You have been excused from this case.

3 Juror 57, John Geib.

4 (John Geib, a white male, came forward.)

5 What says the State?

6 MS. TESSITORE: Please present the juror.

7 THE CLERK: What says the Defendant?

8 MR. ROBINSON: Excuse this juror.

9 THE CLERK: All right, sir, you may be seated.
10 You have been excused from this case.

11 Juror 116, Erik Rhine.

12 (Erik Rhine, a white male, came forward.)

13 What says the State?

14 MS. TESSITORE: Please present the juror.

15 THE CLERK: What says the Defendant?

16 MR. ROBINSON: Please seat the juror.

17 THE CLERK: Sir, please, have a seat in the jury
18 box.

19 THE COURT: Okay, alternate two.

20 Any objection from the State regarding the
21 selection process?

22 MS. GOODE: None from the State, Your Honor.

23 THE COURT: Any motion from Mr. Thomas regarding
24 the selection process?

25 MR. ROBINSON: None from the Defense, Your

1 Honor.

2 THE COURT: Thank you, very much.

3 Ladies and gentlemen, those of you who are not
4 selected, thank you, very much. Appreciate your
5 assistance. You may return to your jury assembly room.
6 Have a good day.

7 (WHEREUPON, the jury venire was excused.)

8 Ladies and gentlemen, those of you that were
9 selected, thank you, very much, as well. There are some
10 matters that I'm going to take up outside of your
11 presence, so I'm going to excuse you for lunch. You're
12 going to receive a little more time than you customarily
13 would receive because of the fact that we have some
14 matters of law that we have to address. And I want to
15 give the court personnel as well an opportunity to have a
16 decent lunch hour. Because of that I'm going to ask that
17 you return to your jury room, please, by 2:30. And we
18 should be with you shortly.

19 When you exist, Mr. Morris will show you where
20 you need to return and you would come directly to the jury
21 room. Please remember something, you'll hear this
22 frequently, when we leave and when you depart the
23 courtroom. You're not at liberty to talk about this case
24 among yourselves or with anyone outside the courtroom.
25 And do not allow anyone to talk about it in your presence.

1 You also are not free to conduct any independent
2 investigation in this matter. We'll talk about that more
3 when you return. Don't speculate. You've heard
4 absolutely no evidence at this point. So have a good
5 lunch. I'll see you hopefully at 2:30. Thank you.

6 (WHEREUPON, the jury left open court at
7 approximately 12:05 p.m.)

8 THE COURT: All right, anything from the State
9 at this point before we move into motions? Any matters of
10 law before we move into the matters we discussed before?
11 Concerning the jury selection or any remarks made by the
12 Court?

13 MS. TESSITORE: None, Your Honor.

14 THE COURT: How about from Mr. Thomas?

15 MR. ROBINSON: I have none.

16 THE COURT: All right, let's go ahead and take
17 up -- let's do at least one of them now. And then we'll
18 probably break for lunch. I'd like to work until 12:30,
19 then we'll come back at 1:45 and finish, hopefully.

20 MR. ROBINSON: Your Honor, may it please the
21 Court. Mr. Thomas would like -- has a motion that he
22 would like to file -- like to have the Court hear.

23 MR. THOMAS: Well, Mr. Thomas can't file a
24 motion. That's called a hybrid motion. He doesn't have a
25 right to file any motions. He has to file motions through

1 you, through his attorney. Mr. Thomas wants to represent
2 himself, we'll talk about that. That's something I would
3 advise him not to do. Strongly advise him not to do.

4 MR. ROBINSON: Your Honor.

5 THE COURT: Yes, sir.

6 MR. ROBINSON: I probably was incorrect, he
7 wants me to put the motion, not him to put the motion on.
8 It's not going so --

9 THE COURT: Tell me what motion -- that's what I
10 asked you, what's the motion?

11 MR. ROBINSON: May it please the Court?

12 THE COURT: Yes, sir. But remember you're an
13 officer of this court. And you may not -- you may not
14 advocate or present anything that you believe to be
15 frivolous because you took an oath to do otherwise. If
16 you want to make to a statement, I had a lawyer say this
17 is what my client wants to do, there's no legal foundation
18 for it. However, Mr. Thomas needs to understand they're
19 rules that apply to this proceeding. So is there a motion
20 that needs to be made?

21 MR. ROBINSON: No, sir, Your Honor.

22 THE COURT: Thank you. Deal with that at a
23 later date, Mr. Thomas, if you want to try to file some
24 motions. As I stated, I just had about three weeks ago in
25 Charleston, tried a week long case with a gentleman that

1 represented himself on 12 criminal sexual conduct cases.
2 He asked to have them all tried. He fired his lawyer.
3 First mistake take, big mistake. At the end of the trial
4 he was about to ready to make his closing arguments and he
5 looked at me and I said, Now you understand why I
6 discouraged you greatly, tried to get you not to fire your
7 lawyer. Know what his answer was? You're right. So
8 you,-- if you want to fire your lawyer and handle this
9 case, I'll talk to you about it. What do you want to say,
10 sir?

11 MR. THOMAS: I don't want to fire my lawyer.

12 THE COURT: Yeah.

13 MR. THOMAS: I'm just trying to put something on
14 the record.

15 THE COURT: Put what on the record, sir? You
16 can't put something on the record that has no legal basis.
17 If you want to fire your lawyer, your lawyer has an
18 obligation not to present something that's frivolous.

19 MR. THOMAS: This won't be frivolous, Your
20 Honor, it's about a witness, a exculpatory witness.

21 THE COURT: About exculpatory witnesses, what
22 about them?

23 MR. THOMAS: What I would like my--

24 THE COURT: I'll allow him to make a statement.
25 What is it that you think has not been done?

1 MR. THOMAS: Well can I present this to you,
2 Your Honor?

3 THE COURT: No, sir, you can tell me what it is.
4 What it is you think has not been done.

5 MR. THOMAS: A lady that's a exculpatory witness
6 that I feel is very important in my case that haven't been
7 subpoenaed or haven't been--

8 THE COURT: That's at another time. That's
9 called post-conviction relief. After you're convicted you
10 can file an action and say your lawyer didn't subpoena
11 somebody. Your lawyer has a duty to talk to people and
12 subpoena people who are going to tell the truth. And
13 there in lies the problem. You don't just subpoena people
14 to testify. That's what -- that's exactly what that
15 gentleman did. He put people on the stand that testify to
16 things that would have never been able to be introduced.
17 That was the worst mistake in the world. But he didn't
18 have a lawyer. To tell him that. Your lawyer's doing you
19 a service by not subpoenaing somebody that could be
20 detrimental to your case. So you'll have another
21 opportunity to present that if that person is true then
22 you can present that at that stage. Your lawyer has made
23 that decision, he is a lawyer. Do you have a legal
24 degree?

25 MR. THOMAS: No, Your Honor.

1 THE COURT: Have you ever tried a case?

2 MR. THOMAS: No, Your Honor.

3 THE COURT: Have you ever prepared a case for
4 trial?

5 MR. THOMAS: No, Your Honor.

6 THE COURT: You may have read some law but have
7 you ever taken any test concerning the law?

8 MR. THOMAS: No, Your Honor.

9 THE COURT: And again, I'm not being critical of
10 you, sir, we all can read and we all have access to
11 tremendous information today, there's no question about
12 that. The problem is kind of the same thing that we do
13 and I've been guilty of it in the medical field. I can
14 get online and read about some physical ailment I have.
15 Probably not a good idea for me to diagnose myself because
16 I really don't have a medical background. Because it's
17 not just the knowledge, it's how it applies. It's how it
18 all plays out in the real world. And that's where your
19 lawyer has had that kind of training. And there's a
20 tremendous knowledge that takes place and that's why it's
21 necessary. So thank you, very much. You're noted and
22 I'll be happy for you to put that on the record when and
23 if it becomes necessary. If the jury acquits you,
24 obviously, your concern is misplaced, isn't it?

25 MR. THOMAS: Yes, sir, Your Honor.

1 THE COURT: Thank you, sir.

2 All right, anything else before we proceed?
3 I'll be happy to hear from you now concerning the first
4 issue. Whichever you want to take.

5 MS. TESSITORE: Yes, Your Honor. I think we can
6 probably -- we'll if we're breaking at 12:30, I think it's
7 probably, perhaps, more prudent to address the issues that
8 Mr. Robinson raised as to the -- I think his expression,
9 he had concerns, he had a motion in limine as to the gun.
10 And, Your Honor, just to clarify, I'm not sure if he's --
11 sounded like he was talking more about the relevance of
12 the gun, was not necessarily the--

13 THE COURT: I don't know what -- let me hear
14 from him as to why I should suppress the gun. What is it,
15 you want to exclude the gun?

16 MR. ROBINSON: May it please the Court?

17 THE COURT: Yes, sir.

18 MR. ROBINSON: Your Honor, I think what, and I
19 appreciate Ms. Tessitore trying to understand what I say
20 but what I'm getting at, Your Honor, as far as -- there
21 was -- my understanding from what they have, they don't
22 have a gun from the scene that connects it to Mr. Thomas.
23 There was not a gun found at the scene. A month or
24 sometime later they went to a motel and they got a gun and
25 some dice. A loaded gun, it was a dart gun. And they are

1 trying to connect -- they're saying that this gun looks
2 like the gun that was used at the time of the crime.

3 THE COURT: Mr. Robinson, that's not going to be
4 something I'm going to be able to rule on pre-maturely
5 because I've got to hear the evidence. They can testify
6 to finding the gun. Whether or not it's admitted depends
7 on what sort of foundation has been established. We had
8 it last week. They never found the gun but somebody could
9 identify the gun and everybody described it. Showed them
10 a picture of the gun. But the State wanted to introduce
11 it and I sustained the objection because it's not
12 relevant. Just because it's a gun that looks like a gun
13 that may have been used, it had nothing to do with
14 anything.

15 MR. ROBINSON: Yes, sir.

16 THE COURT: So I don't know what the testimony
17 is going to be but we'll cross that bridge when we come to
18 it. I'm not going to rule on that before the trial.

19 MR. ROBINSON: Yes, sir.

20 THE COURT: I'm not going to prevent the State
21 from presenting evidence. I'll certainly sustain
22 objections about evidence that may or may not be relevant
23 and may or may not met the 403 test. But whatever, I'm
24 not going to pre-try the case in that sense. Thank you,
25 sir.

1 MR. ROBINSON: Yes, sir, Your Honor.

2 THE COURT: So there's no gun issue unless --
3 that I know of at this point. There may be a gun issue
4 but it's not something to deal with in limine.

5 MS. TESSITORE: Yes, sir. I didn't know if
6 Mr. Robinson was going to make a motion to suppress as far
7 as--

8 THE COURT: If he's making a motion that you're
9 going to have to problem with, he may be right. I don't
10 know what your proof is. But I'm not going -- again, I'll
11 deal with that as it comes up.

12 MS. TESSITORE: Yes, sir.

13 THE COURT: Thank you.

14 MS. TESSITORE: Your Honor, then I think the
15 next probably most brief issue is just, and this may fall
16 along the same lines, but the motion in limine regarding
17 some third party guilt evidence that the State would
18 believe is inadmissible.

19 THE COURT: They may be, may not be, I don't
20 know.

21 MS. TESSITORE: If I could hand this up, Your
22 Honor. This is the State's motion, I provided it to--

23 THE COURT: I don't know that I can rule on that
24 until I hear the case. We're talking about something that
25 obviously will come up, I assume, standpoint of a witness

1 is going to testify to somebody else being responsible, is
2 that?

3 MS. TESSITORE: Well it is that the -- there was
4 a neighbor in a nearby apartment. This was Unit D, she
5 was in Unit C. She was not present during the incident,
6 however, there was, I believe, that this witness is on the
7 Defense's witness list, Ms. Earley, Lucy Earley. And
8 there was an interview, very brief, between the detective
9 who went out to talk with her. And basically I
10 understand her testimony would be that she saw some black
11 male with dreadlocks riding around on a bike around that
12 time period. So there was no other connection with regard
13 to her seeing him there just before the robbery or just
14 after or anything--

15 THE COURT: Solicitor, this is precisely why you
16 don't rule on those beforehand. I don't know what they're
17 going to testify to. I understand what somebody may have
18 said but frankly I hope the day will come when we'll have
19 this in General Sessions, it ought to be maybe on a case
20 by case basis but I assure you if you ever worked in the
21 civil side, it's not uncommon to have not only statements
22 of what somebody said but they're under oath. And low in
23 behold they get on the stand, they don't testify the same
24 way. So I'm not about to rule on that in a vacuum. Thank
25 you, very much. We'll take up when it comes up.

1 MS. TESSITORE: Yes, sir.

2 THE COURT: Thank you.

3 MS. TESSITORE: Your Honor, I think that really
4 just leaves the photo line-up.

5 THE COURT: Okay. We'll have those witnesses --
6 why don't we do this. Let's go ahead an recess and we'll
7 be back at 1:30 and do the line-up.

8 MS. TESSITORE: Yes, sir.

9 THE COURT: Thank you, very much.

10 (WHEREUPON, a lunch break was taken.)

11 THE COURT: All right, let the record reflect
12 Mr. Thomas is present.

13 The State is ready to proceed?

14 MS. TESSITORE: Yes, Your Honor.

15 THE COURT: You may call your first witness.

16 MS. TESSITORE: Your Honor, the State calls
17 Detective Collis Flavell.

18 THE CLERK: Sir, please place your left hand on
19 the Bible, raise your right hand.

20 COLLIS FLAVELL, after being duly sworn,
21 testified as follows:

22 THE CLERK: State your full name for the record,
23 please.

24 THE WITNESS: Collis Flavell.

25 DIRECT EXAMINATION

1 BY MS. TESSITORE:

2 Q Good afternoon, Detective Flavell. Can you tell the
3 Court where you work?

4 A Greenville City Police Department.

5 Q What do you do there?

6 A I'm an investigator.

7 Q How long have you been working with the city police?

8 A A little over 20 years.

9 Q In what capacity?

10 A Right now I'm in the detective division. I started
11 out in uniform patrol.

12 Q How long have you been in the detective division?

13 A Approximately 15 years.

14 Q In your capacity as detective in that division, have
15 you had the opportunity to be involved in photo array
16 identification procedures?

17 A Yes.

18 Q Okay. Approximately, if you know, how many photo
19 arrays have you shown?

20 A I don't know if I can answer that. Several.

21 Q Okay. Less than a hundred, more than a hundred?

22 A I'd say probably more than a hundred.

23 Q Okay. And you were involved in investigating this
24 case that brings us here today?

25 A Yes.

1 Q And that was the -- taking you back to the incident
2 date of July 22nd, 2009. Did you meet with the
3 victim, Mr. Gordon, in this case?

4 A I did.

5 Q And when did you meet with him? Do you recall?

6 A On July 28th.

7 Q So six days after the incident?

8 A Yes.

9 Q And was that the first time that you had met with
10 Mr. Gordon, the victim, in this case?

11 A Yes.

12 Q And when you met with him, where did you meet with
13 him?

14 A In the law enforcement center in the city detective
15 division in my office.

16 Q Who else was there?

17 A Just myself and Mr. Gordon.

18 Q And where did you show him the photo array? What
19 type of an office?

20 A In my office.

21 Q And what, if anything, did you tell the victim before
22 you showed him the photos?

23 A First I asked him if he had ever viewed a six person
24 photo line-up. He stated that he had not. I
25 explained to him that in six person photo line-up was

1 just that, six photos of individuals. That the
2 person may or may not be in the line-up. I asked
3 him -- I told him not to feel like he had to pick
4 someone out of the line-up just because I was showing
5 him the line-up. He then viewed the line-up.

6 Q Okay. If you could, I guess go back and tell the
7 Court how you created the photo array.

8 A Computer generated search at the Law Enforcement
9 Center. Just set the computer. You can set the
10 perimeters for height, weight. We normally use a
11 range on height and weight. Look for physical
12 characteristics such as hair. You pick long hair,
13 short hair, faded, boxed, there's all different.

14 Q Okay. And what, I guess, what did the victim -- what
15 did you base the picking those photographs as far as
16 the physical characteristics? What information did
17 you have that then helped you decide which photos to
18 use?

19 A The physical characteristics in this case was a black
20 male, dark skin, dreadlocks, neatly trimmed, goatee,
21 mustache, some facial hair. In this particular case
22 what I based this line-up off of was a fingerprint
23 identification. So I had a possible suspect. So the
24 other five photos, I tried to make them as similar as
25 I could to the subject photo.

1 Q Okay. Had you spoken with Mr. Gordon prior to
2 putting this photo array together?

3 A I spoke with him on the 24th, I believe two days
4 after the incident.

5 Q Was he able to provide you a description?

6 A He did.

7 Q Physical description?

8 A He did.

9 Q Okay. And how many photos did you select for the
10 photo array?

11 A Six total.

12 Q Okay.

13 THE COURT: Is this one we're going to have to
14 do...

15 MS. TESSITORE: Yes, Your Honor.

16 THE COURT: Let's get both of them marked for ID
17 at this point. State's 1-A and 1-B will be the redacted
18 one.

19 MS. TESSITORE: Yes, Your Honor.

20 THE COURT REPORTER: Judge, if we could just use
21 numbers --

22 THE COURT: Just Exhibit A and Exhibit B?

23 THE COURT REPORTER: No, sir. Exhibit 1 and
24 Exhibit 2.

25 THE COURT: Keep them separate?

1 THE COURT REPORTER: Yes, sir.

2 THE COURT: Okay, whatever works best for you.

3 If you want to do one and two, we'll do one and two.

4 THE COURT REPORTER: Please.

5 THE COURT: Okay, Exhibits one and two.

6 THE COURT REPORTER: Thank you, Judge.

7 (WHEREUPON, State's Exhibits Nos. 1 & 2 were
8 marked for identification only.)

9 BY MS. TESSITORE:

10 Q So, I'm showing you State's Exhibit No. 1 for
11 identification. Would you take a look at that. Do
12 you recognize that?

13 A I do.

14 Q Okay, what is that?

15 A Photo line-up that I compiled in this case.

16 Q Okay. Are there any identifying marks on it that
17 that you may have put on there?

18 A Has my initials that I put on there in the bottom,
19 right corner along with the time I actually showed
20 the line-up. Along with the item number that I
21 assigned to it for property and evidence purposes the
22 date the line-up was obtained.

23 Q Okay, that's your handwriting?

24 A Yes.

25 Q Approximately what time did you show this to him?

1 A At 1:50 p.m.

2 Q And as you as you look at that, I think you explained
3 to the Court as far as the identifying nature of the
4 line-up, is that a fair and accurate representation
5 of the array that you showed to Mr. Gordon?

6 A Yes.

7 Q How did you indicate the different photos?

8 A They're numbered one through six.

9 Q Okay. And did it -- when you showed it to Mr. Gordon
10 did it have any writing on it as far as -- what
11 writing was on it when you showed it to him?

12 A Just the Greenville County Sheriff's Office top label
13 that's automatically assigned to the line-ups when we
14 print them. That the print information that comes
15 off the computer. The actual handwriting was after
16 the line-up was viewed, was added.

17 Q Who's handwriting is that?

18 A The victim, Mr. Gordon.

19 Q Okay. And any other -- did he sign that?

20 A He did. He initialed the photo that he selected of
21 the person that robbed him.

22 Q Okay. So how did you, if you could tell the Court,
23 how you presented that photo array to him?

24 A He was in my office, sitting across the desk from me.
25 Got him to come in, I think he left work early that

1 day to come meet with me. Once he got there, I
2 brought him up to my office, I sat him down, asked
3 him if he had viewed a line-up before. He stated he
4 had not. I then explained to him what a six person
5 photo line-up was. Six individuals. I further
6 explained to him that the person that robbed him may
7 or may not be in this line-up and not to feel like he
8 had to pick someone just because I was showing him
9 this line up. In fact, he stated he understood, that
10 he did not want a innocent person charged. I then
11 handed him the line-up, he viewed the line-up and
12 selected the photo number five as the person that
13 robbed him.

14 Q Okay. Let's go back to when you handed him the photo
15 array, did you indicate to him as you handed it to
16 him anything on there as far as any particular
17 picture or?

18 A No.

19 Q Okay. And how do you -- you said you've shown a lot
20 of photo arrays, how do you typically hand it to the
21 victim or witness?

22 A Face down.

23 Q Okay. Then what did he do?

24 A He flipped it over, looked at it, said, That's the
25 guy.

1 Q Okay. And when he looked at it and said, That's the
2 guy, who did point to?

3 A Photo number five, which is the Defendant.

4 Q Okay. How long did he actually look at the
5 photographs before he selected number five?

6 A Seconds. He was very confident in his selection.

7 Q Okay. Had he seen any photographs -- had you shown
8 any photographs prior to this procedure?

9 A No, I did not.

10 Q Had you shown him any other arrays?

11 A No, I did not.

12 Q Did he see any kind of line-ups before this?

13 A Not involving this case. Not that I'm aware of, no.
14 Definitely not in this case.

15 Q And when he selected the photo number five, did --
16 did he say -- let me rephrase that. How sure was he?

17 MR. ROBINSON: Objection, Your Honor, calls for
18 speculation.

19 THE COURT: Overruled. I'll allow him to answer
20 his observations.

21 THE WITNESS: He was very confident in the
22 selection.

23 He said, That's the guy.

24 I asked him a follow up question of how sure he
25 was that that was the guy.

1 And he said, I'm almost -- I'm almost just about
2 100 percent that that's the guy. Is what he stated.

3 BY MS. TESSITORE:

4 Q And how recent was the photo that was used in that
5 array of the Defendant?

6 A It was within a month.

7 Q Okay.

8 Now, at this point I would ask the Court -- like
9 to admit State's Exhibit No. 1 for purposes of this
10 hearing.

11 THE COURT: Okay, any objection?

12 MR. ROBINSON: Not for purposes of this hearing.

13 THE COURT: Very well, State's Exhibit 1 is
14 admitted for the purposes of this proceeding.

15 (WHEREUPON, State's Exhibit No. 1 was admitted
16 into evidence.)

17 BY MS. GOODE:

18 Q If you would just read what the victim wrote down
19 there.

20 A States, Person number five is the person who walked
21 in on me washing my hands and pulled a pistol and
22 told me to get on the floor. Then went through my
23 wallet looking for money. When I turned my head, he
24 put the pistol between my shoulder blades and said,
25 Look at the floor. Signed Michael Gordon. Photo

1 number five is initialed by MG above the photo.

2 Q And is this substantially the same condition as it
3 was when you finished the procedure?

4 A Yes.

5 Q Okay. And has it been altered in any way?

6 A No.

7 Q Okay. The I'll just ask you to look at State's
8 Exhibit No. 2. Who prepared that, State's Exhibit
9 No. 2?

10 A I did.

11 Q Okay, what is that?

12 A It's a copy of the original photo line-up with
13 redacted at the bottom of the original from the
14 print, from the system we use to process line-ups.
15 It's got a file number, photo manage number, PRT.HPM
16 which are mug shots. So I redacted that by placing a
17 piece of paper over it. I also placed a piece of
18 paper over the collars of the shirts that is visible
19 in the original line-up. Photo copied it again this
20 morning, covering up the shirts and covering up the
21 mug shot name at the bottom.

22 Q Okay. And did you bring both of those with you here
23 today?

24 A I did.

25 Q And with respect to State's Exhibit No. 1, where has

1 that been since -- since you showed him the array?

2 A In property and evidence.

3 Q Okay. And -- and did the victim make any notations
4 regarding number five in State's Exhibit 1?

5 A By his initials are above the photo.

6 Q Okay. Who put those there?

7 A He did.

8 Q Okay. All right. Just one minute. Detective
9 Flavell, did you ever suggest to him in any way,
10 shape or form which photo to select in this array?

11 A I did not.

12 MS. TESSITORE: Thank you.

13 Your witness.

14 THE COURT: Cross-examine.

15 CROSS-EXAMINATION

16 BY MR. ROBINSON:

17 Q Officer Flavell, you took a copy -- or you did get
18 the statement from the victim, isn't that correct?

19 A I did what now?

20 Q You got the statement from the victim, you took the
21 statement from the victim; is that right?

22 A At the time of the incident?

23 Q You took a statement, I believe July 28th 2009; is
24 that correct? From the victim.

25 A After he viewed the line-up.

1 Q All right. And you would agree with me that the
2 victim said he wasn't 100 percent this was the guy?
3 That's what he said, isn't it?

4 A He did not say he was 100 percent, he said he was
5 almost 100 percent that that was the guy who robbed
6 him.

7 Q He said, Almost positive and I'm just about a hundred
8 percent, correct?

9 A That's correct, that's what he said.

10 Q He didn't tell you conclusively that the guy, did he?

11 A He did not say that one hundred percent that this is
12 the guy.

13 Q Okay. Now, you actually -- it was about six days
14 after the incident that you went to him or he came in
15 and you got a statement with this line-up, is that
16 correct?

17 A That is correct.

18 Q Okay. The fingerprint that was that recovered from
19 the scene.

20 A Yes.

21 Q You got the fingerprint and you were able to link
22 that fingerprint to Mr. Thomas, correct?

23 A I did not get the fingerprint but the fingerprint was
24 collected and it was matched to Mr. Thomas, yes.

25 Q And you have that information prior to talking to the

1 victim about this line-up, didn't you?

2 A I did.

3 Q You did. So would you agree with me that prior to
4 this line-up that you put together, that you had
5 information that Mr. Thomas' fingerprint was found at
6 the scene on the door, is that correct?

7 A That is correct.

8 Q Okay. Now, let's talk about how you put together
9 this line-up in this case. Did you take any notes or
10 anything like that of your conversation with the
11 victim in this case?

12 A Yes.

13 Q You did. Because you make a -- you make a statement
14 in your direct examination about the victim saying
15 that he doesn't want to convict an innocent man?

16 A That is correct.

17 Q Is that any place -- that's not any place in your --
18 your file, is it?

19 A Yes, sir, it is.

20 Q So you put that in your file?

21 A I did.

22 Q All right.

23 A It's in my supplemental report.

24 Q Supplemental report, all right.

25 A 7/28/09. It's about the second paragraph -- third

1 full paragraph of the supplemental report.

2 Q Okay. Now you have the -- you have the -- the first
3 statement of the victim which was on 7/22/09, is that
4 correct. Got that there?

5 A Do not have that with me, no.

6 MR. ROBINSON: Can I approach the witness, Your
7 Honor?

8 THE COURT: Yes.

9 BY MR. ROBINSON:

10 Q Is this a copy of the statement? Can you identify
11 this for me?

12 A Yes, it appears to be a copy of the statement taken
13 by Officer Bradley who responded to the original
14 incident, yes.

15 Q That statement -- hold that for a second. In that
16 statement, you would agree with me that the victim in
17 this case also mentioned that the person who
18 committed this crime had a goatee as well, didn't he?

19 A Yes, he did.

20 Q And there nothing in that statement that he gave to
21 you that mentions anything about his beard or
22 mustache being neatly trimmed, was it?

23 A In this statement?

24 Q Yes.

25 MS. TESSITORE: Your Honor, I'm going to object,

1 the victim is going to be called to testify.

2 THE COURT: I'll allow the question.

3 THE WITNESS: No, there's not.

4 BY MR. ROBINSON:

5 Q Okay. So that's something that you omitted, isn't
6 that correct?

7 THE COURT: No, sir, I'm not going to say that.
8 We don't know what the victim is going to say at this
9 point.

10 MR. ROBINSON: I withdraw it, Your Honor.

11 THE COURT: Thank you.

12 MR. ROBINSON: That's all the questions I have,
13 Your Honor.

14 THE COURT: Redirect.

15 MS. TESSITORE: No more questions, Your Honor.

16 THE COURT: Okay. You may step down.

17 MS. GOODE: State would call Michael Gordon.

18 THE CLERK: Sir, if you'd pause at the end of
19 the bench. Place your left hand on the Bible, raise your
20 right.

21 MICHAEL GORDON, after being duly sworn,
22 testified as follows:

23 THE CLERK: Thank you, please be seated. State
24 your name for the record.

25 THE WITNESS: Michael Gordon.

DIRECT EXAMINATION

1
2 BY MS. TESSITORE:

3 Q Good afternoon, Mr. Gordon?

4 A Hi.

5 Q Can you tell the Court what you do for a living?

6 A I work at America Tire Distributors, drive a truck,
7 delivering tires.

8 Q How long have you done that?

9 A Six years.

10 Q And have you ever been a victim of armed robbery
11 before?

12 A Before this?

13 Q Yes, sir?

14 A No.

15 Q Okay. Had you ever seen or have you ever been
16 presented with a photo array other than in this case?

17 A No.

18 Q Okay. I'm going to take you back to Wednesday
19 July 22nd, 2009 and the incident that brings us here
20 today. And, Mr. Gordon, I'm going to ask you,
21 where -- could you tell the Court about 3:30 that
22 afternoon where you were and what you were doing.

23 A [REDACTED] I was painting an apartment.

24 Q Okay. Can you tell the Court just like generally as
25 far as the apartment you were painting and then just

1 generally the structure there?

2 A There's basically four apartments, there's like two
3 buildings. Four apartments. Marked A, B, C, D. I
4 was painting apartment A. I had been painting
5 approximately a week or so and it did not have no
6 water in it. And the lady that's the property
7 manager, she had a apartment D that was vacant also.
8 But I had the lock boxes on the door. I had the
9 combination to both lock boxes. And she told me I
10 could do down there if I needed water or anything to
11 clean up my brushes from painting. But basically
12 just four apartments side by side.

13 Q And so they're all connected?

14 A Well there two separate buildings but there two
15 apartments next to the other, two connected.

16 Q Okay. And was this a second job that you were doing
17 as far as -- was this for the tire company or?

18 A Yeah, it was just a side job.

19 Q And where did you go? What unit did you go to to
20 wash your hands?

21 A Apartment D.

22 Q Were you working with anyone else?

23 A No, I was by myself that day.

24 Q And what were you -- when you went into apartment D,
25 was anyone else in apartment D?

1 A No, not that I saw.

2 Q Okay. Tell the Court when you went in as far as what
3 the -- what the lighting was like in there.

4 A Well it was 3:30 in the afternoon, roughly the time.
5 It was sunny. And apartment D, it was vacant at the
6 time. And it didn't have no blinds. The sliding
7 glass door did not have no blinds. And there was a
8 window right in front of the sink. So it was pretty
9 well lit.

10 Q And when you went in there, did you shut the door
11 behind you?

12 A No. I just kind of pushed it and it never did
13 completely shut.

14 Q Okay. And what happened as you were in there, was
15 anyone else in there when you went in?

16 A No.

17 Q What did you do when you went in there?

18 A I went straight to the sink and started washing my
19 hands.

20 Q Approximately how far is the sink from the door?

21 A Approximately 12, 12-foot.

22 Q Okay. Did you -- while you were washing your hands,
23 what did you observe?

24 A Well I seen the door kind of move. And I thought it
25 was just the wind so I went back to washing my hands.

1 Then the door swung open.

2 Q And when you're standing -- when you were standing at
3 the sink, where was the door in relation to where you
4 were facing?

5 A To my right.

6 Q And you said about 12-feet from the sink to the door?

7 A Yeah, approximately 12-feet.

8 Q What did you see when the door opened?

9 A I saw a man come in, standing there. And I turned
10 around, looked and said, Can I help you?

11 Q Okay. Did you -- were you able to see the man
12 clearly?

13 A Oh, yeah. There was a window right at the door.
14 And, I mean, he just walked in the door. And it was
15 broad daylight. I didn't have no problem seeing.

16 Q What did you observe about his -- how would you
17 describe what he looked like?

18 A A black male, I figured roughly 5'10, looked like to
19 me, I mean, I'm not good with ages but late 30's
20 early 40's is what I figured. And long dreadlocks.
21 Mustache and goatee.

22 Q Okay. And when you say mustache and goatee, how
23 would you describe that in kind of comparing to your
24 facial hair? Was it--

25 A Well when I call a mustache and goatee, it's

1 basically hair between your upper lip and nose is a
2 mustache and any kind of hair on your chin is a
3 goatee.

4 Q And do you recall what color it was?

5 A It was dark.

6 Q And anything distinctive about his hair?

7 A It was long dreadlocks.

8 Q Did he have anything concealing any part of his face
9 or head?

10 A No.

11 Q What was he wearing?

12 A A black tank top and black shorts.

13 Q Did he have anything in his hands?

14 A Not when he first walked in the door.

15 Q Well after he first walked in the door, did he close
16 the door?

17 A He just kind of pushed it. I'm not sure if it ever
18 completely closed or not but you have to push the
19 door open.

20 Q All right. When he stood there, what did he do?

21 A He pull a pistol out of his left, front pocket and
22 told me to lay on the floor.

23 Q Were you able to see what type of pistol he had?

24 A All I could tell you it was a black automatic pistol.

25 Q And how do you know it was automatic?

- 1 A Because it didn't have a cylinder for the revolver.
- 2 Q Are you familiar with guns?
- 3 A Yes.
- 4 Q Did -- how close did he get to you when he was
- 5 holding the gun?
- 6 A He was just -- just inside the door. So
- 7 approximately 8 to 10 feet.
- 8 Q All right. Did -- did you -- how tall are you?
- 9 A 6'2.
- 10 Q And approximately how tall did you think he was?
- 11 A 5'10.
- 12 Q As far as his skin tone, was there anything -- you
- 13 said he was a black male, how would you describe his
- 14 skin tone?
- 15 A Just dark, black male.
- 16 Q Did -- do you remember what his clothing was?
- 17 A Black tank top and black shorts.
- 18 Q Had you ever seen him before?
- 19 A No.
- 20 Q And how did you respond to what he did?
- 21 A Well he told me to lay on floor and I didn't figure I
- 22 had much of a choice so I laid down.
- 23 Q When you laid down, what happened then?
- 24 A He come behind me and straddled my legs and grabbed
- 25 my wallet through my pants.

- 1 Q Were was your wallet?
- 2 A In my right, back pocket.
- 3 Q And what did you do then?
- 4 A I laid there.
- 5 Q What was he doing?
- 6 A He got my wallet and said he was going through it,
7 looking for money.
- 8 Q And did you -- could you see him from where you were
9 laying on the floor there?
- 10 A No, I had turned my head a little because he had said
11 something. And that's when he stuck the gun between
12 my shoulder blades.
- 13 Q Did he say anything?
- 14 A Just to -- he said, I'm not here to kill you, I just
15 want some money.
- 16 Q Did -- so at that point did you have any other
17 opportunity to see him before -- well see him again?
- 18 A No.
- 19 Q In the kitchen?
- 20 A (The witness shook his head.)
- 21 Q Was this the -- what room was it primarily where you
22 were when you were lying on the floor?
- 23 A It was -- repeat that, please.
- 24 Q What room were you in when you were lying on the
25 floor?

1 A It was the kitchen.

2 Q So all took place in the kitchen?

3 A Uh-huh.

4 THE COURT: Was that a yes?

5 THE WITNESS: Pardon?

6 THE COURT: Was that a yes?

7 THE WITNESS: Yes.

8 THE COURT: Thank you.

9 BY MS. TESSITORE:

10 Q What happened after he took -- went through your
11 wallet?

12 A He laid everything up on the counter and he told me
13 he was wiping everything down, not to look up for a
14 few minutes.

15 Q Then what happened?

16 A Then he went out the door.

17 Q Did you -- what did you do at that point?

18 A Well I laid for a minute. I got up. I just grabbed
19 everything, I didn't try to put it back in my wallet
20 or nothing, I just rolled everything up. I went out
21 the door, locked the door behind me, went to my truck
22 and that's when I called 911.

23 Q All right. And in response to that 911 call, did an
24 officer come out to the scene?

25 A Yes.

1 Q Do you recall how long it was before the officer got
2 there?

3 A I really couldn't tell you. I -- I was just...

4 Q Did you speak to the officer as soon as he got there?

5 A Yes.

6 Q And what did you -- what -- were you able to provide
7 him with a physical description that you just gave?

8 A Yes.

9 Q And did you speak to -- did you also provide a
10 description of a gun to Officer Bradley?

11 A Yes.

12 Q Did you provide a statement to Officer Bradley at the
13 time?

14 A Yes.

15 Q And what was the -- why did he get a statement from
16 you as far as on the scene there?

17 A He just asked me what had happened.

18 Q Okay. And did you speak to Detective Flavell a
19 couple of days later?

20 A Yes.

21 Q Did you give him a description of the suspect when
22 you spoke to him?

23 A Yes.

24 Q Did he provide you any names or indicate in any way
25 who might have committed the crime?

- 1 A No.
- 2 Q And did you -- had you ever seen this man before this
3 incident, the robber?
- 4 A No.
- 5 Q Did you have a chance to meet with Detective Flavell
6 six days later to view a photo line-up?
- 7 A Yes.
- 8 Q Okay. Now, where did you meet him?
- 9 A At the penitentiary or I guess you call it, his
10 office. It was his office.
- 11 Q Law Enforcement Center?
- 12 A Yes.
- 13 Q And was anyone else present?
- 14 A No.
- 15 Q When you met with him, did he -- how did he begin the
16 meeting?
- 17 A I met him and we went to his office.
- 18 Q And did he -- you said you had never seen an array
19 before, photo array?
- 20 A No.
- 21 Q Did he explain to you what he was going to do and how
22 he was going to show it to you?
- 23 A Yes.
- 24 Q What did he say?
- 25 A He said he was going to show me a line-up. And that

1 I didn't have to pick any of the pictures on the
2 line-up.

3 Q Okay. How did he -- let me just ask, was anyone else
4 present when you were looking at the array?

5 A No.

6 Q And I'm showing you what's been marked as State's
7 Exhibit No. 1, if you'd take a look at that. Do you
8 recognize that?

9 A Yes.

10 Q What is that?

11 A That's the line-up Mr. Flavell showed me.

12 Q All right. How do you know -- do you recognize any
13 handwriting on there?

14 A Yes, that's my handwriting.

15 Q All right. How did -- did Detective Flavell show
16 that to you? How did he present it to you?

17 A He turned it over and handed it to me.

18 Q Then what did you do? Show the Court how you looked
19 at it, what you did when you looked at it.

20 A I picked it up and just looked at it.

21 Q And did you do anything after you looked at it?

22 A I laid it down and I pointed at number five.

23 Q Okay. How did you -- well who was number five? I
24 mean, why did you pick number five?

25 A Because I was pretty sure that that was the guy that

1 robbed me.

2 Q Okay. Did you give a statement to Detective Flavell?

3 A Yes.

4 Q Okay. Is that provided on the -- is that also
5 present on the array?

6 A Yes.

7 Q Did -- approximately how long did it take you to pick
8 number five?

9 A Not long.

10 Q Did -- was there anything -- had you seen any photos
11 before that array was shown to you?

12 A No.

13 Q Had you seen any other arrays or any form of any kind
14 of line-up of the suspects or people that may or may
15 not contain the suspect?

16 A No.

17 Q Did Detective Flavell, as he met with you, did he
18 suggest anyone of those six?

19 A No.

20 Q Did he influence you or did you feel pressured in any
21 way?

22 A No.

23 Q To pick number five? Or to even pick one at all?

24 A He told me I didn't have to pick nobody.

25 Q Okay. And how did you indicate your selection there

1 as number five?

2 A I don't understand.

3 Q I'm sorry. Did you -- what writing did you place on
4 that?

5 A Number five, my initials.

6 Q Okay. What else did you place on there?

7 A This here.

8 Q When you say this here, what is that?

9 A Where I wrote like a small statement. I signed it.

10 Q So that's your signature?

11 A Yes.

12 Q All right. And is that substantially in the same
13 condition as you last saw it?

14 A Yes.

15 Q Is the person that you picked there present in the
16 courtroom?

17 A Yes.

18 Q Okay, can you identify him?

19 A He's sitting over there.

20 Q Can you describe what he's wearing?

21 A A suit.

22 Q Okay.

23 A White shirt, yellow tie.

24 MS. TESSITORE: All right, let the record
25 reflect that the witness has identified the Defendant.

1 THE COURT: He has.

2 MS. TESSITORE: Answer any questions that
3 Mr. Robinson may have, please.

4 MR. ROBINSON: May it please the Court?

5 THE COURT: Yes, sir.

6 CROSS-EXAMINATION

7 BY MR. ROBINSON:

8 Q Mr. Gordon, let's talk about time. Now you go down
9 there to the apartment and when this all happened --
10 when this happened, when the person came to the door,
11 did you see them come to the door? Did you actually
12 watch them come up to the door?

13 A No.

14 Q You didn't. Is -- was you back to them when they
15 came in?

16 A No.

17 Q Okay. How, if you didn't see him frontally coming to
18 the door, how did you see him?

19 A Side.

20 Q Out of the corner of your eye? Out of the corner of
21 your eye you saw somebody?

22 A Yeah.

23 Q How soon -- this whole event, how long do you think
24 it took? A minute, two minutes, how long you think
25 the whole thing took?

1 A I don't understand, you're talking about the whole
2 situation?

3 Q Yeah. From the time this person came in and you saw
4 the person out of the corner of your eye, to the time
5 the person left, how long you think it took?

6 A I really don't know.

7 Q Pretty short period of time, you agree with that?

8 A I guess.

9 Q This person just wasn't sitting in the apartment with
10 you and talking to you, was he?

11 A No.

12 Q And this was during the day, right?

13 A Yes.

14 Q So first you see him out of the corner of your eye.
15 At what point does this person tell you to get down?
16 Almost immediately?

17 A Yes, pretty much immediate.

18 Q After you look out the corner of your eye to see this
19 person, is that the point they tell you to get down?

20 A No.

21 Q What point do they do it?

22 A Because I asked, I said, Can I help you?

23 Q Okay.

24 A Then after I said that, then that's when he said --
25 he pulled the gun out and said, You can get down on

1 the floor.

2 Q So you see him out of the corner of your eye, he
3 comes in and you're looking at him straight on,
4 correct?

5 A Yes.

6 Q Face-to-face, right.

7 A Yes.

8 Q About 8 to 10 feet away?

9 A Yes.

10 Q So pretty close. Now do you wear glasses?

11 A No.

12 Q Do you have a prescription for contacts or for
13 glasses?

14 A No.

15 Q What's your vision?

16 A I'm not sure.

17 Q Okay. Anything else -- now you were doing an
18 apartment, you were painting that day, is that
19 correct?

20 A Yes.

21 Q Okay. And you were going to come down to this
22 apartment to get a drink or get some water then go
23 back to the apartment, is that correct?

24 A No.

25 Q What were you going to do?

- 1 A Just wash my hands.
- 2 Q Wash your hands and go, is that right?
- 3 A (The witness nods.)
- 4 Q Okay. We you on a deadline to get something done at
- 5 that point or anything like that?
- 6 A No.
- 7 Q Okay. And that was during the afternoon, what time?
- 8 A Roughly 3:30.
- 9 Q What time do you leave, typically?
- 10 A What time do I leave?
- 11 Q What time do you leave? When does it end? What's
- 12 the end of the day for you at that point?
- 13 A Whenever I get done.
- 14 Q Okay. Now you described this person as being 5'10
- 15 and in the late 30's to 40's, is that correct?
- 16 A Yes.
- 17 Q You describe a goatee, this goatee we're talking
- 18 about, was it a goatee like your goatee but black or
- 19 dark or was it a short goatee?
- 20 A It was just -- all I could see was hair. He had
- 21 hair. I mean, I describe a goatee as anybody with
- 22 hair up underneath your chin.
- 23 Q Okay. So it wasn't shaved -- wasn't shaved, it was
- 24 hair.
- 25 A Yeah, it was hair. I mean, any kind of hair. It

1 wasn't like a clean shave.

2 Q It was dark hair, is that correct?

3 A Yes.

4 Q And this person you said was dark, black male?

5 A Yes.

6 Q Not a light skin but a dark skin, black male.

7 A Uh-huh.

8 THE COURT: Is that a yes?

9 THE WITNESS: Yes.

10 THE COURT: Thank you.

11 BY MR. ROBINSON:

12 Q Now, you recall you gave a statement to Officer
13 Flavell, isn't that correct?

14 A Yes.

15 MR. ROBINSON: May I approach the witness, Your
16 Honor?

17 THE COURT: You may.

18 BY MR. ROBINSON:

19 Q Can you identify this document?

20 A Yes.

21 Q Okay. And that document, you actually aren't certain
22 about this person, Mr -- the person in this line-up,
23 the line-up being the person that--

24 MS. TESSITORE: Objection, Your Honor.

25 MR. ROBINSON: -- did this--

1 THE COURT: What's your objection?

2 MS. TESSITORE: He's testifying. He's saying
3 that he's not certain and he's --

4 THE COURT: He's on cross-examination, he can
5 ask him any way he wants. The witness can answer any way
6 he wants to.

7 If you'd repeat.

8 MR. ROBINSON: Yeah.

9 BY MR. ROBINSON:

10 Q You would agree with me, looking at that, your
11 statement to the officer, that you're not certain of
12 that picture that you saw in the line-up was the
13 person who did this attack?

14 A No.

15 Q Well that is your statement, is that correct?

16 A Yes.

17 Q In your statement -- you say in that statement that
18 you're almost positive, correct?

19 A Yes.

20 Q And not a hundred percent?

21 A Almost a hundred percent.

22 Q But you would agree that you did not say in your
23 statement that you were a hundred percent certain?

24 A Yes, I agree.

25 Q Okay.

1 A I also agree I'm not hundred percent that the Lord is
2 not going to take me out of here with a heart attack
3 before I walk out of here either.

4 Q Let's hope that doesn't happen.

5 A That's me. I'm not a hundred percent pretty much on
6 nothing.

7 Q And I think you said there was a mustache as well?

8 A Pardon?

9 Q A mustache.

10 A Yeah, a mustache.

11 Q And that's looking at -- identify this statement?

12 A Yes.

13 Q Okay. In that statement you mention a mustache, is
14 that correct?

15 A Yes.

16 Q Are you talking -- when we talk about a mustache, are
17 we talking about a thick mustache --

18 THE COURT: Mr. Gordon, [sic] Mr. Gordon [sic].
19 You need to mark that so we'll have a reference to what
20 he's looking at.

21 MR. ROBINSON: May I do that, Your Honor? Thank
22 you.

23 THE COURT: That would be Defendant's Exhibit 1.

24 MR. ROBINSON: Can I get this marked as
25 Defendant's Exhibit 1 for identification purposes?

1 (WHEREUPON, Defendant's Exhibit No. 1 was marked
2 for identification only.)

3 BY MR. ROBINSON:

4 Q Show you what's been marked as Defendant's Exhibit
5 No. 1 for identification purposes. You describe a
6 mustache, is that correct?

7 A Yes.

8 Q Was that a lot of hair in the mustache or a little
9 bit of hair?

10 A Just not a whole lot.

11 Q Not a whole lot of hair. All right.

12 A I mean, my definition of a lot of hair might be
13 different. I mean, a mustache to me is just
14 noticeable hair above and between your upper lip and
15 nose.

16 Q Okay. And when this person left, the apartment that
17 you in were, were you still on the floor or had you
18 gotten up?

19 A I was still on the floor.

20 Q What did they touch as they were going out? Did they
21 touch the doorknob or the door, what did they do?

22 A I'm not sure.

23 Q Not sure. I'm going to go back again and make sure I
24 get this marked as a Defendant's Exhibit for
25 identification purposes. Do you recognize this

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1 document?

2 A Yes.

3 MR. ROBINSON: I'd like to get this marked as
4 Defendant's Exhibit No. 2 for identification purposes.

5 (WHEREUPON, Defendant's Exhibit No. 2 was marked
6 for identification only.)

7 BY MR. ROBINSON:

8 Q Want to go back to what's been mark as Defendant's
9 Exhibit No. 2. And that statement, you recognize
10 that statement?

11 A Yes.

12 Q Is that your signature, is that correct?

13 A Yes.

14 Q In that statement, you agree with me, I asked you
15 this before but I want to make sure I put this on the
16 record, you stated in that statement that you were
17 almost positive, correct?

18 A Yes.

19 Q And that you were just about a hundred percent,
20 correct?

21 A Yes.

22 Q And that's exhibit number 2 for identification
23 purposes?

24 A Yes.

25 Q Okay.

1 MR. ROBINSON: Beg the Court's indulgence for
2 one second.

3 THE COURT: Certainly.

4 BY MR. ROBINSON:

5 Q When this person first came in the apartment, you
6 said you saw him out of the corner of your eye,
7 correct?

8 A Yes.

9 Q Did you -- was the door opened or was it closed?

10 A The door was --

11 THE COURT: Wait a minute..

12 Mr. Robinson, you need to clarify what you're
13 talking about.

14 MR. ROBINSON: Thank you, Your Honor.

15 BY MR. ROBINSON:

16 Q When the person first came in.

17 A Yes.

18 Q Okay. When you saw this person out of the corner of
19 your eyes?

20 A Yes.

21 Q Did they go -- was the door opened or was the door
22 closed before they came in?

23 A The door was closed but not shut.

24 Q So it was ajar, is that correct?

25 A Yes, I mean, not -- how you -- it was opened just a

1 little bit.

2 Q All right.

3 MR. ROBINSON: Thank you, that's all I have.

4 THE COURT: Redirect.

5 REDIRECT EXAMINATION

6 BY MS. TESSITORE:

7 Q Mr. Gordon, I know Mr. Robinson kept stressing the
8 fact that you only say this person out of the corner
9 of your eye, when -- once the perpetrator walked in,
10 did you turn your body?

11 A Yes.

12 Q Did you face him?

13 A Yes.

14 Q Is that when he pulled the gun out?

15 A Yes.

16 Q How did your attention change or -- let me ask it
17 this way. How did you feel at that point when he
18 pulled the gun?

19 A I felt like I was about to get shot.

20 Q Okay. Did -- did you have an opportunity to get a
21 good look at his face?

22 A Yes.

23 Q And was there anything between you and him at that
24 moment when he pulled the gun and you asked him --
25 this was after you asked him, Can I help you?

1 A No, there was nothing between us.

2 Q And there was no problem with the lighting at all?

3 A No.

4 MS. TESSITORE: No further questions.

5 THE COURT: Recross, Mr. Robinson?

6 MR. ROBINSON: No recross, Your Honor.

7 THE COURT: Thank you, Mr. Gordon, you may step
8 down, sir.

9 Any additional witnesses, Solicitor?

10 MS. TESSITORE: Can I have just one moment, Your
11 Honor?

12 THE COURT: Certainly.

13 MS. TESSITORE: Your Honor, the State would call
14 Officer Bradley.

15 THE COURT: Okay.

16 THE CLERK: Sir, please place your left hand on
17 the Bible and raise your right hand.

18 J.C. BRADLEY, after being duly sworn, testified
19 as follows:

20 THE CLERK: Please be seated. Please state your
21 name for the record.

22 THE WITNESS: J.C. Bradley.

23 DIRECT EXAMINATION

24 BY MS. TESSITORE:

25 Q Officer Bradley, where do you work?

- 1 A Greenville County Police Department.
- 2 Q What do you do there?
- 3 A I'm currently assigned to resource officer division
- 4 of Greenville Senior High Academy.
- 5 Q How long have you been with the city police?
- 6 A Twenty-five years.
- 7 Q Before you were assigned as a school resource
- 8 officer, what did you do before that?
- 9 A I was assigned to uniform patrol division prior to
- 10 being in community services. Prior to then vice and
- 11 narcotics and uniform patrol.
- 12 Q As part of your duties in uniform patrol, did you
- 13 respond to a call about a armed robbery at [REDACTED]
- 14 [REDACTED], Unit D?
- 15 A Yes, ma'am, I did.
- 16 Q And that was on July 22, 2009?
- 17 A That is correct.
- 18 Q In the afternoon hours?
- 19 A Yes.
- 20 Q And how long did it take you to respond to the scene,
- 21 approximately?
- 22 A I was working across town on East side. [REDACTED]
- 23 [REDACTED] is on the West side of town so it took me
- 24 about 15 minutes to get there.
- 25 Q And when you arrived was that in response to the 911

1 call?

2 A Yes, it was.

3 Q And when you arrived, what did you find?

4 A I was met in the parking lot by Mr. Gordon, the
5 victim.

6 Q And was he anyone else with him?

7 A No, he was alone.

8 Q Where was he when you found him?

9 A He was approaching my vehicle in the parking lot.

10 Q Did have a vehicle with him?

11 A I'm sure he did but I don't recall where it was.

12 Q All right. What did you do once you got there?

13 A Once I arrived I exited my vehicle and made inquiry
14 as to what took place.

15 Q Okay. How would you describe Mr. Gordon's demeanor
16 when you arrived?

17 A Mr. Gordon was visibly nervous, his hands were
18 shaking. He said it was a pretty scary incident. At
19 which point in time he began to describe what took
20 place.

21 Q Was he able to describe the events clearly to you.

22 A Yes.

23 Q Did you have any trouble understanding him?

24 A I did not.

25 Q Did he indicate which unit the incident had occurred

1 in?

2 A Yes, ma'am.

3 Q At some point did you -- did you enter the unit where
4 this had occurred?

5 A To prevent the crime scene from being disturbed we
6 stayed on the outside until forensics arrived.

7 Q Okay, when forensics arrived were you able to view
8 the area where this happened?

9 A Once the forensics technician had entered and
10 gathered evidence, yes I went inside.

11 Q And what -- how would you describe the -- when you
12 walked in the door, how would you describe the
13 lighting?

14 A It was very well lit. As I stated it was about 3:30
15 in the afternoon where you could see everything
16 clearly. There were windows there were not any
17 blinds on any of the windows. So it was very clear.

18 Q Was the apartment being lived in at that time?

19 A It was vacant.

20 Q And did the victim, Mr. Gordon, did he provide to you
21 a physical description of the man that he said robbed
22 him?

23 A Yes, ma'am. That's one of the first things I
24 requested for. The purpose to BOLO information to
25 responding units.

1 Q BOLO meaning?

2 A Meaning all area broadcast to responding units to
3 look out for the subject that fit the description.

4 Q Did he indicate if he was able to see how the --
5 whether the Defendant fled on foot or by vehicle or
6 any?

7 A No, he just said -- gave a description of the
8 gentleman that approached him.

9 Q Okay. So what was the description that he did give
10 to you right there on the scene?

11 A Mr. Gordon described a black male, dark skin, 5'10 in
12 height wearing a black tank top and black shorts with
13 dreadlocks.

14 Q Did he indicate whether he had any facial hair?

15 A He may have, I did not put that in my report for the
16 purpose of just BOLOin' information out to the units
17 as quickly as possible.

18 Q Okay. Did you also -- when he spoke to you, did you
19 take a statement from him?

20 A I did.

21 Q And when you spoke to him immediately after this
22 incident, did he indicate to you whether he observed
23 any facial hair?

24 A I did inquire as to whether or not Mr. Gordon could
25 read and write adequately to write a statement.

1 After which point he began to write his statement, I
2 think he made reference to facial hair in his
3 statement.

4 Q Okay. Do you recall what he said in that statement
5 or do you need to refresh your recollection?

6 A I think actually it's right here. This is actually
7 Officer Flavell -- Detective Flavell. No, this is
8 the one. Okay, he makes reference to a goatee and
9 mustache.

10 Q Okay. Let me just--

11 A Yeah, this is it.

12 Q So Defendant's Exhibit No. 1 is the statement that
13 you took from the victim?

14 A It is.

15 Q And that's where he indicated that he had dreadlocks,
16 a goatee and a mustache?

17 A Yes, ma'am.

18 Q Did he also describe the gun that he saw?

19 A He did.

20 Q What did he tell you about gun?

21 A He advised that it was a black auto pistol. I asked
22 him if he knew the difference between a revolver and
23 automatic pistol. He advised that there was no
24 cylinder to hold the bullets. So he did know it was
25 a auto pistol.

1 Q Okay. And were there any other details that he was
2 able to provide other than the detailed, physical
3 description that he gave?

4 A He told me of the sequence of events that took place,
5 what the suspect instructed him to do, to lie on the
6 floor. That he placed the firearm between his --
7 blades of his shoulders and that he took his wallet
8 out of his back pocket. He went through it. He
9 advised that he didn't get his money because his
10 money was hidden in a separate compartment in his
11 wallet and that he only got a lottery ticketed valued
12 at one dollar.

13 Q Okay. Did he indicate if there was anything
14 obscuring the robbers face at all when this happened?

15 A No, ma'am, he did not.

16 Q Did he indicate if he had anything on his head?

17 A No, ma'am, he did not.

18 Q Other than the long dreadlocks?

19 A No, ma'am.

20 MS. TESSITORE: Answer any questions that
21 Mr. Robinson may have, please.

22 THE COURT: You may cross-examine.

23 MR. ROBINSON: May it please the Court.

24 CROSS-EXAMINATION

25

1 BY MR. ROBINSON:

2 Q Officer, going back to what he told you, look at one
3 of the Defense Exhibits there, what exhibit are you
4 referring when testifying?

5 A I'm sorry?

6 Q What Defendant's Exhibit were you mentioning there
7 when you were answering Ms. Tessitore?

8 A Appears to be 1A, it's a statement that Mr. Gordon
9 gave to me on the scene, a copy of it.

10 Q Okay. In that statement, which is State's Exhibit A?

11 A Is says 1A.

12 Q Okay. That also mentions in there a slender build,
13 is that correct?

14 A That is correct.

15 Q And a goatee, is that correct?

16 A No, sir, it doesn't refer to his build, only that he
17 had dreadlocks, a goatee and mustache.

18 Q You did a report, didn't you Officer Bradley?

19 A I did.

20 Q Do you have a copy of your file?

21 A I can recall.

22 Q Okay. I'm going to approach and let you --

23 Approach the bench, Your Honor?

24 THE COURT: Yes.

25

1 BY MR. ROBINSON:

2 Q So there was a vacant apartment, right?

3 A Yes.

4 Q And did you note whether there was a for rent sign
5 anywhere around it?

6 A No, sir, I did not.

7 Q Was this a pretty highly traveled area?

8 A It is, yes, sir.

9 Q And you would agree with me, I think you testified,
10 before he gave his statement he was nervous; is that
11 what you testified to?

12 A Yes, sir. He was very nervous when I approached him.

13 MR. ROBINSON: That's all the questions I have.

14 Thank you.

15 THE COURT: Redirect?

16 MS. TESSITORE: No redirect, Your Honor.

17 THE COURT: You may step down, thank you, sir.

18 Call your next witness.

19 MS. TESSITORE: Your Honor, that's the State's
20 evidence regarding the line-up.

21 THE COURT: Thank you. I thought that's what we
22 were doing.

23 All right, any additional witnesses from the
24 Defendant?

25 MR. ROBINSON: I have no witnesses at this

1 point.

2 THE COURT: Very well, be happy to hear from you
3 as to why I should suppress it.

4 MR. ROBINSON: May it please the Court, Your
5 Honor. I'm looking at State v. Mack case which goes to
6 the different parts of what the State needs to establish
7 in order to put this in -- put in this line-up. First of
8 all, the length of time between the incident and when the
9 line-up was done was six days in this case. It was kind
10 of a long length, six days.

11 THE COURT: Does that case say six days is a
12 long length of time?

13 MR. ROBINSON: It just gives the elements, Your
14 Honor.

15 THE COURT: I understand that, I'm familiar with
16 the elements, Mr. Robinson, that's your assessment, okay.

17 MR. ROBINSON: But, Your Honor, as far as the
18 accuracy of what he said, he gave -- he didn't as far as a
19 mentioning a goatee and so forth in this case, were
20 different -- different statements regarding the build and
21 so forth like that. It wasn't exactly on target each time
22 he talked to the officers. But as far as the degree of
23 attention, he testified that he saw this person out of the
24 corner of his eye and then he saw him at some point when
25 he got put down on the ground. He didn't testify as far

1 as how long it took in this case. But I'd ask the Court
2 to consider that -- all four factors -- or five factors in
3 this case. When we don't think that...

4 THE COURT: Certainly the factors are important
5 but the true question here is that whether or not the
6 identification was unduly suggestive. And if it was then
7 reliable, so reliable that there's no substantial
8 likelihood of misidentification. This is a question the
9 jury will have to access whether the identification is
10 sufficient. That's a jury question. I find that's
11 nothing unusual about the photo array. That the fact that
12 really is totally not suggestive at all. And I find the
13 witness testified and he indicates the length of time that
14 he had and his focus was certainly there. He had every
15 reason to be looking at him. He said he thought he was
16 going to be shot. So I think that's probably a heightened
17 awareness of what was going on. And he certainly had that
18 opportunity to view him straight face-to-face. And had a
19 period of time to observe this man. So I find there's
20 nothing unreliable about it and therefore I deny your
21 motion. Thank you.

22 Okay, what else? Any other legal issues?

23 MS. TESSITORE: Your Honor, I think one was just
24 the issue of sequestration and I'm not sure...

25 THE COURT: I haven't heard.

1 MR. ROBINSON: I'd would like to have the
2 witnesses sequestered, Your Honor.

3 THE COURT: All witnesses will be sequestered,
4 Defense and State's.

5 MS. TESSITORE: Other than the victim.

6 THE COURT: Other than the victim.

7 MS. TESSITORE: And the investigating officer.

8 THE COURT: And the investigating officer.

9 Detective Flavell, is that the investigator --

10 MS. TESSITORE: Yes, sir.

11 MR. ROBINSON: Your Honor, I do have one motion
12 in limine, Your Honor, when she finishes with her stuff.

13 THE COURT: Okay.

14 MR. ROBINSON: May it please the Court?

15 THE COURT: Yeah.

16 MR. ROBINSON: Your Honor, Officer Flavell
17 stated that he, in his notes, he had a statement from this
18 individual regarding -- regarding -- he said that it was
19 you know, it his statement he says that, I don't want to
20 have a innocent person convicted. I think that's a
21 self-serving statement in this case.

22 THE COURT: Well I appreciate that. You can
23 cross-examine him all day long. It's not any statement.
24 If he wants to testify he can testify to anything he wants
25 to Mr. Robinson. Thank you, sir. I'm not restricting a

1 person from testifying. Thank you. He doesn't have to
2 put it in his statement to be able to testify to it.
3 Appreciate that, motion's denied.

4 What else? Any other motions?

5 MS. TESSITORE: None from the State, Your Honor.

6 THE COURT: Okay, we have our jury present?

7 THE BAILIFF: Yes, sir, Your Honor.

8 THE COURT: All right, State ready to proceed?

9 MS. TESSITORE: Yes, sir.

10 THE COURT: Defendant's ready to proceed?

11 MR. ROBINSON: Defense is ready, Your Honor.

12 THE COURT: Okay, let's bring in our jury,
13 please.

14 (WHEREUPON, the jury came into open court at
15 approximately 2:40 p.m.)

16 THE COURT: Thank you, very much, ladies and
17 gentlemen. I hope you had a good lunch. We're ready now
18 to continue the process that we started before we recessed
19 for lunch. Let me talk to you about the seating
20 arrangements. Get my list if I could. There's nothing
21 magic about any of the seats really. They're three seats
22 that are designated, two right now. One will be occupied by
23 Mr. Jenkins. Is Mr. Jenkins on the end?

24 Mr. Jenkins -- no, excuse me, not Mr. Jenkins.
25 No wonder. I don't think y'all are in Hampton, that was

1 my Hampton jury. Mr. Jenkins was my first alternate.
2 Nothing like starting off with a bang.

3 First alternate is Jo Ann Carter, that would be
4 you. Then the second alternate is Mr. Rhine. Excuse me,
5 for doing that, I apologize to you. We'll remedy that
6 problem right now. You two -- you both have been selected
7 as a alternate. That term really has no significance at
8 this point. Mr. Jenkins oddly enough had to end up
9 serving on the jury because the jury had to be excused
10 during that trial. It's not uncommon for it to happen. I
11 wouldn't say that's often but it's certainly not uncommon.
12 So since neither you nor I know the status of the jurors
13 at this point, at the end of trial, you're very much a
14 part of the jury panel. If at the end, the first 12 that
15 were selected were able to continue, then you would not
16 participate in the final deliberations. But please don't
17 let that deter you from your attention and I'm sure it
18 will not. While you are the alternates, you will occupy
19 those chairs and ask the remaking jurors to leave those
20 chairs vacant as we come into the courtroom.

21 The only other assigned seat is occupied by this
22 lady on the front row, at the end. She, as any of the
23 first 12 of you are eligible to serve as a presiding
24 juror. Now that's a term I use, also called foreman or
25 forelady or foreperson. Someone has to be designated to

1 actually sign the verdict form on behalf of the jury
2 panel. If they're exhibits that are introduced during the
3 trial, then it's the responsibility of the presiding juror
4 to receive those from the Court. When the Court -- when
5 the jury's completed its deliberations, then returning
6 those Exhibits to the Court. There may be from time to
7 time, possible communication that needs to be made between
8 the jury and the Court, it would be your responsibility
9 basically to serve as a clerk for the jury to actually
10 write that out. So those are the additional duties.

11 The statute allows me to appoint the presiding
12 jury. I sat with a Judge who was then my colleague, now
13 he's on the Supreme Court, Judge Pleicones. And he
14 suggested, and I honestly as a lawyer never heard of this
15 because most Judges appointed the presiding juror. Which
16 is absolutely proper in accordance with the statute. But
17 he said that he allowed the jurors to select their own
18 presiding juror. And I've done that now for the last 18
19 years and works pretty well. So at some point you pick
20 your presiding juror, it does not have to be done right
21 away. But once you've designated that person, I would
22 simply ask that that person occupy that seat on the first
23 row.

24 The presiding juror, just observation over the
25 years, I think some people are better facilitators than

1 others, and that's generally what a presiding juror does
2 is helps facilitate the discussions. So talk among
3 yourselves and y'all pick it. Judge Pleicones said don't
4 have any long campaign speeches because it doesn't give
5 you any benefit, it won't increase your pay at all. So
6 with that I'll go ahead and now ask Mrs. Troupe if she'll
7 administer your oath. Thank you.

8 THE CLERK: Please stand, raise your right hand
9 for the oath. The proper response is, I will.

10 (WHEREUPON, the jury was sworn.)

11 THE CLERK: Thank you, please be seated.

12 THE COURT: Thank you, ladies and gentlemen.

13 You now have become that Judge that I mentioned to you
14 would happen when we were qualifying you this morning.
15 This wonderful system that we have for resolving disputes
16 in this country. And it is a wonderful system. And it
17 works exceedingly well because of what you just did. And
18 what we do, too. But primarily what you do. Because you
19 now, by virtue of that oath, have become the judge with me
20 and now you and I will work together to resolve the
21 dispute.

22 You and you alone have the responsibility of
23 deciding the true facts over this dispute. And I promise
24 you, as I said this morning, there's no one more qualified
25 than you are to perform the task that you just accepted.

1 Because all that you will need to do is use what you
2 brought with you when you came in this door just a few
3 minutes ago. You brought everything you're going to need.
4 You brought your life experiences, your common sense, your
5 sense of logic and reason, those tools that you use your
6 entire life to help you make decisions everyday. And
7 that's exactly what you will do when you're instructed to
8 begin your deliberations.

9 You also brought something else. You brought an
10 opened mind. Because if you think about it, you've heard
11 me and probably tired of my constantly saying will you
12 base your decision on the evidence and the law. Will it
13 be fair to both sides? Basically what you've said either
14 by responding or not responding, is I have an opened mind
15 about this dispute. I haven't made any decisions, don't
16 know anything about it. And yes, there's nothing about
17 it. In fact, the last question, if you recall, I said, Is
18 there anything that would give you any concern about your
19 ability to make a commitment you just accepted. None of
20 you said it was. So you said, Okay, I'm willing to serve
21 in this case. Please remember that. That's very
22 important.

23 I would suggest to you to make the proper
24 decision and in honoring the commitment you just made.
25 Because what you have promised to do is not decide

1 anything until I give you the instruction to begin your
2 deliberations. And frankly, ladies and gentlemen, that's
3 the last thing that I'll tell you before you leave this
4 courtroom. And that is when you may start. So until
5 you're given that okay, do everything in your power to
6 maintain that opened mind. And I say that for this
7 reason, we're human. And we all have human tendencies.
8 Some of us, I confess to be one of them, I'm not a
9 detailed person. I get really impatient sometimes with
10 detailed people telling me something, get to the bottom
11 line, let's hurry up. Sometimes I get to the bottom line
12 too early sometimes. I confess that, I jump to
13 conclusions. Detailed people, and you may be one of them
14 and I'm not being critical of you, detailed people or
15 persons that want to hear it all, then they want to think
16 about it. That's what you need to be. That's exactly
17 what you need to be. If you're not, you got to work on
18 that for purposes of this trial.

19 And they're many, many reasons. But the
20 fundamentally basic reason is both the State, Mr. Thomas,
21 have the right to expect that you will honor that.
22 Because that's what you've promised to do. The other
23 reason is simply this. They're four parts to this
24 process, dispute resolution. The attorneys speak to you
25 twice. Once before you hear the evidence and once after

1 you hear the evidence. That will occur in just a minute.
2 First opportunity we call it opening statements. That's
3 when they will have their chance to give you a broad
4 overview of the dispute. Tell you a little bit about the
5 evidence. They may even discuss some of the law with you.
6 And I'm confident you'll find those remarks extremely
7 helpful when we go through the evidentiary portion. Gives
8 you basically an outline of the dispute.

9 We'll move in then to the to evidentiary
10 portion. And the State will go first. And there's a
11 significant reason for that. I listened to some of the
12 video which I found to be quite impressive. I hope you
13 enjoyed it as well, it was very informative. One of the
14 things that it talked or mention, and I didn't hear all of
15 it, but it talked about there's some differences. The
16 format's the same. Whether it's a civil dispute or
17 criminal dispute, same format. Some of you may have
18 participated in jury trials previously. But they're two
19 really, very significant differences.

20 First of all, in a criminal case, the only part,
21 the only part that has anything to prove is the State.
22 They bring the claim, they make the claim, they accuse the
23 defendant of committing these crimes. They and they alone
24 have the burden of proof. In a civil case, yes the party
25 that makes the claim has the burden of proof but there are

1 limited situations where a defendant may have the burden
2 of proof. Generally it deals with affirmative defense
3 that may be raised in a civil trial. That doesn't apply
4 here. The Defendant in this case has absolutely nothing
5 to prove or disprove. Does not have to at any time prove
6 his innocence, explain anything, justify anything, he
7 doesn't even have to present evidence for your
8 consideration because he has no responsibility at all.
9 That's what the trial is about.

10 So obviously, that's one significant difference.
11 Then the other is burden of proof. In a civil trial the
12 burden of proof is preponderance or greater weight of the
13 evidence, that's the legal name. Simply means it is more
14 likely so than not. It is more probable? Well, the
15 burden of proof in this is beyond a reasonable doubt and
16 it's much greater than that. The burden of proof is, that
17 I'll define for you when I give you the charge, but beyond
18 a reasonable doubt is a doubt that would make a honest,
19 conscientious person searching for the truth to hesitate
20 to take some action or act. And that's the standard that
21 you will be applying.

22 And until then, you have, and I'll talk about
23 this in the charge, but you have a responsibility because
24 the law says this. That persons accused of criminal
25 offenses are to be presumed innocent. And those aren't

1 just words. You have to actively presume that. And you
2 may only change that position, when in you're
3 deliberations, you're firmly convinced that the State has
4 met its burden of proof as to each element of the crime.
5 And that's what you will do when you get to that point.
6 You will be analyzing the evidence to decide for yourself
7 whether or not you're convinced beyond a reasonable doubt
8 as to elements. If at the end of the analysis you are,
9 and collectively you are, then you must return a verdict
10 of guilty on that particular charge. Why? Because the
11 State has met its burden of proof and is entitled to a
12 verdict of guilty. On the other hand, if in your
13 analysis, you don't reach that standard to one or more
14 elements, because if they fail on one, then you must
15 return a verdict of not guilty. Because the State has the
16 burden to prove each element. And that's in essence what
17 a verdict says in criminal disputes. Guilty, simply means
18 the State, as to that particular crime, met its burden of
19 proof. And established and convinced that jury of each
20 element. Not guilty said it failed on one element or
21 more.

22 Now, the evidence, of course, will come through
23 the testimony, evidence, exhibits, you heard that in your
24 presentation. And you will be at the appropriate time,
25 basically doing something that we do everyday of our

1 lives. I would suggest to you that most of the time it's
2 a subconscious process. I mean, we very seldom get in a
3 situation here, where we are here, having to say, you
4 know, do I believe this person or not? Most of time we
5 listen to something or we read something and we process it
6 and he say, you know, I don't buy that, I don't believe
7 that.

8 Well that's ultimately what you're going to do.
9 You're going to access the credibility or believability of
10 a witness. My suggestion to you is this. If there are
11 factors of things that you're listening in your life, you
12 heard somebody and you watch their body language or you
13 heard what they said and it caused you to scratch your
14 head and say, that doesn't make any sense. Well you may
15 have those reactions during this trial. Make note of that
16 but don't reach the ultimate conclusion that you don't
17 believe that person. Because when you begin your
18 deliberations, somebody may have a logical explanation
19 that will resolve that concern. But certainly make those
20 notations so that when you do begin your deliberations,
21 you can discuss that with your fellow jurors. And then
22 through that deliberative process, you will reach a
23 determination as to whether or not you do find that person
24 to be credible or believable.

25 And that's basically one of your major

1 objectives in this whole process. The other, of course,
2 is to do it fairly and impartially. And then to apply the
3 law. And that will come after you've heard the evidence,
4 then the attorneys speak to you again after you've heard
5 the evidence. This time we call it closing arguments.
6 And unlike the first time, you will have heard the
7 evidence. But it's proper for them to discuss with you
8 the evidence and reasonable inferences that you may draw
9 from that evidence. And I'm very confident that you'll
10 find those remarks extremely helpful when you begin the
11 process of resolving this dispute.

12 I'll tell you now, as we talked about the
13 various roles in this process of dispute resolution, the
14 attorneys as officers of this court have a very important
15 responsibility. They have the responsibility of
16 presenting the evidence, the law in a fashion that will
17 assist us in making the decisions that we're called upon
18 to make. You should give them your attention. And I'm
19 confident that you will do that. But, please, remember
20 something, their remarks, just as my remarks, should never
21 be considered as evidence by you at all.

22 Now following the closing arguments, I'll give
23 you the law, we'll talk more about this term, reasonable
24 doubt. We'll talk more about a number of factors, I'll
25 define for you the various crimes. I'll list for you the

1 elements of those crimes. Then after hearing that you
2 will be instructed to return to your jury room and resolve
3 this case fairly and impartially as I know that you will.
4 It's an honor to serve with you as a Judge. Thank you for
5 your attention to my remarks. I ask you to give that same
6 attention now to the attorneys as they give their opening
7 statements.

8 Solicitor.

9 MS. TESSITORE: Thank you, Your Honor. May it
10 please the Court.

11 THE COURT: Yes, ma'am.

12 OPENING STATEMENT

13 MS. TESSITORE: Mr. Thomas.

14 Good afternoon, ladies and gentlemen of the
15 jury. I'm going to talk to you a little bit about three
16 things. The first is going to be basically the business
17 at hand. The second thing is going to be a road map of
18 the case so you'll have an idea of where we're going. And
19 then finally a elements checklist of sorts as, Your Honor,
20 told you. He's going to give you the law at the end of
21 this case. But the State sometimes will provide you a
22 quick road map of those elements just so you'll have them
23 in mind and you can use them as a checklist as you hear
24 the evidence. And you can say, Oh, did they prove that he
25 was robbed? Did they prove that something was taken? So

1 there's going to be those elements where you're going to
2 use those.

3 But first, I just want to start with the idea of
4 a lottery ticket. Some people buy lottery tickets because
5 they feel lucky. Some people buy lottery tickets because
6 they hope they'll get lucky. Some people buy lottery
7 tickets because they open a fortune cookie and there's
8 some numbers on the back and they figure, I should go buy
9 a lottery ticket. In this case, Mr. Gordon, Michael
10 Gordon, the victim in this case, he went and he was hoping
11 he would get lucky and bought a lottery ticket back in
12 July of 2009. He put that ticket in his pocket, hoping
13 that he would get lucky so he wouldn't have to work the
14 second job that he was working when this incident
15 occurred. He was doing some painting for a property
16 manager here in Greenville on [REDACTED] in the city
17 limits.

18 And he went to that job with his lottery ticket
19 in his wallet, tucked away. And it turns out, as he'll
20 tell you at the end of this case, or excuse me, when he
21 testifies, he'll get up here and say the only thing he
22 really felt lucky about was being able to walk out of that
23 unit where he was washing up after he had painted.
24 Because he really was only armed with a paint brush goes
25 down to Unit D. And you'll hear the victim testify that

1 when he got there he just went to wash his hands and
2 that's when the Defendant walked in.

3 And the evidence will show that the Defendant
4 was there and he was there to mean business, serious
5 business. He demanded the victim to get down on the
6 floor, he ordered him at gun point, the evidence will show
7 that it was a black automatic handgun. He told him to get
8 on the floor and he went through his wallet, tried to take
9 whatever he had in the wallet. And the victim will tell
10 you that what he was doing is he was riffling through his
11 wallet. And what he was thinking. And what he tried to
12 do as he laid on the floor hoping that he will be able to
13 walk out of there.

14 The State has business, too. And in this case
15 the State's business is to seek justice for the people of
16 Greenville County and for this victim, Mr. Gordon. That's
17 what we're here for. Your business is, as the Judge said,
18 to be the finders of facts, the judges of the facts.
19 You're not here to judge any particular person. You're
20 here to judge the facts, the evidence that the State's
21 going to present to you. Then you determine, with your
22 common sense, whether -- and your logic and everything
23 else, Your Honor told you, you know, just the basics.
24 Something that you can't carry in here in a suitcase. You
25 can't bring in here with a fancy phone that as all sorts

1 of apps on it. There's no apps or common sense. You
2 haven't -- and that's why you were chosen today to be on
3 this jury. And with that you will decide -- that will be
4 your tool as you decide the facts of this case.

5 Now, the road map that I'm going to give you,
6 essentially, so you'll know what to expect. You're going
7 to hear from the fact witness, first of all. That's going
8 to be Mr. Gordon. He's going to tell you, again, what
9 happened that day. Why he was there, what he saw. And
10 he's going to explain to you, you know, what -- what was
11 taken out his wallet. He's going to explain to you what
12 he did as a result as soon as this happened. He called
13 911. And the evidence will show that then this officer
14 arrived, Officer Bradley. And you'll here from two
15 investigating officers. You're going to hear from Officer
16 Bradley who responded out to the victim and met with the
17 victim, shaking, got to the description out of him. And
18 he was able to relay that law enforcement to try to put
19 that out to other officers so they could be on the lookout
20 for this other person. And gave a good, physical
21 description of him.

22 The next witness that you're going to hear from
23 is Detective Flavell. Detective Flavell, who's seated
24 here at the State's table, he was assigned to investigate
25 this case based on what Officer Bradley was able to find,

1 based upon what the victim told him and based on something
2 that this Defendant left behind at Unit D where the victim
3 was held up at gun point. And you're going to hear them
4 tell you about a photo array process. And you'll hear
5 Detective Flavell testify about the victim's
6 identification in this case. And how sure he was.

7 MR. ROBINSON: Objection, Your Honor, I think
8 this is going to argument.

9 THE COURT: Overruled.

10 MS. TESSITORE: You'll also hear from the
11 forensic witness. Witnesses who came to retrieve certain
12 evidence there from the crime scene. You're going to hear
13 from the arresting officer, Officer Mike Aiken, who found
14 this Defendant two months later at a motel room. And he's
15 going to tell you what he found at that hotel room with
16 this defendant. You're also going to hear a chain of
17 custody witnesses, people who work in property and
18 evidence department down at the Law Enforcement Center
19 where they maintain records, they maintain evidence in the
20 case to make sure it's not tampered with, that it's
21 secured, that it can be tested, that it can be tested at a
22 later time. And you'll hear from those witnesses as well.

23 And finally, a forensic expert who will tell you
24 about what the tests were that were conducted and what the
25 results were. And how those results lead to this

1 Defendant. All of those witnesses, probably about ten,
2 maybe a couple more, maybe a few less, hopefully. Will
3 tell you about what, when, where and most importantly in
4 this case, the who. That's the main case, the main issue
5 in this case is identity. So the Defendant in this case,
6 he answered these questions by his own actions as
7 Mr. Gordon with tell you. He, as I said, left his
8 identity behind. He left his physical description etched
9 in Mr. Gordon's memory.

10 The checklist that you will -- I'd ask you to
11 keep in mind as far as the law goes, is well, first of
12 all, the charges the Judge told you at the beginning.
13 Armed robbery, possession of a weapon during the
14 commission of the armed robbery and burglary, third
15 degree. Let's start with burglary, third degree. Very
16 simply. Entering a building without consent of a person
17 who owns it and with the intent to go in to commit a crime
18 inside. Three elements. Very simple checklist right
19 there. The armed robbery is unlawful taking of money,
20 goods or other personal property of any value from the
21 person of another by violence or putting that person in
22 fear while armed with a deadly weapon or what appears to
23 be a deadly weapon. And finally, the possession of a
24 firearm during the commission of a violent crime is
25 exactly what it says, possession of that firearm,

1 physically displaying it during the commission of a
2 violent crime, being armed robbery. So that's the
3 elements checklist.

4 And you're, as the Judge said, this Defendant is
5 presumed innocent until and unless the State provides the
6 firm grounds, the firm solid footing upon which you could
7 base a verdict. If you're firmly convinced that he is
8 guilty, then the State has done its job. And I would
9 submit that as Mr. Gordon was hoping to get lucky that
10 day, the Defendant was also hoping to get lucky. And he
11 did because he found Mr. Gordon all by himself.

12 The evidence will show that there was a crime of
13 opportunity, he took the opportunity but his luck has run
14 out. And the evidence -- that luck began running out when
15 the evidence started to match. And that is left at the
16 scene and then the evidence that you will hear from each
17 subsequent witness, until the end of this case when I'll
18 stand before you and provide you the evidence to plead to
19 you to enter a true verdict at the end of this case. And
20 that would be guilty. Thank you.

21 THE COURT: Thank you, Ms. Tessitore.

22 Mr. Robinson.

23 OPENING STATEMENT

24 MR. ROBINSON: Good afternoon, my name is Scott
25 Robinson. Mr. Thomas is innocent. You may look at him

1 and think, well he's got deadlocks and so forth but he's
2 innocent. When you come into this courtroom all you
3 really have to have is common sense. And you take your
4 life experiences and so forth, look at all evidence
5 presented by each party and make a decision based on
6 common sense.

7 As the Judge told you a few moments ago, this
8 issue, this idea of beyond a reasonable doubt in this
9 case, the State cannot establish to you beyond a
10 reasonable doubt of Mr. Thomas' guilt. Why? Many of you
11 when you were kids may have had horse shoes, played horse
12 shoes with your father, mother, friends and so forth. And
13 the idea was that if a horse shoe was leaning up against a
14 post or something like that, it was almost there and that
15 was good enough. In this case, almost is not good enough.
16 It's beyond a reasonable doubt. And you are the persons
17 who have to look at the facts in this case and determine
18 whether or not the State has proven their case beyond a
19 reasonable doubt.

20 And the statements that I want you to pay
21 attention to are from the victim. Almost positive, I'm
22 just about a hundred percent, pretty sure. Ladies and
23 gentlemen, that counts in horse shoes and hand grenades my
24 dad use to say, it doesn't count in a court of law.

25 Now many of you may have seen different car

1 accident cases and so forth and different administrative
2 cases where the standard of proof is lower. It's
3 preponderance of the evidence. A little bit more means
4 that they're liable. That's off the table, that's not the
5 case. When you took an oath a few moments ago, that's
6 gone. It's beyond a reasonable doubt. I ask you in this
7 case, to look at the evidence and look at the lack of
8 evidence in this case. As I told you before, almost,
9 positive, just about a hundred percent sure, pretty sure,
10 is not enough. This is not a popularity contest we're
11 talk about, this is a court of law. Mr. Thomas is
12 innocent on these charges by the State. I ask you to
13 return to a verdict that speaks the truth and that he is
14 not guilty of these charges. Thank you.

15 THE COURT: Thank you, Mr. Robinson.

16 You may call your first witness, Solicitor.

17 MS. TESSITORE: Thank you, Your Honor.

18 Michael Gordon.

19 THE CLERK: Mr. Gordon, if you'd, please, come
20 forward. If you'd pause at the end of the bench. Place
21 your left hand on the Bible, raise your right.

22 MICHAEL GORDON, after being duly sworn,
23 testified as follows:

24 THE CLERK: Thank you, please be seated. State
25 your name for the record.

1 THE WITNESS: Michael Gordon.

2 DIRECT EXAMINATION

3 BY MS. TESSITORE:

4 Q Mr. Gordon, can you tell the jury where you work?

5 A America Tire Distributors in Mauldin.

6 Q What do you do there?

7 A I drive a truck, delivering tires basically in the
8 upstate.

9 Q How long have you lived in the upstate?

10 A Pardon?

11 Q How long have you lived in the upstate?

12 A Seven years.

13 Q And where did you live before that?

14 A In Hendersonville, North Carolina.

15 Q What do you do as far as -- well let me take you back
16 to 2009? What kind of work were you doing then?

17 A I was doing a side job painting.

18 Q In addition to the --

19 A American Tire.

20 Q And did you hold the same position with the tire
21 company?

22 A Yes.

23 Q What were your hours at that time at the tire
24 company?

25 A I'd go in about 4:00 and get off -- 4:00 in the

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1 morning and get off between most time around 1:00 --
2 between 1:00 and 2:00.

3 Q So you had time to do a second job?

4 A Yes.

5 Q All right. Tell the jury how you come to have this
6 second job that took you to [REDACTED] where this
7 incident happened?

8 A I met a guy that his wife was a property manager and
9 she needed some assistance on fixing up some of the
10 apartments as people moved in and out of them as
11 painting them, doing -- just fixing certain --
12 whatever.

13 Q Okay. How many units were there?

14 A Four.

15 Q And just generally describe for the jury what kind of
16 apartment structure we're talking about.

17 A It was basically two different buildings with two
18 apartments at each building. They was two stories.
19 It was a three bedroom apartment. There was a
20 kitchen, dinning room and bath.

21 Q Okay. And -- and had you -- how long had you been
22 working out there prior to the incident date of
23 July 22nd?

24 A Approximately a week.

25 Q And what kind of work were you doing?

- 1 A Panting.
- 2 Q Now, had you worked the week before this incident
- 3 or -- I mean, what was your typical schedule going
- 4 out there to [REDACTED] to do this panting?
- 5 A I would do it basically in my spare time. When I had
- 6 time to do it. I mean, I wasn't out there everyday.
- 7 Q What specifically took you out there on July 22nd?
- 8 A Because I was trying to get it finished up.
- 9 Q When you say, It finished up, what exactly are you?
- 10 A Painting in apartment A.
- 11 Q Okay. And how -- how about -- how long did it take
- 12 you to paint apartment A?
- 13 A Roughly a week.
- 14 Q Okay. Did you work on the weekends?
- 15 A Yes.
- 16 Q So is this Wednesday that this happened?
- 17 A Yes.
- 18 Q So you would be done about week before that?
- 19 A Yeah, roughly. Like I said, I didn't work everyday.
- 20 It was just when I got a chance.
- 21 Q Did you work by yourself?
- 22 A Yes.
- 23 Q Any helpers at all?
- 24 A No.
- 25 Q Did -- where did you do the painting at Unit A?

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1 A I...

2 Q I mean, inside, outside?

3 A Inside apartment A.

4 Q All right. And did you have a vehicle?

5 A Yes.

6 Q Where would that vehicle -- typically where would you
7 park it?

8 A Outside in the front of the units.

9 Q All right. And while you were there working on this
10 paint job, did you ever, while you were in Unit A,
11 did you ever have any perspective -- well let me back
12 up. Unit A, was it vacant?

13 A Yes.

14 Q All right. And while you were there at Unit A, did
15 you ever have anybody come up and ask to look at the
16 apartment?

17 A No.

18 Q All right. Let me show you -- first, just to give
19 the -- one minute.

20 Can you mark this?

21 THE COURT REPORTER: Yes.

22 (WHEREUPON, State's Exhibit No. 3 was marked for
23 identification only.)

24 BY MS. TESSITORE:

25 Q Okay. Mr. Gordon, I'm showing you what's been marked

1 as State's Exhibit No. 3. Just ask you to take a
2 look at that. Do you recognize that?

3 A Yes.

4 Q What is that?

5 A That's [REDACTED] apartments that I was at.

6 Q All right. Is that a fair and accurate description
7 of the area in question?

8 A Yes.

9 MS. TESSITORE: And at this time I would move
10 State's Exhibit No. 3 into evidence.

11 THE COURT: Any objection?

12 MR. ROBINSON: No objection.

13 THE COURT: Without objection State's Exhibit 3
14 is admitted.

15 MS. TESSITORE: Thank you.

16 (WHEREUPON, State's Exhibit No. 3 was admitted
17 into evidence.)

18 BY MS. TESSITORE:

19 Q Mr. Gordon, if you could just step down here.

20 THE COURT: Mr. Gordon, I'll ask while you're
21 down if you'd keep your voice elevated, please. Thank
22 you.

23 BY MS. TESSITORE:

24 Q Mr. Gordon, if you could point out for the jury the
25 apartments that we're talking about.

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1 A Located right here. Right in here.

2 Q Okay. And which -- which is apartment A? Where were
3 you?

4 A Well from a bird's-eye view you have to look,
5 apartment A would be right here on this end.

6 Q Okay. And what are the other apartments?

7 A And this roughly right in here would be apartment B.
8 Here's C and here's D.

9 Q Okay. And is this area, were you familiar with this
10 area?

11 A Yeah.

12 Q If you could, tell the jury where, roughly, where
13 this is in Greenville?

14 A This is Washington Street, which the post office is
15 back up here. Then right here is the train trestle,
16 here's the train station right in here. To get here
17 you have to come up right up in here to the train
18 station, make a hard left turn by it, then come back
19 down [REDACTED] here. And there's actually a
20 parking lot here but it's hard to tell but there's
21 dirt and that's the way I also went to park, right in
22 front of all the apartments.

23 Q So that's where you would park?

24 A Yes, right in front.

25 Q Okay. Just describe as far as the amount of foot

1 traffic when you were out there.

2 A You'd see people walking, riding bicycles, cars on
3 Washington Street a lot.

4 Q Are there any bus stops around there?

5 A Yes, I think the bus stop's somewhere right in here,
6 not exactly sure from the overhead view.

7 Q Okay. All right, you can take your seat, thank you.

8 A (The witness complies.)

9 Q And who was the property manager?

10 A Jennifer Hallex.

11 Q Jennifer Hallex. And would she go out there with
12 you?

13 A No.

14 Q And how did you gain access into the apartments when
15 she wasn't with you?

16 A She had lockboxes on the door.

17 Q Is that on all the doors or just the vacant ones?

18 A Just the vacant ones.

19 Q Okay. While the Court Reporter is marking those, let
20 me ask you, what time when -- when you were out there
21 when this incident occurred, approximately what time
22 did you head out to those apartments to work that day
23 on Wednesday July 22nd?

24 A I was out there approximately 3:00, 3:30.

25 Q Okay, how long did you work on Unit A?

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1 A I didn't work long that day.

2 Q Okay. What did you do once you finished up?

3 A I went from apartment A to apartment D to wash my
4 hands.

5 Q Okay. And why didn't you wash your hands in A?

6 A Apartment A did not have water, running water.

7 Q And so tell the jury what you did to go wash your
8 hands.

9 A I went down to apartment D and the lockbox was on the
10 door. I had the combination, unlocked the lockbox,
11 got the key and went in. And basically went to the
12 sink to wash my hands.

13 Q Okay. When you first got over to Unit D and opened
14 the lockbox, was that unit also vacant or?

15 A Yes, it was vacant.

16 Q And did -- did there -- was there any evidence of any
17 kind of problems or tampering with the lockbox?

18 A No.

19 Q Anything that you observed about the door or when
20 your entered, anything disturbed?

21 A No.

22 Q Was there furniture in the apartment?

23 A No.

24 Q And what was the first room that you see when you
25 walk in unit D?

1 A The kitchen, living room, it's pretty much a opened
2 floor plan.

3 Q And are all the units like that?

4 A Well I'm not sure about B and C but yeah, A and D's
5 pretty much the same.

6 Q Okay. I'm going to show you -- one minute.

7 (WHEREUPON, State's Exhibits Nos. 4-13 were
8 marked for identification only.)

9 BY MS. TESSITORE:

10 Q Mr. Gordon, I'm showing you what's been marked as
11 Exhibits 4, 5, 6, 7, and 8. Just ask you to go ahead
12 and take a look at those. You can look at them one
13 by one. And let me know when you're done looking at
14 them.

15 A Okay.

16 Q All right. And looking at those, what are those?

17 A This is a picture of the front of the apartments.

18 Q You're talking about State's Exhibit 4?

19 A Yes. This is a picture of Apartment A as State's
20 Exhibit 5. This is the front door of Apartment D,
21 State's Exhibit 6. This is standing in the front of
22 Apartment D, looking to the right, be Exhibit 7. And
23 this is in front of Apartment D around the corner,
24 going towards the other side of the apartment,
25 Exhibit 8.

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1 Q Okay. And are those photograph, are those fair and
2 accurate depictions of the way it appeared back in
3 July of 2009, roughly?

4 A Yes.

5 MS. TESSITORE: State would move Exhibit 4
6 through 8 into evidence.

7 THE COURT: Any objection?

8 MR. ROBINSON: No objection, Your Honor.

9 THE COURT: Without objection, State's Exhibits
10 4 through 8 are admitted, each being a photograph.

11 (WHEREUPON, State's Exhibits Nos. 4-8 were
12 admitted into evidence.)

13 BY MS. TESSITORE:

14 Q So, looking at State's Exhibit No. 4 -- actually
15 might be easier if you just step down. Can you
16 explain to the jury what State's Exhibit No. 4?

17 A This is the front of the apartments which A would be
18 here, B, C and D would be right here.

19 Q Okay, and number 5?

20 A Number 5, that's just the front door of the Apartment
21 A.

22 Q That's where you were doing the...

23 A That's where I was doing the painting.

24 Q Okay. And would your vehicle -- where would your
25 vehicle be?

- 1 A It would be -- it's right here. Right up here.
- 2 Q And State's Exhibit No. 6?
- 3 A That's the front door of Apartment D where I got
- 4 robbed.
- 5 Q Okay. And is that -- what around the corner from..
- 6 A There's just trees. I think there's a house back up
- 7 in here. That's basically it.
- 8 Q Okay. And now that does not have a lockbox on the
- 9 knob. Did it at the time?
- 10 A It did at the time.
- 11 Q Okay. Was -- let's see, looking at number 7?
- 12 A That would be standing in front, the apartment would
- 13 be right here. That would be standing in the
- 14 apartments looking straight, basically.
- 15 Q Okay. And No. 8, what is that view?
- 16 A That's the door to Apartment B would be here and
- 17 that's just going around the corner to go around the
- 18 whole apartment.
- 19 Q Okay. So that's the exterior around the unit where
- 20 you were?
- 21 A Yes.
- 22 Q When you got robbed. Okay. You can take your seat
- 23 back.
- 24 A (The witness complies.)
- 25 MS. TESSITORE: Your Honor, the State would

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1 request to publish these to the jury.

2 THE COURT: I think they've seen them but that's
3 fine.

4 Ladies and gentlemen, from time to time exhibits
5 that are introduced may be handed to you. If you'd just
6 look at them, pass them along. But know that any exhibits
7 that are introduced into evidence will accompany you to
8 your jury room. You can study them in more detail, in
9 depth, at that time.

10 BY MS. TESSITORE:

11 Q Now, I'm just going to run through, showing you
12 State's Exhibit 9, 10, 11 and 12 and 13. If you'd
13 just take a look at those. Do you recognize those?

14 A I'm not sure what that one is.

15 Q Okay. Which ones -- looking at State's 9 through 12,
16 do you recognize those?

17 A Yes.

18 Q Okay. And what are those?

19 A That's the apartment D.

20 Q Okay. And what is -- let me ask you this. Are those
21 fair and accurate depictions of the way the unit
22 appeared just as far as when you walk in the door and
23 what you would see regarding the countertops, kitchen
24 area?

25 A Yes. I mean, everything except -- besides the

1 apartment was vacant at the time.

2 Q Okay.

3 MS. TESSITORE: State would move 9 through 12
4 into evidence.

5 THE COURT: Any objection?

6 MR. ROBINSON: If I can see them.

7 THE COURT: Certainly.

8 MR. ROBINSON: No objection, Your Honor.

9 THE COURT: Without objection State's 9 through
10 12 are admitted, each being a photograph.

11 (WHEREUPON, State's Exhibits Nos. 9-12 were
12 admitted into evidence.)

13 BY MS. TESSITORE:

14 Q Mr. Gordon, what I want you to do is tell the jury
15 when you went in to wash your hands, what was the
16 lighting like in that unit D that you went into?

17 A It was well lit.

18 Q Was there electricity?

19 A Yes.

20 Q Were there windows?

21 A Yes, there were two windows and a big sliding glass
22 door.

23 Q Were there curtains on the windows?

24 A No.

25 Q At the time. And did you -- where did you go once

1 you went in the apartment?

2 A Straight to the sink.

3 Q And what did you do at the sink?

4 A Washed my hands.

5 Q Did you have anything that you brought in with you?

6 A No.

7 Q And was anyone inside that apartment or around that
8 you noticed when you went in?

9 A No.

10 Q Had you seen anything suspicious or particular before
11 you went in there?

12 A No.

13 Q And what happened as you were washing your hands
14 there at window?

15 A The door kind of swung opened.

16 Q Well when you -- let me back up. When you went in,
17 did you close the door behind you?

18 A No, I just pushed the door.

19 Q Did it shut all the way?

20 A It did not shut, it just kind of closed.

21 Q Closed meaning?

22 A It did not latch.

23 Q Okay. So you didn't hear -- you didn't hear the
24 latch or door closing completely?

25 A No.

1 Q All right. And so as you're washing your hands --
2 I'm sorry I interrupted you, what happened?

3 A As I was washing my hands the door moved. I thought
4 it was the wind so I just kept washing my hands.
5 Then the door come open.

6 Q Okay. What did you see when the door opened?

7 A I saw him standing in the door.

8 Q Okay. And had you ever seen him before?

9 A No.

10 Q What happened?

11 A I looked at him, I said, Can I help you?

12 Q Okay. When he came in, how was he dressed?

13 A In a black tank top and black shorts.

14 Q And did he -- did you get a good look at him at that
15 moment?

16 A Yes.

17 Q What was -- how would you describe him physically?

18 A Black male, long dreadlocks, mustache, goatee,
19 approximately 5'10.

20 Q What about his build?

21 A Just a medium build.

22 Q Was there anything unique about him that stood out to
23 you?

24 A Just the dreadlocks and I don't know. Other than
25 that I don't guess.

1 Q Okay. Did he have anything in his hands when he
2 first came in?

3 A No.

4 Q And when you asked him, Can I help you? Did you know
5 why he was there at first?

6 A Had no idea.

7 Q Did you turn away from the sink at all when you spoke
8 to him.

9 A No, I just turned my head when I spoke.

10 Q Okay. And you turned your head in which direction?

11 A To the right.

12 Q And that would be towards the -- so where were you
13 looking at him?

14 A He was standing in the door.

15 Q Okay, so he was still in the doorway?

16 A He stepped in the door.

17 Q All right. Did he shut the door behind him?

18 A No, he just pushed it, I guess. Because it was
19 basically like I did, it never did latch.

20 Q And so then what happened at the point when you asked
21 him, Can I help you?

22 A He pulled a gun out of his left front pocket, told me
23 to get on the floor.

24 Q And what was your response to that?

25 A I done what he said.

1 Q Did you have to move away from the sink?

2 A No, I was turned and I just laid -- went straight
3 down to the floor.

4 Q Okay. I'm going to show you State's Exhibit No. 12.
5 And again, what does that show?

6 A That's the kitchen.

7 Q Okay.

8 A Front of the sink.

9 Q All right. And how -- approximately how far away was
10 he from you when you first saw him?

11 A 10, 12 feet.

12 Q Okay. Was there any other window other than the
13 window over the sink?

14 A Yes, there's another window here beside the
15 refrigerator.

16 Q Okay.

17 A And the sliding glass door.

18 Q And the sliding glass door, is that in the kitchen?

19 A Just offhand to the living room.

20 Q Okay. If you could, probably just easier, if you
21 could step down. So everybody can hear you. And
22 just describe, if you could, just stand with your
23 back this way and that way, there you go. Describe
24 to the jury where you were and where he was and what
25 happened there?

1 A Roughly right in here is the sink. Here is the door,
2 that you see the door handle. And he walked in, he's
3 standing approximately right here when he first
4 walked in.

5 Q And where were you when he first walked in?

6 A I was standing at the sink.

7 Q Okay. Then when -- when he told you to get on floor,
8 where did you go?

9 A I laid face down. My head was kind of this way
10 towards the door. I was laying face down right here
11 on the floor.

12 Q And what was he doing while you were on floor?

13 A He walked in and straddled my legs as I was laying
14 face down.

15 Q Why did he do that?

16 A He grabbed my wallet.

17 Q Where was your wallet?

18 A In my right, back pocket.

19 Q Okay. Did he grab anything else?

20 A My cell phone.

21 Q What happened at that point?

22 A He said something I couldn't understand and I kind of
23 turned my head. And when I did, he poked the pistol
24 between my shoulder blades. And he started looking
25 through everything in my wallet. And he told me-- I

1 asked him not to kill me. I have a wife and kids.

2 And he said, I ain't here to kill you, I just
3 want your money.

4 Q And so were you able to look at him after that? Did
5 you make any attempt to?

6 A No, I was afraid I was going to get shot.

7 Q Could you tell what he was doing while you were
8 laying on the ground?

9 A He laid my wallet up on the counter, I could hear him
10 scuffling around and stuff. And then he said he was
11 wiping stuff down, told me not to look up for a few
12 minutes. I heard him go out the door.

13 Q Did you hear the door -- when you got up were you
14 able to see out the door?

15 A No, the door was pulled to.

16 Q Was it closed all the way?

17 A No.

18 Q What did you do?

19 A I just -- I got up and all my stuff was laying on the
20 counter. I didn't bother to put it back up, I just
21 grabbed everything up and went to the truck. As I
22 come out the door I did lock the door. I went to the
23 truck and called 911.

24 Q Okay. Take your seat.

25 A (The witness complies.)

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1 MS. TESSITORE: Your Honor, the State would
2 request to publish 9 through 12 to the jury.

3 THE COURT: You may do so.

4 BY MS. TESSITORE:

5 Q Now, Mr. Gordon, when you say you got your stuff off
6 the counter, gathered it up, went out and called 911,
7 what was it that was on the counter there?

8 A I had like Lowe's, Home Depot card, I had a debit
9 card, just receipts. Just like little business
10 cards, stuff like that.

11 Q Okay. Did you have any cash in there?

12 A I did realize that I had \$26.00 tucked away. I
13 didn't realize it at the time until I started putting
14 everything back together.

15 Q Okay. Can you describe to the jury just a little bit
16 about the wallet that you had and where the money was
17 and...

18 A It was a -- at the time I had a trifold wallet. I
19 don't know if you understand what a trifold is but --
20 can I pull my wallet out?

21 Q Sure.

22 A I've got a bifold wallet now and it's got little
23 pockets like right in here. I had like 26 bucks hid
24 back in here. Hiding it from my wife, I guess.
25 But -- but I didn't realize it until I was out there

1 putting everything back in my wallet.

2 Q And where was the lottery ticket?

3 A The lottery ticket was just up front. I mean, it was
4 like right here. Just down where you stick your
5 money.

6 Q So --

7 A And I put the lottery ticket in the same place I put
8 it every time I buy it, right there. That way when I
9 know it's time to check them, I know where it's at.

10 Q All right. What kind of lottery ticket was that?

11 A Power Ball.

12 Q When was the drawing for that?

13 A It was that night, it was that Wednesday night.

14 Q So you don't know if teffs even a winning ticket yet?

15 A No.

16 Q Do you recall how much you paid for it?

17 A Three dollars.

18 Q So how quickly did he go through your wallet and the
19 items inside?

20 A It was, I would say it was pretty quick. I mean, you
21 know, I just -- I had all kinds of things going
22 through my mind, I didn't set there with a watch and
23 try to time everything.

24 Q Of course. Did -- so what was missing? Were you
25 able to figure out what was missing?

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1 A The only thing I figured out was missing -- I mean, I
2 had my debit card. That was the only thing of value.
3 And I still had it. The only thing I figured out was
4 my lottery ticket was gone.

5 Q So no quick cash if someone were to go in your wallet
6 to try to find it quickly?

7 A No.

8 Q And when you went out and called 911, where did you
9 go out to call 911 from?

10 A I went out to my truck.

11 Q Was anyone out there when you went out there?

12 A No.

13 Q Were you able to see how the robber left or how, you
14 know, as far as foot, car?

15 A No, I could not tell.

16 Q Did -- so you went to your vehicle and called 911.
17 And what kind of response did you get?

18 A Dispatcher come and asked me where I was, what I
19 needed, excuse me, and where I was at.

20 Q So did an officer come out?

21 A Yes.

22 Q And were you able to -- was that Officer Bradley?

23 A Yes.

24 Q And when you met with Officer Bradley -- about how
25 long did it take them to get out there,

1 approximately?

2 A Like I said, I'm not exactly sure. I couldn't tell
3 you. I was nervous and I that part I don't remember.

4 Q Okay. Were you still feeling the effects of what had
5 just happened?

6 A Yes.

7 Q And when Officer Bradley got out there, what did you
8 do?

9 A Well I was still on the phone with dispatch and
10 they -- I seen him coming so I told them -- then I
11 got out of the truck, he was pulling into the parking
12 lot.

13 Q Okay. Did you speak to him?

14 A Yes.

15 Q Did you tell him what had happened?

16 A Yes.

17 Q Were you able to provide him the description that you
18 gave here today?

19 A Yes.

20 Q And did he take a statement from you as well?

21 A Yes.

22 Q Did you try to provide that information in the
23 statement?

24 A Yes.

25 Q Did -- how would -- you how would you describe the --

- 1 you said a mustache and a goatee, right?
- 2 A Yes.
- 3 Q How would you describe it compared to, I guess, the
- 4 width and shape?
- 5 A It was just --
- 6 Q Of yours.
- 7 A -- to me a mustache is a mustache and a goatee is any
- 8 type of hair you can see down here on your chin.
- 9 Q Okay. And was it -- was there anything about it as
- 10 far as was it thick, was it thin? I mean, what --
- 11 can you describe it just as far as?
- 12 A I mean, it was just dark. It wasn't real full.
- 13 Q Did it look like it had been trimmed or did it look
- 14 scruffy?
- 15 A No, it had been trimmed.
- 16 Q Okay. Did -- did he have any glasses on or anything
- 17 or obscuring his face?
- 18 A No.
- 19 Q Anything on his head?
- 20 A No.
- 21 Q Other than the dreadlocks?
- 22 A No.
- 23 Q And were you able to look at him more than just out
- 24 the corner of your eye?
- 25 A Yes, I turned my head.

1 Q At some point did you ever face him face-to-face?

2 A Yes.

3 Q When was that?

4 A While I was standing at the sink. Then when I said,
5 Can I help you? And then I turned. And that's when
6 he pulled the gun out and said, You need to get down
7 on the floor on your face. And I think I asked him
8 again, I said, Do what?

9 He said, You can get down on the floor on your
10 face.

11 Q Okay. Did -- were you able to see what he had in his
12 hand? You said it was a gun?

13 A All I could tell it was black pistol and I knowed
14 [sic] it was an automatic.

15 Q Did -- are you familiar with guns?

16 A Yes.

17 Q Okay. Just one moment, please. Okay. Now, as this
18 was going on, did you make any effort to try alert
19 anyone as it was happening?

20 A No.

21 Q And why not?

22 A Well I had a gun pointed at me. If I screamed or
23 hollered, I'd likely got shot.

24 Q And when you came out, did you go to the neighbors,
25 did you see anyone or try to talk to anyone before--

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1 A No, I went straight to the truck because of the way
2 the apartment was, I -- I didn't know if he was
3 waiting outside or not. I went straight to the
4 truck.

5 Q And did -- after Officer Bradley got out there, spoke
6 with you, got the description, did -- did any other
7 officers come out there?

8 A Yes, forensics came out and took fingerprints.

9 Q And did you talk to that officer?

10 A Yes. I took him back into the apartment. So he
11 could do what he had to do.

12 Q And when you went into the apartment, did you speak
13 with him in there?

14 A I just -- I told him where I was at and where all my
15 stuff was and that he had said, you know, that he was
16 wiping everything down.

17 Q Okay. So you showed him where this took place?

18 A Yes.

19 Q All right. And after--

20 THE COURT: Solicitor, at this point let's take
21 a break. I hate to interrupt your examination.

22 Ladies and gentlemen, I'm going to let you go to
23 your jury room, do not begin your deliberations, do not
24 discuss the case. We'll with you in about 10 minutes.
25 Thank you, you may retire to your jury room.

1 (WHEREUPON, the jury left open court at
2 approximately 3:50 p.m.)

3 THE COURT: Sorry, to interrupt you, Solicitor.
4 We've been here -- Ms. Herron has been very patient and
5 kind, been going for over two hours. So I think it's time
6 to give her a break and me a break and you and everybody
7 else a break. So I apologize for the interruption.

8 Mr. Gordon, during this break you may have step
9 down but do not have any conversation with any of the
10 lawyers, please.

11 We'll be ease for 10 minutes, please.

12 Anything from the State before we recess?

13 MS. TESSITORE: Your Honor, just briefly. This
14 is -- we're getting close to the point where I will be
15 showing the witnesses the gun that has been -- that was
16 seized.

17 THE COURT: You're welcome to show him whatever
18 you want to show him.

19 MS. TESSITORE: Yes, sir.

20 THE COURT: But I don't know that he'll be able
21 to identify it. Just have it marked for identification.

22 MS. TESSITORE: Right. But I just wanted to
23 alert the Court just because of the firearms policy. It's
24 all strapped down into a box.

25 THE COURT: That's fine. Okay.

1 MS. TESSITORE: Okay.

2 THE COURT: All right, anything from the
3 Defendant before we recess?

4 MR. ROBINSON: No, Your Honor.

5 THE COURT: We'll be at ease for 10 minutes,
6 please.

7 THE WITNESS: May I go to the bathroom?

8 THE COURT: Yes, sir, you're sure can. Just
9 don't have any conversation with any of the attorneys.

10 (WHEREUPON, a short break was taken.)

11 MR. ROBINSON: Your Honor, before the jury comes
12 in, if I could just -- I think in a few moments she's
13 going to try to use the gun.

14 MS. TESSITORE: I'm not going to use--

15 MR. ROBINSON: Show the gun they found in the
16 hotel room. I'm going to object that -- to much of that.

17 THE COURT: Okay.

18 All right, let the record reflect Mr. Thomas is
19 present.

20 What's the firearm that you're going to show?

21 MS. TESSITORE: Your Honor, it is a black with
22 some silver on the grip, automatic pistol that was seized
23 when the Defendant was arrested, two months later, he was
24 in a motel room. No one else was in the motel room but
25 him. And there was a pouch within his grabbing area that

1 was seen by the officer who was making the arrest. For
2 officers safety, he picked up the pouch, felt like what
3 was inside was a gun. he opened it, there was a black
4 semi-automatic pistol that was similar in color and style
5 as far as it being automatic and not a revolver. And it
6 was seized.

7 What the State will as show later in this case
8 is that there was also -- well they -- the gun was dusted
9 for print, no prints were found on the gun. However, they
10 went back and looked at a dice game package that was in
11 the same pouch with the gun, and the forensic officer was
12 able to lift a print and that print came back to this
13 Defendant. So there is a fingerprint that the State
14 intends to introduce that makes it even more relevant and
15 highly probative that this was this Defendant's gun, the
16 gun matched the description. The State can proffer the
17 testimony of the victim but that, you know, it's -- I was
18 just going to show the item marked as State's Exhibit for
19 identification 14. And I--

20 THE COURT: How is it going to be shown to the
21 jury?

22 MS. TESSITORE: I was simply going to have
23 the -- I can show, Your Honor. It's in a box and just
24 have him look at the box, open the box, look at it and
25 tell me if he recognizes it, does he know what it is.

1 THE COURT: We'll that's the problem, he can't
2 recognize that. He doesn't know that that's the gun. I
3 mean, it's premature. First of all, for him to say I
4 recognize it, how is he going to recognize that gun as
5 being the gun that was in any way connected to him? To
6 the Defendant? At this point. For him to do that you
7 really are kind of -- you can ask him what does that look
8 like? Does that look like the gun that you saw? That --
9 there was a photograph in the case I was telling you about
10 that I tried last week. He said, Yeah, that looks like
11 the gun. And it was mark marked for identification. But
12 he can't ask him if he recognizes that gun. I'm not going
13 to allow him to speculate. Because he's got to speculate
14 as to whether or not that was the gun or not.

15 MS. TESSITORE: Well I think that -- well I can
16 certainly ask him, Does look like the gun that was used?
17 And then introduce this through the arresting officer.

18 THE COURT: All right, as along as it's not
19 shown to the jury.

20 MS. TESSITORE: Correct.

21 THE COURT: And you can object to it at that
22 time, Mr. Robinson.

23 MR. ROBINSON: I will have an objection when the
24 officer comes forward about this.

25 THE COURT: I'll sure they will, that's fine. I

1 don't know what he's going to testify to yet. But I'll
2 deal with that as it arises. Thank you. Okay.

3 State ready to continue?

4 MS. TESSITORE: Yes, sir.

5 THE COURT: Defendant ready to continue?

6 MR. ROBINSON: Defense is ready, Your Honor.

7 THE COURT: All right, let's bring in our jury,
8 please.

9 (WHEREUPON, the jury came into open court at
10 approximately 4:05 a.m.)

11 MS. TESSITORE: Your Honor, can I just get this
12 premarked?

13 THE COURT: Sure, sure.

14 (WHEREUPON, State's Exhibit No. 14 was marked
15 for identification only.)

16 THE COURT: Very well. I kind of suspected
17 that.

18 Ms. Dunlap, as I understand you've been selected
19 as the presiding juror?

20 PROSPECTIVE JUROR: Yes, sir.

21 THE COURT: Thank you, very much.

22 Thank you, ladies and gentlemen.

23 That, of course, will be your seat for the
24 balance of the trial. I appreciate it.

25 Thank you, please give your attention now to

1 this witness that's continuing. And I apologize to you.
2 We try to -- I told you when we were qualifying you about
3 hour an a half. And we didn't go quite an hour that you
4 were in here but we started at 1:30. So the Court
5 Reporter and other staff and me included, we needed a
6 short break. So I apologize to you. Thank you.

7 Thank you, Solicitor, you may continue
8 examination.

9 MS. TESSITORE: Thank you, Your Honor.

10 BY MS. TESSITORE:

11 Q Mr. Gordon, going back to the gun that you saw in the
12 Defendant's hand, did -- how did -- can you show the
13 jury how he held that gun when you saw it? How he
14 was holding it?

15 A Just pointing it straight.

16 Q Okay. And was there anything about length of it or
17 size of it that you recall?

18 A All I could see was the barrel. I could tell it was
19 black. I could not tell the length of it.

20 Q Okay. Nothing distinctive about the butt of the gun?

21 A No. I could tell it was not a revolver.

22 Q Okay. And how could you tell that?

23 A A revolver has got a cylinder that turns that as it
24 revolves the shells around and this was flat.

25 Q Okay. I'm going to show you what's been marked as

1 State's Exhibit No. 14. I'm going to ask you to go
2 ahead and just take a look at that.

3 A (The witness complies.)

4 Q If you could just turn it, there you can go. And
5 does that appear similar to the gun that was held in
6 hand?

7 A Yes. I'm not saying that is gun but it's similar to
8 it.

9 Q Okay. You didn't have time to ask for the serial
10 number?

11 A No.

12 Q All right. Let's talk about when -- did you meet
13 with Investigator Flavell after -- let me take you
14 back one step. After you met with the forensics
15 officer, who was the second one to come out there and
16 retrieved evidence, where did you go from there?

17 A I went home.

18 Q Okay. And when you got home did you talk to anybody
19 or talk to the?

20 A No. I got home and I reckon it hit me as to what
21 could have really happened. And I sat down on the
22 porch and just started balling. And I called my
23 momma. Because my wife wasn't home from work yet.

24 MR. ROBINSON: Objection, Your Honor, relevance.

25 THE COURT: I'm going to allow some -- allow a

1 little bit of this but I understand your objection. Let
2 him finish his answer.

3 You may complete your answer.

4 THE WITNESS: But my wife wasn't home from work
5 yet so I didn't have nobody else to talk to. It just, I
6 guess, it just hit me what could have really happened.

7 BY MS. TESSITORE:

8 Q Did you talk with Detective Flavell that day?

9 A No.

10 Q Okay. Did he get in contact with you after that day?

11 A Yes.

12 Q All right. Do you recall meeting with him -- let's
13 see -- well did you speak with him on the phone?

14 A Yes.

15 Q And when did you speak with him on the phone in
16 relation to when this happened?

17 A It was a couple of days later. I'm not exactly sure
18 which day.

19 Q And when you spoke to him a couple days later, were
20 you able to provide him the physical description that
21 you gave Officer Bradley?

22 A Yes.

23 Q And did he schedule a time for y'all to meet?

24 A No, that I recall.

25 Q Did you meet Detective Flavell at the Law Enforcement

1 Center?

2 A Yes.

3 Q Do you recall when that was?

4 A That was six days later.

5 Q All right. And prior -- well when you met Detective
6 Flavell six days later, where did you meet him?

7 A At the Law Enforcement Center.

8 Q And was anyone else with you?

9 A No.

10 Q Was there any other officer there with Detective
11 Flavell?

12 A No. I mean, there was other officers there but.

13 Q All right. And when you got there and met with
14 Detective Flavell, what happened?

15 A He took me to his office.

16 Q And what did you do when you got to his office?

17 A He sat down and started telling me -- asking if I had
18 ever seen a photo array. And no. He told me he was
19 going to show me one.

20 Q All right. Did he explain to you what a photo array
21 was?

22 A Yes.

23 Q What did he tell you about that photo array?

24 MR. ROBINSON: Objection, Your Honor, hearsay.

25 THE COURT: Sustained.

1 BY MS. TESSITORE:

2 Q Okay, when you met with him, did he show you a photo
3 array?

4 A Yes.

5 Q And how -- do you recall how many pictures were in
6 the array?

7 A Six.

8 Q I'm going to show you -- in just one moment I'm going
9 to show you State's Exhibit No. 2 and ask you to take
10 a look at that. Do you recognize that?

11 A Yes.

12 Q What is that?

13 A That's the photo array that the Detective Flavell
14 showed me.

15 Q Okay. And did you place any markings on that?

16 A I did.

17 Q What did you -- well first of all, how did Detective
18 Flavell show that to you?

19 A He had it upside down, gave it to me across his desk,
20 laid it front of me.

21 Q Then what did you do?

22 A I picked it up and looked at it.

23 Q Show the jury when you did look at it, how you looked
24 at it and what you did.

25 A I just looked at it, pointed at number five.

1 Q Okay. What -- by pointing on number five, what were
2 you saying?

3 A That that was the guy that robbed me.

4 Q Had you seen any other photographs before that photo
5 array that was shown to you?

6 A No.

7 Q Had you seen any type of line-ups of any kind?

8 A No.

9 Q And had you ever seen a photo array -- have you ever
10 been a victim in a case before?

11 A No.

12 Q Did -- after you indicated your selection, number
13 five, what did -- how did you indicate that number
14 five was your selection?

15 A I put my initial in the box.

16 Q Okay. And did you -- is there any other writing that
17 you recognize on that?

18 A Yes.

19 Q What writing is on that?

20 A Below it I wrote that -- would you like for me to
21 read it?

22 Q Sure.

23 A Person number five is the person who walked in on me
24 washing my hands, pulled a pistol, told me to get on
25 the floor. Then went through my wallet looking for

1 money. And when I turned my head, he put a pistol
2 in my shoulder blades, said, Look at the floor. Then
3 I signed it.

4 Q So your name appears on there?

5 A Yes.

6 Q All right. And did you see any other photo arrays
7 after this?

8 A No.

9 Q Did Detective Flavell make you feel, when you were
10 there, any kind of pressure that you had to make a
11 selection?

12 A None at all.

13 Q Did Detective Flavell suggest any of those pictures?

14 A No.

15 Q When you came in? Did Detective Flavell provide you
16 any information about the name of the suspect or
17 anything identifying?

18 A No.

19 Q Did -- when you selected number five, how certain
20 were you that that was the person who robbed you?

21 A I was pretty sure. I mean, I was almost a hundred
22 person.

23 Q Did -- do you see that person in the courtroom here
24 today?

25 A Yes, I do.

1 Q Could you point him out, please?

2 A Yes.

3 Q And you're pointing to? Can you describe what he's
4 wearing?

5 A Jacket, white shirt and yellow tie, glasses.

6 MS. TESSITORE: Let the record reflect that the
7 victim has identified the Defendant.

8 THE COURT: So reflects.

9 BY MS. TESSITORE:

10 Q Now, Mr. Gordon, did the picture that you -- excuse
11 me, the pictures that you looked at, what could you
12 see about him in that picture?

13 A Dreadlocks, his face features, just, I mean, when you
14 got a gun pointed at you, looking at him eye to eye,
15 I reckon, you know, that's burnt there.

16 Q And would you say when he pulled that gun, what was
17 your attention level at that point?

18 A I was well aware, you know. I got a gun pointed at
19 me, I'm paying attention to what's going on.

20 Q Were you able to tell in that photo as far as height,
21 weight or anything like that?

22 A I mean, I didn't have a tape measure or set of scales
23 but, I mean, he looked roughly around 5'10. I was
24 figuring late 30's, early 40's, had a black tank top
25 and black shorts on.

1 Q In the photographs that you were shown, how much of
2 the individual is shown in that?

3 A Just basically just his head.

4 Q Okay. Just one moment. Did you -- when you were
5 discussing the procedure with Detective Flavell, was
6 explaining the procedure of how he was going to show
7 you this photo array, did you make any statements to
8 him about what you expected or what -- let me ask it
9 this way. Did you appreciate the seriousness of what
10 you were about to do?

11 A Yes, I did..

12 MR. ROBINSON: Your Honor, objection, relevance
13 in this case.

14 THE COURT: Overruled.

15 BY MS. TESSITORE:

16 Q And when you made your selection, did you say
17 anything to Detective Flavell about your selection?

18 A Told him I don't want nobody innocent being convicted
19 of it.

20 Q Okay.

21 MS. TESSITORE: All right, please, answer any
22 questions that Mr. Robinson may have.

23 THE COURT: You may cross-examine.

24 MR. ROBINSON: May it please the Court..

25 CROSS-EXAMINATION

1 BY MR. ROBINSON:

2 Q Mr. Gordon, do you recall giving two different
3 statements? One to Officer Bradley, one to Detective
4 Flavell, is that correct?

5 A Yes, sir.

6 Q I'm going to ask you to look at what's been marked as
7 Defense No. 1, is that your statement there to
8 Officer Bradley?

9 MS. TESSITORE: Your Honor.

10 THE COURT: Yes, ma'am.

11 MS. TESSITORE: At this point the State would
12 object. He hasn't even spoken with the victim
13 regarding --

14 THE COURT: What's the basis -

15 MS. TESSITORE: -- the --

16 THE COURT: No, excuse me.

17 MS. TESSITORE: Sorry.

18 THE COURT: What's the basis of your objection?
19 If you need to discuss it with me, we'll do a sidebar.
20 What's the basis of your objection?

21 MS. TESSITORE: I'll withdraw it at this point.

22 THE COURT: Thank you. Thank you.

23 THE WITNESS: Yes.

24 BY MR. ROBINSON:

25 Q That's your statement?

1 A Yes.

2 Q Now, looking at that statement, and that has been
3 marked Defendant's Exhibit No. 1 for identification
4 purposes, you don't mention anything in that
5 statement about a lottery ticket, do you?

6 A About what?

7 Q A lottery ticket.

8 A No.

9 Q You didn't mention anything in that statement about
10 money being taken either, do you?

11 A No.

12 Q But you do mention in the statement which has been
13 marked Defendant's No. 1, you did mention in that
14 statement that the person had a goatee, is that
15 right?

16 A Yes.

17 Q All right. And let's look at what's been marked --
18 excuse me, you recognize what's been marked Defense
19 No. 2 for identification purposes, don't you?

20 A Yes.

21 Q And that is your statement to Officer Flavell?

22 A Yes.

23 Q Is that correct? Now, when you gave that statement
24 or -- you were under oath, weren't you? You were
25 told to tell the truth, weren't you?

1 A Yes, sir.

2 Q And you took that very seriously to make sure that
3 you told the truth and everything you said was right,
4 isn't that correct?

5 A Yes.

6 Q And you weren't under the influence of any drugs or
7 alcohol when you gave that statement, were you?

8 A No.

9 Q You were clear minded, you knew what you were doing?

10 A Yes.

11 Q And you were going to tell the truth, isn't that
12 correct?

13 A Yes.

14 Q Now, in your statement to Officer Flavell, which was
15 under oath, and I believe if you could, please,
16 looking at Defendant's, for identification only, No.
17 2, what is printed on the bottom of the statement?

18 A I reviewed the above statement, one of one page and
19 it is true and correct as best I recall.

20 Q All right. Now, in the statement you state that you
21 have a 12th grade education, is that correct?

22 A Yes.

23 Q And you can read and write, right?

24 A Yes.

25 Q And in that statement, in response to Officer

MICHAEL GORDON-CROSS BY MR. ROBINSON

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1 Flavell's questioning about how competent are you
2 that the photo in number five, which is marked in
3 State's Exhibit No. 1, how competent you were, why
4 don't you tell the jury what your response to that
5 was to Officer Flavell.

6 A I'm almost positive that that's guy the. And just
7 about one hundred percent that this is the guy.

8 Q Okay.

9 THE COURT: Mr. Robinson, you can leave those
10 right there with the Court Reporter.

11 MR. ROBINSON: Thank you, Judge.

12 BY MR. ROBINSON:

13 Q I think you also stated to Jennifer Tess --
14 Ms. Tessitore, that nothing of value was taken from
15 you, isn't that correct?

16 A A three dollar lottery ticket.

17 MR. ROBINSON: That's all I have, thank you.

18 THE COURT: Redirect?

19 MS. TESSITORE: No, Your Honor.

20 THE COURT: Thank you, you may come down.

21 Call your next witness, please.

22 MS. TESSITORE: Your Honor, the State calls
23 Officer Bradley.

24 THE CLERK: Officer Bradley, if you'd come
25 forward. Place your left hand on the Bible, raise your

1 right hand.

2 J.C. BRADLEY, after being duly sworn, testified
3 as follows:

4 THE CLERK: Thank you, please be seated. State
5 your name for the record.

6 THE WITNESS: Officer J.C. Bradley.

7 DIRECT EXAMINATION

8 BY MS. TESSITORE:

9 Q Officer Bradley, where do you work?

10 A Greenville City Police Department.

11 Q What do you do there?

12 A I am assigned as a School Resource Officer to
13 Greenville Senior High Academy.

14 Q And how long have you been in that position?

15 A I've been in that position for three years.

16 Q What did you do before that?

17 A I was a training officer in the uniform patrol
18 division.

19 Q How long did you do that for?

20 A About five years.

21 Q And what other training and experience do you have?

22 A Prior to that I was assigned in community services,
23 vice and narcotics. As I said, I'm a field training
24 officer for new recruits. Narcotics identification,
25 accident investigation, incident report writing,

1 communications, pretty much done it all.

2 Q All right. As part of your duties, tell the jury
3 what your duties are in uniform patrol.

4 A Uniform patrol we respond to call response. We go to
5 calls in progress, report of an armed robbery, banks,
6 accident investigation, anything that's reported to
7 911 call, we respond to things like that.

8 Q Okay. Were you working in uniform patrol back in
9 July of 2009?

10 A Yes, ma'am, I was.

11 Q And did you receive a call out to [REDACTED] ?

12 A I did.

13 Q In Greenville city?

14 A Yes, ma'am.

15 Q What was the nature of the call?

16 A The call came out as an armed robbery. I work across
17 town. So that side of town was very busy so I
18 responded. I was dispatched to the call.

19 Q Approximately how long did it take you to respond?

20 A Took about 15 minutes because I was off Laurens Road.
21 And this was by the Amtrak Station off West
22 Washington Street.

23 Q And generally how well -- what did you find when you
24 got there?

25 A I was met -- once I arrived I was met by the victim

1 who advised he had been robbed at gun point.

2 Q Where did you find the victim when you arrived there?

3 A As I pulled into the parking lot, the gravel parking
4 lot outside of another one that was that paved, he
5 was approaching my car.

6 Q Is this the location that we're talking about, [REDACTED]
7 [REDACTED], is that in Greenville County?

8 A Yes, it's in the city limits of Greenville County.

9 Q Okay. When you got there -- about what time did the
10 incident occur?

11 A I believe dispatch time was 15:28 but I think I
12 arrived probably, maybe, before then.

13 Q So 15:28?

14 A That being military time 3:28.

15 Q So 3:28 in afternoon?

16 A Yes.

17 Q All right. Was -- do you recall generally the
18 weather that day?

19 A It was very sunny, it was clear.

20 Q When you found the victim, describe his demeanor when
21 you found him.

22 A As he approached I think his hand was shaking and he
23 had looked like shocked. His hand was shaking and he
24 was very upset. Visibly.

25 Q Was he able to communicate with you?

J.C. BRADLEY-DIRECT BY MS. TESSITORE

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1 A Yes, he was able to communicate very clearly, yes.

2 Q And when you found him there was anyone else around
3 there?

4 A No, no one else was around.

5 Q And you spoke with him about what had happened?

6 A Yes, I wanted to get as much information as possible
7 so we could BOLO, to be on the lookout for the
8 suspect.

9 Q So that's what BOLO stands for?

10 A Just broadcast.

11 Q Bulletin?

12 A Yeah.

13 Q So the information that you relaid to dispatch to
14 relay to other officers, why was it so important that
15 you get information out?

16 A Time was of the essence. We didn't know when it
17 happened. Just in case another officer, whether in
18 our jurisdiction or another, came across the
19 individual fitting the physical description.

20 Q What physical description did you have at that point
21 in time to relay?

22 A The victim relaid that it was a black male, dark skin
23 with dreadlocks, 5'10 in height, late 30's, early
24 40's, wearing a black tank top, had black shorts and
25 a black auto pistol.

1 Q And I may have missed it. Did he describe his build?

2 A He advised he was slender build.

3 Q Did he, I may have missed it as well as, height?

4 A 5'10.

5 Q Approximately?

6 A Yes, ma'am.

7 Q Was he able to give you -- give you any indication as
8 far as how he left the area? By foot or by car or
9 anything?

10 A He advised, generally, that he was painting in
11 Apartment A, had no running water. He went down to
12 Apartment D, which was on the same side, to wash his
13 hands. The gentleman came in, gave him instructions
14 to lay on the floor after pulling out a firearm, went
15 through his pocket, got his wallet, got a lottery
16 ticket out of his wallet, didn't find the money
17 because it was hidden in a compartment in his wallet,
18 then exited out the front door.

19 Q Did he -- did he give any information regarding how
20 he left as far as on foot or?

21 A On foot. He said he left the apartment. I assume he
22 left on foot. He didn't say he got into a car.

23 Q And were there any other suspects -- or did you have
24 any suspects at that time?

25 A I did not.

1 Q Did -- did you -- let me step back. Did you go into
2 the unit where this occurred?

3 A Well because it's a crime scene, I didn't enter the
4 apartment where he said it took place. I instead
5 called for forensic unit and waited for their arrival
6 so they could process the scene.

7 Q So when he -- when the forensics officer did arrive
8 at that point, do you recall going into Unit D?

9 A After he processed the scene, I went in afterwards,
10 yes.

11 Q Are you familiar with this area by the way?

12 A Oh yes, I was community patrol officer there for many
13 years.

14 Q And just generally, what -- how would you describe
15 this area there as far as traffic and traffic volume?

16 A If you're familiar with West Washington Street area,
17 it's right across from the Amtrak Station. [REDACTED]
18 [REDACTED] is a small street that goes off to your left
19 if you're traveling down West Washington Street under
20 the trestle where the train tracks go. So it's well
21 traveled as far as foot traffic.

22 Q Okay. I'm showing you State's Exhibit No. 11, take a
23 look at that. Do you recognize that?

24 A I do not. The apartment was vacant. This one
25 clearly is occupied. But I wouldn't be able to tell

1 if it was this apartment or not. Because there were
2 no appliances or anything inside of it at that time.

3 Q So it was vacant?

4 A It was vacant, yes, ma'am.

5 Q Okay. As far as when you were out there, do you
6 recall the layout?

7 A The kitchen -- as soon as you enter the kitchen was
8 directly in front of you. I can't recall what was to
9 the right but the kitchen was to the left, as I
10 recall.

11 Q All right. Do you recall what the lighting was like?

12 A It was very lit. There was no blinds, no curtains,
13 as I stated it was vacant so it was very well lit.

14 Q And did you have any trouble understanding the victim
15 as he described what happened and what he saw?

16 A He was extremely nervous but it was very articulate
17 and he was able to write the statement to that
18 effect.

19 Q And once forensics arrived, did you have any other
20 involvement -- any other involvement in the case?

21 A Other than the statement, providing the victim with a
22 victim witness notification, no, ma'am, that was my
23 involvement completely.

24 Q Did Mr. Gordon indicate whether he had ever scene
25 this man before?

J.C. BRADLEY-DIRECT BY MS. TESSITORE

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1 A No, he did not indicate that he had ever saw him
2 before.

3 MS. TESSITORE: Just one moment, please.

4 THE COURT: Certainly.

5 BY MS. TESSITORE:

6 Q I'm going to show you State's Exhibit 4, 6 and 9 and
7 just ask you to take a look at those. Do you
8 recognize those?

9 A Yes. A would be to the far left and D would be at
10 very end, right there.

11 Q So those the apartments that we're talking about
12 here?

13 A Yes, these are the apartments.

14 Q And you're familiar with that property there?

15 A I am.

16 Q And what is State's Exhibit No. 9?

17 A I believe this one to be Apartment D, where the
18 incident took place.

19 Q As you look in, what's the first thing you saw?

20 A Stove, kitchen to the left, yes.

21 MS. TESSITORE: Please answer any questions that
22 Mr. Robinson may have.

23 THE COURT: You may cross-examine, Mr. Robinson.

24 MR. ROBINSON: May it please the Court?

25 THE COURT: Yes, sir.

CROSS-EXAMINATION

BY MR. ROBINSON:

Q Officer, in your investigation you're speaking with an alleged victim in this case, he never indicated who the person --

A I'm sorry, sir, I didn't hear you.

Q He never mentioned gloves or anything or that nature, is that correct?

A No, sir, not that I recall.

MR. ROBINSON: Okay, that's all I have, thank you.

THE COURT: Redirect.

MS. TESSITORE: None from the State, Your Honor.

THE COURT: Thank you, Officer you, may step down.

You wish the witness be excused, Solicitor?

MS. TESSITORE: Yes, Your Honor.

THE COURT: Any objection?

MR. ROBINSON: No, Judge.

THE COURT: You are free to leave, as well Mr. Bradley.

THE WITNESS: Thank you, Your Honor.

THE COURT: Yes, sir.

Call your next witness, please.

MS. TESSITORE: Your Honor, may we approach?

1 THE COURT: Sure.

2 MS. TESSITORE: Thank you.

3 (WHEREUPON, a bench conference was held
4 off-the-record and in the presence of the jury
5 but out of the hearing of the jury.)

6 THE COURT: All right, ladies and gentlemen of
7 the jury, at this point due to the length of the next
8 witness, I think the better thing to do is give you a
9 little break a little early today. Please remember that
10 you're not at liberty to talk about this case among
11 yourselves. Certainly you're not at liberty or should you
12 permit anybody to talk about the case in your presence or
13 talk directly to you about serving on this case. And that
14 would include anyone that might be at home tonight when
15 you go home. Imagine the first question is going to be,
16 What are you doing? What's the case about? Great
17 temptation to talk about it. But if you do you will have
18 violated the oath that you took today. Because you would
19 have started your deliberations by discussing this case.
20 Because obviously unless you're going to give word for
21 word, which I don't think we're capable of doing, you're
22 starting to summarize the case mentally. And that's
23 normal human trait but you haven't concluded or
24 articulated anything. So refrain from doing that. You'll
25 finish this case this week. Then if you want to talk

1 about it you may do so. But until then talk anything else
2 but this case.

3 Please also, and any of you that might have
4 children, as you know, the last thing you want to do is;
5 tell a child not do something because that's the first
6 thing they want to do. At least my children did, I don't
7 know about yours. But so sometimes we're adults but we
8 really still -- I use to always say we're sophisticated
9 children. But one thing we have to remember, we live in a
10 information society. But you're not at liberty to do any
11 independent research in this area. In any aspect of it.
12 And if you do, you will jeopardize all the efforts and
13 energy we've spent thus far.

14 I'll share this with you just to show you it's
15 perfectly innocent. But we had a case years ago in my
16 home circuit and right before we went to the jury with
17 closing arguments and charge, the case was resolved. And
18 I stepped back to tell the jury that the matter had been
19 resolved and they were excused. And one juror said, Well
20 I'm delighted to know that because I was wondering after I
21 went online last night and read some law, how they were
22 going to get around this particular issue. And I just
23 shook my head and thanked the good Lord we resolved it.
24 Because it would have just been off and done. So don't do
25 any independent research. If you finish and you want to

1 look at something, please feel free to do so. But right
2 now you must refrain from doing that.

3 Have a great evening, be back in your jury room,
4 please, at 9:30 in the morning. Don't call the number
5 tonight because that message will not apply to you. So
6 see you in the morning at 9:30. Thank you.

7 (WHEREUPON, the jury left open court at
8 approximately 4:40 p.m.)

9 THE COURT: All right, anything from the State
10 before we recess?

11 MS. TESSITORE: No, Your Honor.

12 THE COURT: Anything from the Defendant?

13 MR. ROBINSON: Your Honor, may it please the
14 Court?

15 THE COURT: Yes, sir.

16 MR. ROBINSON: Your Honor, in her opening
17 statement she mentioned something about, if I'm hearing
18 this right, something found in the motel room or arrested
19 at a later point or something like that. I'm really
20 concerned about her -- she got the gun and she identified
21 it look like this, similar, and so forth. But I'm really
22 concerned about her going into this alleged arrest and
23 what they found at the that scene as far as the dice and
24 so forth. There's no indication of any lottery ticket or
25 anything connecting this gun to this particular incident.

1 I'm concerned that the jury may get the impression that
2 this guy is a criminal or whatever, has had another arrest
3 is some motel room. Just concerned about that part of it.
4 As far as objecting, as far as relevance go.

5 THE COURT: Well I appreciate your objection. I
6 I guess you and I have a different understanding and
7 appreciation of what circumstantial evidence means. But
8 the bottom line is I will hear your objection at the
9 appropriate time.

10 MR. ROBINSON: Yes, sir.

11 THE COURT: I understand that if there's some --
12 I don't believe it's against the law, unless he's a
13 convicted felon, to have a firearm in your motel room. I
14 don't believe there's anything wrong with that. If you
15 were otherwise entitled to have it, I believe that room
16 when you, at least my understanding of the law and having
17 been trying cases in Horry County, the first time I
18 encountered it, where there was a burglary of a motel
19 room. Because the person rented the motel room it became
20 their premises. Therefore, when they entered it, it's
21 burglary.

22 So if a person has access to those premises and
23 has a firearm, then it's the same thing as having a
24 firearm in their home. So I don't think see anything
25 illegal about that. Having dice, nothing wrong with

1 having dice. So there's no crime outside of this. Is
2 there a connection to this, that's for the juror to
3 determine. Whether or not there's a link. So I
4 appreciate it. I'm not going to restrict the State from
5 proving circumstantial evidence.

6 MR. ROBINSON: Yes, sir.

7 THE COURT: Thank you, sir. But I'll certainly
8 entertain any objections that you may have.

9 MR. ROBINSON: Yes, sir, Your Honor.

10 THE COURT: Thank you.

11 MR. ROBINSON: Thank you.

12 (WHEREUPON, the proceedings were concluded for
13 the day to be reconvened on September 11, 2012.)
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September 11, 2012

MS. TESSITORE: Judge, I think it seems that we may have been able to arrive at a stipulation as to some of the fingerprint evidence. And if you would just indulge me, I just need a little bit of time to try to sort out what I need to -- how I can trim it.

THE COURT: You want to do that before we start?

MS. TESSITORE: That would be my first witness. So if...

THE COURT: Okay, take your time.

MS. TESSITORE: It will save time if I take a little time.

THE COURT: Yes, ma'am, go ahead.

Let the record reflect that Mr. Thomas is present.

Good morning, Mr. Thomas.

MR. THOMAS: Good morning, Your Honor.

MS. TESSITORE: Thank you, Your Honor.

THE COURT: And you've had conversation with your attorney concerning that stipulation?

MR. THOMAS: I like to ask him --

Scott could I ask --

MR. ROBINSON: Judge, may I?

THE COURT: Sure. I just want to be sure that you were privy to that.

1 (WHEREUPON, an off-the-record conversation was
2 had between Mr. Robinson and Mr. Thomas.)

3 (WHEREUPON, State's Exhibits Nos. 15-18 were
4 marked for identification only.)

5 MR. ROBINSON: I spoke to him again. I spoke to
6 him previously but he is in agreement.

7 THE COURT: Okay, that's fine.

8 MR. THOMAS: Yes, Your Honor.

9 THE COURT: Thank you, sir.

10 MS. TESSITORE: Your Honor, I can go prepare the
11 written stipulation so that it would spell out each and
12 every -- as to what the Defense is agreeing to.

13 THE COURT: Can't we do that at a later point to
14 just supplement the record with that?

15 MS. TESSITORE: Sure.

16 THE COURT: We can just move on. We just won't
17 be asking those questions of this witness. Or is this
18 witness not necessary?

19 MS. TESSITORE: This witness -- I would just --
20 he would be necessary for a very little bit.

21 THE COURT: Okay, just ask those questions and
22 then when we have a break, you can prepare that. And then
23 I'll explain to the jury when we read it what a
24 stipulation is.

25 MS. TESSITORE: Okay, great. Thank you.

1 THE COURT: Sure.

2 (WHEREUPON, State's Exhibits Nos. 19-20 were
3 marked for identification only.)

4 THE COURT: Is the State ready?

5 MS. TESSITORE: Your Honor, if I could just have
6 one minute, I'm sorry.

7 THE COURT: That's fine.

8 MS. TESSITORE: Thank you, Your Honor. Thank
9 you for that extra five minutes.

10 THE COURT: Yes, ma'am.

11 Defense ready?

12 MR. ROBINSON: Yes, sir, Your Honor.

13 THE COURT: Very good. Let's bring in our jury.
14 Thank you.

15 (WHEREUPON, the jury came into open court at
16 approximately 9:41 a.m.)

17 THE COURT: Thank you, very much, ladies and
18 gentlemen. Good morning to you, I hope you had a restful
19 evening. We're now ready to continue the matter we
20 started yesterday.

21 Solicitor, good morning, you may call your next
22 witness.

23 MS. TESSITORE: Thank you, Your Honor. The
24 State calls Doug Smith.

25 THE COURT: Okay.

1 THE CLERK: Mr. Smith, please come forward.

2 Place your left hand on the Bible, raise your right hand.

3 DOUG SMITH, after being duly sworn, testified as
4 follows:

5 THE CLERK: Thank you, please be seated. State
6 your name for the record.

7 THE WITNESS: Douglas Smith.

8 DIRECT EXAMINATION

9 BY MS. TESSITORE:

10 Q Mr. Smith, where do you work?

11 A Currently I work for Ogletree Deakins.

12 Q What is Ogletree Deakins?

13 A It's a law firm.

14 Q And what are you doing at that law firm?

15 A I'm a computer analyst.

16 Q And when did you begin working with Ogletree Deakins?

17 A May of this year.

18 Q And before you began working there, where do you
19 work?

20 A Greenville County Forensics Division.

21 Q How long did you work with the forensics division?

22 A Just a little over eight years.

23 Q Eight years?

24 A Yes, ma'am.

25 Q And in those eight years, what were your titles and

1 what kind of work does that involve?

2 A I was a Senior Forensics analyst. My job was to
3 process crime scenes, locate, collect, preserve
4 forensic evidence related to crimes.

5 Q And so how many crime scene's do you think in your
6 whole career, do you think you processed?

7 A A little over 6000.

8 Q And as part of your duties, did you -- what kind of
9 training and -- I guess training did you have?

10 A I have a Bachelor's of Science in Criminal Justice.
11 I'm a graduate of the South Carolina Criminal Justice
12 Academy. I had a nine week training with the South
13 Carolina Criminal Justice Academy. I had a 26 week
14 FTO program with the Greenville Police Department. I
15 did three years on the road with Greenville Police
16 Department. I did a six month FTO program with
17 Greenville County Forensics. Been to numerous
18 advance training and processing for fingerprints.
19 Advance photography, digital, computer forensics.
20 Shooting reconstruction. Just on-going training the
21 eight year tenure in the forensics division.

22 Q So with all that fun, what led you to leave the
23 forensics to go the job that you're in now?

24 A Personal reasons, family.

25 Q Okay. What kind of hours did you work when you were

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1 working with the forensics division?

2 A Typically 12 hour shifts. Rotating nights, weekends,
3 every two weeks.

4 Q With a family? Do you have family?

5 A Yes, two small kids. Makes it difficult.

6 Q So going back to when you were working with the
7 forensics division back in July of 2009, is that
8 correct?

9 A Yes.

10 Q And what was your title at that point?

11 A I was a Senior Forensics Investigator.

12 Q And did you respond to the call at Unit D, [REDACTED]

13 [REDACTED] in Greenville?

14 A Yes, I did.

15 Q Is that in Greenville County?

16 A It's in Greenville city.

17 Q Okay. Is that within Greenville County?

18 A Yes.

19 Q When you responded to that call, approximately what
20 time did you arrive?

21 A I arrived a few minutes after four o'clock in the
22 afternoon.

23 Q What was the -- what was the lighting like there?

24 A It was middle of the day, bright, very few clouds.

25 Q Okay. I'm going to show you State's Exhibit 6 and

1 ask you to take a look at that and tell the jury what
2 that is.

3 A Do I need to show them?

4 Q Well take a look at it, do you recognize it?

5 A Yes, that's Apartment D, [REDACTED].

6 Q Is that the unit that you responded to?

7 A Yes.

8 Q All right. And what is State's Exhibit 9, do you
9 recognize that?

10 A It's the same door, just opened for Apartment D.

11 Q I'm sorry?

12 A It's Apartment D.

13 Q Apartment D. And I'm showing you State's Exhibit No.
14 10, do you recognize that?

15 A Yes that's inside the Apartment D. The only
16 difference is it's occupied now.

17 Q When you were there, what was the condition of that
18 apartment?

19 A It was an unoccupied apartment, ready for rent.

20 Q Okay. Did -- did you take photographs when you were
21 out there?

22 A No, I did not.

23 Q And why didn't you take photographs?

24 A After speaking with the victim, he advised that he
25 had no visible injuries, there were no torn

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1 impressions. There was nothing substantial to be
2 photographed at that point.

3 Q Okay. So these photographs were taken after?

4 A Yes, ma'am.

5 Q Now, when you arrived on the scene, what -- tell the
6 jury what your focus is and what you did.

7 A Upon arriving on the scene, I spoke with Officer
8 Bradley originally. He advised that --

9 MR. ROBINSON: Objection, Your Honor, hearsay.

10 BY MS. TESSITORE:

11 Q Without getting into what Officer Bradley told you --

12 THE COURT: Sustained.

13 BY MS. TESSITORE:

14 Q Did you speak with the Officer Bradley?

15 A Yes, I did.

16 Q Okay. And based on the information that he relaid to
17 you, what did you do then?

18 A I spoke with the victim and first inquired if he had
19 any visible injuries. He advised he did not. At
20 that point I had him take me to the thresh hold of
21 the apartment, Apartment D and advised exactly what
22 had transpired, what had taken place so I could
23 identify what my next course of action would be.
24 Whether I needed to take pictures, whether I needed
25 to process the floor, whether I needed to process the

1 door. What parts of the apartment I would actually
2 be able to assist processing.

3 Q Okay. When you say processing, can you explain to
4 the jury, what does that mean?

5 A Processing is looking for fingerprints. Whether they
6 be latent fingerprints -- once you can't see patent
7 prints which are visible or plastic prints, which are
8 3D model of the fingerprint soft surface, is just
9 trying to identify what surfaces the suspect could
10 have handled. Which would be areas I would
11 concentrate to actually process for fingerprints.

12 Q What areas were those in this crime scene?

13 A In this instance the first thing I did before we went
14 back into the apartment is called a bleb lighting
15 technique to make sure there were no footwear
16 impressions before I walked into the apartment. The
17 apartment had linoleum floor. We identified the
18 door. The surrounding area around the door and the
19 countertops as potential areas that we could process
20 for fingerprints.

21 Q Okay. And that's basically the information you
22 received from Officer Bradley?

23 A That's based off information I received from the
24 victim.

25 Q Now, were you able to locate any prints?

1 A I located prints on the exterior and interior of the
2 front door.

3 Q Okay. Had you -- what was the first thing that you
4 processed?

5 A Would have been the front door.

6 Q Front door.

7 A The area around the front door, the front door.

8 Q Okay. And can you describe just as far as when you
9 processed that door, what do you use to process?
10 What did you use to process that door?

11 A Typically we have several different types of powder.
12 I'm sure y'all have seen crime scene on T.V, they
13 have different color powder for different surfaces.
14 This one it would just be a standard charcoal gray,
15 it's a carbon powder basically flat color. Process
16 it with a camel hair brush, a light brush. And I
17 would do the area typically about eye level to about
18 knee level, all the way around the door, door frame.
19 In this instance the side of the apartment complex
20 was not suitable for processing textured surface.
21 The only thing I was able to process was the door,
22 the door frame and the door handles on both sides.

23 Q Okay. So you process both the interior side and the
24 exterior side?

25 A Yes.

1 Q Okay. I'm going to show you -- I'm going to show you
2 State's Exhibit No. 15 and 16. And just have you
3 take a look at those. And what are those?

4 A This would be a latent envelope that I sealed on the
5 scene after the lifting three latent prints from the
6 incident location.

7 Q Okay. Is that State's Exhibit No. 16 you're
8 referring to?

9 A Yes.

10 Q Okay. And is your handwriting on there?

11 A Yes.

12 Q Okay, when was that filled out?

13 A On scene at 4:35. It gets filled out as soon as I
14 clear the scene and sealed.

15 Q Okay. Now, let's go back to the other State's
16 Exhibit No.?

17 A Fifteen.

18 Q Fifteen, what is this?

19 A This is a latent lift, one of three, from the
20 interior side of the door.

21 Q Okay. When you say latent lift, what does that mean?

22 A It is a tape lift that physically transfers the
23 latent prints that become patent due to powder
24 processing on to the back of a card. It gives it the
25 ability to submit to our latent division.

1 Q Okay. What I would like you to do is, if you could
2 step down in front of the jury and use your art
3 skills. Just diagram, we're going to focus on the
4 interior of the door where you had lifted the one
5 print there.

6 A Print was lifted between the deadbolt, which is a
7 double deadbolt lock to the door handle to the
8 interior side of the door.

9 Q And so what was the door knob?

10 A This is the key lock, this is the actual handle.

11 Q Okay. And were you able to find any other prints
12 around that area on this interior?

13 A On the interior side, no.

14 Q Okay. Did -- did you also, when you were out on the
15 scene, how do you -- how do you document that print
16 that you found?

17 A As I find the print, it's covered with a latent tape
18 lift. As it's lifted off it's placed right on the
19 card. That card is filled out at the time that the
20 latent is placed on the back of it with the
21 corresponding information. The case information,
22 date information, incident location and the
23 description of where the print was physically lifted
24 from. Inside the door, what part of the door.

25 Q Were you working alone?

1 A Yes.

2 Q And who filled that out?

3 A I did. I can tell because that my handwriting on the
4 cards...

5 Q All right. And when you lifted that print, how do
6 you go about if they're other prints that you lift?
7 In what order as far as writing on the card and
8 documenting that?

9 A Typically, outside edge. Front door is processed. I
10 lifted the first one. I identified the front door as
11 the only location that had any prints that I was
12 going to the lift. As I left the apartment I
13 processed the tape lifts from the inside of the door
14 out on my way out. So one was from interior side and
15 two and three were from the outside as I left the
16 apartment.

17 Q Okay. And once you lifted it off the interior of the
18 door, do you immediately fill out the card?

19 A Yes, the cards filled out as the tape lift is
20 physically taken. These are in packs of 50. As
21 they're physically taken off the door, they're placed
22 on the back of the card. The card is then flipped
23 over and filled out. The diagram, and I know it
24 doesn't seem like a lot but this had three on the
25 scene, had 150. So it -- you have to fill them out

1 as you lift the print to help keep up with them or
2 you would never be able to keep them straight.

3 Q Okay. So documentation is pretty crucial?

4 A Yes.

5 Q And let's see, what did you -- you can go ahead and
6 take the witness stand.

7 A (The witness complies.)

8 Q What did you do with the latent lift that you did --
9 well let me step back one more step. Did you process
10 the countertops?

11 A Yes.

12 Q Okay. And what was your -- did you find any prints
13 there on the countertop?

14 A No, I did not.

15 Q Did -- what did you do with the cards once you
16 prepared those?

17 A Once you leave the scene, I can't speak for what
18 other technicians do, but as soon as I leave the
19 scene, and just like latent cards, sometimes you'll
20 work 10, 15 crime scenes a day, the card is filled
21 out on the scene, sitting in your truck in a
22 controlled environment. The cards are cleaned up,
23 filled out, sealed on the back, my initials are on
24 the back, sealed from the scene.

25 Q Okay. And then where do you go from there?

1 A Depends on the day. Other times I may go to
2 different crime scenes or may go back to the crime
3 scene office.

4 Q And when you get back to the office, what do you do
5 with those prints?

6 A These are placed into a locked box for the latent
7 print division to pick up every morning. No one has
8 access, not even in our department, once they're
9 submitted in the box.

10 Q Okay. And once they are put in the box there, where
11 do they go from there?

12 A Latent Prints Division comes pick them up every
13 morning, every weekday morning.

14 Q Who has access to that box there?

15 A Latent Prints Division only.

16 Q Did you collect any other prints from anyone on the
17 scene while you were there?

18 A I rolled a set of elimination prints from the victim.
19 That would be all 10 fingers and both palms. Just so
20 we could eliminate him from any print that was
21 actually lifted off the front door.

22 Q Did you have any other involvement in this case?

23 A No, I did not.

24 Q All right.

25 MS. TESSITORE: Answer any questions that

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1 Mr. Robinson may have, please.

2 MR. ROBINSON: May it please the Court?

3 THE COURT: You may cross-examine.

4 CROSS-EXAMINATION

5 BY MR. ROBINSON:

6 Q Doug, the prints on the outside of the door, those
7 were also sent for -- sent to be tested, is that
8 correct?

9 A Yes, sir, they're sent up in that envelope.

10 Q And that would be exhibit number what?

11 A The envelope would be 16. I don't know what they've
12 been identified as. I don't think they have been.

13 Q So those are prints from the outside of the door,
14 correct?

15 A Yes. There two tape lifts from the exterior side of
16 the front door.

17 Q Okay. And you're not sure what age of the prints,
18 you don't know how long they've been there, anything
19 like that, is that correct?

20 A That's correct.

21 Q They could have been there for weeks, days, you don't
22 really know how long?

23 A I'm not allowed to testify to that, no.

24 MR. ROBINSON: Thank you.

25 THE COURT: Redirect?

1 MS. TESSITORE: No questions, Your Honor.

2 THE COURT: All right, you may come down.

3 You wish Mr. Smith to be excused?

4 MS. TESSITORE: Yes, Your Honor.

5 THE COURT: Any objection?

6 MR. ROBINSON: No, sir, Your Honor.

7 THE COURT: Mr. Smith, you're free to leave,
8 sir.

9 THE WITNESS: Thank you.

10 THE COURT: Thank you.

11 You may call your next witness.

12 MS. TESSITORE: Thank you, Your Honor. The
13 State would call Chris Gary.

14 THE CLERK: Mr. Gary, come forward, please.
15 Pause at the end of the bench. Place your left hand on
16 the Bible, raise your right hand.

17 CHRIS GARY, after being duly sworn, testified as
18 follows:

19 THE CLERK: Thank you, you may be seated. State
20 your name for the record.

21 THE WITNESS: Christopher Adam Gary.

22 THE CLERK: Thank you.

23 DIRECT EXAMINATION

24 BY MS. TESSITORE:

25 Q Good morning, Mr. Gary.

1 A Good morning.

2 Q If you could, just speak up nice and loud. And if
3 you need to pull the microphone in a little bit just
4 to make sure all the jurors can hear you all the way
5 over here. Where do you work, Mr. Gary?

6 A I work for the Greenville County Department of Public
7 Safety in the Forensics Division.

8 Q And how long have you worked there?

9 A I've worked for full-time for over three years.

10 Q What is that -- what's your title?

11 A I'm a latent print examiner.

12 Q What does that entail?

13 A What I do is I take latent fingerprint evidence as
14 well as tire track evidence and footwear impressions
15 from the crime scene section. And I analyze them for
16 quality and I compare them to any known standards
17 that I have. And I issue reports based on my
18 findings.

19 Q And can you describe as far as your -- well, before
20 we get into that, how long have you been working
21 there?

22 A Over three years, full-time.

23 Q Before that where did you work?

24 A Before that I had the opportunity to work for
25 Greenville County part-time for three years as well

1 in the apprentice style training program. It was
2 almost like a internship so to speak. And I also had
3 the opportunity to work for North Charleston
4 Forensics in the same capacity. Just learning the
5 trade because it's a very specialized field. Just
6 learning the trade from other examiners that had much
7 more experience than I had at that point.

8 Q Okay. And what type of specialized training and
9 education do you have as it relates to fingerprint
10 analysis?

11 A Well in 2009 I was actually selected -- I was one of
12 15 in the country to be selected by the national
13 government to go down to Florida to take part in a
14 program that was sponsored by the National Institute
15 of Justice. And it was a latent fingerprint program.
16 It was 10 weeks long, that was about 400 hours of
17 training. Where we went through everything in
18 fingerprints regarding how to compare them. We went
19 through different exercises on how to compare, what
20 to look for. And everything from the very basics of
21 fingerprints all the way up to expert testimony.

22 I also had the opportunity to go to Marshall
23 University for a 40 hour training program there that
24 dealt with the other types of impression evidence as
25 well.

1 Q And after receiving all of that, do you hold any
2 certifications?

3 A Yes, I'm certified by the International Association
4 for Identification. Which is the highest
5 certification that you can hold in the field of
6 latent prints.

7 Q What do you have to do to become certified?

8 A Well to become certified, it's not as simple as
9 taking a test. You have to actually have to meet
10 very numerous prerequisites. You have to have 80
11 hours of acknowledged training in the field. And you
12 also have to have been examining latent fingerprints
13 for a minimum of two years. Once you have met those
14 requirements you can apply to take the test, where
15 they can accept or reject your application. The test
16 is a three part test, it tests your knowledge and it
17 tests your developing of techniques for fingerprints
18 as well as a comparison exercise. That is a total of
19 a 80 hour test. And once you pass the test you're
20 issued a certificate that you're certified by the
21 board.

22 Q And do you receive on-going training as well?

23 A Yes, I'm actually a member the International
24 Association for Identification. And I'm sent
25 articles and I'm also annually tested just to make

1 sure that I'm keeping up-to-date on everything that I
2 need to do to continue to be an examiner.

3 Q And approximately how many latent prints have you
4 analyzed or print comparisons have you conducted?

5 A I conducted ten of thousands of examinations.

6 Q Have you ever been qualified as an expert in latent
7 print analyst?

8 A Yes, I have.

9 MS. TESSITORE: At this point the State would
10 move Mr. Gary be declared as an expert the latent print
11 examination comparison and identification.

12 THE COURT: Wish to examine him as to the
13 qualifications?

14 MR. ROBINSON: I don't, Your Honor.

15 THE COURT: Very well, he will be permitted to
16 render opinions in that area.

17 BY MS. TESSITORE:

18 Q Okay. Mr. Gary, can you describe for the jury what
19 we're talking through and all these CSI terms out
20 there, break it down, what does latent print mean?

21 A All right, a latent print is what we refer to is a
22 fingerprint from a crime scene. If you look at the
23 surface of your hand, your entire surface of your
24 hand is -- it has all these little ridges on it.
25 Kind of like a rubber stamp that we use to have as

1 kids or maybe we still use. And sweat, oil, your
2 makeup, things like that, that's ink for that stamp.
3 So anytime you're coming in contact with something,
4 you're stamping your personal identity on to those
5 objects. And later the crime scene office has to
6 come and look for those prints.

7 Q How do you develop -- how is a latent print
8 developed?

9 A Well, like I said, you're stamping but your not
10 visibly seeing the fingerprint. Because the word
11 latent means hidden. When the crime scene office
12 comes to look for these fingerprints, they have to
13 use a thin -- it's a ground up graphite that actually
14 adheres to the moisture, makeup or whatever you left
15 on to an object. Once it adheres to the object, you
16 can see it, it turns black. And there's also other
17 techniques such as chemical techniques that change
18 those ridges into different colors. So that you can
19 see them. And once they are they're captured either
20 with a camera or captured with a thin, almost like
21 scotch tape that we use at home. We lift it, put it
22 on the back of the card so that there's contrast.

23 Q And how -- tell the jury what is a known print.

24 A Well a known print is, you might have heard of inked
25 print. And that's where we take a standard -- known

1 standard from an individual. We'll roll their
2 fingerprints either electronically or with black
3 printers ink, place it on to a fingerprint card.
4 Where we will put all their personal information
5 including their name, social security number, date of
6 birth and gender, race and any other personal
7 identifiers that are unique to that person. Because
8 we know if these fingerprints belong to this person
9 in front of us.

10 Q What type of equipment do you use to conducted your
11 comparisons?

12 A Well you'll see on CSI where they have all the fancy
13 tools, unfortunately it's not like that in real life.
14 We use a simple specialized magnifier that's
15 especially made for latent print evidence.

16 Q And how many examiners are in your office currently?

17 A Currently, there are myself and three other
18 examiners.

19 Q What type of, I guess, quality control procedures do
20 you have within the office?

21 A Every report that I write or issue based on a case is
22 peer reviewed by another examiner. And all reports
23 go through the captain.

24 Q Okay. So let's talk about why are fingerprints a
25 positive means of identification?

1 A Well fingerprints are a positive means of
2 identification because no two people have the same
3 fingerprints. Not even twins, identical twins. They
4 share the same DNA but they do not share the same
5 fingerprints. Fingerprints are unique to every
6 person.

7 Q And unique to each finger?

8 A Yes, they are. They're actually -- if you were to
9 look at each finger, each finger for every person has
10 a different fingerprint. So each finger is unique.

11 Q What factors effect whether a fingerprint will be
12 left on an object?

13 A Well there's, you know, it's not like CSI where every
14 time you touch an object, you're leaving prints.
15 That's why when the crime scene comes out, they're
16 looking for things that have been tampered with so
17 that they can process it. There's actual a variety
18 of reasons why someone may or may not leave a
19 fingerprint. Weather is an example of that. If it's
20 cold outside we don't sweat as much when it's cold.
21 So we're not putting as much ink on that stamp so to
22 speak. And when we touch objects, we're not leaving
23 our fingerprints behind.

24 If a surface has been painted over or cleaned,
25 any fingerprints that were there have been

1 obliterated, they're not present anymore. Items such
2 as say a gun for example, guns are normally very
3 dirty, they're not very clean. They have grease and
4 they have dust on them. Whenever you touch a gun, on
5 top of all the ridges, all the handling of a weapon,
6 you're not leaving fingerprints like you would think
7 because of the texture of that weapon.

8 Q And if a weapon has a grip or any type of?

9 A Anything --

10 Q I'm sorry, go ahead.

11 A Anything that has like a textured surface or a very
12 dirty surface, you're not going to leave prints on
13 very often at all.

14 Q And what about the effect of if a print were left on
15 a object and someone were to paint it. What's the
16 effect of paint?

17 A Well paint would absolutely cover up a fingerprint.
18 If a fingerprint was left on a surface and someone
19 came along and painted that surface, any fingerprints
20 that were there would not be there anymore. It would
21 essentially be a clean slate with no fingerprints on
22 a fresh painted door or object.

23 Q Okay. And if there hasn't been anything to effect
24 that print, how long can a print stay on a object?

25 A There's no scientific basis for how long a

1 fingerprint can last. And we can't, as examiners,
2 judge that. All we can say is that that fingerprint
3 was there and that person came in contact with that
4 object at some point in time.

5 Q And so if an item were placed in a closed
6 environment, secured and there's a print on that
7 object, would you -- is that print able to be lifted
8 from an object such as that?

9 A Yes. It depends on the condition. I mean, if
10 someone is handling an object, they could rub that
11 print off or if they're washing that object they
12 could certainly take that print off. But if a print
13 is left on an object and no one comes along to
14 manipulate it, move it and it's just left in a
15 storage type condition and it's not harmed, there's
16 no amount of time that it couldn't last. It could be
17 there much later.

18 Q Did -- as part of your duties in July of 2009, were
19 you asked to conduct a fingerprint comparison in this
20 case?

21 A Yes, I was.

22 Q Okay. I'm going to show you State's Exhibit 15 and
23 State's Exhibit 16 in just one minute.

24 (WHEREUPON, State's Exhibits Nos. 21 & 22 were
25 marked for identification only.)

1 BY MS. TESSITORE:

2 Q And I'm going to show to you State's Exhibit 21 and
3 22. And do you recognize those?

4 A Yes, I do.

5 Q What are those?

6 A These are the latent fingerprint lifts that I was
7 speaking of earlier when I was talking about how we
8 collect fingerprints. We place them onto a white
9 backing card and we have the tape lift from the
10 fingerprint where the fingerprint was actually lift
11 and placed on that object.

12 Q How many prints were you asked to examine?

13 A On this specific date on 7/23 of 2009, I was
14 requested to examine three latent fingerprints.

15 Q And who collected those from the crime scene?

16 A Officer Smith.

17 Q And how did -- well, how did they get to you?

18 A Once the crime scene technician collects a latent
19 fingerprint or any latent evidence, they place them
20 into a secured lock drop box. Where only myself and
21 three other examiners, that I speak of before, have a
22 key to it. Every morning that evidence is unlocked
23 by myself or the other three examiners. It's all
24 collected and taken back to my office where it's kept
25 until today.

1 Q And did you examine those three lifts?

2 A Yes, ma'am, I did.

3 Q Okay. And were you provided the known prints of the
4 Defendant?

5 A Yes, I was.

6 Q And what about the prints of the victim?

7 A Yes, I was also provided the victim's elimination
8 prints.

9 Q And as far as the results of your examination as to
10 the latent lift two and three, which would be State's
11 Exhibit 21 and 22, what was your -- what was the
12 result of your analysis?

13 A Latent lift number two was from the exterior side of
14 the door between the lock. So it was of the outside
15 of the door. And I did not make an identification.
16 Latent lift number three was also on the exterior
17 side of the front door and no identifications was
18 made on that print as well.

19 Q And as to latent print number one?

20 A Latent print number one was from the interior side of
21 the front door above the handle, on the inside of the
22 front door. And it was identified as being the
23 number 10, which is the left little finger of Eugene
24 Thomas.

25 Q And did you issue a report as to the results?

1 A Yes, I did.

2 Q Did you prepare that the day that you conducted the
3 comparison?

4 A Yes, ma'am, I did.

5 Q And just one moment. Showing you State's Exhibit
6 number 20, take a look at that. And do you recognize
7 that?

8 A Yes, I do.

9 Q What is that?

10 A This is the latent print report that I issued for
11 this case. It details out where the latent lift was
12 from. As I say, it was from the interior to the
13 door. It describes the individual that I matched,
14 Eugene Thomas. With all the known descriptors, like
15 I was saying, of the known standard such as your date
16 of birth, your gender and race. As well as your
17 name. And it also says that my boss, Andy Renee
18 Sherbert, my sergeant, peer reviewed and approved the
19 issued report.

20 MS. TESSITORE: State would move State's Exhibit
21 No. 20 into evidence based on the stipulation.

22 THE COURT: Any objection?

23 MR. ROBINSON: No objection.

24 THE COURT: Without objection it is admitted.
25 State's Exhibit 20.

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1 (WHEREUPON, State's Exhibit No. 20 was admitted
2 into evidence.)

3 MS. TESSITORE: Thank you, Your Honor.

4 BY MS. TESSITORE:

5 Q Did you have any other involvement as to as to any
6 other -- let me rephrase that. Did that conclude
7 your examination as far as these prints that were
8 found that day on July 22, 2009?

9 A Yes, it did.

10 Q Okay.

11 Your Honor, may we approach?

12 THE COURT: Sure.

13 (WHEREUPON, a bench conference was held
14 off-the-record and in the presence of the jury
15 but out of the hearing of the jury.)

16 MS. TESSITORE: Answer any questions that
17 Mr. Robinson may have, please.

18 THE COURT: You may cross-examine.

19 MR. ROBINSON: Thank you, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. ROBINSON:

22 Q Good morning.

23 A Good morning.

24 Q Let me ask you, you would agree with me that looking
25 at what's been marked State's Exhibit No. 20, which

1 was taken from the inside of the door, you don't know
2 exactly the age of how long these prints had been
3 there or anything like that do you?

4 A No, I do not.

5 Q Could have been weeks, could have been months, you
6 really don't know, do you?

7 A I can testify to the age of a print.

8 Q So you just don't know.

9 A No, sir. The prints, there's no way it's not
10 scientific to state an age for a print.

11 Q So based on your experience, based on your
12 background, you cannot to a reasonable degree of
13 medical [sic] certainty, you cannot say the age of
14 the print, can you?

15 A No, you cannot.

16 Q You also were given prints from the outside of the
17 door that did not match Mr. Thomas, is that correct?

18 A That is correct.

19 MR. ROBINSON: Okay, that's all I have. Thank
20 you.

21 THE COURT: Redirect?

22 MS. TESSITORE: Nothing on redirect, Your Honor.

23 THE COURT: You may step down at this time but
24 you're subject to recall so stay in touch with the
25 Solicitor, please. Thank you.

CHRIS GARY-CROSS BY MR. ROBINSON

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1 MS. TESSITORE: Thank you, Your Honor.

2 THE COURT: You may call your next witness.

3 MS. TESSITORE: Thank you, Your Honor, the State
4 would call Jennifer Hallex.

5 THE CLERK: Ma'am, if you'd come forward.
6 Please pause at the end of the bench. Place your left
7 hand on the Bible, raise your right hand.

8 JENNIFER HALLEX, after being duly sworn,
9 testified as follows:

10 THE CLERK: Thank you, you may be seated.
11 Please state your name for the record.

12 THE WITNESS: Jennifer Hallex.

13 CROSS-EXAMINATION

14 BY MS. TESSITORE:

15 Q Good morning, Ms. Hallex, how are you today?

16 A Good.

17 Q Are you familiar with the units out at [REDACTED]
18 [REDACTED] in Greenville?

19 A Yes.

20 Q How are you familiar with that?

21 A I'm the property manager.

22 Q And is that what you do now?

23 A Yes.

24 Q How long have you been the property manager for that
25 property?

1 A Since October of 2008.

2 Q Okay. How is it -- just tell the jury a little bit
3 about how -- kind of what your duties are and how you
4 came to be the manager for that property, just give
5 them a little background?

6 A My duties -- well first how I became manager of the
7 property I have property owners contact me via
8 website or however to ask me to do services of
9 managing the property. Which includes soliciting for
10 new tenants, showing the property, taking their
11 application. If they are proved, then, you know, I
12 collect their security deposit and rent or lease and
13 collect the rent each month to the pay the owner at
14 the end of each month for the term of the management
15 agreement, however long that may be.

16 Q Okay. And what is the size of your operation, of
17 your company?

18 A It's just me. I'm the owner and I run it myself.
19 So.

20 Q Okay. Did you have anyone helping you back in
21 July 2009?

22 A No, I did not.

23 Q And do you now?

24 A I do have a new part-time person that just started
25 approximately a month ago.

1 Q All right. Who actually owns the units that we're
2 talking about?

3 A A gentlemen named Mark Green.

4 Q And where is he located?

5 A He lives in New Jersey.

6 Q So are you -- I guess you're familiar with the
7 property out there?

8 A Yes.

9 Q And what kind -- of as far as going out to the units,
10 how much contact or how often would you go out there?

11 A It varies based on phone calls from people who might
12 be interested in viewing the property. It really
13 fluctuates. I could go once a week, three time a
14 week, once a month. It just depends, you know, how
15 often I need to go by or to inspect the property to
16 make sure the grass is being mowed, that type of
17 thing.

18 Q Did -- did you -- well let me ask you this. Did
19 those units out at [REDACTED], they're four
20 units out there?

21 A Correct.

22 Q Okay. And at the time back in -- well let's focus on
23 Apartment A. Can you describe how you came into
24 contact with Michael Gordon, first of all, the victim
25 in this case?

1 A Yes, Unit A was vacant. And I hired him to repair a
2 leak in the downstairs bathroom ceiling. And it
3 needed to be cut out, patched and painted in the
4 bathroom.

5 Q Okay. And that's Unit A?

6 A That's in Unit A, yes.

7 Q Where is that in relation to D?

8 A Well you have A and B in one building, then building
9 beside is D and C. So A is here, D is here if you're
10 facing the doors of the building.

11 Q Did you hire him to do any work on any of the other
12 units?

13 A No, I did not.

14 Q And how did he have access to those units?

15 A On unit D, because I have a lockbox that's hanging on
16 it, I had a key in it for Unit A and D. Because they
17 were vacant. And I keep keys in there for repair
18 maintenance to be able to access to get into the
19 units to do repairs.

20 Q Okay. Who would be the person that would make a
21 decision about who was going to be hired and who was
22 going to be out there doing this work?

23 A Just me.

24 Q Did you have any prior -- did Mr. Gordon do any prior
25 work for you before July of '09?

1 A No, actually that was the first thing that I had
2 asked him to do. That I recall on any property. I
3 believe that was the first little job I had given him
4 through me.

5 Q I'm going to -- I'm going to show you State's Exhibit
6 9. And do you recognize that?

7 A Yes.

8 Q What is that?

9 A That's the front door at Unit D.

10 Q If you could speak up just a little bit.

11 A The front door of Unit D.

12 Q Okay. And looking at State's Exhibit 12, what is
13 that?

14 A That is standing in the doorway looking into the
15 unit. You view the kitchen and part of the living
16 room area.

17 Q Okay. And State's Exhibit 11, what is that?

18 A That is standing in the living hall area facing the
19 kitchen wall with the front door to the right.

20 Q Now, and these are all of unit D?

21 A Yes.

22 Q And at the time that back in July of 2009, was this
23 apartment -- did it appear this way as far as
24 curtains and personal items?

25 A No, it wasn't furnished because it was vacant. And

1 the only thing that is furnished are the
2 refrigerator, the dishwasher, a stove and the
3 microwave over the stove.

4 Q And did this unit become rented shortly after this
5 crime was committed in unit D?

6 A It was rented August, I believe, 8th of 2009 is when
7 the tenant actually moved in.

8 Q Okay. So, do you know who took these pictures?

9 A I took the pictures.

10 Q And when you took the pictures, are those fair and
11 accurate representations of how it appeared when you
12 were able to take those pictures?

13 A Yes.

14 Q Okay. I'm going to show you State's Exhibit No. 13
15 and ask you if you recognize that?

16 A It's the interior side of the front door.

17 Q Of which unit?

18 A Of unit D.

19 Q Okay. Who took the picture?

20 A I did.

21 Q All right. Is that a fair and accurate depiction of
22 how this door appeared when you took the picture that
23 day?

24 A Yes.

25 Q Just as far as the size of the door, the color, the

1 locks?

2 A Correct.

3 Q Is that how it appeared generally on July 22 of 2009?

4 A Yes.

5 MS. TESSITORE: All right, the State would move
6 State's Exhibit No. 13 into evidence.

7 THE COURT: Any objection?

8 MR. ROBINSON: No objection.

9 THE COURT: Without objection it's admitted.

10 (WHEREUPON, State's Exhibit No. 13 was admitted
11 into evidence.)

12 Q Now, Ms. Hallex, I'm going to talk to you a little
13 bit about the history of Unit D because that's what
14 we're going to focus on here today. That's what
15 we've been focusing on. Who decides who those units
16 are going to be rented to?

17 A I do after going through a screening process.

18 Q And what is that screening process entail, just
19 generally?

20 A I collect application, I run criminal credit and
21 eviction history. Then I have a scoring system where
22 I give them points. Then if they meet the criteria,
23 then they qualify.

24 Q And do you typically meet them face-to-face?

25 A Yes.

1 Q So you become quite familiar with the people that's
2 going to be in those units?

3 A Yes.

4 Q As far as their financial history and things like
5 that, of that nature?

6 A Yes.

7 Q Do you -- do you always talk to them about who might
8 be living in there with them?

9 A Yes. Occupants have to be listed on the application
10 itself.

11 Q And how long had Unit D been in existence to be
12 rented?

13 A Well, the previous tenant had been evicted middle of
14 November, 2008. We cleaned and changed the locks in
15 January. And I had it fully painted in February.

16 Q Of?

17 A I'm sorry, of 2009.

18 Q Okay. Is that just, as far as after a tenant is
19 evicted, is that kind of the normal?

20 A It is. I just have to go through a procedure to get
21 approval from the owner to do each phase.

22 Q Okay. And do you recall whether -- do you recall who
23 the tenant was back in 2008 that was evicted?

24 A Yes. Actually his name was Fred Cannon.

25 Q Okay. Have you -- looking at -- looking at

- 1 Mr. Thomas, who's seated here next to Mr. Robinson,
2 have you ever scene Mr. Thomas before as far as--
- 3 A Not in --
- 4 Q -- renting out an apartment?
- 5 A No, not showing a unit to, no.
- 6 Q Okay. Did you ever employee him to do any work?
- 7 A No.
- 8 Q Did you -- did you ever see him out at Unit D?
- 9 A No.
- 10 Q Did -- when Mr. Gordon -- well let me go back. Is
11 his name familiar as far as receiving any call or
12 information being requested by Eugene Thomas?
- 13 A No.
- 14 Q For renting Unit D?
- 15 A No.
- 16 Q Or renting any unit there?
- 17 A No.
- 18 Q Or any of your properties?
- 19 A No.
- 20 Q Did -- just one moment. You said that you had had
21 some folks paint the unit in February of 2009 while
22 it was vacant?
- 23 A That is correct.
- 24 Q And who did you hire to do that painting in Unit D?
- 25 A Greg and his wife, Debbie Byrum.

1 Q And how do you know Greg and Debbie Byrum?

2 A They had been doing work for me such as painting and
3 repairs since 2007.

4 Q And how often did you use them for your properties?

5 A Weekly.

6 Q For different properties?

7 A Yes. Yes. Different repairs. You know, plumbing,
8 pretty much anything and everything. They're all
9 around handyman type people.

10 Q Okay. What kind of -- did they have a company or
11 what?

12 A They're independent contractors. Yes, they have
13 their on repair company.

14 Q And who -- in all your dealings with them, did they
15 ever have any other employees with them?

16 A Not that I'm aware of.

17 Q Okay.

18 A I never saw anyone.

19 Q Did -- did you ever -- do you know if they ever hired
20 Mr. Thomas to do any work?

21 A I do not believe so, no.

22 Q Did -- did they do the work that you hired them to
23 do?

24 A Yes.

25 Q And what exactly did you hire them to do as far as

JENNIFER HALLEX-CROSS BY MS. TESSITORE

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1 Unit D?

2 A They were hired to paint all the walls, trim, doors,
3 anything and everything that needed to be painted in
4 the unit to make it ready again and presentable for a
5 now have tenant.

6 Q And did they do all that work?

7 A Yes, they did.

8 Q Did you pay them?

9 A Yes, I did.

10 Q How much did you pay them?

11 A I believe it was -- can I reference my notes?

12 Q Sure.

13 A \$950.00.

14 MS. TESSITORE: If you could mark this for
15 identification.

16 (WHEREUPON, State's Exhibit No. 23 was marked
17 for identification only.)

18 BY MS. TESSITORE:

19 Q Okay, I'm showing you State's Exhibit No. 23, if you
20 could take a look at that. Do you recognize that?

21 A Yes.

22 Q What is that?

23 A That is an invoice that was given to me for payment
24 to the Byrum's for the work they did. Painting the
25 interior walls, doors and trim.

1 Q When did they complete the job?

2 A They completed it at the end of February, 2009.

3 Q All right. Did you pay them all at once or?

4 A No, actually they took a draw on the job as they
5 progressed through. So they were paid in three
6 installments.

7 Q Do you recall when the last installment was?

8 A I don't remember exactly the date, no, I do not.

9 Q Is that -- where -- is that an invoice that would be
10 kept as part of your records as a property manager?

11 A Yes.

12 Q Was it prepared around the time that the work was
13 done?

14 A Yes.

15 Q Who prepared that?

16 A This invoice?

17 Q Yes.

18 A It looks like Debbie's handwriting.

19 Q Is that something that you've had in part of your
20 records?

21 A Yes.

22 Q All right. And the -- well the --

23 MS. TESSITORE: The state would move State's
24 Exhibit 23 into evidence.

25 THE COURT: Any objection?

JENNIFER HALLEX-CROSS BY MS. TESSITORE

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1 MR. ROBINSON: No objection, Your Honor.

2 THE COURT: Without objection, it's admitted.

3 (WHEREUPON, State's Exhibit No. 23 was admitted
4 into evidence.)

5 BY MS. TESSITORE:

6 Q Now, once they finished panting there, I guess before
7 you describe that, you had this lockbox?

8 A Yes.

9 Q And so -- did you give the Byrum's the combination
10 for the door?

11 A Yes. To give them access, yes.

12 Q And while they were there, did they have any
13 permission -- or did they have any permission to show
14 the unit to any perspective renters?

15 A Absolutely not. Absolutely not.

16 Q Did the -- did the Unit D become available for rent
17 at some point after March?

18 A Yes. When they completed their job and I did an
19 inspection. Which would have probably been around
20 the first part of March, 2009. That's when it was
21 available for showings.

22 Q And who would show it?

23 A Me.

24 Q And when you went out there and showed it, did --
25 just generally, how would you show the unit?

1 A I would just meet the perspective tenant at the
2 property. And I would access the lockbox, remove the
3 key, open the door and allow the perspective tenant
4 to enter the property. And I'd tour the property
5 with the perspective tenant.

6 Q Did you ever show the Defendant this unit?

7 A No.

8 Q Did he have --

9 Well strike that.

10 Was there much interest in Unit D during the
11 time between March and when this incident happened
12 July 22?

13 A Not a tremendous amount, no.

14 Q Do you recall how many times you may have shown Unit
15 D?

16 A I don't recall how many. I honestly do not know how
17 many times I showed it.

18 Q Okay. Well just as far as the people that you did
19 show that unit to, was Mr. Thomas ever present with
20 any of them?

21 A No.

22 Q And at what point did you find a tenant for that
23 unit?

24 A I actually collected an application for a tenant
25 named Kelly Green who did went it on July 21st, 2009.

1 Q So you said she rented on July 21st. So she was --
2 the apartment, when was it available to be moved
3 into?

4 A It was available then when she completed the
5 application.

6 Q Okay. Was the lockbox was still on the door on the
7 22nd, correct?

8 A Yes.

9 Q Okay. And so as far as her having the key and moving
10 in, when did that occur?

11 A That did not occur until the date in August,
12 August 8th, 2009 when she paid her rent.

13 Q Okay. And did you actually show her the apartment?

14 A Yes, I did.

15 Q Just generally, where did she come from and?

16 A She actually moved from Washington, D.C.

17 Q Okay. And did she have any family members?

18 A Yes.

19 Q Okay. Did you meet them or?

20 A She had--

21 THE COURT: Solicitor, let's move on, please.

22 MS. TESSITORE: Okay.

23 THE COURT: Thank you.

24 BY MS. TESSITORE:

25 Q When you -- when you were out there on the property,

1 did you observe anything as far as any problems
2 regarding that unit before this incident as far as
3 the inside, or the door, or lockbox, or anything like
4 that?

5 A No.

6 Q And did -- did the Defendant, Eugene Thomas, have any
7 reason to be out at Unit D during that time that it
8 was vacant between March and July 22 of 2009?

9 A No.

10 Q As far as you know?

11 A Not as far as I know, no.

12 MS. TESSITORE: Please answer any questions that
13 Mr. Robinson may have.

14 THE COURT: You may cross-examine.

15 MR. ROBINSON: Thank you, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. ROBINSON:

18 Q Good morning, ma'am.

19 A Hi.

20 Q And ma'am you got your --

21 A I'm sorry?

22 Q You got your records with you?

23 A Yes, sir.

24 Q Who was living in Apartment A at that time?

25 A That was actually vacant.

1 Q Vacant, too?

2 A Yes, sir.

3 Q And I think, looking at this over here, this is a
4 picture of the development or [REDACTED].

5 How many apartments are there?

6 A There are four.

7 Q Four. And you don't live on site, do you?

8 A No, sir.

9 Q Okay. So you're not there 24/7 watching what's going
10 on and so forth, right?

11 A No, I am not.

12 Q Okay. So when Ms. Tessitore asked you as far as
13 whether you saw anything during this period of time
14 regarding Mr. Thomas on the site, since you weren't
15 there 24 hours a day, seven days a week, you couldn't
16 tell when you weren't there if he was there or not;
17 could you?

18 A No, I can't.

19 MR. ROBINSON: Thank you.

20 THE COURT: Redirect?

21 MS. TESSITORE: No further questions, Your
22 Honor.

23 THE COURT: Thank you, you may step down.

24 You wish the witness to be excused?

25 MS. TESSITORE: Yes, sir.

1 THE COURT: Any objection?

2 MR. ROBINSON: No objection.

3 THE COURT: You're also free to leave. Thank
4 you.

5 Call your next witness, please.

6 MS. TESSITORE: Your Honor, the State calls Greg
7 Byrum.

8 THE CLERK: Mr. Byrum, if you'd please come
9 forward. Place your left hand on the Bible, raise your
10 right hand.

11 GREG BYRUM, after being duly sworn, testified as
12 follows:

13 THE CLERK: Thank you, please be seated. State
14 your name for the record.

15 THE WITNESS: Greg Byrum, B-Y-R-U-M.

16 THE CLERK: Thank you.

17 DIRECT EXAMINATION

18 BY MS. TESSITORE:

19 Q Still morning, good morning, Mr. Byrum, how are you?

20 A Fine, thank you.

21 Q Could you tell the jury where you work?

22 A Right now I work in Greer for Honeywell, MS Company.

23 Q What do you do there?

24 A I report a CMM machine.

25 Q What is that?

1 A It is a contour measuring machine that measures the
2 blades on turbine engines. And measures different
3 dimensions on the blade.

4 Q Do you work full-time?

5 A Yes.

6 Q How long have you been working for Honeywell?

7 A I've been with Honeywell for three and a half months
8 but the MS company is who I work through to get to
9 Honeywell. And I have been there for a year.

10 Q Did you -- what did you do before you began working
11 for Honeywell?

12 A I worked for myself.

13 Q Doing what?

14 A Remodeling, working with property managers, getting
15 house turnkey for new clients.

16 Q And is Jennifer Hallex one of the property managers
17 that you worked for?

18 A Yes, that was Absolute Property Services, that's
19 correct.

20 Q How long did you do work for Absolute Property?

21 A Did work for Absolute Property Services for probably
22 a total of six years.

23 Q And are you familiar with [REDACTED], Units A
24 through D?

25 A Yes, ma'am, they're right down here past the old post

1 office. I know exactly where they're at.

2 Q Okay. I'm going to show you State's Exhibit No. 4,
3 ask you do you recognize that?

4 A That's the apartments on [REDACTED].

5 Q Okay. And State's Exhibit 6, what is that?

6 A That's Apartment D, it's the one on the far
7 right-hand side.

8 Q All right. Did you do some work there in Unit D?

9 A A couple of times. We went originally for eviction,
10 to clear out the contents of the apartment. Then
11 after that was taken care of and everything was done,
12 we went back and did the painting and cleaning
13 inside. We actually painted the columns and the
14 outside of the front door, too.

15 Q Okay, let's talk about the painting that you did do.
16 That was in February of 2009?

17 A Correct.

18 Q Okay. And what were you hired to do specifically as
19 far as the painting job?

20 A That particular job was painting interior walls,
21 trim, doors, exterior of the front door and the two
22 columns.

23 Q Did you do that work?

24 A Yes, we did.

25 Q Do you have any -- who else works with you?

GREG BYRUM-DIRECT BY MS. TESSITORE

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- 1 A My wife helps me on occasion. But I don't have any
2 employees. We're very small, it was just me.
- 3 Q Okay. So Byrum and Byrum?
- 4 A Yes.
- 5 Q Or mostly just Byrum?
- 6 A She helped more with the cleaning. She helped with
7 the cleaning and painting. I did all the hard stuff.
- 8 Q Did you have anyone help you with respect to Unit D
9 other than your wife?
- 10 A No, ma'am, just my wife.
- 11 Q Have you ever seen the Defendant, Mr. Thomas, here
12 before? Seated next to--
- 13 A No, ma'am.
- 14 Q -- Mr. Robinson?
- 15 A No, ma'am.
- 16 Q Okay. Ever hire him?
- 17 A No, ma'am.
- 18 Q Never seen him?
- 19 A No.
- 20 Q Do you -- do you recall when -- while you were
21 painting that unit, did any perspective renters come
22 by while you were at Unit D, painting there?
- 23 A No, ma'am.
- 24 Q Did -- if someone had come by, what is your policy as
25 far as showing the units?

1 A Nobody was allowed in, insurance wouldn't cover it.
2 You have to give them the name of the property
3 manager. They have to call the property manager and
4 arrange a showing. We don't do anything as far as
5 showing. We don't let anybody -- when we're working
6 a property, they're even allowed inside.

7 Q And was there any other work that you did with
8 respect to Unit D after the painting in February?

9 A We painted the front door and after that we were
10 done.

11 Q When you say you painted the front door, did you
12 paint both sides or?

13 A Yes, ma'am, inside and outside.

14 Q Okay. And do you recall what color you painted it?

15 A White.

16 Q Did -- one moment. As far as getting into the and
17 the access there, how would you access the unit?

18 A The property manager had put a lockbox on the front
19 door. She gave me the code that was changed each
20 time we moved to a different property. But I had the
21 code to get in and out.

22 Q Okay. Did -- did you notice any type of problems
23 with the lockbox or tampering or anything with that
24 lockbox on Unit D?

25 A No, ma'am.

GREG BYRUM-DIRECT BY MS. TESSITORE

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1 Q How many times would you say you had been out [REDACTED]
2 [REDACTED] doing work? Just generally.

3 A Well I've done probably four, five individual jobs
4 but there were multiple days, not just D, I did work
5 on B also. So we were out there for multiple days.
6 If I had to count the number of days, I probably say
7 a total of, time we spent, time we worked there, 15,
8 20 times total.

9 Q All right. In all those times that you were out
10 there, did you ever see this Defendant?

11 A No, ma'am.

12 MS. TESSITORE: No further questions.

13 THE COURT: Cross-examination.

14 MR. ROBINSON: I have no questions for this
15 witness, Your Honor.

16 THE COURT: Thank you, you may step down, sir.

17 MS. TESSITORE: Ask the witness be excused.

18 THE COURT: Any objection?

19 MR. ROBINSON: No objection.

20 THE COURT: You're also free to leave, sir.

21 Thank you, sir.

22 All right, ladies and gentlemen, at this point
23 we'll take a recess. Please do not begin your
24 deliberations, don't discuss the case. We'll be with you
25 in about 10, 15 minutes. Thank you.

1 (WHEREUPON, the jury left open court at
2 approximately 10:50 a.m.)

3 THE COURT: All right, anything from the State
4 before recessing?

5 MS. TESSITORE: None, Your Honor.

6 THE COURT: Anything from the Defendant?

7 MR. ROBINSON: No, Your Honor.

8 THE COURT: We'll be at ease for about 10
9 minutes, please.

10 (WHEREUPON, a short break was taken.)

11 (WHEREUPON, State's Exhibit No. 24 was marked
12 for identification only.)

13 THE COURT: All right, you ready, Solicitor?

14 MS. TESSITORE: Your Honor, let me just make
15 sure that my next witness is here.

16 THE COURT: Okay, hopefully they are.

17 MR. ROBINSON: Your Honor, just one pre-trial
18 matter, not pre-trial matter. Ms. Tessitore's showing me
19 some pictures here where he was arrested. One picture is
20 the location of the InTown Suites. The other two pictures
21 looks like a picture of the room that he was arrested in.
22 And I'm not really seeing the relevance of this in terms
23 of --

24 THE COURT: I appreciate that. I, again, I
25 appreciate your pre trying it. I'm just not a Judge

1 that's going to give a heads-up. You put it in, I'll make
2 the ruling. That's why they have the Rules of Evidence.

3 MR. ROBINSON: I'm just one of these guys --

4 THE COURT: I wanted to know too. And I
5 understand why. You want to avoid the possible jury
6 hearing. But I just think that's part of the trial
7 process.

8 MR. ROBINSON: Thank you.

9 THE COURT: Thank you, sir. Don't know. I'll
10 let you know -- I'll let you know when she offers it.

11 MR. ROBINSON: Thank you, I appreciate that.

12 THE COURT: Solicitor, you ready now?

13 MS. TESSITORE: Very ready, Your Honor.

14 THE COURT: All right, let the record reflect
15 Mr. Thomas is present.

16 Excuse me, are y'all ready?

17 MR. ROBINSON: Defense is ready, Your Honor.

18 THE COURT: Excuse me, Mr. Thomas, for
19 interrupting, sir.

20 Let's bring in our jury.

21 (WHEREUPON, the jury came into open court at
22 approximately 11:14 a.m.)

23 THE COURT: Thank you, very much, ladies and
24 gentlemen. We're ready to continue.

25 Solicitor, you may call your next witness.

1 MS. TESSITORE: Your Honor, the State calls
2 Collis Flavell.

3 THE CLERK: Mr. Flavell, place your left hand on
4 the Bible raise, your right hand.

5 COLLIS FLAVELL, after being duly sworn,
6 testified as follows:

7 THE CLERK: Thank you, please be seated. State
8 your name for the record.

9 THE WITNESS: Collis Flavell.

10 DIRECT EXAMINATION

11 BY MS. TESSITORE:

12 Q Detective Flavell, where do you work?

13 A Greenville City Police Department.

14 Q What do you do for the city police department?

15 A I'm currently assigned to the crimes against persons
16 unit in the detective division.

17 Q What kind of crime does that include?

18 A It's all violent crimes, any kind of violent crime
19 that's to a person we investigate.

20 Q How long have you been an investigator with the city
21 police?

22 A Approximately 15 years.

23 Q What are your duties as a detective?

24 A Uniform patrol responds to the original call.

25 Whether it be a 911 call, call to our dispatch center

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1 and they take a report. Depending on the nature of
2 the crime, we either respond to the crime or it's
3 forwarded to us the next day via a incident report.

4 Q And once you get the incident report and it's
5 assigned to you, what are your general duties at that
6 point?

7 A We start following up with leads, investigate the
8 incident and try to identify -- first identify if a
9 crime occurred and then identify the potential
10 suspect in that crime.

11 Q In your time with the city police department, how
12 many cases would you say you've been assigned and
13 worked?

14 A In general?

15 Q (Ms. Tessitore nods.)

16 A Thousands.

17 Q Okay. Did you -- did you become involved in the
18 investigation in this case?

19 A Yes, I did.

20 Q And when did you become involved?

21 A I actually became involved on the 23rd. It actually
22 happened on the 22nd. And the report was forwarded
23 to me on the next day. The 23rd is when I received
24 it.

25 Q Okay. And once you received the report, what did you

1 do first?

2 A Actually, I received a notification from our
3 forensics division, latent section, via email, his
4 report on a fingerprint match prior to me even
5 actually getting started on this investigation.

6 Q And is that the fingerprint match that we talked
7 about earlier with the latent print examiner?

8 A It is. Latent Print Examiner Gary forwarded me his
9 findings from a match that he made on the
10 fingerprint.

11 Q And which print was that?

12 A It was a print taken off the door of Apartment D.

13 Q Okay. Do you recall if it was the interior or
14 exterior?

15 A Interior.

16 Q And what did you do once you got that information?

17 A I followed up with the information that Gary provided
18 me in his report. He identified a print that matched
19 Eugene Thomas. I then took the description that was
20 given by the victim, compared it to Mr. Thomas and
21 determined that they were very similar.

22 Q And if they had not been, what would you have done?

23 A Just continue to investigate the case and see why his
24 print was on that door.

25 Q Okay. Did you get in contact with the victim at some

1 point?

2 A I did. I actually called him on the 24th.

3 Q And did you speak with him?

4 A I did.

5 Q Was he able to provide you a description of the

6 suspect on the phone?

7 A I did. I did a phone interview with him, asked him

8 to explain to me what had happened and give me a

9 description of the suspect. He was able to do that

10 over the phone. Said it was a dark skinned, black

11 male with dreadlocks. Had a neatly trimmed -- he

12 said, Neatly trimmed mustache and a goatee.

13 Q Provided his approximate height and weight?

14 A I believe he said it was around 5'10. I don't recall

15 if he gave me a weight or not.

16 Q Did you--

17 A I don't think he actually gave me a weight.

18 Q And what kind -- any approximate age?

19 A I noticed in the original report, I believe the

20 original report, was late 30's.

21 Q Okay. Did -- did he -- that was when you spoke to

22 him on Friday?

23 A The 24th.

24 Q Okay. And so this was two days after the incident

25 occurred, is that correct?

1 A That is correct.

2 Q All right. Now once you spoke with him and confirmed
3 the identification or excuse me, the description that
4 he gave you said, at that point what did you do next?

5 A Well, I made a -- on the 28th is when I got back in
6 touch with the victim. His work he had that weekend
7 Saturday, Sunday, Monday, his work schedule he was
8 able to come in on Tuesday and meet with me. On
9 Tuesday I compiled a six person photo line-up and met
10 with the victim in my office.

11 Q Okay. When you say you compiled a six person photo
12 array, was that something that you did prior to the
13 to victim arriving there?

14 A Yes.

15 Q Okay. Explain to the jury how you go about doing
16 that?

17 A Basically a photo line-up is a computer generated
18 document. We're able to, of course -- this line-up I
19 had a potential suspect. So the line-up was built
20 around that suspect. What we try to do is as close
21 as we can is to match physical descriptions. Hair,
22 skin tone, facial features, try to get similar photos
23 in a line-up. And we were able to -- the computer
24 gives us our original five photos to go with the
25 suspect photo. And I'm able to manipulate that

1 photo. If it doesn't match, I can kick the photo,
2 generate another photo in its place. And we just
3 keep doing that until we get a line-up that we feel
4 is similar in nature that doesn't make the subject
5 photo stand out.

6 Q Okay. I'm showing you State's Exhibit No. 17, do you
7 recognize that?

8 A I do.

9 Q What is that?

10 A That's a photo of the Defendant that I used for the
11 photo array or the line-up.

12 Q And is that -- is that a fair and accurate depiction
13 of the Defendant?

14 A Yes.

15 Q Did you -- were you able to determine how recent that
16 picture was in relation to when the crime was
17 committed?

18 A Approximately three weeks prior.

19 Q Okay. And so with that recent picture, what did you
20 do? You said you compiled a -- so State's Exhibit
21 17, is the photo that you used in the array?

22 A Yes.

23 Q Okay.

24 MS. TESSITORE: The State would move State's
25 Exhibit 17 into evidence.

1 MR. ROBINSON: No, objection, Your Honor.

2 THE COURT: Without objection State's Exhibit 17
3 is admitted, a photo.

4 (WHEREUPON, State's Exhibit No. 17 was admitted
5 into evidence.)

6 BY MS. TESSITORE:

7 Q Okay, that's -- going to the photo array that you
8 created, how did you -- once you generated the
9 picture and determined which pictures you're going to
10 use, how did you then set that up to be able to show
11 it to the victim?

12 A Printed the document. I knew the victim was coming
13 in that day. So about an hour, a little bit before
14 he got there, I printed the document. When he got
15 there, I met with him in my office and did the photo
16 line-up.

17 Q Okay. I'm going to show you State's Exhibit No. 2,
18 and what is that?

19 A This is the photo line-up that I showed the victim.

20 Q And that was on July 28th?

21 A Correct, approximately 1:50 in the afternoon.

22 Q Is that in substantially the same condition as when
23 you conducted that array, the line-up for him?

24 A Yes, it is.

25 Q Okay.

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1 MS. TESSITORE: And at this time the State would
2 move State's Exhibit No. 2 into evidence.

3 MR. ROBINSON: Subject to my previous objection.

4 THE COURT: Previous objection made and
5 discussed and argued on the record.

6 That's State's Exhibit?

7 MS. TESSITORE: Number 2, Your Honor.

8 THE COURT: Number 2. Okay, State's Exhibit 2
9 is admitted subject to your objection.

10 MS. TESSITORE: Thank you, Your Honor.

11 (WHEREUPON, State's Exhibit No. 2 was admitted
12 into evidence.)

13 BY MS. TESSITORE:

14 Q Detective Flavell, I'm going to try to --

15 Could you dim the lights for me?

16 THE COURT: But hold on just one second. With
17 respect -- excuse me just one second, Solicitor.

18 With respect to State's 2, we argued that issue,
19 ruling's made, the Court will supplement the record though
20 concerning State's 2 at the first break. Thank you.

21 MS. TESSITORE: Thank you, Your Honor. Your
22 Honor, may we approach?

23 THE COURT: Uh-huh, you may.

24 (WHEREUPON, a bench conference was held
25 off-the-record, in the presence of the jury but

1 out of the hearing of the jury.)

2 THE COURT: Ladies and gentlemen, what happens
3 when we have a bench conference is we talk about matters
4 of law. They're two ways of accomplishing that. One is
5 excuse you, then discuss it fully in the courtroom. The
6 other is to have them approach and we do that. You heard
7 me say, I will place my ruling on the record. That's just
8 to avoid having to send you out. That's a matter for me.
9 It should not concern you. And you don't need to be
10 concerned with that fact. Thank you, very much.

11 Thank you, Solicitor.

12 MS. TESSITORE: Thank you, Your Honor.

13 BY MS. TESSITORE:

14 Q See if I can get the --

15 Could you give me a little so -- just so I can
16 read the buttons, please. Very good, thank you.

17 Okay, Detective Flavell, if you could, explain
18 to the jury as far as when you showed this photo
19 array to the victim, did -- how -- as far as the
20 numbers that are placed on there, can you describe
21 what you had put on there prior to the victim putting
22 his writing on there?

23 A Yes. The only handwriting that would have been on
24 that document prior to the victim viewing it would be
25 the numbers 1 through 6. We only number the

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1 photographs so that we are confident on which number
2 so he can identify the number to me. Which photo did
3 you pick? He can assign a number to it. The number
4 handwritten at the top would have been written after
5 I showed it. All that simply is is a case number
6 that assigns that line-up to this case. As far as
7 our records go.

8 The writing at the bottom, the paragraph with
9 the signature, that's actually the victim's
10 handwriting and statement. Then the initials in
11 photo number five just, above the left side of the
12 head, is the victim's initials where he identified
13 that photograph. Prior to me showing him a
14 photograph, a lot of times people we deal with as
15 victim has never been through this process. So the
16 first thing I do is explain to him, I ask if he's
17 ever viewed a six person photo line-up. A lot of us
18 have not. In this case he had not viewed a six
19 person photo line-up. So I explained to him what it
20 was, that it was six photographs of six individuals.
21 I further explained to him that the person who robbed
22 him may or may not be in this line-up. And not to
23 feel like he had to pick someone just because I was
24 showing him a line-up. He stated he understood. In
25 fact, he made the statement he did not--

1 MR. ROBINSON: Objection, Your Honor, hearsay,
2 relevance.

3 THE COURT: I sustain the objection.

4 BY MS. TESSITORE:

5 Q Did he seem to understand what you were explaining to
6 him?

7 A He did.

8 Q Did he also seem to understand the seriousness of
9 what he was doing?

10 A He did.

11 Q Was he by himself?

12 A He was him and I in my office at the law enforcement
13 center.

14 Q And if we can get the lights back on..

15 I'm going to hand you back State's Exhibit No.
16 2. And if you could, just show the jury how you
17 presented the array to him and then what he did with
18 it when he received that.

19 A The actual photo array would have been out of sight
20 while I was explaining the process to him. Once he
21 understood what we were doing, I would hand him he
22 line-up face down. When he got ready to flip it
23 over, he flipped it up. He looked at the line-up, he
24 laid it down on my desk and said, That's the guy and
25 pointed to photo number five.

- 1 Q And did he -- did he have any other information
2 regarding any of the individuals in that array before
3 looking at it?
- 4 A No.
- 5 Q Did he -- had he seen any pictures? Did you show him
6 any pictures prior to the photo array?
- 7 A No, I did not.
- 8 Q And when he pointed to number five -- well first of
9 all, could you tell if he had looked at all six
10 pictures?
- 11 A I mean, he took -- it wasn't a very long length of
12 time, it was seconds. I handed him the line-up. You
13 know, you can see him scanning the line-up. He laid
14 it down and said, That's was the guy. Within seconds
15 he identified photo number five being the person that
16 robbed him.
- 17 Q Do you ever have situations where a victim or witness
18 can't pick somebody out?
- 19 A Quite often.
- 20 Q What is your procedure if that happens?
- 21 A We just document we showed them a photographic
22 line-up in our report, the line-up stays with the
23 file. We just document they were unable to pick
24 anyone from the line-up.
- 25 Q Do you have victims and witnesses who hedge between--

- 1 A Yes, we do.
- 2 Q Before they make any selection, if they make it at
- 3 all?
- 4 A Yes.
- 5 Q Did Mr. Gordon seem to hedge or hesitate or have any
- 6 hesitation as he -- before he pointed to number five?
- 7 A Not at all.
- 8 Q Did he point to any other pictures?
- 9 A He did not.
- 10 Q And how did you have him document his selection?
- 11 A I asked him to initial the photo that he selected,
- 12 which he did initial above the photo. Then I asked
- 13 him to write a small summary below indicating that.
- 14 And he did, he wrote a short paragraph and signed it.
- 15 Q And that was in your presence?
- 16 A Yes, it was.
- 17 Q And who did he identify?
- 18 A The Defendant, Eugene Thomas.
- 19 Q After the identification of Mr. Thomas -- and by the
- 20 way, this was just six days after the incident?
- 21 A Yes, it was on the 28th.
- 22 Q I'm sorry, I cut you off.
- 23 A It was on 28th.
- 24 Q On the 28th, okay. What did you do as a result of
- 25 that identification? What did you at that point as

1 far as -- well let me back up. After he made this
2 identification, did you obtain -- did you obtain
3 warrants in this case?

4 A I did.

5 Q And were you able to -- did you have any information
6 from Officer Bradley or any other officers that had
7 been relaid the information regarding his
8 description? Was there any type of other, I guess,
9 information regarding which way -- or whether they
10 found anybody matching the description that day this
11 occurred or any activity that would have helped you
12 find where he was?

13 A No. What I received was the original incident report
14 that the officer took. What the information in that
15 report's what I had. There was no indication of,
16 understanding what you're asking me, direction of
17 travel after the incident, where the suspect was, who
18 he was, nothing until the next day when I got the
19 report from the latent examiner.

20 Q So there was -- on one was -- there were no other
21 suspects at that time?

22 A No.

23 Q Okay. And as a result of your further investigation
24 of obtaining warrants, what did you do after you
25 obtained the warrants?

1 A I'm not sure what you're asking me.

2 Q Well, after you got the warrants in this case, was
3 there any other -- was there anything else that you
4 did as far as finding the Defendant or looking for
5 the Defendant?

6 A Yes, I'm sorry, yes. Once I obtained the warrants on
7 a case of a violent offense, we place those warrants
8 on NCIC which is -- all agencies in the United States
9 are members of NCIC. And if someone runs a name, any
10 agency runs a name, if they're on NCIC, they'll get a
11 hit that that person's wanted out of Greenville.

12 MR. ROBINSON: Your Honor, objection, relevance
13 in this case.

14 THE COURT: Sustained.

15 BY MS. TESSITORE:

16 Q Okay. Just as far as after you obtained the
17 warrants, were you involved in locating the
18 Defendant?

19 A No.

20 Q Okay. And who was involved in that?

21 A It was turned over to U.S. Marshals Task Force. We
22 have an officer--

23 MR. ROBINSON: Your Honor, objection, relevance,
24 again.

25 THE COURT: Sustained.

1 BY MS. TESSITORE:

2 Q Okay, Detective Flavell, at some point were the
3 warrants served on the Defendant?

4 A Yes, they were.

5 Q When -- approximately when were they served on the
6 Defendant?

7 A September. Not sure exact date, a couple months
8 later.

9 Q Okay. Did you receive information as to -- excuse me
10 one second. Okay, did you have an opportunity to
11 view the Defendant once he was served with those
12 warrants?

13 A I did.

14 Q And at that point in time, this was two months later,
15 how did he compare as far as his -- or just describe
16 his physical appearance at that time.

17 A Well he looked pretty much the same as the photo used
18 in the photo line-up, except his hair was grayer.

19 Q Okay. And I'm showing you State's Exhibit 18. Do
20 you recognize that?

21 A I do.

22 Q What is that? Or let me ask you this -- strike that
23 question. Who is that?

24 A Eugene Thomas.

25 Q Is that a fair and accurate depiction of how he

1 appeared when you saw him?

2 A Yes.

3 Q Okay.

4 MS. TESSITORE: At this point the State would
5 move State's Exhibit No. 18 into evidence.

6 THE COURT: Any objection?

7 MR. ROBINSON: No objection.

8 THE COURT: Without objection, it's admitted.

9 (WHEREUPON, State's Exhibit No. 18 was admitted
10 into evidence.)

11 BY MS. TESSITORE:

12 Q Detective Flavell, how -- based on how he appeared
13 then and how he appears now, how has he changed in
14 appearance?

15 A He has -- now he has a full beard and his hair is
16 grayer.

17 Q Okay.

18 A And no glasses. He's wearing glasses today.

19 Q What about generally his height -- well obviously his
20 height. His weight, I'm sorry, his build?

21 A Looks pretty much the same.

22 Q Okay. Now --

23 Just one moment, please.

24 THE COURT: Certainly.

25

1 BY MS. TESSITORE:

2 Q Okay, Detective Flavell, I'm just going to take you
3 back for a second as far as when Mr. Gordon was
4 looking at the array, did you influence or suggest to
5 him?

6 A No, I did not.

7 Q Anyone force--

8 MR. ROBINSON: Your Honor, object.

9 THE COURT: What's the basis of your objection?

10 MR. ROBINSON: It's duplicative.

11 THE COURT: Sustained.

12 You covered that, Solicitor.

13 MS. TESSITORE: Okay.

14 THE COURT: He's testified to that, fully.

15 MS. TESSITORE: All right.

16 Detective Flavell, if you could answer any
17 questions that Mr. Robinson may have.

18 THE COURT: You may cross-examine.

19 MR. ROBINSON: May it please the Court?

20 THE COURT: Yes, sir.

21 CROSS-EXAMINATION

22 BY MR. ROBINSON:

23 Q Officer Flavell, you sat in the courtroom the entire
24 time that we've been here since yesterday, correct?

25 A That's correct.

1 Q Now, in your investigation in this case, did you --
2 you didn't see whether or not this lotto ticket was
3 ever turned in, did you?

4 A No.

5 Q So wouldn't it have made sense that this person, this
6 perpetrator, that took this alleged ticket from the
7 victim -- and the victim testified, you heard the
8 victim testify that it was for that night, the Power
9 Ball, wouldn't it have made sense for that person to
10 look to see whether that person try to cash that
11 Power Ball ticket? Wouldn't that be a prime suspect
12 in this case?

13 A If there was a winning number, yeah it would be smart
14 to turn it in. But if it was not a winning number,
15 you would throw it in the trash.

16 Q But wouldn't that person go -- wouldn't logically
17 that person go and check to see whether or not that
18 number was good or not? Say a store that would give
19 him or her an idea of the ticket was good or not?

20 A Again, you're asking me to speculate to how the
21 lottery system operates. I'm not sure -- it's my
22 understanding that they print the numbers across the
23 T.V. screen a night on the news. So I don't know
24 where you would go to check to see if the numbers
25 were accurate.

1 Q Did you -- in your investigation, did you ever check
2 to see whether or not a lotto ticket, a Power Ball
3 ticket had ever been sold to this victim?

4 A No.

5 Q So you really don't know whether or not a lotto
6 ticket was ever even sold to the victim, do you?

7 A No, I don't. But I'm not sure how you would know
8 that. You don't use an ID to buy a lottery ticket.

9 Q Well you said a few minutes ago that you're not
10 familiar with the lottery system?

11 A That's correct.

12 Q True. So you don't know?

13 A I don't know. I don't know how you buy a lottery
14 ticket.

15 Q Now you've been a police officer -- I this you told
16 the jury, you'd been a police officer, how many
17 years?

18 A Twenty.

19 Q Twenty years. And in all time you never had any
20 exposure to getting a lottery ticket--

21 THE COURT: You've covered that as far as I'm
22 going to allow you under 611(a).

23 MR. ROBINSON: Thank you, Judge.

24 THE COURT: All right, move on.

25

1 BY MR. ROBINSON:

2 Q In the -- what's been noted [sic] as Exhibit 2 --
3 excuse me, there's no mention in the statement by
4 that victim about any goatee, was there?

5 A In the statement, no.

6 Q And you would agree with me that the picture of
7 Eugene Thomas in this line-up that was taken, does
8 not have a goatee, you would agree?

9 A Does not have a full goatee.

10 Q And that would be Exhibit 2, correct?

11 A Yes.

12 Q And with Exhibit 18, which is what you -- 18 and 17,
13 these also don't have a goatee, is that correct?

14 A Eighteen has no facial hair other than a mustache.
15 And 17 does not have a full goatee, no.

16 Q Okay. The --

17 MR. ROBINSON: That's all I have, thank you.

18 THE COURT: Redirect, Solicitor?

19 MS. TESSITORE: No further questions, Your
20 Honor.

21 THE COURT: You may come down, thank you, sir.
22 Call your next witness please.

23 MS. TESSITORE: Thank you, Your Honor. The
24 State would call Officer Mike Aiken.

25 THE CLERK: Officer Aiken, please come forward.

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1 Sir, if you'd, please, place your left hand on the Bible,
2 raise your right hand.

3 MIKE AIKEN, after being duly sworn, testified as
4 follows:

5 THE CLERK: Thank you, please be seated. State
6 your name for the record.

7 THE WITNESS: James Michael Aiken. My family
8 and friends call me Mike.

9 DIRECT EXAMINATION

10 BY MS. TESSITORE:

11 Q Good morning, Mike, how are you?

12 A I'm good, thank you.

13 Q Where do you work, Office Aiken?

14 A I'm currently part-time working with the Greenville
15 County Sheriff's Office and part-time retired for
16 medical purposes.

17 Q Okay. And what do you do for the -- in your
18 part-time job?

19 A Investigations with the Greenville County Sheriff's
20 Office.

21 Q And how -- before that what did you do?

22 A I was with the Greenville Police Department for 19
23 years. In my final five to six years, I worked in
24 the warrant division. My job primarily was to locate
25 and apprehend people with active warrants for their

1 arrest.

2 Q Okay. And that -- did you have position back in
3 September 28th of 2009?

4 A Yes, ma'am, I did.

5 Q And that was with the Greenville Police Department?

6 A That's correct. At that current time I was a
7 Greenville police officer but I was assigned to the
8 U.S. Marshals Task Force. That is a group of
9 officers from different agencies that work together
10 in serving warrants.

11 Q And I'm going to take you to September 28th of 2009
12 and ask you, did you have warrants for this
13 Defendant?

14 A I did.

15 MR. ROBINSON: I'm going to object to relevance,
16 Your Honor.

17 THE COURT: I'll allow it.

18 BY MS. TESSITORE:

19 Q Were you able to locate this Defendant as to the
20 charges that brings us here today?

21 A Yes, ma'am, I was.

22 Q Okay. Where did you locate him?

23 A I located him at the InTown Suites which is a hotel
24 located on Wade Hampton Boulevard in Greenville
25 County.

1 Q And just generally, what led you to that location?

2 A I had cases that were assigned to me that were long
3 term cases. And I was working this and received
4 information that he was possibly there.

5 Q Okay. When you got there, what did you do?

6 A I did some very brief surveillance on the hotel room
7 that I suspected he was staying in. After confirming
8 someone was inside the room, I knocked and announced
9 who I was and Mr. Thomas came to the door.

10 Q Okay. And explain to the jury or just describe for
11 the jury, what happened at that point?

12 A Normally I wore plain clothes so I displayed my
13 badge. And when he come to the door, I announced who
14 I was, showed my credentials, told him that he was
15 under arrest for armed robbery. It was kind of a
16 strange situation because the door was partially
17 opened. And he was nude. He was wet, he had just
18 gotten out of the shower. And so instead of
19 immediately handcuffing him, I allowed him to sit
20 with his hands on his knees, on a chair, right inside
21 the hotel room, where we could put some clothes on
22 him before handcuffing him and that type of thing.
23 And going through our protocol for transporting him.

24 Q Okay. Was there anyone else in the room with him?

25 A No, he was alone in the room.

1 Q And what -- what type of room was this? Queen bed,
2 one bed, two beds, what size of room was it?

3 A I don't know the size of the room but there was only
4 one bedroom. I mean, it was a -- one bed in the
5 room. When you looked into the door, the door opened
6 to the left, I could see the bed, a chair and then
7 the bathroom was directly in front to me. The door
8 went open and went straight back into the bathroom.

9 Q Was anyone in the bathroom?

10 A No, they were not.

11 Q Okay. So at that point, what did you do -- well let
12 me ask you this. What did you observe as far as just
13 generally? Where there other -- what did you observe
14 about the room?

15 A Well I noticed in the room there was assorted
16 clothing lying around, television set going, some
17 food was inside the room. Once I had Mr. Thomas sit
18 in a chair, I picked up some clothing and allowed him
19 to get dressed. But I wanted to hand it to him to
20 make sure there was nothing in the pockets or
21 anything that would be a danger to me or the officers
22 that were with me. So there was a lot of clothing
23 lying around in the room.

24 Q Okay. And did you -- what did you do once he got
25 dressed?

MIKE AIKEN-DIRECT BY MS. TESSITORE

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1 A Well during the process -- as he was getting dressed,
2 I remember filling the pockets of the pants that I
3 gave to him to put on, make sure there was nothing in
4 there that would be a danger to anyone. And as he
5 was sitting in the chair, the bed was probably five
6 to six feet, the corner of it from where we were, I
7 noticed a blue, small zipper bag. And I didn't know
8 what was in it so I picked it up in case it was
9 something that could be a danger to me because it was
10 within arms reached. And picket it up and held it to
11 me.

12 Q What did you -- how would you describe the items that
13 you picked up?

14 A It was heavy and it was a soft bag. So feeling
15 through the bag and picking it up, it felt like a
16 firearm to me. It felt like a pistol.

17 Q Okay. So what did you do in response to that?

18 A I opened the zipper bag and discovered the contents
19 within was a pistol, two men's watches and a dice
20 game.

21 Q Okay. What did you do with those items?

22 A I placed them into property and evidence.

23 Q Before you did that did you do anything with respect
24 to the pistol?

25 A Yeah. When I put the pistol and the items into

1 property and evidence, I did a form to try to get
2 fingerprints off of the items as well to see if it
3 would assist with this case. I contacted Detective
4 Flavell, who was the investigator assigned to this
5 case, and notified him.

6 Q Okay. Before we get to that point, let me just go
7 ahead and show you -- I'm showing you State's
8 Exhibit -- can you go ahead and open that? Do you
9 need scissors? Let me get this marked first.

10 (WHEREUPON, State's Exhibit No. 27 was marked
11 for identification only.)

12 BY MS. TESSITORE:

13 Q I'm showing you State's Exhibit No. 27 and take a
14 look at that. Do you recognize that?

15 A I do.

16 Q Okay, what is that?

17 A That is the zipper bag that was sitting on the bed
18 that I retrieved while Mr. Thomas was getting
19 dressed.

20 Q Where has that been since you put it into you said
21 P&E?

22 A I put it in -- we have a room called property and
23 evidence. That once we seize an item, we have to log
24 it into property and evidence where it's secured for
25 safe keeping for court purposes.

MIKE AIKEN-DIRECT BY MS. TESSITORE

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1 Q Okay. And if you could, just go ahead and open that
2 up. Without taking the items out, just look in there
3 and see, do you recognize those items?

4 A I do.

5 Q Okay. That's the same items, the two watches and the
6 dice game.

7 (WHEREUPON, State's Exhibit No. 28 was marked
8 for identification only.)

9 BY MS. TESSITORE:

10 Q I'm showing you what's been marked as State's Exhibit
11 28, and do you recognize that?

12 A I do.

13 Q What is that?

14 A That's the dice game that was in the zipper bag at
15 the time I retrieved it. Everything looks exactly
16 the same absent the firearm is not in here.

17 Q Okay. The -- and can you just describe as far as
18 the -- well why did you -- why did you seize all
19 these items?

20 A The reason I seized this is because I didn't know
21 exactly what was connected to the case at the time.
22 All -- at that time I was serving a warrant and I
23 didn't know what was supposedly taken or anything
24 like that. So just for general, to be safe, I took
25 these items to put in evidence. And that's when I

1 notified Investigator Flavell in case there was
2 something connected to the case that I was unaware
3 of.

4 Q Yes, sir. Did you know whether there was any type of
5 weapon involved in the alleged robbery?

6 A Yes. I was informed that there was a--

7 MR. ROBINSON: Objection, Your Honor, hearsay.

8 BY MS. TESSITORE:

9 Q Without going into the description of that--

10 THE COURT: She's withdrawing the question?

11 MS. TESSITORE: Yes, sir.

12 THE COURT: All right.

13 BY MS. TESSITORE:

14 Q The firearm that you found in the motel room, can you
15 describe that?

16 A It is a mostly black with some silver color on it,
17 semi-automatic handgun.

18 Q Okay. And did you also retrieve that item?

19 A I did.

20 Q Okay.

21 Your Honor, may we approach?

22 THE COURT: Okay.

23 (WHEREUPON, a bench conference was held
24 off-the-record and in the presence of the jury
25 but out of the hearing of the jury.)

MIKE AIKEN-DIRECT BY MS. TESSITORE

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1 BY MS. TESSITORE:

2 Q Officer Aiken, I'm showing you what's been marked as
3 State's Exhibit No. 14. And the evidence sheet that
4 goes along with that. Could you take a look at those
5 items?

6 A Sure.

7 Q And do you recognize that Exhibit?

8 A I do.

9 Q Okay, what is that?

10 A That is the handgun that was in the bag that I seized
11 on this particular day. And this property and
12 evidence sheet is the sheet that I completed after
13 the arrest and when placing these items into property
14 and evidence.

15 Q Okay. Is there a way that you record anything
16 identifying about the -- the weapon to ensure that
17 it's -- it can be tracked?

18 A Yes. What we have to do is we have to assign it an
19 item number, which would be my initials. And we
20 would start with a number one. Then we would give a
21 model number. But more distinctly we put a serial
22 number on our property and evidence sheet that is on
23 this gun. And the serial number does match the one
24 that I put on the property and evidence. So this is
25 the same gun.

1 Q And did it appear to be in working order when you
2 seize the gun that day?

3 A It appeared to be in working order. And it was
4 loaded. And I am the one that actually took the
5 ammunition out and unloaded the weapon and secured it
6 for safe keeping in property and evidence.

7 Q Is that part of your policy and procedures?

8 A Yes, it is.

9 Q Okay. And has that item been altered in any way
10 since you put it into property and evidence?

11 A No, it appears to be in the same condition.

12 Q Okay.

13 MS. TESSITORE: At this time the State would
14 move State's Exhibit 14 into evidence.

15 THE COURT: Any objection?

16 MR. ROBINSON: Objection, to relevance, Your
17 Honor.

18 THE COURT: Okay, subject to the objection of
19 counsel it's admitted. State's Exhibit 14.

20 (WHEREUPON, State's Exhibit No. 14 was admitted
21 into evidence.)

22 BY MS. TESSITORE:

23 Q Now, Officer Aiken, the you stated that the address
24 where he was located was on Wade Hampton Boulevard?

25 A That's correct. It's actually 2540 Wade Hampton

MIKE AIKEN-DIRECT BY MS. TESSITORE

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1 Boulevard which is InTown Suites.

2 Q I'm showing you marked as State's Exhibit 24, take a
3 look at that. What is that?

4 A That's an aerial view of where it would actually be
5 located. The hotel itself.

6 Q Is that a fair and accurate depiction of that area
7 between -- with [REDACTED] and then the
8 location where he was apprehended?

9 A Yes.

10 Q Okay.

11 MS. TESSITORE: The State would move State's
12 Exhibit No. 24 into evidence.

13 MR. ROBINSON: No objection.

14 THE COURT: Without objection, State's 24
15 photograph is admitted.

16 (WHEREUPON, State's Exhibit No. 24 was admitted
17 into evidence.)

18 BY MS. TESSITORE:

19 Q I'm showing you State's Exhibit 17, and ask you if
20 you recognize that?

21 A Yes, I do.

22 Q Okay. Is that a fair and accurate -- well who is
23 that?

24 A That's Mr. Thomas.

25 Q Is that a fair and accurate depiction of how he

- 1 appeared the day that you arrested him?
- 2 A Yes.
- 3 Q A little bit dryer?
- 4 A I was going to say absent the wet hair, yes.
- 5 Q Okay, thank you.
- 6 A His hair is very long and took a while to dry.
- 7 Q All right. Just one moment. Did -- going back to
- 8 State's Exhibit No. 28, did you also place that into
- 9 property and evidence?
- 10 A Yes, I did.
- 11 Q Did you also fill out the sheet for that?
- 12 A Yes. That would be item number JMA, which would be
- 13 my initials dash 6. That would be the number assign
- 14 to that when I put it into property and evidence.
- 15 Q When did you put it in property and evidence for
- 16 storage?
- 17 A I actually put it in on September the 28th at 3 p.m.
- 18 Q Okay. So that same day?
- 19 A Same day.
- 20 Q And did you request any processing as far as those
- 21 two items? The weapon in State's No. 14 and 28?
- 22 A I requested the firearm only to be processed for
- 23 latent prints.
- 24 Q And do you know if they were able to locate any
- 25 prints on the gun?

MIKE AIKEN-DIRECT BY MS. TESSITORE

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1 A To my knowledge they were not.

2 Q Okay. Did the -- did they also try to locate prints
3 on the magazine?

4 A Of the handgun?

5 Q Yes, sir.

6 A I'm unaware. I do not know.

7 Q Okay.

8 A I would assume they did but do not know for sure.

9 Q And all those items were submitted together?

10 A Yes, ma'am.

11 Q Now when you were in the room with Mr. Thomas, did he
12 have the opportunity at any point in time to put his
13 hands on the dice game or touch any of these items
14 while he was being...

15 A No, absolutely not. They were in a sealed bag. As
16 soon as he was dressed, I handcuffed him and he was
17 handcuffed behind his back. The only person that
18 touched these items in the meantime were me.

19 Q Okay. And do you know whether the dice game was
20 submitted for analysis at a later point in time?

21 A It was submitted at a later point in time.

22 Q Okay.

23 MS. TESSITORE: At this point the State would
24 move State's Exhibit 28 into evidence.

25 THE COURT: Any objection?

1 MR. ROBINSON: No objection.

2 THE COURT: Without objection. State's Exhibit
3 28 is admitted.

4 (WHEREUPON, State's Exhibit No. 28 was admitted
5 into evidence.)

6 BY MS. TESSITORE:

7 Q All right. As far as the -- well strike that. How
8 does his appearance now compare to when you saw him
9 that day when you arrested him?

10 A A little more gray hair, maybe just a little heavier.

11 Q What about facial hair?

12 A He has a little more facial hair than he did at the
13 time and it's lighter in color, a little more gray.

14 Q Okay.

15 MS. TESSITORE: All right, please answer any
16 questions that Mr. Robinson may have.

17 THE COURT: You may cross-examine.

18 CROSS-EXAMINATION

19 BY MR. ROBINSON:

20 Q Good morning, Officer. Let me ask you, InTown
21 Suites, that's like Extended Stay Motel, is that
22 correct?

23 A From what I understand people stay there longer
24 periods of time than your average hotel.

25 Q So there was nothing unusual about a number of

1 clothes being there, correct? Nothing unusual about
2 that?

3 A I have seen that before.

4 Q As far as the -- there's nothing unusual about a
5 person staying at InTown Suites? You find nothing
6 wrong with that, do you?

7 A No.

8 Q And when you came to serve papers on Mr. Thomas, he
9 didn't run or hide, did he?

10 A He did not.

11 Q He was cooperative?

12 A He was.

13 Q Didn't try to hide anything?

14 A No. He opened the door and allowed us in. At that
15 point he was cooperative.

16 Q How old was he at the time?

17 A How old was he?

18 Q Yeah.

19 A I put in my report he was born in '61, 1961. The
20 paper work I have had [REDACTED] 1961.

21 Q And that puts him how old?

22 A Well that was three years ago, I believe. Math's
23 correct, 48.

24 Q Forty-eight. And how tall did you put down? Did you
25 put down his measurements and so forth in your

1 report?

2 A In my report I put that he was 5'8, approximately 160
3 pounds.

4 Q Okay. In terms of the gun, there's nothing wrong
5 with a person having a gun, is there? A normal
6 person -- people can own guns, correct?

7 A Under certain situations.

8 Q Okay. People can have dice, is that correct?

9 A Yes.

10 Q Okay. And people can have a blue zipper bag,
11 correct?

12 A Yes.

13 Q And people can own two watches, correct?

14 A They can.

15 Q Okay. You didn't find any lottery tickets there, did
16 you, when you're searching his duffel bag and stuff?

17 A No, I did not.

18 Q Okay. And the gun, I think, that you found there,
19 you described it as being silver and black, is that
20 correct? Is what that you said?

21 A Most of it's black but it's black with some silver
22 color. I don't remember if it was chrome or nickel
23 or what.

24 MR. ROBINSON: Beg the Court's indulgence.

25 THE COURT: Yes, sir.

MIKE AIKEN-CROSS BY MR. ROBINSON

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1 BY MR. ROBINSON:

2 Q And when you went there to serve your papers or
3 arrest Mr. Thomas, that was about two months after
4 that alleged incident, correct?

5 A Yes, sir, approximately.

6 Q Like in October, is that correct?

7 A No, I went to arrest him in September.

8 Q September, excuse me.

9 A September 28th.

10 MR. ROBINSON: Okay, thank you.

11 THE COURT: Redirect?

12 MS. TESSITORE: No, Your Honor.

13 THE COURT: You may come down, thank you, sir.

14 MS. TESSITORE: We ask that the witness be
15 excused.

16 THE COURT: Any objection?

17 MR. ROBINSON: No objection, Your Honor.

18 THE COURT: You are also free to leave. Thank
19 you.

20 THE WITNESS: Thank you, Your Honor.

21 THE COURT: Call your next witness, please.

22 MS. TESSITORE: Your Honor, at this time the
23 State would recall Chris Gary.

24 THE COURT: Okay.

25 MR. ROBINSON: Your Honor, I have a matter I

1 need to take up outside the presence of the jury. Or we
2 could approach the sidebar.

3 THE COURT: Approach the sidebar, please.

4 Mr. Gary, come on forward. Remind you, sir,
5 that when you take your seat, that you're still under oath
6 in this matter.

7 MR. GARY: Yes, sir.

8 (WHEREUPON, a bench conference was held
9 off-the-record and in the presence of the jury
10 but out of the hearing of the jury.)

11 MR. ROBINSON: Thank you, Judge.

12 THE COURT: Okay.

13 REDIRECT EXAMINATION

14 BY MS. TESSITORE:

15 Q Mr. Gary, did you have the opportunity to examine
16 another latent print in this case after Mr. Thomas
17 was arrested?

18 A Yes, I did.

19 Q Okay. And do you have the -- that latent print that
20 you examined?

21 A Yes, I do.

22 Q Who provided the -- let me ask you this. Who
23 provided the print to you?

24 A Lieutenant Mike Pettersen.

25 Q Who is Lieutenant Mike Pettersen?

1 A Lieutenant Mike Pettersen, is the lieutenant, which
2 is the head of the crime scene unit.

3 Q How did he provide that to you?

4 A Same way as the prints were provided by Doug Smith.
5 They were dropped into a locked, secured lockbox and
6 then I picked them up the following morning.

7 Q And how many print cards did he provide to you for
8 analysis?

9 A There was only one fingerprint provided in this
10 instance.

11 Q And who actually collected the print?

12 A Lieutenant Mike Pettersen.

13 Q And from what surface did that print come? If you
14 want to go ahead and take it out.

15 A This print was lifted from the back of a glow dice
16 game package, item JMA-6.

17 Q Okay, so just one print?

18 A Yes, just one fingerprint.

19 Q Did you have an opportunity to compare it to the
20 known prints of this Defendant?

21 A Yes, I did.

22 Q Okay. And results of that examination?

23 A I identified the number 2 finger, which is the right
24 index finger to Eugene Thomas.

25 Q Did you also issue a report as to that comparison?

1 A Yes, I did.

2 Q Okay. Just one moment. I'm showing you State's
3 Exhibit No. 19, do you recognize that?

4 A Yes, I do.

5 Q And what is that?

6 A This a fingerprint match report that I issued based
7 on my findings on this case. I stated that I --
8 Lieutenant Mike Pettersen had submitted the latent
9 prints and that is the latent was from the back of a
10 glow dice package game. And I identified the number
11 two, right index finger, to Eugene Thomas. And that
12 it was peer reviewed by my captain and peer reviewed
13 by Captain Jackie Kellet.

14 Q So that report contained your conclusion?

15 A Yes, it does.

16 MS. TESSITORE: That State's Exhibit No. 19, I
17 would move that into evidence.

18 THE COURT: Any objection?

19 MR. ROBINSON: No objection, Your Honor.

20 THE COURT: Without objection, it's admitted.

21 (WHEREUPON, State's Exhibit No. 19 was admitted
22 into evidence.)

23 MS. TESSITORE: Answer any questions

24 Mr. Robinson may have.

25 THE COURT: Cross-examination?

1 MR. ROBINSON: I have no questions, Your Honor.

2 THE COURT: Thank you, you may step down.

3 Now you wish the witness to be excused?

4 MR. ROBINSON: Your Honor.

5 THE COURT: You're also free to leave, sir.

6 Thank you.

7 You may call your next witness.

8 MS. TESSITORE: Your Honor, may we approach?

9 THE COURT: You may.

10 (WHEREUPON, a bench conference was held
11 off-the-record, in the presence of the jury but
12 out of the hearing of the jury.)

13 THE COURT: All right, thank you, ladies and
14 gentlemen. At this point, we need to take our recess for
15 lunch. Do not begin your deliberations, do not discuss
16 this case among yourselves. Of course, while you're out,
17 do no permit anyone to talk with you about the case or
18 talk about it in your presence. I'd ask you return to
19 your jury room, please, by 1:45, we'll resume the trial at
20 that time. Thank you.

21 (WHEREUPON, the jury left open court at
22 approximately 12:15 p.m.)

23 THE COURT: All right, before we recess, we had
24 a sidebar concerning the recall of Mr. Gary. And, of
25 course, I understand the concern expressed by

1 Mr. Robinson. The recall was permitted primarily because
2 we could not -- it was not appropriate, given the concern
3 expressed by the Defendant through counsel of the possible
4 prejudice and possible fact that it was not relevant, to
5 have testimony concerning an exhibit and the evaluation of
6 that exhibit until that exhibit had been duly admitted.
7 Or obviously, should that been submitted, the testimony
8 would have been inappropriate. For that reason, and I
9 understand that the witness testified to prints found at
10 the scene which clearly was subject to -- and properly
11 admitted without objection. The Court allowed the witness
12 to stand down. And I believe the record reflects that I
13 advised him to remain subject to recall.

14 The Court has exercised its right under 611(d).
15 Just out of an abundance of caution, to protect the
16 Defendant, without having an opportunity to hear all the
17 evidence, I did not want to make any ruling pre-maturely.
18 At a later point I was provided with information and
19 certainly made a ruling based on -- overruled the
20 relevance objection. But I would not be comfortable doing
21 that at that stage, at that stage Mr. Gary had earlier
22 testified. So that was the reason for allowing the
23 witness to be recalled.

24 Anything else supplementing the record,
25 Mr. Robinson?

1 MR. ROBINSON: No, sir, Your Honor.

2 THE COURT: Thank you, very much.

3 Solicitor, anything else from the State?

4 MS. TESSITORE: Not from the State, Your Honor.

5 THE COURT: All right, as I understand from our
6 sidebar, is you will resting after you publish the
7 stipulation upon our return. Having said that, does the
8 Defendant intend to present any testimony or exhibits for
9 the jury's consideration?

10 MR. ROBINSON: May it please the Court, Your
11 Honor. I spoke with him last Thursday about his right to
12 testify and so forth. He wanted a little more time to
13 talk to me about it.

14 THE COURT: All right. Let's plan to be back at
15 1:30 so we can discuss that at that time. And we'll
16 then --

17 Mr. Thomas, at that time I'll discuss with you
18 your understanding of your rights and your decision, sir.
19 Okay. Thank you, sir.

20 Thank you, we'll be at ease until 1:30.

21 MS. TESSITORE: Thank you, Your Honor.

22 (WHEREUPON, a lunch break was taken.)

23

24 THE COURT: All right, let the record reflect
25 Mr. Thomas is present.

1 When we recessed for lunch you indicated that
2 you were going to talk with your client, Mr. Robinson.
3 Have you discussed with him his right to testify and not
4 to testify?

5 MR. ROBINSON: I have, Your Honor.

6 THE COURT: Has he made a decision?

7 MR. ROBINSON: I believe he has, Your Honor.

8 THE COURT: What is that decision, sir?

9 MR. ROBINSON: Not to testify.

10 EXAMINATION

11 BY THE COURT:

12 Q Mr. Thomas, you may remain seated, sir. Good
13 afternoon. You talked with your lawyer about your
14 right to testify and not to testify, is that correct?

15 A Yes, sir.

16 Q And he explained to you, of course, that you have the
17 absolute right to not to testify. And as I've
18 already indicated to the jury, you heard me in my
19 opening statement, you have absolutely nothing to
20 prove or disprove in this case. As I even said, you
21 don't have to present any evidence for their
22 consideration. But it's still your right to do so if
23 you choose to. Do you understand that, sir?

24 A Yes, sir.

25 Q Of course, if you choose to take the stand, then you

EUGENE THOMAS-EXAMINATION BY THE COURT

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1 would be subject to cross-examination just as you've
2 observed each witness the State has called and
3 Mr. Robinson has had the opportunity to cross-examine
4 them and challenge that testimony. Do you understand
5 that as well?

6 A Yes, sir.

7 Q Of course, if you choose not to testify, I will
8 further instruct the jury that they may not consider
9 that, they may not even discuss that in their jury
10 room. And you would be entitled to that charge, do
11 you understand that as well?

12 A Yes, sir.

13 Q Have you had sufficient time to reflect on your
14 decision about testifying or not testifying?

15 A Yes, sir, I have.

16 Q Are you comfortable with your decision today, sir?

17 A Yes, sir, I am.

18 Q Are you satisfied with which the manner that your
19 lawyer has advised you concerning your right to
20 testify not to testify?

21 A Yes, sir, I'm satisfied.

22 Q Okay. Are you under the influence, sir, of any
23 medication or any type of alcohol or drugs?

24 A No, Your Honor.

25 Q Have you consumed any of those substances in the last

1 24 hours?

2 A No, Your Honor.

3 Q Do you know of anything that's affecting your ability
4 to think and reason about making a decision at this
5 hearing?

6 A No, Your Honor.

7 THE COURT: Thank you, Mr. Thomas.

8 I find Mr. Thomas has had the benefit of
9 competent counsel. He's indicated he's satisfied in the
10 manner in which he's advised concerning his rights. I
11 find that Mr. Thomas has demonstrated by his responses,
12 that he fully understands and appreciates those rights and
13 has made the decision not to testify in this proceeding.
14 And I find that decision to be one that he's making
15 freely and voluntarily, knowingly and intelligently.

16 And thank you, very much, Mr. Thomas.

17 MR. THOMAS: You're welcome, Your Honor.

18 THE COURT: Do you intend to present any
19 witnesses?

20 MR. ROBINSON: May it please the Court?

21 THE COURT: Yes, sir.

22 MR. ROBINSON: Your Honor, at lunch time I met
23 with Mr. Thomas down at the visiting area downstairs. And
24 we talked at length about the pros and cons of each
25 witness and so forth. I was under the understanding that

1 the one witness we were going to use in this case, an
2 alibi witness in this case, that she had a fraudulent
3 check conviction. I went back and looked at that and she
4 does not. I advised him of that it. And it hasn't
5 changed the decision that we've made in this case. We
6 went over the positives and negatives of putting up a
7 case, putting in evidence and so forth as far as last
8 argument, not having last argument and so forth. And he
9 came to the conclusion -- I came to the conclusion that we
10 would rest without presenting testimony.

11 THE COURT: Very well.

12 MS. TESSITORE: Can I interject one moment, Your
13 Honor?

14 THE COURT: Sure.

15 MR. ROBINSON: I just advised him, Your Honor,
16 Ms. Tessitore has showed me that she did have a fraudulent
17 check from 2005. Conviction.

18 THE COURT: Okay, Mr. Thomas, you -- and you
19 don't have to share with me your discussions with your
20 lawyer but you agree that you and your lawyer have talked
21 about strategy?

22 MR. THOMAS: Yes, sir.

23 THE COURT: Of presenting evidence and not
24 presenting evidence?

25 MR. THOMAS: Yes, sir.

1 THE COURT: And you're comfortable with the
2 strategy that he's articulated?

3 MR. THOMAS: Yes, sir.

4 THE COURT: Very well, thank you, so much,
5 Mr. Thomas. Thank you, I appreciate it.

6 Thank you, Mr. Robinson.

7 All right, when the jury comes back then we'll
8 do the publication of the stipulation. Do you all need
9 further time to organize your thoughts?

10 MS. TESSITORE: Yes, sir.

11 THE COURT: Before -- all right, well -- I'll
12 give you about 10, 15 minutes to do that after we send the
13 jury out.

14 Any specific request to charge from the State.

15 MS. TESSITORE: Your Honor, as far as charges, I
16 think, obviously, the issue of the value came up and then
17 there is the -- I can get that for you, it's the case as
18 to--

19 THE COURT: The value is not -- it has to be
20 some property item. It has, to be transportation of
21 property item but it doesn't have to have any significant
22 value.

23 MS. TESSITORE: Just any value?

24 THE COURT: Any value. It doesn't matter. If
25 it belonged to somebody and it was taken from that person

1 with a firearm and through intimidation, then it would
2 meet the elements. The significance of the value has
3 nothing to do with it. So I'm going to charge just a
4 general charge on that particular issue.

5 MS. TESSITORE: Yes, sir. Obviously
6 circumstantial evidence.

7 THE COURT: I'll charge that.

8 MS. TESSITORE: Eye witness.

9 THE COURT: I'm going to charge identification.

10 MS. TESSITORE: The -- I guess one question,
11 Your Honor, and it may be a little premature, but as far
12 as whether the jury would be charged on a lesser included
13 of attempted, if the jury determines --

14 THE COURT: That's -- I'm not going to charge
15 attempted because you presented evidence that there was a
16 firearm. And you could have indicted him on attempted and
17 then it wouldn't have been necessary. I don't think that
18 would...

19 MS. TESSITORE: Well, if they determine that
20 the--

21 THE COURT: I'm not going to charge -- I'm not
22 going to charge a lesser included when the evidence --
23 just because they don't believe there was a firearm.

24 MS. TESSITORE: Well the issue not being the
25 firearm, Your Honor, but the actually taken of--

1 THE COURT: You charged that he took it. I'm
2 sorry, you could have easily presented this as attempted.

3 MS. TESSITORE: Right.

4 THE COURT: Or, I guess, you could have -- I
5 guess you could have indicted him on both, I don't know
6 but I'll look at it. I don't think that's there. I think
7 you have -- they have to disbelieve that portion of it. I
8 don't know that that would trigger any crime. Where there
9 was an attempt -- which could be an attempt if you could
10 present evidence simply because the fact that the jury
11 doesn't believe there was -- didn't believe there was any
12 actual robbery. So I don't believe that to be the case.

13 MS. TESSITORE: No, I think I was just more
14 focused on the issue of did the lottery have any value.

15 THE COURT: Well value doesn't have anything do
16 with it.

17 MS. TESSITORE: Right.

18 THE COURT: So that doesn't make it attempt.
19 You have him taking a lottery ticket or you didn't have
20 one at all.

21 MS. TESSITORE: But if they determine that it's
22 not an item of value.

23 THE COURT: Doesn't matter, it's property.

24 MS. TESSITORE: Yes, sir.

25 THE COURT: You're going to argue that, I'm

1 going to charge it.

2 MS. TESSITORE: Yes, sir.

3 THE COURT: Okay. You just told me value
4 doesn't matter and then you now arguing that value does
5 matter, which way you going, Solicitor?

6 MS. TESSITORE: Well I'm just paying attention--

7 THE COURT: No, not paying attention. Which way
8 are you advocating for your client, the State of South
9 Carolina? It doesn't have to have value.

10 MS. TESSITORE: Right.

11 THE COURT: If the jury disbelieves that then
12 you're going to prove -- then there's no robbery. I mean,
13 there's nothing.

14 MS. TESSITORE: Yes, sir.

15 THE COURT: Okay. Pointing a firearm but you
16 didn't charge him with that you. You charged him with
17 possession of a violent crime. So if you don't find armed
18 robbery, there's no charge for that, we go to burglary and
19 we charged him with burglary?

20 MS. TESSITORE: Yes.

21 THE COURT: And what evidence do we have of
22 that? That he went in and commit a robbery?

23 MS. TESSITORE: Yes, sir.

24 THE COURT: Okay. All right. You want -- let's
25 assuming -- let's go ahead, we'll do that after you rest.

1 I'll give you motions at that point.

2 MR. ROBINSON: Yes, sir.

3 THE COURT: Thank you. We have all of them,
4 missing one. Good, we'll be at ease.

5 MS. TESSITORE: Your Honor, I was just going to
6 say we could probably go ahead and address the
7 stipulation. At this point. Off the record as far as
8 just discussions and --

9 THE COURT: Well y'all talk about it, I don't
10 need to be privy to that.

11 MS. TESSITORE: Yes, sir.

12 THE COURT: Whatever y'all agree upon is fine
13 with me.

14 MS. TESSITORE: Thank you.

15 THE COURT: Solicitor, have you resolved the
16 stipulation? We need to bring the juror in so you can
17 read it.

18 MS. TESSITORE: Your Honor, will you be
19 publishing the stipulation?

20 THE COURT: I can. Be happy to.

21 MS. TESSITORE: Okay. I think we've got this
22 stipulation with respect to the chain on the item JMA-6,
23 the dice game. The only question remaining, Your Honor,
24 was State's Exhibit 15, which is the fingerprint card.
25 Based on what I understood as Mr. Robinson's agreement,

1 that the -- since I called the witness that the foundation
2 was laid as far as him identifying the cards and that he
3 prepared it. But I was waiting until we completed it to
4 admit the card. So I would move to admit this card,
5 State's Exhibit No. 15.

6 THE COURT: Any objection?

7 MR. ROBINSON: No objection.

8 THE COURT: So admitted.

9 MS. TESSITORE: Okay.

10 THE COURT: And we'll mark that as Court's
11 Exhibit No. 1.

12 (WHEREUPON, State's Exhibit No. 15 was admitted
13 into evidence.)

14 (WHEREUPON, Court's Exhibit No. 1 was marked for
15 identification and received into evidence.)

16 THE COURT: And the stipulation.

17 MS. TESSITORE: Thank you, Your Honor.

18 THE COURT: Thank you.

19 MR. ROBINSON: Judge.

20 THE COURT: Yes, sir.

21 MR. ROBINSON: As far as the -- they'll rest,
22 then I'll rest.

23 THE COURT: That's correct.

24 MR. ROBINSON: And as far as the charge goes,
25 should I ask you now for the charge?

1 THE COURT: We'll talk about it.

2 MR. ROBINSON: Yes, sir.

3 THE COURT: I'll be happy to..

4 MR. ROBINSON: Yes, sir, thank you.

5 THE COURT: Entertain any requests you have.

6 MR. ROBINSON: Thank you.

7 THE COURT: And Mr. Thomas, until I turn to
8 Mr. Robinson and ask him -- what I'm going to ask is Does
9 Mr. Thomas wish to present additional witnesses for the
10 jury's consideration? Until that is done, he tells me no.
11 If you change you're mind, just let Mr. Robinson know,
12 I'll excuse the jury and we'll revisit our earlier
13 discussion. But if I don't hear from you, I'll assume
14 that you're still comfortable with your decision not to
15 testify.

16 MR. THOMAS: Thank you, Your Honor.

17 THE COURT: Very well.

18 Bring in your jury, please.

19 (WHEREUPON, the jury came into open court at
20 approximately 1:49 p.m.)

21 THE COURT: State has a stipulation, is that
22 correct?

23 MS. TESSITORE: That's correct, Your Honor.

24 THE COURT: Which is now Court's Exhibit No. 1.

25 Ladies and gentlemen, it's not uncommon for

1 parties, through their attorneys, to stipulate to certain
2 testimony rather than bringing a witness in, have that
3 witness testify, they stipulate to what the witness would
4 have said had they been present. A stipulation is
5 evidence that you would consider with all other evidence
6 in this case when you evaluate, assess the credibility or
7 believability of the evidence and the testimony of the
8 witnesses. I'm going to share this stipulation with you
9 now. If I could have your attention.

10 (WHEREUPON, Court's Exhibit No. 1, a
11 stipulation, was published to the jury.)

12 THE COURT: Having published that and it is
13 admitted into evidence, what was it State's Exhibit the
14 card, 16? That we talked about, the fingerprint card.

15 MS. TESSITORE: No, Your Honor, may we approach?

16 THE COURT: You didn't admit that?

17 MS. TESSITORE: No, Your Honor, not that one.

18 THE COURT: No, I'm talking about one that you
19 asked that was admitted.

20 MS. TESSITORE: Yes, I'm sorry.

21 THE COURT: I'm not talking about that one.

22 MS. TESSITORE: Yes, sir, State's Exhibit No.
23 15.

24 THE COURT: State Exhibit 15, which is the
25 fingerprint card, has been admitted without objection as

1 well, thank you.

2 MS. TESSITORE: Thank you, Your Honor.

3 THE COURT: You bet.

4 All right, anything further from the State,
5 Ms. Tessitore?

6 MS. TESSITORE: Nothing further from the State,
7 Your Honor.

8 THE COURT: All right.

9 MS. TESSITORE: The State rests.

10 THE COURT: Okay, preserving motions, having had
11 a discussion and just to accommodate the jury, as you
12 recall, ladies and gentlemen, the only -- when I discussed
13 with you when we started this, the only party that had any
14 burden of prove was the State of South Carolina. And I
15 further informed you that Mr. Thomas, had no
16 responsibility to prove or disapprove anything. He
17 certainly does not have to prove his innocence. But he
18 would nevertheless have the right, if he chose to, present
19 testimony after the State's case.

20 Mr. Robinson, at this time, does Mr. Thomas wish
21 to present any additional testimony for the jury's
22 consideration?

23 MR. ROBINSON: No, sir.

24 THE COURT: Very well.

25 Ladies and gentlemen, at this point there's some

1 matters of law then that I must take up out of your
2 presence. I'm going to ask that you go to your jury room.
3 When you return, we will move into the two final portions
4 of this process. You will not hear anymore evidence.
5 You have heard all the evidence that you're going to
6 evaluate. But it would still be inappropriate for you to
7 begin your deliberations, collectively or individually.
8 So do not discuss this case, do not begin to decide
9 anything and we'll be with you as quickly as we can.
10 Thank you.

11 (WHEREUPON, the jury left open court at
12 approximately 1:56 p.m.)

13 THE COURT: All right, any motions from the
14 State at this point, Ms. Tessitore?

15 MS. TESSITORE: None from the State, Your Honor.

16 THE COURT: Mr. Robinson, any motions?

17 MR. ROBINSON: May it please the Court?

18 THE COURT: Yes, sir.

19 MR. ROBINSON: At this time, Your Honor, we make
20 a motion for a directed verdict of acquittal as to the
21 charges in this case, armed robbery, burglary in the third
22 degree and possession of a weapon during the commission of
23 a violent crime. It's our position that the -- that
24 obviously the burden is on the Defendant [sic] in this
25 case and the we don't think there's any evidence -- the

1 weight of the evidence in this case. But, Your Honor,
2 they have put forth a lottery ticket that we don't -- or
3 it's the Defendant's contention that that is not property,
4 has no value and so forth as far as armed robbery claimed.
5 And with the other charges we ask that the Court grant a
6 directed verdict of acquittal in this case.

7 THE COURT: Thank you. Based on the testimony
8 of the witnesses and the light most favorable to the State
9 as I'm required to take it, I would respectfully deny your
10 motion. I think there is sufficient evidence for the jury
11 to conclude that the crime of armed robbery was committed,
12 including property, transportation. I also find that is
13 the jury believes the testimony of Mr. Gordon, clearly
14 they established a firearm, they also by circumstantial
15 evidence linked that and put it in Mr. Thomas' possession.
16 Potentially. No question there's no conclusive evidence
17 of that but again, a logical deduction would be if the
18 jury were the to find that, would be that it was his and
19 could well have been because it was identified by
20 Mr. Gordon as the gun that looked like the gun that was
21 presented to him at that time. The jury convicts him of
22 armed robbery and therefore, they believe the testimony of
23 Mr. Gordon, clearly is that the State has met its burden
24 of proof as to being in possession of a weapon during the
25 commission of a violent crime, armed robbery being a

1 violent crime.

2 Then as to burglary third, obviously, I believe
3 his testimony her entered Apartment 119, didn't have any
4 permission and if they believe that he committed armed
5 robbery, then he entered with the intent to commit a
6 crime. So that all the elements of that have been
7 established. So I must respectfully deny your motion for
8 those reasons.

9 All right now, any requests to charge from
10 Mr. Thomas?

11 MR. ROBINSON: Yes, Your Honor, at this time,
12 Judge, we would request a charge of strong armed robbery
13 in this case. As you know, the elements of strong armed
14 robbery, use of force, intimidation take place, to take
15 personal property from a person or intermediate possession
16 without permission of another person, with the intent to
17 deprive them of possession of the property taken. We'd
18 ask for the charge of strong armed robbery.

19 THE COURT: What's the State's position?

20 MS. TESSITORE: Your Honor, I think based on the
21 victim's testimony, he looked at what appeared to be to
22 him a deadly weapon. So even if they find that -- I
23 just -- I just don't think--

24 THE COURT: It's a gun. It doesn't even have to
25 be loaded.

1 MS. TESSITORE: Right.

2 THE COURT: It can constitute an armed robbery.
3 It's one of those things, yeah, I guess a jury goes back
4 to what I said, a jury could disbelieve that he had a gun
5 but that he threatened him. And therefore, would warrant
6 strong armed robbery. But I just don't think that's the
7 way we deal with any lesser included offenses. It has to
8 be some evidence of it. Something for the Court to
9 conclude that the jury could disbelieve that. And
10 evidence supports the other. I think that would warrant
11 as charged in almost any crime that could occur. For that
12 matter it could be petit larceny. If they believe he
13 didn't threaten him, he just took his -- he just took his
14 lottery ticket. I'm certainly not going to charge petit
15 larceny. So, I mean, it just -- at some point we have to
16 draw a line. And based on the evidence, and I would note
17 your request but I must respectfully deny that. I don't
18 think the evidence supports it. That there's any
19 reasonable interference to charge the elements to support
20 that.

21 MS. TESSITORE: Yes, sir, Your Honor. I think
22 if it would have been covered up or even some testimony
23 about--

24 THE COURT: He never saw it--

25 MS. TESSITORE: -- being concealed.

1 THE COURT: -- maybe thought he had it, sure.
2 There's a possibility. But this one he said, I saw the
3 firearm, I was looking at it. And I think that would be
4 sufficient to take it out of strong armed robbery.

5 Now, grant it, you can argue, if they don't
6 believe it was a firearm then they must return a verdict
7 of not guilty. It's -- that's the interesting issue but I
8 think that's the way it is. And the State has the burden
9 of proving the crime that it sought to pursue.

10 So any other requests to charge?

11 MR. ROBINSON: No, Your Honor, just as along as
12 we have something regarding his decision not to testify.

13 THE COURT: Oh, I'm going to definitely charge
14 that. You'll hear that probably -- that follows the
15 second -- that follows the presumption of innocence.

16 MR. ROBINSON: Thank you, Judge.

17 THE COURT: Okay. Thank you.

18 All right, we'll be at ease then for about 15
19 minutes.

20 (WHEREUPON, a short break was taken.)

21 THE COURT: The charge of attempt -- of
22 attempted armed robbery and also made that a lesser
23 included offense of armed robbery.

24 MS. TESSITORE: Thank you, Your Honor.

25 THE COURT: Well I don't know whether you thank

1 me or not. You sure that's what you want to do? I mean,
2 I think they have a request and you can request it but you
3 know what that means. Because attempt is not a strike.

4 MS. TESSITORE: Well, my understanding was it
5 would be a strike.

6 THE COURT: How is it a strike? It's a
7 lesser -- it's a 20 year sentence.

8 MS. TESSITORE: I believe -- I thought it was
9 designated as a most serious.

10 THE COURT: Attempted armed robbery is? I mean,
11 I defer to the statute, I've never looked at it so I don't
12 know.

13 All right, are you ready? Or you need a minute?

14 MS. TESSITORE: One of the shorter minutes, Your
15 Honor.

16 THE COURT: Is that like 45 seconds?

17 MS. TESSITORE: Your Honor, the State's ready.

18 THE COURT: Very well, thank you.

19 Bring them in.

20 (WHEREUPON, the jury came into open court at
21 approximately 2:30 p.m.)

22 THE COURT: Thank you, ladies and gentlemen,
23 we're ready now to move into the third phase of this
24 process where the attorneys have their second opportunity
25 to speak to you. Unlike the opening statements, you've

1 heard the evidence. But now it's proper for them to
2 discuss that evidence with you and suggest reasonable
3 inferences that you may draw from that evidence. I'm very
4 confident that you will find those remarks to be extremely
5 helpful when you begin the process of resolving this case.
6 So please, give them your attention, but, of course, as
7 you know and as I've stated throughout, their remarks,
8 just as my remarks, are not evidence. Thank you, very
9 much for your attention thus far. If you'll give your
10 attention now to the attorneys.

11 Solicitor.

12 MS. TESSITORE: May it please the Court?

13 THE COURT: Yes, ma'am.

14 CLOSING STATEMENT

15 MS. TESSITORE: Mr. Robinson.

16 When I began this case, ladies and gentlemen, we
17 talked about luck and playing the lottery, buying a
18 lottery ticket. And as you've heard, based on everything
19 you've heard over the course of the last two days, the
20 State would submit that this Defendant, Eugene Thomas,
21 thought he was going to get lucky. And he found a crime
22 of opportunity, this is a crime of opportunity, found a
23 victim, so that's the first thing he got lucky about. He
24 was looking for quick cash, obviously. Rifling through a
25 wallet, not finding any, grabs whatever he can. So he

1 doesn't leave empty handed, I guess.

2 He's lucky because the victim was buy himself,
3 he wasn't work with anyone. So there were no witnesses
4 around. He was lucky because the victim was just there,
5 wet hands, just put down the paint brush, he is just
6 completely vulnerable, he's all by himself, and he doesn't
7 put up any kind of fight. He's completely vulnerable.
8 And he does what the Defendant ordered him to do. And
9 what he ordered him to do with this, a black, automatic
10 pistol, mostly black, some silver, the silver as you'll
11 see, is where his hand would be holding the grip. The
12 grip had a textured, obviously not a good surface for
13 lifting any kind of prints.

14 He was lucky because he was able to leave there
15 without being detected as far as where he went and what he
16 did after that. And we don't know if the lottery ticket
17 was a winning ticket. I would submit that this
18 Mr. Robinson think's some type of tracing system to the
19 lottery. As you can imagine Mr. Gordon, when he went and
20 bought that ticket, he probably didn't keep his receipt
21 and save it for later just in case he had to prove that he
22 bought a lottery ticket. He testified, I bought them all
23 the time. And he was just hoping to get lucky.

24 Well, this a not about the lottery ticket, it's
25 not about the value what he took. Clearly it had value.

1 Even the victim testified that he bought the ticket, he
2 didn't steal it, nobody gave it to him. He clearly had an
3 item of some value. He was hoping it was of a huge value
4 but he'll never know either. So the lottery ticket,
5 that's not the point. It's the point only that it was an
6 item that was taken. And he told Officer Bradley when he
7 came out three, that's the only thing that was taken. He
8 didn't take my money, you know, he didn't take anything
9 else. Nothing that would trace him back to being the
10 suspect of this crime.

11 But, it's not about what he took, as I told you
12 at the beginning of this case, it's what he left behind.
13 And what did he leave behind? And that's where his luck
14 started to run out, ladies and gentlemen. When he, as you
15 heard the testimony, the forensics officer came out and
16 he -- he went through the apartment in Unit D. And Doug
17 Smith looked at the area where he may have touched, he
18 talked to the victim as well as the officer. And he went
19 out there and he was able to lift their prints. And as he
20 described and drew up here, that print was on the inside
21 of the door between the deadbolt and between the doorknob.
22 Right in between. Not on the doorknob, not anywhere else
23 but a place where if you were going in a door or if you
24 were trying to push a door behind you, that would be an
25 area that he would have touched. And it was his pinky

1 finger, left pinky finger.

2 So, as you heard the victim describe, he came
3 in, first the door just kind of opened gradually.
4 Mr. Thomas is not going to alert his victim, he's trying
5 to sneak in quietly so that he can pull the gun on him and
6 get the job done. Now, he also, the victim also testified
7 that he pushed the door as he came in and then he pulled
8 the gun out in his left hand. At that point, he pushed
9 the door, left pinky finger on the door, maybe, that's
10 when it got there. You don't know. Either it was when he
11 was opening the door and peered in or maybe when he was
12 pulling the door. Or maybe after he went to the counter
13 and took all the items out and put them on the counter and
14 went through his wallet, trying to find things. And then
15 he went back out the last time he was seen by the victim
16 and he pulled the door. So there's really three
17 possibilities at that point where he could have put his
18 pinky finger on that door and left that evidence behind.

19 He told the victim he was wiping down the
20 counter as he was gathering up and getting ready to leave.
21 There were no prints found on the counter. But the print
22 that he wasn't thinking about, to worry about where he
23 might leave was on the inside of that door. Because he
24 wasn't thinking about that at that point. He was thinking
25 about getting in and getting that gun out and making sure

1 he had control of the situation and getting out as fast as
2 he could.

3 So, you heard Doug Smith testify about that
4 fingerprint, where it was found. That fingerprint was
5 then compared to the known print of Mr. Thomas. And you
6 heard Chris Gary, the latent printed examiner, who
7 testified that he compared the prints. And in his
8 conclusion, was that it was this Defendant. So there you
9 go. So those three pieces of evidence you'll have back
10 there, you can look at those and you can look at the first
11 layer of evidence.

12 Secondly -- well let me just add one more thing.
13 With Greg Bryum, who was the painter and the property
14 manager, you might have been wondering, why are they here
15 to testify? Well they were here to let you know and they
16 told you that this apartment was vacant. And that door
17 had been painted in February. There were no tenants after
18 that, so therefore there were no tenants, no tenant
19 visitor. Nobody had reason to be in there except for the
20 painter and Mr. Gordon, where he can go and wash his hands
21 because he had just finished painting in A. And he needed
22 running water and he was just trying to clean up. So
23 Mr. Thomas had no reason to be in Unit D. Except to rob
24 the victim, Michael Gordon.

25 That door was like a blank canvas and he put his

1 fingerprint on it. He put his identity. And you heard
2 the property manager say he never worked for her, she'd
3 never seen him before. You heard the painter say that he
4 didn't hire anybody, it was just he and his wife. And he
5 never showed the apartment to anybody. The property
6 manager said I never showed it to this guy. I never
7 showed it to anyone with whom this guy was hanging around
8 and apartment hunting. So that is -- that is important to
9 let you know that you're looking at that time period
10 between February, when the door was painted and July, when
11 this incident occurred. There's no traffic like a normal
12 apartment where you might say, Oh, well, he could have
13 been visiting there, you know. That paint, as you heard
14 the expert testify, would have covered over any prints
15 that were there from prior tenants and prior -- anybody,
16 you know, coming in, visiting, party goers, whatever.

17 MR. ROBINSON: Objection, Your Honor, that's
18 fact not in evidence in this case.

19 THE COURT: The jury's already been instructed
20 that your remarks are not -- and I overrule your
21 objection. Thank you.

22 MS. TESSITORE: Okay, secondly, the second layer
23 of evidence that you have to consider is that when
24 Mr. Gordon was right there on the scene, right after this
25 happened, he gave a description. First he gave it to 911

1 who then relayed it to Officer Bradley. And Officer
2 Bradley came and told you the description that he gave.
3 First of all, Mr. Gordon had a great opportunity to view
4 him. You'll see in the pictures that there's lots of
5 windows. You heard from several witnesses that lighting
6 was not an issue. That at the time it was vacant, there
7 weren't any curtains, there were the blinds, the mini
8 blinds, the sliding glass door, you can see. As you look,
9 even with the blinds that are on there, how well lit that
10 is. And he had great opportunity to see him, it was in
11 the afternoon, it was sunny, no problem. Nothing
12 concealing his face.

13 He was so brazen that when he came in there, he
14 didn't even make an attempt to cover his face or anything
15 like that. He just figured, I got the gun, I'm going to
16 get it done. So, you look at the description that he
17 gave. Obviously his attention is quite heightened at this
18 point when she says, Can I help you? Doesn't know who he
19 is, doesn't know why he's there, he didn't invite him in.
20 He didn't have consent to come into that apartment. And
21 he said, Can I help you? And at that point he started
22 today to realize when he said, Get down on the floor, and
23 this Defendant pulled out the gun, with his left hand and
24 said, Get on the floor. At that point, Mr. Gordon was
25 paying attention. He had a family, he has a family and he

1 wanted to be able to go home to that family. So he did
2 what he said. He got down on the floor, he let this
3 Defendant go through his pockets, pull out his wallet and
4 his cell phone and at that point he was taking orders.

5 He was able to describe him as a dark skinned
6 black man. Had long dreadlocks. And a very distinctive
7 set of dreadlocks I might add, as you can see as he sits
8 in the courtroom. He was -- at that time the victim
9 described he had a mustache. And he saw a neatly trimmed
10 goatee or some type of hair coming down, depending on how
11 you would define a goatee, around, under his bottom lip.
12 He described him in his late 30's early 40's. You know,
13 age is a difficult thing to judge. And his build was
14 slender and he was about 5'10.

15 Now you heard that when he was arrested, he was
16 about slender build, long dreadlocks, dark skin, he had a
17 mustache, he didn't have a goatee. But as you know, a
18 goatee can be shaven. Facial hair can be changed. If you
19 look at him here today, he has a full beard. So he knows
20 how to change his appearance. And all he has to do is
21 pull out a razor. He's trying, as you look at the many
22 faces of Mr. Thomas, you can see this was three weeks
23 prior, this was two months later when he was arrested.
24 And then you look at him now. So he has changed quite a
25 bit in the last three years. So he has changed. But that

1 doesn't mean that he can change his fingerprints. And
2 that goes back to the first lawyer of evidence,
3 fingerprints don't change. His hair can, his face can but
4 certainly not his fingerprint.

5 Mr. Gordon was able to give that description to
6 police and then that description is what Detective Flavell
7 took when he pulled that -- when he was able to get the
8 picture that he used in the array and he looked at it, he
9 compared it to what the victim told him. And how he
10 looked much differently, he wouldn't have been showing him
11 an array. It was because the description matched the man
12 at the other end of the fingerprint. He matched him.
13 Then when he showed that array to Mr. Gordon and gave him
14 other pictures to look at and he put it down in front of
15 the victim and he said, You know, he may not be in there,
16 you don't have to pick anybody, no pressure, he understood
17 how serious it was. And he told you, he didn't want a
18 innocent person to be charged. And he looked at it and he
19 said, That's the man who robbed me. That was his first
20 words when he looked at this array. He didn't hesitate.

21 And Mr. Robinson kind of focused on this idea
22 that, well, he was, you know, he was almost 100 percent.
23 Knowing that when he put his finger right there, he said,
24 That's the man who robbed me. And then when he talked to
25 Detective Flavell he said, I'm just about 100 percent.

1 Well, ladies and gentlemen, just about 100 percent, it's
2 not like horseshoes. This isn't a game. It's not about
3 luck and fortune and throwing a horseshoe. This is about
4 being firmly convinced that this is the man who committed
5 this crime. It all goes back to identity. And when he
6 picked him out and he said, That's the man. He had seen
7 him so he was -- there was no question in Mr. Gordon's
8 mind.

9 And essentially, the -- the eye witness
10 identification when he looked at those pictures and he
11 said, I'm just about 100 percent, the fingerprint is what
12 takes it to 100 percent. So that's what I'm going to
13 bring you to. Okay, it's not just about him saying, I saw
14 this guy, this is what he looked like and they go out and
15 they find someone who matches the description, that's not
16 how it went. As you heard, it started with the
17 fingerprint. And that fingerprint then led to the victim
18 looking at a group of men, who looked very similar and
19 having on hesitation. So with that fingerprint, that
20 takes it 100 percent.

21 The gun, that's the next layer of evidence. You
22 look at the fact that he was arrested two months later,
23 because he was in a motel. He was not with friends and
24 family in that hotel room, he was just there in that hotel
25 at Wade Hampton Boulevard. Just down the road from [REDACTED]

1 [REDACTED] So it's all within the city limits. And
2 you can look at that and see how close that was. The gun
3 was found in a pouch. The pouch is what contained this
4 gun, two watches. There were no watches taken in this
5 case so the State did not introduce those as evidence.
6 But this matches the description when the victim looked at
7 it on the stand and said, Yeah, that looks like it. He
8 doesn't know for sure. He didn't check the serial number.
9 But he can tell you that he saw a black automatic pistol
10 and it matches the description and it matches the one that
11 you get to look at back in the jury room.

12 That gun -- he was the only one in the motel
13 room and it was within his reach. He was clearly in
14 possession of that item and you can consider that. You
15 can also consider that in that pouch was the dice game
16 that he had. And that dice game was with the gun, with
17 the watches in the pouch. And this dice game had his
18 fingerprints on it. And it was lifted from this dice
19 game. So that even should confirm it even more for you
20 that if there was any question that that maybe wasn't his
21 gun and it was somebody else's, they just left it there,
22 this should take you to that next step of, okay, his
23 fingerprint's here too. And it's with the gun and it's in
24 the pouch and it's in a motel room where the Defendant is.
25 You had the latent print examiner tell you about that as

1 well.. And that came back as the right index finger of
2 this Defendant.

3 So you have basically five layers of evidence
4 that you can consider, that taken all together, should
5 convince you firmly, that this a not a bunch of
6 coincidences. This is not about lightening striking
7 multiple times this Defendant right here, that's not what
8 it's about. It's not about coincidences, it's not about
9 fortune, it's about evidence. And the layers that the
10 State has provided to you so that you can take it all with
11 you and go back to the checklist that we talked about at
12 the beginning of this case. The Judge is going to
13 instruct you as to those elements.

14 And I'm just going to very briefly touch on a
15 few of those elements just so that it will be nice and
16 fresh when you do it hear it from the Court. Burglary
17 third degree, he went in the building, he did not have
18 consent to be there, with a intent to commit a crime
19 inside. That crime, armed robbery. The unlawful taken of
20 money, goods or other personal, private property of any
21 value, the lottery ticket, it's got some value. And it
22 was his property. So -- so we've met -- the State has
23 provided you the evidence as to that.

24 But, ladies and gentlemen, it's -- it's not
25 about the value. As you can see, this crime is about

1 taking from the person of another by violence or putting
2 that person in fear of death or serious bodily injury
3 while they're armed with a deadly weapon or what he
4 thought was a deadly weapon. You take a look at this.
5 When you go back there in the jury room, you take a look
6 at this and you decide, does that look like a deadly
7 weapon? I ask you to use your common sense and answer
8 that question. And Mr. Gordon at that point, that was not
9 his biggest concern of what he lost, it was what he gained
10 which was the ability to walk out of there, to go home and
11 sit on the front step and digest everything that had just
12 happened to him. And what could have happened.

13 Finally, possession of a firearm during the
14 commission of a violent crime. If you determine that he
15 did, in fact, was in possession of a firearm, then did he
16 visibly displayed it? Did he possess it? And was it in
17 the commission of a violent crime? Well you heard the
18 testimony of Mr. Gordon. So that should be -- there was
19 no question of about what he saw as he was describing the
20 gun. It wasn't concealed in any way. In fact, it was
21 held and he showed you how he pointed it. And he pointed
22 it straight at the victim. He pointed it and he looked at
23 him and said, Get down on the floor. So there's no
24 question that Mr. Gordon saw a gun.

25 And the amount of fear that Mr. Gordon felt was

1 not calibrated on the value of the property. So I just
2 want that to be clear. As far as the contrast in that, I
3 would just note for you to consider is that you got the
4 victim out there, working a second job, trying to support
5 his family and he's just trying to use a paint brush to do
6 that. On the other hand, you have this Defendant, Eugene
7 Thomas, who goes out and his tool, his way of earning a
8 living is buy using that gun, right there and just taking
9 a crime -- taking an opportunity to rob the victim.

10 Ladies and gentlemen, as I again, in the opening
11 statement, the State is here to seek justice for the
12 victim and for the people of Greenville County. And based
13 on these layers of evidence, the State would ask you to
14 find a verdict of guilty as to all crimes. Thank you.

15 THE COURT: Thank you.

16 Mr. Robinson.

17 MR. ROBINSON: May it please the Court?

18 THE COURT: Yes, sir.

19 CLOSING STATEMENT

20 MR. ROBINSON: Good afternoon, again. As I said
21 before, my name is Scott Robinson, I practice in
22 Greenville. After listening to the Solicitor's closing
23 statement, I would submit that it would kind of make
24 everyone a little bit upset to me because she left out
25 some extremely important points in this case. She makes

1 out this whole, like this five layer that she wants to
2 talk about as far as evidence. But let's talk about what
3 she doesn't talk about in her closing statement. First,
4 let's talk about the two forensic persons that they had on
5 the stand. There was not one person that came in here, no
6 one from forensic people ever said, she never asked them
7 one question about the effect of paint on a fingerprint.
8 Nothing was ever asked about that.

9 MS. TESSITORE: Objection, Your Honor.

10 THE COURT: Okay.

11 MS. TESSITORE: Your Honor, the witness,
12 Mr. Gary testified--

13 THE COURT: Solicitor, I appreciate that. I've
14 instructed the jury that y'all's comments are not--

15 MS. TESSITORE: Yes, sir.

16 THE COURT: -- evidence. They can go with their
17 recollection, I'll remind them of it.

18 Overruled.

19 MS. TESSITORE: Yes, sir.

20 MR. ROBINSON: He also -- what he did say was
21 that he could not tell how long that fingerprint of
22 Mr. Thomas had been there. Had no idea how long it had
23 been there. Now we do know that the son that lived there
24 previously was evicted. But what we don't know, what we
25 really don't know is what kind of relationship that

1 Mr. Thomas may have had with this person. Was he in some
2 sort of relationship? Was he in -- did he attend a party
3 there or something? Did he have friends visit there? The
4 explanation is that they got no idea when that fingerprint
5 got there, and how old it was. And if you listen to the
6 expert, the person they had, he couldn't say how old it
7 was. It could have been weeks, maybe longer.

8 So what's more interesting is that the victim
9 himself, besides the forensics establishing this case, the
10 victim himself said, on the stand, and you heard him on
11 the stand, he said that the door was ajar and he heard the
12 door swing open in this case. Which is the front of the
13 door, the door swings -- is ajar, it swings open, sees the
14 guy out of the corner of his eye. That's what he says.
15 And he also says that the door was left opened. And he
16 also said, his testimony was, if you can recall this, that
17 the perpetrator never touched the inside of the door. He
18 said he just left. Left it open. There was no testimony
19 that the perpetrator ever touched the inside of this door.
20 Not one. Not one time. By the victim.

21 Think about that. If the victim testifies that
22 the perpetrator didn't touch the inside of the door, then
23 they're saying, Well, since Mr. Thomas' fingerprint was
24 there, it must be him. How does that make sense? How
25 does it make sense? As I said at the beginning of this

1 case, use your common sense. If the victim himself says
2 that the door was ajar, he kind of pushed the door opened,
3 then he left without closing the door.

4 But here's the interesting thing that they did
5 leave out in their closing statement, if you remember
6 this. They left out this little issue of the fact that
7 there were other prints taken in this case on the front of
8 the door. They left that out. Why? Why? Because they
9 can't connect it to the Mr. Thomas, they can't connect it
10 to Eugene. They have nothing. You listened to the
11 testimony, those prints were not Eugene's prints on the
12 front of that door. Why did they leave that out of their
13 closing statement?

14 And you'll get an opportunity to listen to the
15 testimony of this victim, when they showed this gun and
16 tried to connect this gun in this case, the victim didn't
17 identify this gun as the gun. He didn't say that it was
18 the gun. He said it may be similar. Well there are a lot
19 of guns that are similar. Lots of them. Millions of
20 them. But he never said this was the gun. And the State
21 is trying to put together two separate incidents. They
22 have the one that allegedly occurred at this place, this
23 apartment complex. That interestingly, mention too, is
24 that there's not one witness through this whole thing, you
25 heard the officer in the start of this case, the officer,

1 the big guy, testified it's a heavily -- a lot of foot
2 travel, a lot of people around and so forth. Where are
3 these people that could say something? Where are these
4 people? In the middle of the day, broad daylight, not one
5 person saw anything. Not one person saw anything.

6 So you can look at the forensics, the
7 forensics -- all the forensic information establishes is
8 that one, the prosecution cannot link the outside of the
9 door prints to Eugene Thomas. Two, these prints on the
10 inside of the door, they don't know how long they've been
11 there. And then the -- these pictures that they talked
12 about here, all these pictures regarding what Mr. Thomas
13 looks like and so forth, pictures of the inside of the
14 apartment months afterwards, that's great but it doesn't
15 establish that Mr. Thomas had anything to do with this.
16 And the victim himself, he's the one that reveals the
17 whole -- he talks about the whole situation. The guy
18 never touched the inside of door. He left in a huff, bam.
19 Outside of the door, he touched. But interestingly, all
20 this exhibits and so forth in this case, there is not one
21 piece of information from the State regarding whose prints
22 were on the front of that door. That's the person that
23 did this. Not Mr. Thomas. The victim himself in this
24 case said it wasn't the person -- the perpetrator did not
25 touch the inside of the door. And if he didn't touch the

1 inside of the door, it sure as heck wasn't Mr. Thomas.

2 So we got this faulty attempt to try to put
3 together two events, two or three months apart. This gun
4 was not connected to this. The victim himself said looks
5 similar but can't say it's connected to this. You didn't
6 see anything, lottery ticket Mr. Thomas had. And you know
7 something, it's interesting, I asked the officer on
8 cross-examination, tell me if this guy was cooperative.
9 Or did he try to run or anything like that. It is normal
10 at InTown Suites to have clothes, things like that. It's
11 not illegal -- it's not illegal to have a gun, it's not
12 illegal to have clothes.

13 So I'd ask you to look at the forensics which
14 establishes -- that they really haven't established
15 anything. And the victim's own statement in this case.
16 And you know something, I appreciate, I appreciate the
17 prosecutor talking about how we're not talking about
18 horseshoes and hand grenades and all that stuff. I
19 appreciate it. And I think that's great. Well, here's
20 the thing, y'all took an oath when you came in here, okay.
21 You took an oath. And, you know, when you go home and you
22 see things, you read the paper, look at the internet, do
23 certain things, you may think, Well the police got
24 somebody, they're guilty. Well, that's not really the
25 standard that you have in a criminal case. The standard

1 is the State has to prove each and every element of their
2 case beyond a reasonable doubt. It's not -- and this is
3 using the victim's words in this case. It's not almost
4 positive. It's not just about 100 percent. It's just
5 about or pretty sure. That's not beyond a reasonable
6 doubt. That's not beyond a reasonable doubt.

7 You use your common sense in this case. And I
8 know y'all really don't -- when you come into a courtroom
9 on a weekday, it's probably not the most enjoyable thing
10 but in peace time, outside of a lot of things, it's one of
11 biggest things you can do. Because we have the greatest
12 justice system in the world. And it takes 12 people that
13 come from different backgrounds and so forth, that come
14 together and use your common sense in this case. If you
15 can do that and you look at what the State has shown, has
16 not shown, what they're not putting forth in their closing
17 statement and so forth in this case, it does come down to
18 reasonable doubt.

19 And the State, I would submit, has not presented
20 the case that establishes beyond a reasonable doubt that
21 Eugene Thomas did any of these crimes. And I appreciate
22 all you've done in considering this case. And I hope that
23 you return a verdict that speaks the truth. And the
24 standard again is beyond a reasonable doubt. It's not
25 almost positive, just about, pretty sure, that's not

1 reasonable doubt. Thank you.

2 THE COURT: Thank you, Mr. Robinson.

3 JURY CHARGE

4 Ladies and gentlemen of the jury, if I can have
5 your attention now, it becomes my responsibility, of
6 course, as the judge of the law to give you the law that
7 you have promised to accept and apply fairly and
8 impartially to the facts that you will determine very
9 shortly when you begin your evaluation of the evidence.
10 And certainly, the State, Mr. Thomas, respect that you
11 will very shortly evaluate that evidence and determine the
12 effect, value, weight and truth of the evidence in this
13 case. And you will thereby, honor your oath by
14 determining the true facts and then take the law and apply
15 it fairly to those facts. And I would suggest that when
16 you've done that, both the State and Mr. Thomas have had a
17 fair and impartial determination. Which is what we talked
18 about Monday. The ultimate goal is to honor that
19 commitment that we both made.

20 This isn't a result oriented process. We're
21 here, the only result, only aspect, is we determine the
22 truth and take the law as I give it, apply it fairly and
23 impartially. Now, please understand that during this
24 instruction you may hear me use the term Defendant. You
25 probably heard me use it during the trial. That term is

1 just a term that we use to destinate a party against whom
2 a claim is made. Or it's for identification only, it
3 means nothing else. Synonomous with Mr. Thomas. So when
4 I use that term, just know that I'm referring to
5 Mr. Thomas.

6 As I mentioned to you, he's been accused in
7 these two documents that I have, we call them Indictments.
8 They're the formal charging or the formal charging
9 documents. One document accuses him of committing the
10 offense of armed robbery and possession of a weapon during
11 the commission of a violent crime. The other accuses him
12 of committing the offense of burglary in the third degree.
13 These documents will not accompany you to your jury room
14 because they're not evidence. And to these charges,
15 Mr. Thomas has rendered a plea of not guilty. Which
16 places upon the State, of course, the burden of proving
17 his guilt beyond a reasonable doubt. For as I stated at
18 the onset, persons of this State and this country, who
19 have been accused of committing a criminal offense such as
20 Mr. Thomas is today, are never required to come in and
21 prove themselves innocent. They're not required to
22 disprove, explain. They have no duty whatsoever because
23 the law says that those persons are so accused, are
24 presumed innocent. And each of you is required under your
25 oath to actively presume that Mr. Thomas is not guilty.

1 The presumption of innocence is maintained at
2 all times throughout the trial of this case and may only
3 be removed when and if the State brings enough evidence to
4 persuade you beyond a reasonable doubt that he is guilty
5 of one or more of these offenses. Obviously, ladies and
6 gentlemen, since a person is so accused have no burden to
7 prove or disprove anything, the fact that a person accused
8 of a criminal offense does not cast a light in his or her
9 own behalf, cannot and must not be considered against that
10 person under any circumstances or any manner whatsoever.

11 A defendant has the absolute Constitutional
12 right to remain silent. And the assertion of that right
13 cannot and must not be considered by a jury in its
14 deliberations. Under your oath and you are to reach no
15 inference and draw no conclusion whatsoever from the fact
16 that the Defendant in this case did not himself testify.
17 His failure to testify shouldn't even be discussed in the
18 jury room. If you do you will have violated the oath that
19 you took. Know, as I stated throughout, the burden is on
20 the State to prove his guilt beyond a reasonable doubt.
21 And his -- he has no burden whatsoever in that. So
22 therefore, you must evaluate the evidence solely on the
23 basis of what has been presented. And determine whether
24 you're convinced beyond a reasonable doubt.

25 What is a reasonable doubt? A reasonable doubt

1 is doubt which would make an honest, sincere,
2 conscientious juror who's searching for the truth in a
3 case to hesitate to act. Prove beyond a reasonable doubt
4 is prove that leaves you firmly convinced of the
5 Defendant's guilt. I would further instruct you that
6 there are very few things in this life and in this world
7 that we know with absolute certainty. And in criminal
8 disputes such as this, the law does not require proof that
9 overcomes every possible doubt. And based on your
10 consideration of the evidence, you are firmly convinced
11 that Mr. Thomas is guilty of one or more of the crimes
12 charged, then you must return a verdict of guilty. If on
13 the other hand, you think there's a real possibility that
14 he's not guilty, then you must give him the benefit of
15 that doubt and return a verdict of not guilty.

16 I would instruct you that reasonable doubt may
17 arise from the evidence which is in a case or the lack or
18 absence of the evidence in a case. It's up to you to
19 determine whether or not a reasonable doubt exists as to
20 the guilt of this Defendant. I charge you that he's
21 entitled to every reasonable doubt arising in the whole
22 case. And that means simply this. If upon any issue of
23 fact which would be essential for you to return a verdict
24 of guilt or convict him of that particular crime, if you
25 should have a reasonable doubt as to how that issue should

1 be resolved, it would be your duty to resolve that in his
2 favor.

3 Now, the evidence which you are to consider
4 consists of the testimony of the witnesses and the
5 exhibits that were introduced through their testimony.
6 Now, please understand something in that regard. Where we
7 say evidence that was introduced, it means that it was
8 admitted into evidence. There are time in a trial, and it
9 may have been some in this one, when a witness was shown a
10 document and the document was identified by giving a
11 number. But that document was not actually admitted. The
12 fact that it was not admitted shouldn't be considered by
13 you. You consider the testimony about that document but
14 the document, if it was not admitted, will not accompany
15 you to your jury room. And that's perfectly normal,
16 that's not uncommon. You are to evaluate the testimony of
17 the witnesses and the exhibits that were introduced
18 through their testimony.

19 Now, please remember also that any time during
20 the trial if you heard the term or attorneys say,
21 Objection, Your Honor. That was proper. That's precisely
22 how matters of law are presented. And as I mentioned to
23 you one time, during the trial, sometimes we have to
24 excuse you to deal with matters of law, sometimes we did
25 it at a bench conference. The fact that the attorney made

1 an objection, the fact that I may have ruled and indicated
2 a ruling in your presence, should not be considered by you
3 at all. Because it's very proper as officers of the court
4 for the attorneys to make those objections and to raise
5 those matters for my consideration.

6 I think probably the greatest example I can give
7 to a jury, of how we work together, comes about when I
8 would have -- an objection was made and I overruled the
9 objection. Just because I overruled it, doesn't mean that
10 you have to accept it. Really, it stops the moment I say,
11 I overruled, I've said as a matter of law, I'm going to
12 permit the question and the response. But then it shifts
13 to you. You have to decide whether you believe it or not.
14 And if so, how old strongly you believe it. So it really
15 does demonstrate how we work together. But other than
16 that, you're to place no significance whatsoever from any
17 ruling or the fact that anything was given. Likewise,
18 anything that I may have said or any actions or body
19 language you noticed from me during the trial, you must
20 disregard that as well. Again, I have nothing to do with
21 the determination of the evidence. That's your
22 determination based on the testimony of the witnesses.

23 Also, as you've heard me say throughout, the
24 remarks of the attorneys are very helpful, very important
25 as officers of this court. But their remarks should never

1 be considered evidence. If their remarks differs, for
2 instance, what a witness said or didn't say differs from
3 your recollection, you're instructed to disregard their
4 remarks in its entirety. Likewise, if their remarks
5 differ from the law, differ from what I tell you the law
6 is, you must disregard their remarks in its entirety.
7 Why? Because as to the evidence, as to the facts, you and
8 you alone are the sole judges of the facts. As to the
9 law, for purposes of this proceeding today, I'm the sole
10 judge of the law. You must accept the law as I give it to
11 you.

12 Now, ladies and gentlemen, evidence is presented
13 for a jury's consideration, basically, using two types of
14 evidence. And it's not uncommon to have both present.
15 It's not always but it's not uncommon to have both types
16 present for a jury's consideration. One is direct
17 evidence and the other indirect evidence. But the more
18 popular name for that is circumstantial evidence. Direct
19 evidence is a name were the party suggest generally a
20 sensually perception. I saw something, I heard something,
21 I felt something of the like. And if you're firmly
22 convinced of the truthfulness of that testimony,
23 credibility of that testimony, then it establishes that
24 particular fact or circumstance.

25 Circumstantial evidence would be when a person

1 testifies to a number of factors. And you're firmly
2 convinced as to each of those factors. And when you link
3 them, either through inductive or deductive reasoning, it
4 leads you to a logical conclusion, that's circumstantial
5 evidence. And that is likewise, equally proper for both
6 direct and circumstantial evidence maybe used. And our
7 law makes absolutely no distinction between the weight or
8 the value to be given to direct or circumstantial
9 evidence. Nor is any greater degree of certainty required
10 of circumstantial evidence than direct evidence. You're
11 instructed to weigh all of the evidence in this case and
12 decide what you find to be credible and believable.

13 Now, I would instruct you concerning that, that
14 if in your consideration of all the facts and
15 circumstances, it leads you to the conclusion that the
16 Defendant's guilt is strongly suspicious of guilt or the
17 circumstances are such that his guilt is probably,
18 remember that's not sufficient. Because it has to be more
19 than being suspected of being committing a crime or
20 probably committing a crime. It has to be proof that
21 convinces you beyond a reasonable doubt.

22 Now, how do you make a decision on what you find
23 to be credible and believable? It is a common sense
24 exercise. You've done it many, many times in your life.
25 And that's all you're expected to do now. Applying your

1 life experiences, your sense of logic and reason, fairly
2 and impartially analyzing the evidence or testimony of the
3 witnesses. Because you see, the fact that testimony in a
4 case is not contradicted directly, does not necessarily
5 render it undisputed. Because there always remains the
6 inherent credibility and probability of what one testifies
7 to. And that's where you have to access in applying that
8 common sense, common sense application.

9 Now, there are many factors that we consider to
10 assist us and I'm going to discuss some of them with you
11 now. But if I don't mention a method or factor that you
12 used in your life that you found reliable, please use it
13 when you begin your deliberations. You may consider the
14 appearance of the witness, how did they appear to you?
15 Straightforward or hesitant in answering questions. Was
16 the testimony of the witness strengthened or weakened by
17 other evidence in the case? Was it consistent or
18 inconsistent? How did the witness come to know the facts
19 that he or she testified to? And what was the ability of
20 that witness to have that knowledge? To develop that
21 knowledge? Is there some reason for a witness to give
22 testimony which maybe helpful or detrimental to one side
23 or the other? In other words, was the witness bias or
24 prejudice in any fashion?

25 In making these determinations of credibility

1 and believability, you're giving very broad discretions,
2 wide latitude. You have the right to believe one witness
3 against many. Many witnesses against one. You have the
4 right to believe all of a witness' testimony--

5 (WHEREUPON, a cell phone interrupted the court
6 proceedings.)

7 THE COURT: Ma'am, can you leave the courtroom,
8 please?

9 UNIDENTIFIED LADY: I'm sorry.

10 THE COURT: Well, ma'am, we'll talk about that
11 when we finish. Don't leave the building, please.

12 UNIDENTIFIED LADY: I apologize, I thought I had
13 it off.

14 THE COURT: Yes, ma'am.

15 UNIDENTIFIED LADY: I'm sorry.

16 THE COURT: Precisely why they're not allowed.
17 Good example of it.

18 Excuse me, ladies and gentlemen, I think we were
19 talking about your wide latitude and who you can believe
20 and you can believe one witness against many, many
21 witnesses against one. You have a right to believe all of
22 a witness' testimony, parts of a witness' testimony or
23 none of a witness' testimony. Now, of course, you don't
24 make these decisions arbitrarily but if there's a reason
25 in the record in this case of taking that position, you

1 have that prerogative. Because your objective from the
2 onset has been to determine the truth regardless of the
3 source of the evidence.

4 Now, an issue in this case is the identification
5 of Mr. Thomas as the person who committed the crime or
6 crimes charged. And the State has the burden of proving
7 identity beyond a reasonable doubt. You must be satisfied
8 beyond a reasonable doubt of the accuracy of the
9 identification of the Defendant before you may convict
10 him. Identification testimony is an expression, a belief
11 or impression by a witness. You must determine the
12 accuracy of the identification and you may consider the
13 believability of each identification witnesses in the same
14 way as any other witness. You may consider whether the
15 witness had an adequate opportunity to observe the
16 Defendant at the time of the offense. This will be
17 effected by like things like how long or short of time was
18 available. How close or how far the witness was. The
19 lighting conditions. Whether the witness had a chance to
20 see or know the person in the past.

21 Once again, I instruct you that the burden of
22 proof on the State extends to every element of the crime
23 charged. And specifically this includes the burden of
24 establishing the Defendant's identity. If after examining
25 the testimony you have a reasonable doubt as to accuracy

1. of the identification, then you must return a verdict of
2. not guilty. If on the other hand, you find that you are
3. firmly convinced of the identification, then you will need
4. the consider, of course, the crimes charged and the
5. elements of whether the State has met its burden of proof.

6. Now, a lot of you are given very wide latitude,
7. broad discretions in determining the believability of
8. witnesses and facts of the case. Remember you don't enjoy
9. the same with the law. Because you've promised just as I
10. have nothing to do with the facts, you have nothing to do
11. with the law. And this mean that is if you came here with
12. your own idea of what the law was or what it should be, I
13. respect your right to feel that way. And you may leave
14. after this, leaving and saying now I don't believe what
15. the Judge said. But for purposes of this proceeding,
16. you've promised that you will set aside whatever your
17. beliefs may be and you will accept the law as I give it to
18. you. And apply that law fairly to the facts. And I'm
19. confident that you will do that. Please remember, also
20. that the order of my instruction means absolutely nothing.
21. I had to put them in some order. And don't consider any
22. one part more than you consider any other part. Consider
23. the charge as a whole.

24. Now, let's look at the crimes charged. As I've
25. mentioned to you, I would explain to you each crime and

1 give you the elements of each crime. First, I'd like to
2 look at the offense of armed robbery. The Defendant is
3 charged in this matter with armed robbery. And in order
4 to prove this offense, the State must prove beyond a
5 reasonable doubt that Mr. Thomas took personal property
6 from the person or presence of another. The property is
7 in the presence of a person if it is within the persons
8 reach, inspection, observation or control. So that the
9 person could, if not overcome with violence or prevented
10 by fear, keep possession of the property. The State must
11 also prove beyond a reasonable doubt that the Defendant
12 carried the property away, intending to permanently
13 deprive the owner of the property and to keep the property
14 for the Defendant's own use. The slightest removal of the
15 property or the complete possession of the property, even
16 for an instant by the Defendant, is sufficient to show a
17 taking and carrying away of the property. The taking and
18 carrying away of the property must have been done with
19 violence or by putting the owner to the property in fear
20 of violence.

21 Finally, the State must prove beyond a
22 reasonable doubt, that the Defendant was armed with a
23 deadly weapon during the robbery. A deadly weapon is any
24 article, instrument or substance which is likely to cause
25 death or great bodily harm. Whether an instrument has

1 been used as a deadly weapon depends on the facts and
2 circumstances shown in each case. And example of a deadly
3 weapon would be a pistol. A gun may be a deadly weapon
4 even though it's not operated or loaded.

5 Now, the next crime is possession of a weapon
6 during a violent crime. In this case Section 16-23-490 of
7 our Code of Laws which provides that if a person is in
8 possession of a firearm or visibly displays what appears
9 to be a firearm, during the commission of a violent crime
10 and is convicted of committing or attempting to commit a
11 violent crime, as defined in Section 16-160, then the
12 person would be guilty of this offense. I would instruct
13 you that armed robbery is a violent crime. The term
14 firearm is defined in this section as any machine gun,
15 automatic rifle, revolver, pistol or any weapon which will
16 or is designed to or may readily be converted to expel a
17 projectile.

18 Now, in addition to armed robbery, should you
19 find that the State has failed to establish beyond a
20 reasonable doubt that the crime was fully committed, fully
21 consummated, you may consider as a lesser included
22 offense, an attempted armed robbery. An attempt is an
23 effort to accomplish a crime which does not succeed. An
24 attempt includes a specific intent to do a particular
25 criminal act, along with an act falling short of the act

1 intended. The State must prove more than mere preparation
2 and intent, there must be some overt act committed in
3 effort to commit the crime. Intent means intending the
4 result which actually occurred. Not accidentally or
5 involuntarily. Intent may be shown by acts and conducted
6 of the person and other circumstances for which you may
7 naturally and reasonably infer intent. And I would
8 further instruct you that attempted armed robbery, just as
9 armed robbery, is a violent crime as defined by our law.

10 Now, the third offense which you're going to
11 consider is the offense of burglary third. In order to
12 prove burglary third, the State must first prove beyond a
13 reasonable doubt that Mr. Thomas entered a building
14 without consent. A building is any structure, where any
15 person lodges or lives or where people assemble for the
16 purpose of business, government, education, religion,
17 entertainment, public transportation or public use or
18 where goods are stored. In order to prove the Defendant
19 entered the building, the State does not have to prove --
20 does not have to show the Defendant's entire body entered
21 the building. The smallest entry is sufficient. It may
22 be any part of the body such as a hand, foot or even an
23 instrument. In addition, the State does not have to prove
24 that force was used to gain entry. If a person enters a
25 building by using deception, artifice, trick or

1 misrepresentation to get the consent to enter, this is an
2 entry without a consent.

3 Next the State must prove beyond a reasonable
4 doubt that the Defendant intended to commit a crime.
5 Either a felony or a misdemeanor at the time of the entry
6 to be guilty of burglary. The mere entry into a building
7 without consent is not burglary if the intent to commit a
8 crime is formed after the entry. It is not burglary on
9 the other hand if the Defendant intended to commit a crime
10 at the time -- no excuse me, let me restate that. It
11 is -- it would be burglary if the Defendant intended to
12 commit a crime at the time of entry, even if the attempt
13 was abandoned after the entry. It does not matter that
14 the intended crime was completed or not. Again, intent
15 may be shown from all circumstances which have been shown
16 to exist from which you may reasonably infer or make your
17 logical deduction.

18 Ladies and gentlemen, you were selected to be
19 fair and impartial judges with me in deciding this case.
20 You were not selected to be partisans or advocates for
21 either side. You certainly don't have any friends to
22 reward, nor do you have any enemies to punish. You really
23 were selected to not be not be motivated by anything other
24 than your sense of logic and reason. And that has to be
25 fairly and impartially performed. That means without

1 human emotion. And as we talked, that's not always easy.
2 But one thing we have to do as judges is we have to make a
3 conscious effort to do that. And you will do the same
4 when you begin your deliberations. You will methodically
5 analyze the evidence and decide what you believe to be the
6 true facts. And then once deciding those facts, you'll
7 take the law as I give it to you -- as I have given to it
8 you and apply it to those facts and report your decision.

9 Ms. Dunlap, in assisting you in reporting that
10 decision, I wish to discuss the verdict forms now with you
11 and the other jurors. There will be three. And each one
12 sets out the crime itself to know that's the one you're
13 working with. You'll note that all three of them are
14 captioned -- captioned basically the same, that doesn't
15 mean anything to you. That's just to facilitate the
16 filing of the document, that's the reason that's there.
17 The first form that I want to discuss is the armed
18 robbery. The other two have two choice. And I would
19 state also the order in which they appear means nothing.
20 This one has three.

21 It says, We, the jury, by unanimous consent find
22 the Defendant, Eugene Robinson [sic] on the charge of
23 armed robbery, the first choice guilty. The second choice
24 of a lesser included offense is attempted armed robbery or
25 third, not guilty. Then a place for you to sign it where

1 it says, Presiding Juror. And a place for you to write
2 the date. Which ever your choice, I'd ask you to, please,
3 place a check or cross -- or probably a check in the box
4 proceeding it, circle it, we'll know that's your choice,
5 then sign it. .

6 As to this form what you will be saying?
7 Obviously if it's guilty, you've evaluated the evidence
8 and are firmly convinced that the State's met its burden
9 of proof, established the identity of Mr. Thomas,
10 established each element of the crime of armed robbery,
11 and you're firmly convinced of that and that is your
12 decision. The lesser included offense of attempted would
13 mean that you established that there was some overt act,
14 that there was an attempt to commit a crime but it was not
15 completed. But all other elements have been established
16 beyond a reasonable doubt and that would be your second.
17 Then not guilty would mean that you've analyzed it and you
18 find the State has failed to prove each element. They if
19 fail on one, then you must return a verdict of not guilty.
20 If they fail on the necessary elements for the offense
21 charged.

22 The next two forms, burglary third, again, We by
23 unanimous consent find the Defendant Eugene Robinson [sic]
24 on burglary third, guilty or not guilty. As we discussed,
25 guilty means you analyzed it, you're firmly convinced as

1 to each of those elements that we discussed and that is
2 your verdict. Not guilty, the State failed on one or more
3 of those elements that we discussed. Whichever, again,
4 place a check mark and circle it.

5 The third form, possession of a weapon during
6 the commission of a violent crime, that's the other
7 charge, two choices, guilty or not guilty. Guilty means
8 that the State has established either beyond a reasonable
9 doubt armed robbery or attempted armed robbery. And you
10 found beyond a reasonable doubt that the Defendant was
11 armed with a death penalty or something that appeared to
12 be a weapon or presented a weapon. Not guilty would mean
13 that if you find the Defendant not guilty on armed
14 robbery, you cannot return a verdict of guilty on the
15 weapon during the commission of a violent offense because
16 you've not found him guilty of a violent offense. Or you
17 found the armed robbery was committed but he didn't
18 present a weapon. So whichever your choice, you'll just
19 again check it.

20 What does unanimous consent mean? That means 12
21 to zero. Eleven to 1 is not sufficient. Now I need to
22 ask you, ladies and gentlemen, if you feel that the first
23 12 feel that you can complete this process, if anyone does
24 not, please raise your hand.

25 There was no response.

1 My alternates, thank you, very much. It appears
2 that the first 12 will be able to continue. So as far as
3 when the jury's excused, Mr. Rhine, I'm going to ask that
4 you not join them in the jury room. They'll take you to
5 another room and I'll be in very shortly to discuss how
6 much longer you need to remain with us.

7 I know you're anxious to get started and you're
8 almost there. I told you the last thing that I would tell
9 you is when you may start. I need to excuse you now to
10 discuss my charge with the attorneys. It may be necessary
11 to return you to the courtroom to give you some additional
12 instruction or clarification. If so, we'll return all of
13 you. If there aren't any additions, then we'll gather the
14 exhibits and deliver them to you. When you receive the
15 exhibits, then you may begin your deliberations, not
16 before. Now, once the deliberations commence, the only
17 restriction is this. If any juror has to leave the table
18 for any reason, you must stop deliberating. The law says
19 that 12 of you must deliberate. Other than that, ladies
20 and gentlemen, you can proceed as you wish. I thank you
21 for your attention, please retire to your jury room and
22 await for the exhibits before you begin your
23 deliberations.

24 (WHEREUPON, the jury left open court at
25 approximately 3:34 p.m.)

1 THE COURT: Exception or additions from the
2 State?

3 MS. TESSITORE: Nothing from the State, Your
4 Honor.

5 THE COURT: Exception or additions from Mr.
6 Thomas other than your request for strong armed robbery?

7 MR. ROBINSON: No, sir.

8 THE COURT: Very well. Thank you all, we'll be
9 at ease. I appreciate the manner in which you presented
10 this case.

11 MS. TESSITORE: Thank you, Your Honor.

12 THE COURT: All right, the lady with the phone,
13 I want her back in here in just a minute, I'll be with
14 her.

15 (WHEREUPON, deliberations began at approximately
16 3:40 p.m.)

17 THE COURT: Ms. McAbee, you're aware that you're
18 not supposed to have a phone active in the courthouse?

19 MS. MCABEE: Yes, sir, I didn't mean to do it.

20 THE COURT: Well it doesn't matter about you
21 meaning to do it. You know that doesn't have anything to
22 do with it. You brought a phone in and it was activated
23 and it disrupted the proceeding.

24 MS. MCABEE: I'm sorry.

25 THE COURT: Well ma'am, I appreciate you being

1 you sorry. The problem is it's not my Order. My boss
2 issued an Order several years ago. You violated her
3 Order. That's contempt of court. It occurred in my
4 presence. I have a responsibility to her and to everyone
5 in this room and in the State of South Carolina, when
6 somebody violates a proper decorum of the courtroom, then
7 I have to deal with that. I've incarcerated people for
8 that before.

9 MS. MCABEE: It was in my purse and--

10 THE COURT: Ma'am, I don't care where it was.
11 It went off and it disrupted a very important part. You
12 caused the jury to lose their train of thought, I had to
13 stop what I was doing. That's precisely why they don't do
14 it.

15 MS. MCABEE: I have never experienced this
16 before.

17 THE COURT: Ma'am, you know what, that's the --
18 there's an old saying. And I'm not saying your ignorant
19 but ignorance of the law is no excuse. Zero.

20 MS. MCABEE: Yes, sir.

21 THE COURT: I'm going to give you a break this
22 time, ma'am. But I tell you this, if it goes off again,
23 while I'm here, I'll put you in jail for 60 to 90 days.
24 And won't even blink at doing it. Because it that's
25 serious. You understand me?

1 MS. MCABEE: Yes, sir.

2 THE COURT: Thank you, ma'am.

3 (WHEREUPON, court was in recess awaiting a
4 verdict.)

5 THE COURT: All right, let the record reflect
6 that Mr. Thomas is present.

7 I'm advised, Mr. Thomas, the jury has reached a
8 verdict. Is the Defendant ready to receive that verdict,
9 sir?

10 MR. THOMAS: Yes, sir, Your Honor.

11 THE COURT: Very well.

12 Is the State ready to receive the verdict?

13 MS. TESSITORE: Yes, sir, Your Honor.

14 THE COURT: Let's invite the jury to return,
15 please, Mr. Morris. Thank you, sir.

16 (WHEREUPON, the jury came into open court at
17 approximately 4:20 p.m.)

18 THE COURT: Thank you, very much, ladies and
19 gentlemen.

20 Ms. Dunlap, as I understand, the jury has
21 reached a verdict?

22 MS. DUNLAP: Yes, sir, we have.

23 THE COURT: If you'd pass the verdict forms,
24 please, to Mr. Morris.

25 Thank you, sir.

1 The verdict forms have been properly completed.
2 Mary, if you would publish them for us, please:

3 VERDICT

4 THE CLERK: Your Honor, in the case of
5 2009-GS-23-9349, the State of South Carolina vs. Eugene
6 Thomas, we, the jury, by unanimous consent find the
7 Defendant, Eugene Thomas, on the charge of burglary third
8 degree, guilty. In the case of 2009-GS-23-9350, we, the
9 jury, by unanimous consent find the Defendant, Eugene
10 Thomas, on the charge of possession of a weapon during the
11 commission of a violent crime, guilty. Also, in the case
12 of 2009-GS-23-9350, we, the jury, by unanimous consent
13 find the Defendant, Eugene Thomas, on the charge of armed
14 robbery, guilty of a lesser discharge of attempted armed
15 robbery. These are all signed by Ms. Dunlap, our
16 foreperson.

17 THE COURT: Thank you, Ms. Troupe.

18 If the clerk has accurately published your
19 verdicts, ladies and gentlemen, please indicate that by
20 raising your right hand. Thank you, you may put them
21 down.

22 Let the record reflect that each juror raised
23 his or her right hand in response to the Court's inquiry.

24 Anything further from the jury panel from
25 Mr. Thomas?

1 MR. ROBINSON: No, sir, Your Honor.

2 THE COURT: Anything further from State?

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

4 THE COURT: Thank you, ladies and gentlemen, I
5 appreciate your service in this case and appreciate the
6 manner in which you approached your duties and
7 responsibilities as the judge with me. It has been a true
8 honor to serve with each one of you. I would love to be
9 able to tell you that concludes your service for this week
10 but there's work to be done. And you won't be involved
11 today but I believe that the jury will be returning
12 tomorrow morning. So call the number after 6:00 tonight
13 and follow that instruction. I may see some of you
14 tomorrow as well. You're now free to talk about this case
15 if you choose to. But if you don't want to talk about it,
16 that's your right. And if somebody should persist in
17 asking you questions, if you'll let your clerk now, they
18 can make it known to me and we'll try to assist you. Have
19 a great day. You are now free to leave if you wish.

20 (WHEREUPON, the jury left open court at
21 approximately 4:25 p.m.)

22 THE COURT: Ms. Dunlap.

23 MS. DUNLAP: Yes, sir.

24 THE COURT: If you could sign, it's just a
25 formality of the verdict forms. Just the Indictments.

1 Thank you.

2 All right, the State ready to proceed with
3 sentencing?

4 MS. TESSITORE: Yes, sir, Your Honor.

5 THE COURT: Okay.

6 Is the Defendant ready to proceed with
7 sentencing?

8 MR. ROBINSON: Yes, sir, Your Honor.

9 THE COURT: Okay, I'll be happy to hear from
10 you, from the State. Do you believe that he was served
11 with life without parole?

12 MS. TESSITORE: Yes, Your Honor. I will hand up
13 to the Court what has been provided to Mr. Robinson and
14 also filed the documents regarding the notice of intention
15 to seek life without parole. And that was filed on
16 September 8th. It was served on the Defendant on
17 July 15th, 2010, hand delivered to him. There's an
18 Affidavit of Service. It was also served on his first
19 attorney, Randy Chambers, on July 16th, 2010 with an
20 Affidavit of Service. A letter to Mr. Robinson. That
21 also includes the letter including a copy of the notice as
22 well as the second notice of the intention, which was
23 served on Mr. Robinson on February 10th, 2011 and that
24 Affidavit of Service.

25 I will also hand up to the Court the certified

1 conviction from St. Lucie County, Florida in which the
2 Defendant was convicted of murder in the second degree.
3 And I've also provided that to defense counsel.

4 THE COURT: Very well. And you take the
5 position that attempted armed robbery is a most serious
6 offense?

7 MS. TESSITORE: Yes, sir.

8 THE COURT: You want to give me the statute that
9 provides that, please?

10 MS. TESSITORE: Yes, sir. Under South Carolina
11 code 17-25-45(C)(1), under the definition of most serious
12 offense that includes attempted armed robbery Section
13 16-11-330(B).

14 THE COURT: Thank you. I concur with your
15 reading of that.

16 MS. TESSITORE: And, Your Honor, under
17 17-25-45-(A)(2), a out-of-state conviction of an offense
18 classified as a most serious offense under this section.
19 Clearly this is an out-of-state conviction.

20 THE COURT: Clearly. But it would probably fall
21 in the category of manslaughter.

22 MS. TESSITORE: Yes, Your Honor. He pled nolo
23 contendere, which again, under that statute, it includes a
24 nolo contendere plea. The Florida statute 782.04,
25 Subjection 3, which is Florida's felony murder statute,

1 provides any killing during the perpetration of attempt to
2 perpetrate any felony as listed in the Subsections A
3 through Q, is guilty of murder in the second degree.
4 Which constitutes a felony in the first degree and is
5 punishable for a term of years not exceeding life.

6 If, Your Honor -- I can get into the facts that
7 are clearly indicated in the certified conviction that
8 indicates that he, along with co-defendants, unlawfully
9 attempted to perpetrate a robbery, they killed a human
10 being by shooting him with a gun. And this out-of-state
11 murder conviction would qualify as most serious since both
12 murder and voluntary manslaughter--

13 THE COURT: Are --

14 MS. TESSITORE: Excuse me?

15 THE COURT: Clearly voluntary manslaughter is a
16 most serious offense. And I would believe that murder in
17 the second degree would be similar if not identical to
18 voluntary manslaughter.

19 MS. TESSITORE: Yes, sir. And the reference to
20 the nolo contendere plea, 17-25-45(C)(3) which is
21 conviction meaning a conviction of guilty or a plea of
22 nolo contendere.

23 THE COURT: Okay.

24 MS. TESSITORE: So the State has complied with
25 the written notice requirement well in advance of this

1 trial.

2 THE COURT: And all of the documents that you
3 referenced on the record are part a of this file in the
4 Clerk's Office, is that correct?

5 MS. TESSITORE: Yes, sir.

6 THE COURT: Very well.

7 MS. TESSITORE: Well, the only exception being a
8 letter to Mr. Robinson.

9 THE COURT: You may want to file that as well.

10 MS. TESSITORE: Yes, sir.

11 THE COURT: If you'll do that as well.

12 Mr. Robinson, you received the letter, though,
13 did you not?

14 MR. ROBINSON: Yes, yes, sir.

15 THE COURT: Anything else from the State?

16 Do you have the sentencing sheet?

17 THE CLERK: I do, sir. But we need the correct
18 code since it's not armed robbery but attempted armed
19 robbery.

20 MS. TESSITORE: I'm sorry, Your Honor.

21 THE COURT: Thank you, Mary, pretty sharp.

22 THE CLERK: If you would make this Court's
23 Exhibit 2.

24 (WHEREUPON, Court's Exhibit No. 2 was marked for
25 identification and received into evidence.)

1 MS. TESSITORE: Your Honor, I don't have the CDR
2 code for attempted armed robbery.

3 THE COURT: That's all right, we'll get it.

4 MS. TESSITORE: Thank you, Your Honor.

5 THE COURT: No problem.

6 Mr. Robinson, I'll be happy to hear from you
7 now.

8 MR. ROBINSON: May it please the Court?

9 THE COURT: Yes, sir.

10 MR. ROBINSON: Your Honor, just for appeal
11 purposes in this case, Your Honor -- Your Honor, when he
12 was convicted or nolo contendere in Florida back in 1981,
13 I believe he was in his early 20's at that time. I saw
14 some stuff that Ms. Tessitore gave me regarding the range
15 of sentencing at that time.

16 If I can see that.

17 But, Your Honor, if what I'm looking at from
18 what she gave me, it was a range between -- I think the
19 maximum of a certain number of years, 10 years, 15 years,
20 something like that. But it's going to be -- we would
21 submit that this does not qualify as a strike, this
22 conviction from 20 something years ago. Or actually 30
23 years ago. As well as the description of this offense,
24 while it was a conviction for murder, the actual
25 sentencing range was in the -- was a lesser charge from

1 South Carolina, I believe. I think the Court mentioned
2 voluntary manslaughter. But we would submit that this
3 does not qualify as a strike based on the age of the
4 conviction in Florida. And based on the description of
5 this particular offense in this case. Thank you.

6 THE COURT: Thank you, sir.

7 Mr. Thomas, is there anything you wish to say,
8 sir?

9 MR. THOMAS: Your Honor, I was listening to the
10 Solicitor, Your Honor, when she said that -- she was
11 incorrect, Your Honor, when she speak that back then I
12 tried to rob somebody, Your Honor. That was not the case,
13 Your Honor.

14 THE COURT: Okay.

15 We believe, you can check, but we believe the
16 CDR code is 26. Attempted robbery. It was attempted
17 armed robbery. Twenty-six. You can verify that if you
18 want.

19 MS. TESSITORE: Yes, sir.

20 SENTENCING

21 THE COURT: Mr. Thomas, as we talked prior to
22 the commencement of this proceeding, what you just said
23 certainly could be -- have significance in fashioning a
24 sentence if the Court had discretion. But the Court does
25 not have any discretion. As I mentioned to you, it

1 doesn't matter what may opinion is on what the appropriate
2 sentence would or should be. Life without parole and the
3 notice of that on the basis of two strikes, is clear in
4 the law. And I took an oath to follow and apply that law.
5 So for those reasons, the sentence of the Court on
6 2009-9350, count one is life in prison without the
7 possibility of parole. Sentence of the Court on count 2,
8 that's the possession of a weapon during the commission of
9 a violent crime is five years. It is concurrent. Credit
10 for time served. Sentence of the Court on 2009-9349, the
11 burglary third, is five years, it is concurrent. And
12 credit for time served.

13 Court's Exhibit 2 for purposes of this sentence,
14 is a packet that was handed to me, including the certified
15 copy of the prior offense of murder in the second degree.
16 The Court does believe that that does constitute a strike
17 under our law. And therefore, I -- and clearly attempted
18 armed robbery is clearly a strike under our statute.
19 Therefore, the life without parole is a proper sentence.
20 Thank you.

21 Good luck to you, sir.

22 MS. TESSITORE: Thank you, Your Honor.

23 THE COURT: Anything further from the State?

24 MS. TESSITORE: Nothing from the State.

25 THE COURT: Anything further from the Defendant?

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MR. ROBINSON: Nothing, Your Honor.

THE COURT: Okay. Thank you all.

(WHEREUPON, the proceedings were concluded.)

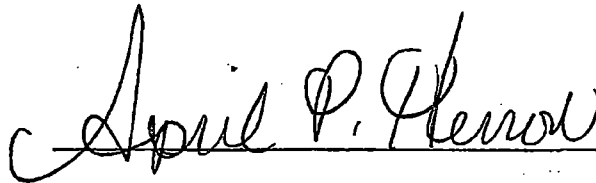
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for the Thirteenth 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 Greenville County, South Carolina, on the 10-11th day of September, 2012.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

February 18, 2012



APRIL P. HERRON, Court Reporter

FORM 5

STATE OF SOUTH CAROLINA

County of GREENVILLE

EUGENE THOMAS #222351

Full name and prison number (if any) of Applicant

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2015-CP-23- 0229

APPLICATION FOR

POST-CONVICTION RELIEF

OPEN TO AMEND

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL BROCKENSHIME
JUL 15 2015 PM 1:55

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention PERRY CORRECTIONAL INSTITUTION
430 OAKLAWN ROAD PELZER, SC 29669
2. Name and location of Court which imposed sentence GENERAL SESSION
THIRTEENTH JUDICIAL CIRCUIT COURT 305 E. North St. Greenville S.C. 29601
3. Name(s) of co-defendant(s) (if any) (NONE) - G
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2009-GS-2309350 ARMED ROBBERY
(b) 2009-GS-2309350 WEAPONS / POSS. DURING VIOLENT CRIME

- (c) 2009-GS-23-009349 / Burglary Third DEGREE
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 9-11-2012 - Life without Parole
- (b) 9-11-2012 - FIVE (5) YEARS CONCURRENT - Time SERVE
- (c) 9-11-2012 - FIVE (5) YEARS CONCURRENT - Time SERVE
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. THE SOUTH CAROLINA COURT OF APPEALS
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. CONVICTION AFFIRMED FOR ALL THREE (3) CHARGES
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. HEARD SEPTEMBER 09, 2014 - Filed October 15, 2014
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. UnPublish Op. No. 2014-up-360
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) SEE ATTACHED MEMORANDUM OF LAW
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(c) the disposition thereof:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(d) the date of each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. N/A
- ii. N/A
- iii. N/A

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. N/A
- iii. N/A

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) EXCLUSIVE PCR GROUNDS
 (b) //
 (c) //

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? YES
 (b) your trial, if any? YES
 (c) your sentencing? YES
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:
 i. SCOTT D. ROBINSON, Esq. SC BAR # 65351
P.O. Box 10042 Greenville S.C. 29603, Trial Counsel
 ii. TIMOTHY GEHRET 223 SCHUYLER AVE
SE ATLANTA, GA 30312, Direct Appeal Counsel
 (b) the proceedings at which each such attorney represented you:
 i. TRIAL - SCOTT ROBINSON
 ii. DIRECT APPEAL - TIMOTHY GEHRET
 iii.

19. State clearly the relief you seek in filing this application:

TO EITHER VACATE SENTENCE, EITHER REMAND FOR NEW TRIAL
OR REMAND FOR RESENTENCING PER PRE-TRIAL PLEA
AGREEMENT.

20. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)

County of GREENVILLE)

VERIFICATION

I, EUGENE THOMAS, 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.

Eugene Thomas
Eugene Thomas # 222351

SWORN to and subscribed before me this 4th
 day of May, 2015.

Nancy E. Merchant (L.S.)
 Notary Public

My Commission Expires: 1-23-2022

PLEASE NOTE THAT APPLICANT LEAVE OPEN TO AMEND PCR.

RECEIVED
 MAY 04 2015
 P.C.I. MAILROOM

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, EUGENE THOMAS, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Eugene Thomas # 222351 ✓
Applicant

SWORN or affirmed to and subscribed before me this

4th day of May, 2015.

Nancy C. M. [Signature]
Notary Public

My Commission Expires: 1-23-2022

MAY 04 2015
P.C.I. MAILROOM

Attachment For 10(a): AND 11(a) OF PCR Application

10(A): Applicant was denied the right to effective assistance of counsel—
Guaranteed by the Sixth and Fourteenth Amendments to the United States
Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—
during the Guilt-or-innocence phase of his trial.

11(A): Supporting Facts: Trial counsel's performance during the guilt-or-innocence
phase was both unreasonable and prejudicial. See... Strickland v. Washington,
466 U.S. 688 (1984). Counsel's acts or omissions included, but are not
limited to the following:

Argument 1) Counsel failed to communicate the full extent and consequences of
Plea offer.

Argument 2) Counsel failure to object to a constructive amendment of applicant
indictment, and failure to move for a verdict in arrest of judgment and
entry of judgment of acquittal based on the trial court's lack of jur-
isdiction to convict and sentence applicant for "unindicted" ATTEMPTED
ARMED ROBBERY offense.

Argument 3) Ineffective assistance of counsel's failure to move for suppression
of "Gun" and "Dice Game" that was obtained in violation of a search
incident to an arrest. Applicant was listed as a guest. (Police testified
that "Gun and Dice Game" was not within applicant's reach at any time of
his arrest) See... Tr. Pg. 269 L. 11-18

Argument 4) Trial counsel was ineffective due to his failure to present appellant's
Alibi defense as a reasonable strategy instead of opting for the
last argument.

CONT... ATTACHMENT FOR 10(A) AND 11(A) OF PCR APPLICATION³⁶¹

ARGUMENT 5.) TRIAL COUNSEL INEFFECTIVE DUE TO COUNSEL'S FAILURE TO INVESTIGATE OR RESEARCH

ARGUMENT 6.) TRIAL COUNSEL INEFFECTIVE DUE TO COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENT OF INSINUATING PRIOR BAD ACTS OF ROBBERY BEING COMMITTED BY APPELLANT.

ARGUMENT 7.) TRIAL COUNSEL FAILURE TO OBJECT TO ERRONEOUS JURY CHARGE.

ARGUMENT 8.) PROSECUTOR VIOLATED BRADY V. MARYLAND, 373 U.S. 83, 83 S. CT. 1194, 10 L. ED. 2D 215 (1963) BY FAILING TO DISCLOSE THAT THE STATE'S FINGERPRINT ANALYST, CHRISTOPHER ADAM GARY WASN'T CERTIFIED BY SLED IN ACCORDANCE WITH S.C. STATUTORY LAW § 23-3-15. SEE... (TR. PG. 196 L. 11-25 ALSO PG. 197-200 L. 1-16)

10(b): APPLICANT WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL—GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND BY ARTICLE I, §§ 3 AND 14 OF THE SOUTH CAROLINA CONSTITUTION—DURING THE SENTENCING PHASE OF HIS TRIAL

11(b): SUPPORTING FACTS: TRIAL COUNSEL'S PERFORMANCE DURING THE SENTENCING PHASE WAS BOTH UNREASONABLE AND PREJUDICIAL. SEE STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984). COUNSEL'S ACTS OR OMISSIONS INCLUDED, BUT ARE NOT LIMITED TO, THE FOLLOWING:

ARGUMENT 1.) TRIAL COUNSEL WAS INEFFECTIVE BY GIVING CLIENT ERRONEOUS ADVICE OF STATUTORY LAW.

Cont... ATTACHMENT FOR 10.(c) AND 11.(c) OF PCR Application

10.(c): Applicant was denied the right to effective assistance of counsel - GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND BY ARTICLE I, §§ 3 AND 14 OF THE SOUTH CAROLINA CONSTITUTION - DURING THE DIRECT APPEAL PHASE OF HIS CONVICTION.

11.(c) SUPPORTING FACTS: TRIALS COUNSEL'S PERFORMANCE DURING THE DIRECT APPEAL PHASE WAS BOTH UNREASONABLE AND PREJUDICIAL. See... STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984) COUNSEL'S ACTS OR OMISSIONS INCLUDED BUT ARE NOT LIMITED TO THE FOLLOWING:

ARGUMENT 1) APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE REVERSIBLE ERROR WHICH WAS MERITORIOUS ON DIRECT APPEAL. See... EVITT V. STATE, 469 U.S. 387, 396-99 (1985). THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT GUARANTEES THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON A FIRST APPEAL AS A RIGHT IN STATE COURT. THE APPLICANT SUBMITS THAT HAD HIS ISSUE BEEN RAISED THERE WAS A REASONABLE PROBABILITY THAT HIS APPEAL WOULD HAVE BEEN SUCCESSFUL. See... e.g. PATRICK V. STATE, 562 S.E.2d 609 (S.C. 2002).

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Eugene Thomas #222351

Applicant.

Vs.

THE STATE,

Respondent.

} In The Court of Common Pleas
} For The Thirteenth Judicial Circuit
}
}
} Memorandum Of Law
} In Support Of Application
} For Post-Conviction Relief
}

Comes Now, the Applicant presents his Memorandum Of Law, and would show the following unto this Honorable Court:

Statement Of The Case

Appellant Eugene Thomas was indicted by the Greenville County Grand Jury on May 4, 2010 for Third Degree Burglary, Possession Of A Firearm during the Commission Of A Violent Crime and Armed Robbery. His case proceeded to trial before the Honorable R. Markley Dennis in the Court Of General Sessions for the Thirteenth Judicial Circuit in Greenville, South Carolina on September 10, 2012. Greenville Attorney Scott D. Robinson represented Appellant, while Assistant Solicitor Jennifer Tessitore represented the State.

The jury returned a verdict of guilty on the charges of Third Degree Burglary, Possession Of A Firearm during the Commission Of A Violent Crime, and Lesser Included Offense of Attempted Armed Robbery.

CONT d...

Due to the fact that Mr. Thomas was convicted of 2nd degree murder in 1981 in Florida, South Carolina Code Ann. Section 17-25-45 (2007) also known as the "two strikes law" mandates a life time prison sentence without the possibility of parole for a conviction of two most serious offenses. Under this law, attempted armed robbery and second degree murder, are classified as most serious offenses. Judge Markley Dennis sentenced Mr. Thomas accordingly.

Attached For 10. And 11. of PCR Application

Grounds

10 CA) Applicant was denied the right to effective assistance of counsel - guaranteed by the 6th and 14th Amendments to the United States constitution and by Article I § 3 and 14 of the South Carolina Constitution during the guilt or innocence phase of his trial.

11 CA) Supporting Facts: Trial counsel's performance during the guilt or innocence phase was both unreasonable and prejudicial. See... Strickland v. Washington, 466 U.S. 668 (1984). Counsel's acts or omissions included but not limited to the following:

Argument

Trial counsel was ineffective in not communicating the full extent and consequences of plea offer. Counsel's failure to explain a matter to the extent reasonably necessary to permit defendant to make an informed decision regarding plea bargain caused defendant to proceed to trial when there is a reasonable probability that if correctly advised, the defendant would have accepted plea offer of 12-14 years.

Facts

On June 19, 2012, defendant received a potential offer from the state of a recommendation of 12-14 years, with the remaining charges to be dismissed. [Please See Exhibit (1) for 11. I (A). After discussing plea offer with family, defendant advised counsel that defendant would accept plea offer from state.

Defendant was transported from the Greenville County Detention Center to the Greenville County Courthouse on June 21, 2012 to willingly accept the State's offer. Please See Exhibit (2) for 11.(A)(E)

While waiting to be called into the courtroom, the defendant suggested to trial counsel about making a better deal of the 12-14 years the State offered for information wanted by the Greenville County detectives. Trial counsel went and spoke with solicitor, and they both came back to the courthouse holding cell to speak with defendant. After briefly speaking with solicitor concerning the information defendant had, solicitor stated that if her detectives could use defendant's information, then, and only then would a better negotiation be offered to nullify the 12-14 years first offered. Solicitor spoke with her detectives and was informed that the information defendant had given was already knowledgeable by the detectives from another source; thereby ascertaining that defendant's information qualified non-useful.

Argument

11. (A)(E)

The defendant argues that trial counsel never conveyed plea offer to its entirety, including the consequences. This right applies to all critical stages of criminal proceedings. Monte Jo V. Louisiana, 556 U.S. 778, 786: Hill V. Lockhart, 474 U.S. 52, established that the two-part test in Strickland v. Washington, 466 U.S. 668 governs Ineffective Assistance of Counsel claims in plea bargain context.

CONT a...

There remains no doubt that defendant detrimentally relied upon the State's offer of 12-14 years, and that trial counsel should have informed defendant that it would be in defendant's best interest to go ahead and sign for the 12-14 years offer just in case for any reason the State changed their mind about defendant's information. Please See Exhibit (4) of II. (A) of the letter sent to trial counsel clearly explaining defendant's concern of the best strategy. Instead, trial counsel allowed defendant to be placed back on the trial docket to proceed to trial. Please See Exhibit (5) and (6) of II. (A). (E) for the proposition that counsel's failure to be effective at the plea bargain stage could constitute ineffective assistance. U.S. V. Gordon, 156 F.3d 376 (2d Cir. 1998) per curiam; counsel's failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation; see... Caruso V. Zelinsk, 689 F.2d 435 / 1983).

Because of counsel's deficient performance of not informing defendant of the consequences of not signing plea bargain offer, prejudiced defendant by counsel's ineffective assistance because, but for counsel's deficiency, defendant truly would have accepted the solicitor's plea offer of 12-14 years instead of going to trial. Instead, defendant was given life without parole. Glover V. United States, 531 U.S. 198, 2003 (2000) "Any amount of additional jail time has Sixth Amendment Significance".

Counsel's representation fell below an objective standard of reasonableness causing defendant to be highly prejudiced by counsel's deficient performance. Defendant's detrimental reliance on plea offer was known to trial counsel the day defendant was transported to the Greenville County Courthouse to sign the plea offer of 12-14 years. Please See Exhibit (2) and (3) of II. (A). (E)

Even if the Agreement has not been finalized by the courts, a defendant's detrimental reliance on a prosecutorial promise in a plea bargaining could make a plea agreement binding; detrimental reliance on a plea offer be shown by the prospect of a longer sentence. See... U.S. V. Savage, 978 F.2d 1136 (9th Cir 1992) State V. Gates, 299 S.C. 92, 382 S.E.2d 886 (1989) and Jordan V. State, 297 S.C. 52, 374 S.E.2d 683 (1988).

The State may withdraw a plea bargain offer before a defendant pleads provided the defendant has not detrimentally relied on the offer. See Custodio V. State 644 S.E.2d 36 (S.C. 2007).

Ineffective assistance of trial counsel deficient performance caused defendant to miss out on a more favorable earlier plea offer. This deficient performance by trial counsel violates defendant's constitutional right of Due Process of Law for ~~ineffective~~ assistance of counsel the constitution requires.

Conclusion

For the foregoing reasons, Appellant Eugene Thomas respectfully request that this court reverse his conviction, and remand his case for re-sentencing for states plea offer of 12-14 years.

Respectfully submitted
Eugene Thomas # 222351

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2015-CP-23-2998
COUNTY OF GREENVILLE	)	
	)	
Eugene Thomas,	)	
S.C.D.C. No. 222351,	)	
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

In response to the post-conviction relief application filed May 7, 2015, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the May 2010 term of General Sessions for third-degree burglary (2009-GS-23-9349), armed robbery (2009-GS-23-9350, count 1), and possession of a weapon during commission of a violent crime (2009-GS-23-93580, count 2). Scott D. Robinson, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On September 11, 2012, the Honorable R. Markley Dennis, Jr. sentenced the Applicant to concurrent terms of 5 years for third-degree burglary, life imprisonment without parole for armed robbery, and 5 years for possession of a weapon during commission of a violent crime.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek,

Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Thomas, Op. No. 2014-UP-360 (S.C. Ct. App. filed October 15, 2014). The Remittitur was sent on November 3, 2014.

Attached herewith and incorporated herein by reference are the records of the Greenville County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II.

In his application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel.
 - a. Failed to communicate full extent and consequences of plea offer.
 - b. Failed to object to a constructive amendment of the indictment.
 - c. Failed to move for suppression of evidence obtained in violation of a search incident to arrest.
 - d. Failed to present alibi defense instead of opting for final argument.
 - e. Failed to investigate or research.
 - f. Failed to object to prosecutor's closing argument that insinuated prior bad acts.
 - g. Failed to object to erroneous jury charge.
2. Brady violation.
 - a. Prosecutor failed to disclose the State's fingerprint analyst was not certified by SLED.

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant

must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

EUGENE THOMAS, 222351

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2015-CP-23-2998

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Eugene Thomas, 222351
 Perry Correctional Institution
 430 Oaklawn Road
 Pelzer SC 29669

DATED this 30th day of November, 2015.


 Judy A. C. Carey, Legal Assistant
 For Respondent

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF GREENVILLE) IN THE COURT OF COMMON PLEAS
3
4 Eugene Thomas,)
5 Applicant,) TRANSCRIPT OF RECORD
6 The State,) 2015-CP-23-2998
7 Respondent.) October 24 and 27, 2016
8) Greenville, South Carolina
9
10

11 B E F O R E:

12 HONORABLE JOHN C. HAYES, III, JUDGE
13
14

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

16 BRIAN P. JOHNSON, ESQUIRE
17 Attorney for the Applicant

18 PATRICK L. SCHMECKPEPER, ESQUIRE
19 Attorney for the Respondent
20
21
22

23 Margaret A. Woods
24 Circuit Court Reporter
25

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EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
C-1	Letter dated 8/17/11 from Absolute Property Services	107	
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MOTIONS AND MATTERS

1 (Proceedings October 24, 2016)

2 THE COURT: Call your next case.

3 MR. SCHMECKPEPER: May it please the Court, Your Honor,
4 this is Eugene Thomas vs. the State of South Carolina,
5 2015-CP-23-2998. The applicant was indicted in May of 2010
6 for third degree burglary, armed robbery and possession of a
7 weapon during the commission of a violent crime, represented
8 by Scott Robinson. The applicant when it proceeded to trial
9 was found guilty. On September 11th 2012 he was sentenced to
10 by Judge Dennis to life imprisonment without the possibility
11 of parole for attempted armed robbery. A timely notice of
12 appeal was filed and perfected in the South Carolina Court of
13 Appeals which was subsequently denied. The remittitur was
14 issued on November 3rd 2014. This application was filed on
15 May 7th 2015. I believe at this time opposing counsel has a
16 motion he'd like to make.

17 THE COURT: All right.

18 MR. JOHNSON: Thank Your Honor, may it please the Court.

19 THE COURT: Yes.

20 MR. JOHNSON: Um, Your Honor, we're here today on a
21 number of issues, uh, as pertinent to my motion there's an
22 issue with regard to the failure to, uh, call certain
23 witnesses at, uh, my client's trial. Uh, he had a couple a
24 witnesses who would have testified as to potential alibi
25 information and, Your Honor, I have, uh, my office has been in

MOTIONS AND MATTERS

1 contact with these witnesses extensively. Um, there are are a
2 bit transient, um, but but that there's one issue with, uh, as
3 alluded to, uh, counsel here today, he would tells me he's on
4 his way, tells me he's here and acts like he doesn't know who
5 I am and I'm concerned about that and there's another issue
6 where, uh, as my client will convey, uh, we actually spoke
7 with, uh, witness's of ours nephew and she says that she's
8 here and she is not here, it's the strangest thing that I
9 think I've encountered, uh, in a long time as far as witnesses
10 are concerned, I I don't, truly don't understand, um, I I am,
11 uh, because of those reasons I I'm inclined to ask the Court
12 for a continuance to the December term, um, I would, uh, in
13 that instance make sure that, uh, I try to lock down some sort
14 of a solid address for these people, make sure that there's no
15 further, uh, delay in this matter. Uh, it is very important
16 to my client, he is serving life and I I believe if these
17 people would say what they told me that he would have a
18 meritorious case. Um, Your Honor, we ask you to consider that
19 or or or in the alternative whether it's we be allowed to
20 potentially supplement the record with these peoples', uh,
21 potential testimony and/or even have them submit an affidavit,
22 uh, I I mention it to opposing counsel, course, uh, it's Your
23 Honor's dec -- decision on these things but we ask for the
24 mercy of the Court at this time.

25 THE COURT: All right, did your client give you addresses

MOTIONS AND MATTERS

1 for these witnesses?

2 MR. JOHNSON: Well that there is, um, address for, uh,
3 Ms. Vicky McBee; however, she actually does not live at that
4 address and it was communication from my investigator that,
5 um, her, she didn't have a a solid address, that was my
6 communication. Now Romell Thompson [sic] is someone who I
7 know where his place of employment is, I did not subpoena him.
8 I I suppose that that, uh, is is is is my mistake; however,
9 uh, he he's the one who got me the information for all, for
10 anyone he want me to call and it was Romell who got it for me
11 and I'm just shocked that he's not here but, uh, Your Honor,
12 uh, so that's what it was on Vicky, on Romell I didn't have a
13 work address.

14 THE COURT: Was notice of alibi given as required at
15 prior to his trial?

16 MR. JOHNSON: Prior to his trial I believe they did but
17 they did that late but they did pro -- provide notice of
18 alibi, Mr. Robinson actually had, uh, Vicky McBee on his
19 witness list, uh, he did not have Roma -- Romell Thompson on
20 his witness list. I believe he actually subpoenaed ---

21 THE APPLICANT: No, he was on there.

22 MR. JOHNSON: Romell wasn't on there.

23 THE APPLICANT: Yes, sir.

24 MR. JOHNSON: I don't believe Romell was on there.

25 THE APPLICANT: Okay.

MOTIONS AND MATTERS

1 MR. JOHNSON: Romell was not on there as I thought, um,
2 and, uh, I believe they had a subpoena, I think they had 'em
3 there at trial, for whatever reason they weren't called, I I
4 suppose that that's what that the parties dispute

5 THE COURT: All right, I'll tell you what I'll do, uh,
6 I'm not gonna continue the case beyond the term. Uh, I know,
7 uh, Mr. Thomas is incarcerated, uh, not sure where, uh, but if
8 he could be kept here, I'll give you till -- do we have stuff
9 scheduled for Friday?

10 MR. SCHMECKPEPER: Your Honor, we have stuff scheduled
11 for most a the day Friday and depends what falls off. I know
12 Wednesday morning -- no, Thursday morning is pretty much
13 entirely free.

14 THE COURT: All right, uh, I'll give you to Thursday
15 morning to, uh, get the ---

16 MR. SCHMECKPEPER: Is that -- now I don't know if
17 Mr. Robinson's available at that time.

18 THE COURT: Well we can go, we're gonna go forward ---

19 MR. ROBINSON: I'm good, ---

20 THE COURT: --- today, ---

21 MR. ROBINSON: --- I I'm good.

22 THE COURT: --- we're gonna, we're gonna try everything
23 except well whatever those witnesses may ta -- I'm just
24 leaving it open for him to get those witnesses here.

25 MR. SCHMECKPEPER: Yes, Your Honor.

MOTIONS AND MATTERS

1 THE COURT: Mr. Robinson can testify today, of course it
2 might be nice if he was here to hear what these witnesses say.

3 MR. ROBINSON: I'll be hear anyway, Your Honor.

4 THE COURT: Okay, uh, but no, I'm not continuing the case
5 beyond the term, I'm not continuing the meat a case today,
6 I'm only gonna leave the record open for, uh, applicant to
7 present, uh, one one or both a those witnesses who've already
8 been named and I'm gonna ask you to name again, uh, and, uh,
9 not any new witnesses but, uh, I'm gonna give you to Thursday
10 to get those witnesses in, we'll we'll take them kinda outta
11 order. What are their names again?

12 MR. JOHNSON: Uh, Romell Thompson and Vicky McBee.

13 THE COURT: All right, and, uh, course I would suggest
14 that what whatever help you need from the clerk's office to
15 get subpoenas out too as best you can, I I don't know if
16 they're transient, the guy that, one is workin' you should be
17 able to get him served, the transient one, uh, that may be
18 more of an issue but I'll give you Thursday.

19 MR. JOHNSON: Yes, sir, Your Honor.

20 (Pause.)

21 MR. JOHNSON: All right, Your Honor, we're ready to
22 proceed. Well my my client does, he he doesn't want, he
23 would, uh, for the record, Judge, he would, there was some
24 other people who he had me talk to that weren't available but
25 I I have notes for both a those conversations with my

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1 investigator but it it's my understanding that these are the
2 only two witnesses that, uh, are viable and were willing to
3 come and assist and I think in my judgment important for him
4 to come to assist him in this case and he, uh, there's some
5 other people who he wo -- would like to call that I know that,
6 uh, some of 'em say they don't know what we talkin' about,
7 some of 'em they say different things.

8 THE COURT: All right, and we'll go forward with whatever
9 testimony you have today.

10 MR. JOHNSON: Yes, sir, Your Honor.

11 THE COURT: All right, you may call your first witness.

12 MR. JOHNSON: Oh, thank you.

13 THE COURT: Well, let let's do this, this be pretty big
14 package and he has a laundry list of concerns about counsel
15 and, uh, one other issue, I had it a moment ago but can you
16 narrow it down or it it just ---

17 MR. JOHNSON: Well, Your Honor, that, um, he has a a
18 number of issues, uh, which I guess there's a a difference of
19 opinion as to what's viable, what's not, um, I think, uh, as
20 as, let me just go back, as previously mentioned, um, the
21 issue with the, uh, Vicky McBee and Romell Thompson, there's
22 an also an issue with, uh, the failure of counsel to, uh, if
23 you're lookin' at the, at the transcript, there's a difference
24 of opinion as to whether or not, uh, he was subject to life
25 without the possibility of parole, um, he believes that he was

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 incorrectly advised regarding that. As far as his issues are
2 concerned, I think those those are the big ones, Judge, those
3 are the ones that I see as to to to viable issues before the
4 Court.

5 THE COURT: Okay. All right, wanna call Mr. Thomas?

6 MR. JOHNSON: Yes, I'm gonna call Eugene Thomas to the
7 stand.

8 THE COURT: All right, c'mon up and be sworn, Mr. Thomas.

9 (Whereupon, a discussion was held off the record.)

10 (Whereupon, the applicant came forward.)

11 THE CLERK: Mr. Thomas, please place your left hand on
12 the Bible and raise your right hand..

13 EUGENE THOMAS, having been first
14 duly sworn, testified as follows:

15 THE CLERK: Thank you, you may be seated.

16 (Whereupon, a discussion was held off the record.)

17 THE CLERK: Please state your full name for the record.

18 THE APPLICANT: Eugene Thomas.

19 DIRECT EXAMINATION BY MR. JOHNSON:

20 Q. All right, Eugene, uh, where are the, where are you
21 currently housed in the Department of Corrections?

22 A. At McCormick Correctional Institution.

23 Q. And what type of sentence are you serving?

24 A. Life without parole.

25 Q. You're serving the life without parole sentence as a

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 result of what proceeding?

2 A. That, kinda deaf now, could you come here.

3 Q. Oh, I'm sorry.

4 A. Okay, and can I ask the the judge a question, please.

5 THE COURT: Fine with me.

6 A. Your Honor, will you please allow me to just just my
7 right hand where I can maneuver my paperwork where I can get
8 my ---

9 THE COURT: I don't, ---

10 A. --- stuff?

11 THE COURT: --- I don't have any objection to that,
12 less ---

13 A. Thank you.

14 THE COURT: --- less security does. I'm not, I'm not in
15 charge a their security.

16 POLICE OFFICER: It it's sheriff's office policy we, Your
17 Honor, we do not unhandcuff, if you tell me to, I'll I'll ---

18 THE COURT: No, if it it's a security po -- that if it
19 it's a security concern I'm I'm not gonna let you do that.

20 A. I own that.

21 BY MR. JOHNSON:

22 Q. Can I assist you, Mr. Thomas, somehow?

23 A. Say say it again.

24 Q. Can I assist you in getting to your paperwork you wanna
25 get to?

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 (Whereupon, a discussion was held off the record.)

2 Q. Are you ready?

3 (Whereupon, a discussion was held off the record.)

4 Q. All right, Mr. Thomas, are you, are you ready? Can you
5 hear me?

6 A. Yes, sir.

7 Q. Okay. All right. Uh, okay, so you're serving a life
8 without the possibility of parole sentence, is that correct?

9 A. Yes.

10 Q. And, uh, what proceeding had you sentenced to that, uh,
11 provision?

12 A. Say it again.

13 Q. To what, uh, proceeding had you sentenced to life without
14 the possibility of parole?

15 A. You mean the charge?

16 Q. Yes.

17 A. Attempted armed robbery.

18 Q. And who was your attorney?

19 A. Uh, Scott Robinson.

20 Q. Was this a sentence from a guilty plea or a sentence from
21 a trial?

22 A. A trial.

23 Q. And do you recall when the trial took place?

24 A. September the, uh, between September the 10th and 11th of
25 2012.

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 Q. Okay. Was there an appeal filed?

2 A. Yes.

3 Q. What was the result of the appeal?

4 A. Uh, it was denied.

5 Q. Okay. Who was your appellate counsel?

6 A. Uh, Mr., uh, Gehret out in Charleston, South Carolina.

7 Q. Okay. Before the hearing started, we we referenced, uh,
8 to the Court a a couple a different issues, uh, to which, uh,
9 you believe that your counsel was ineffective, is that
10 correct?

11 A. Yes.

12 Q. All right. Uh, the first issue is, um, and I believe
13 that as alleged in your application is you believe you were
14 given erroneous advice as, uh, as, uh, as it pertains to the
15 potential sentence in your case, is that correct?

16 A. Well, yes, ---

17 Q. Okay.

18 A. --- that's, that was one of the issues that that, are you
19 saying was that the first issue?

20 Q. Well that was one a the is -- that was one a the issues I
21 mentioned be -- before the case started, is that correct?

22 A. Yes, that was ---

23 Q. Okay.

24 A. --- one of the issues.

25 Q. Okay, ca -- will you please portray to the Court, uh, the

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 circumstances there and why you believe that Mr. Robinson was
2 ineffective.

3 A. Could I get you to, that come to, go to ---

4 Q. Yes.

5 A. --- this issue for me, please.

6 (Whereupon, counsel approached the witness.)

7 Q. Are you ready, Mr. Thomas?

8 A. Yes.

9 Q. All right. Please, uh, please tell the Court, uh,
10 circumstances of why you believe Mr. Mr., uh, Robinson was
11 ineffective in that instance.

12 A. Well Mr. Roberson's [sic] my trial counsel, he gave me
13 erroneous advice on statutory law. He informed me that I
14 couldn't receive life without parole because of the age of my
15 conviction I had in Florida and that I wouldn't be able to
16 have nothin' but a 0 to 20 if I was found guilty for the, uh,
17 attempted murder charge and that, uh, he he was like he was
18 sure that he can prove to the Court that I wouldn't be
19 convicted of armed robbery.

20 Q. Now as it comes to the prior conviction from Florida,
21 please tell the the Court the date a that, what what that
22 conviction was.

23 A. I was charged with a second degree murder 1981.

24 Q. Okay, and, uh, were you convicted of the same?

25 A. Yes.

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 Q. Okay, and, uh, I believe you're trying to portray to the
2 Court that ya'll discuss that that that, uh, conviction was
3 too old for enhancement purposes, is that ---

4 A. Um-hum, ---

5 Q. --- correct?

6 A. --- yes. Mr. Robinson he argued this here with with the,
7 uh, with the Court. If you, uh, go to my transcript page, uh,
8 348 line 8 to 25 ---

9 Q. Mr. Thomas, I'm gonna ask that you communicate with the
10 Court exactly what you're talkin' about.

11 A. What you mean? You want -- you you say you want me to
12 read this from my transcript, okay.

13 Q. Yes, yes.

14 A. Okay, it says, that this is the Court, excuse me, this is
15 the Court talkin' to Mr. Robinson and Mr. Robinson say, "May
16 it please the Court," and the Court say, "Yes, sir, Mr.
17 Robinson."

18 "Your Honor, just for appeal purpose in this case, Your
19 Honor, Your Honor. When he was convicted a nolo contendere in
20 Florida back in 1981, I believe he was in his early 20s at the
21 time. I saw some stuff that Ms. Tessitore gave you regarding
22 the range of sentencin' at that time if I can see it. Well,
23 Your Honor, if what I'm lookin' at from what she gave me, it
24 was a range between I think the maximum a certain number
25 years: 10 years, 15 years, somethin' like that but it's going

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 to be, we would submit that this does not qualify as a strike,
2 this conviction from 20 somethin' years ago or actually 30
3 years ago as well as the description a this offense while
4 there was a conviction for murder, the actual sentence range
5 was in the, was a lesser charge from South Carolina. I
6 believe I think the Court mentioned voluntary manslaughter but
7 we submit," again he says, "that this does not qualify the
8 strike based on the ages of conviction in Florida and based on
9 the description a this particular offense in this case."

10 THE COURT: I I'm gonna interrupt ya, I hate to do this,
11 I'm gonna have to step across the hall just a second.

12 MR. JOHNSON: Yes, sir, Your Honor.

13 THE COURT: I hate that ---

14 MR. JOHNSON: Yes, sir, Your Honor.

15 THE COURT: --- just I've I've just got to use the
16 restroom. I'll be right back.

17 THE APPLICANT: Okay, Your Honor.

18 (Pause.)

19 BY MR. JOHNSON:

20 Q. Okay, Mr. Thomas, you just read a an excerpt from the
21 trial transcript, is that correct?

22 A. Say agains.

23 Q. You just read an excerpt from the trial transcript, is
24 that correct?

25 A. Yes.

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 Q. And that, uh, Mr. Robinson had stated his understanding
2 of of, uh, whether or not that charge that you have reported
3 was a strike, was that correct as well?

4 A. Yes.

5 Q. All right. Um, and is is this a understanding that ya'll
6 also communicated about?

7 A. Yes.

8 Q. Okay. And so what was your understanding based on your
9 conversations?

10 A. My understanding was through what Mr. Robinson told me
11 that I couldn't, I couldn't receive life without parole and
12 just that that that was a, a, was was vital to me because it
13 it it it didn't give me a chance to to but to be able to
14 understand what I was goin' through on my case at that time or
15 or what could hap -- what could happen to me so he misled
16 me.

17 Q. So, uh, your understanding of the maximum and minimum
18 penalties at the time, do you recall? What was your
19 understanding of the maximum and minimum minimum penalties ---

20 A. That I could receive 15 ---

21 Q. --- if if you were convicted?

22 A. That I could receive 15 to 30 or from 0 to 20.

23 Q. Now knowing that you, if you were convicted that you you
24 would get life, does that, would that have affected your, uh,
25 opinion on whether or not you would have proceeded to trial

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 potentially accepting a guilty plea?

2 A. Oh most greatly it would have because it it was like this
3 here: If I, if I'm facin' both of the charges, the the, uh,
4 the original charge and the less included offense a that
5 charge and and both of 'em carry life without parole well then
6 that one advice hurt me dearly then because if I'd a knew this
7 right here, if I'd a been known that that day, aint no way I
8 woulda tried to fight both of them charges like that there.

9 Q. So let's let's, uh, elaborate on what you say the
10 original charge and the lesser included offense. Okay, the,
11 tell the Court, tell the Court what you mean, what what what
12 lesser included offense are you talkin' about that you coulda
13 been convicted of?

14 A. The attempted armed robbery offense.

15 Q. Rather than the armed robbery.

16 A. Rather than the armed robbery offense.

17 Q. And what you're tryin' to tell the Court is the attempted
18 armed robbery also would have subjected you to a strike.

19 A. It most definitely.

20 Q. Okay, and so if you had even won that point, you would
21 have gotten life, you had to get life without parole.

22 A. On either one a those charges.

23 Q. But it was your understanding that, um, if if you pursued
24 attempted armed robbery that you could get the the lesser
25 included, is that correct?

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 A. If I'd a could, if I'd a went to trial for the, for the
2 armed robbery on the, from from what Mr. Robinson explained to
3 me, I only coulda got from 15 to 30 but if I went to charge on
4 the attempted armed robbery, I only coulda got from 0 to 20,
5 that's is, well that's what he told me.

6 Q. And so you believe you were, you were prejudiced by, uh,
7 affecting your decision of whether or not to do a guilty
8 plea ---

9 A. Highly highly prejudiced. Highly prejudiced 'cause the
10 way Mr. Robinson his his strategy was that that, uh, he felt
11 like that he could, he could beat this this armed robbery, he
12 could convince the jury that nothin' was taken in this armed
13 robbery and without without me puttin' up any evidence or any
14 witnesses to rebutte [sic] anything that the State said or, uh,
15 or the wit -- or the, or the evidence that the State put up
16 left me wide open for both a these charges, it wasn't no way I
17 could have rebutted them so that that that highly prejudiced me
18 and if I, if he gave me the right advice whatever that 'cause
19 the State offered me a a plea bargain, uh, of a 12 to 14 years
20 and that's that's a lot less than what Mr. Robinson, uh, uh,
21 erroneously advised me of of bein' subjected to life without
22 parole on either one a those charges: the armed robbery charge
23 or the attempted armed robbery charge and that highly
24 prejudices me.

25 Q. Now you just referenced, uh, in regard to trial strategy

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 as far as, uh, that that nothing, they wouldn't be able to
2 prove that nothing was taken, um, you also had, uh, an
3 alternative strategy of of po -- potentially of of alibi
4 witnesses, is that correct?

5 A. Yes.

6 Q. Okay. Uh, now we had some, uh, discussion of 'fore
7 before the case started here today and, uh, but I knew that
8 you do have, uh, you did have, you did prepare a list of
9 potential witnesses that would have been there to potentially
10 provide you with an alibi, is that correct?

11 A. Yes.

12 Q. Okay, let's communicate with the Court what that might
13 have been.

14 A. Well when I, when I went to court, when I -- see, I ne --
15 I needed my pretrial hearin' from Ms., the court reporter
16 typin' up 'cause I I went to court and Mr. Robinson claimed
17 that he didn't, he didn't have no information about my alibi
18 witnesses, he didn't subpoena these people or nothin' but ---

19 Q. Now, uh, let me stop ya, that you just made reference to
20 a pretrial hearing, you're talking about a another date that
21 the case was set for trial, is that correct?

22 A. Yes, yes, ---

23 Q. Okay.

24 A. --- another date I was gettin' ready to go to trial.

25 Q. Okay, and and and what you're basically tellin' the Court

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 is there's no transcript from that hearing.

2 A. It's a transcript, it was a transcript.

3 Q. Okay, but at that, at that hearing, um, they continued
4 the case, is that correct?

5 A. Yes, they continued the case, based on that Mr. Roberson
6 [sic] violated the alibi rule rule that if I can remember a
7 Rule 5 and at the time without him subpoenaing the witnesses,
8 these witnesses showed up at my, at that trial in the
9 courtroom. Judge Miller spoke to the witness his -- himself
10 and, um, he questioned them about was they there to testify on
11 my behalf and they they all answered yes, that this woulda had
12 a been in the transcript and he asked Mr. Roberson, he -- well
13 Mr. Robinson tried to claim that he knew nothin' about the
14 alibi witnesses but I had al -- when Mr. Robinson first became
15 my attorney, I had wrote Mr. Robinson concerning the alibi
16 witnesses and I ha -- and and and so happened his his, uh,
17 investigator at the time Mr. Paul Salavio [sic] was goin'
18 through his binder and I seen two the letters that I had wrote
19 Mr. Roberson concerning the alibi witnesses so I raised my
20 hand to Judge Miller and asked to talk to him and Judge
21 Miller, uh, and I told him about the two letters that was in
22 his binder and that Judge Miller had asked, told Mr. Robinson
23 to bring the two letters up and Mr. Robinson got the letters
24 from, uh, Paul Salavio out the binder and took 'em up to
25 Judge, uh, Miller and when Judge Millers read the letters he

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1 began to to admonish Mr. Roberson even sayin' that he was
2 gonna hold Mr. Roberson for contempt in court because my
3 letters clearly explained to Mr. Robertson about my alibi
4 witnesses that was in their courtroom so at that, at that time
5 'cause Mr. Robertson was lettin' the judge know that that, uh,
6 the only time I told him about the alibi witness was the the
7 the day before I was gettin' ready to go to trial and
8 Mr. Robinson what he did was that when he came to that county
9 jail to talk to me and I kept tellin' him about them alibi
10 witness, he got upset and upset with me about the alibi, like
11 what alibi, what what, I I said, Man, the witness I had been
12 tellin' you about and writing you about, so he had went and
13 talked to the solicitor, Ms. Tessitore, and well then he
14 notify her that I had the witnesses so Mr. Tessitore,
15 Ms. Jennifer Tessitore said yes at that time, told
16 Mr. Robinson that he he had violated the rules and was tryin'
17 to ambush her with these witnesses and she said but the day
18 that we went to court Mr. Robinson went lookin' for this lady
19 to, uh, blow, to blow 'em out the, at the game with this here
20 but she told him that, uh, that, uh, she explained to the
21 judge that Mr. Robinson was violated the rules and had told
22 her about these witnesses, she said that she agreed with
23 Mr. Robinson to only allow one a the witness to testify which
24 was Ms. Vicky McBee because I was facin' life parole, she
25 said, Bein' that Mr. Thomas is facin' life without parole I'll

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1 I'll allow one a these witness, so that's when Judge Miller
2 went to askin' Mr. Robinson about the witness and he denied it
3 in that courtroom and that's when I seen the letters in the
4 binder and Mr., uh, that the judge seen 'em and he told
5 Mr. Robinson that he was gonna hold him in con, uh, tempt a
6 court, he was gonna allow the witness to testify and
7 Ms. Tessitore she jumped up and say, Well well, Your Honor,
8 well, uh, you got, you can't do that, you gotta give us a
9 chance to talk to the witnesses or so, she asked for him to
10 continues and the judge, uh, admonished Mr. Robinson that he
11 needed to get all my alibi witnesses to this lady where that
12 to give them a chance, uh, uh, to come and talk which at that
13 time I had six alibi witness not just Ms. Vicky McBee or, uh,
14 or Romell Thompson but other witnesses too.

15 Q. Okay, and so the case was continued and then there was
16 another trial date, this was the date of your trial, is
17 that ---

18 A. Yes.

19 Q. --- correct? Okay.

20 A. Yes.

21 Q. And on the date of your trial, were your witnesses
22 subpoenaed?

23 A. My witness came again, even Romell Thompson, even
24 Ms. Vicky McBee and Mr. Robinson felt like we didn't need
25 these witnesses because he, for some reason he felt like that

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 he can convince the jury if he had the last argument that a
2 robbery never took place.

3 Q. And again this relates to, uh, pursuing an attempted
4 armed robbery rather than an armed robbery, is that correct?

5 A. Yes, ---

6 Q. Okay.

7 A. --- yeah, ---

8 Q. And ---

9 A. --- it's for some, for for some reason Mr. Robinson he
10 he, I don't know what he he was thinkin' of his strategy was
11 because it, for this is what I find out later: the, it says
12 that if a person commit the originally charge then any other
13 charge, um, any attempt a that charge can be, can be
14 considered a less included offense of that charge so it it,
15 how could Mr. Robinson's strategy be if he, if if, even if he
16 don't prove a robbery then he left me open for attempted armed
17 robbery and that that wasn't a great strategy when I had, and
18 I never admitted to Mr. Roberson about about committin' a
19 crime, if he was to tell the truth, even though I always held
20 my innocent that I had a alibi and he, and he didn't want to
21 go to my alibi witness and that that that wasn't, that that
22 wasn't reasonable strategy not to go, that I, that's all I
23 had.

24 Now they tried to say that, uh, my witnesses, Ms., like
25 Ms. Vicky had a fraud or a check that, uh, a check fraud and

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 that, and that, uh, she mighta had a financial one for the,
2 what's the name, had been, uh, had -- for drunk, for drivin',
3 uh, untaxed really but those are the only witnesses I had
4 for that alibi and I'm fine and they mighta had those little
5 charges but they needed to be put up there in my defense and
6 he didn't take that route, he wanted to argue he felt like if
7 he had the last argument that he could win it and that that
8 unreasonable.

9 Q. Okay, and obviously if if he wins and gets attempted
10 armed robbery, you still have to get life?

11 A. I still get the life.

12 Q. Now as far as what the witnesses would have said, I
13 believe that the last day of the robbery was the afternoon of
14 of July 22nd of 2009, is that correct?

15 A. Say it again, I can't hear.

16 Q. Is is the alleged day of the robbery was it -- well,
17 wa -- was the day of the robbery, that July 22nd of 2009, does
18 that sound correct to you?

19 A. Yes.

20 Q. Okay, and, um, as far as that relates to to Romell and
21 Vicky, uh, whom we hope to have here, um, they would have said
22 what to the Court?

23 A. That ---

24 Q. What ---

25 A. --- I was at a cookout ---

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 MR. SCHMECKPEPER: I object, Your Honor, hearsay.

2 THE COURT: I I overrule the objection, I don't have a
3 jury here, I'll take it whatever weight and value it may have.

4 BY MR. JOHNSON:

5 Q. Okay. Will you please tell the Court what they would
6 say.

7 A. That I was at a cookout playin' poker at that time.

8 Q. Okay, and, uh, so durin' that whole afternoon they woulda
9 said that they had eyes on you basically.

10 A. Yes.

11 Q. Um, as far as the evidence that the State had against
12 you, was it primarily had to do with a a fingerprint,
13 that ---

14 A. Yeah.

15 Q. --- correct?

16 A. Yes.

17 Q. Please explain to the Court.

18 A. Well, they got, they had got my my left fingerprint in
19 the inter -- inside terior of a door over a an abandoned house
20 that was bein' remodeled. I told Mr. Roberson how my
21 fingerprint got on that door. I went to that house lookin'
22 for rent. Me and a woman named Darlene Gordon who she was
23 supposed to testify too and what I had explained this and then
24 told this to Mr. Robinson and Mr. Robinson even spoke to
25 this woman on the phone and she had explained all this here to

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 Mr. Robinson but once again he refuse to to call the witness.

2 Q. Okay. Now there was an identification of you as well,
3 wasn't there?

4 A. Yes.

5 Q. Okay, well let -- ex -- please explain to the Court
6 circumstances regarding the the identification of you as as
7 the, uh, alleged perpetrator.

8 A. What you mean?

9 Q. The identification you as the person who committed the
10 crime.

11 A. 'cause this guy said that he, this guy's, uh, the victim,
12 uh, Mr. Michael Gordon, he said that I was the guy that that
13 had committed the crime.

14 Q. Oh, okay, and was there, was there a problem? was he
15 sure?

16 A. Say it again.

17 Q. Was he sure that you were the one?

18 A. No, he wasn't sure, he even stated that that that he
19 wasn't, he wasn't sure. He sa -- basically what he said that,
20 uh, ---

21 MR. SCHMECKPEPER: Your Honor, and at this point I object
22 to this allegation being raised, it's already been decided at
23 the low -- at the Court of Appeals and it's barred this point
24 by res judicata.

25 THE COURT: I'll let him go ahead and make a record but

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 it's already been raised, I certainly can't do anything with
2 it at ---

3 MR. JOHNSON: Yes, sir, Your Honor, I believe -- okay,
4 'cause this this was testimony given in the original trial so
5 I suppose if you just take judicial notice, he was just tryin'
6 to establish a background for why he may have wanted to call
7 the witnesses, Judge.

8 THE COURT: I'll -- go head, he can do that.

9 MR. JOHNSON: Yes, sir, Your Honor.

10 BY MR. JOHNSON:

11 Q. Uh, but the i -- but any or anyhow that the
12 identification was was not the strongest identification.

13 A. No, it wasn't.

14 Q. Okay. Okay, and so, uh, calling your witnesses may have
15 been a a viable, a reasonable option considering you had, you
16 you had to win the case, you couldn't get attempted armed
17 robbery or armed robbery conviction.

18 A. As yes.

19 Q. Okay. All right, Eugene what I'm gonna do is I'm gonna
20 ask that you answer questions that the attorney general has
21 and then I may have an opportunity to question you again,
22 okay?

23 A. Okay.

24 Q. All right, thank you.

25 CROSS-EXAMINATION BY MR. SCHMECKPEPER:

EUGENE THOMAS - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 Q. Good afternoon, Mr. Thomas, uh, I just have a couple
2 quick questions and, um, I I think the first allegation we
3 kind of went over today was that your attorney never told you
4 that you could s -- get get a sentence of life without parole
5 or he told you you would not, you were not eligible for life
6 less parole.

7 A. That will you -- sir, will you come closer, I'm kinda
8 deaf like I said.

9 Q. Is it ---

10 (Whereupon, counsel came forward.)

11 A. Thank you.

12 Q. I'll stand here where Mr. ---

13 A. All right, thank you.

14 Q. --- Johnson was standing. Now I think what you said
15 during your testimony is that your attorney told you you could
16 not, you were not eligible for life without parole ---

17 A. Yes..

18 Q. --- and I just wanna get the record straight and and and
19 make sure all the facts are correct, did you receive a notice
20 of li -- of the State's intent to seek life without parole?

21 A. Yes.

22 Q. How many a those did you receive?

23 A. I receive I say, uh, two.

24 Q. Received two.

25 A. Yes.

EUGENE THOMAS - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 Q. And then correct me if I'm wrong -- beg the Court's
2 indulgence.

3 A. I said I received two because I had Randy Chambers as my
4 lawyer and then he he he wasn't my lawyer no more, then
5 Mr. Scott Robinson came my lawyer so when Scott Robinson came
6 my lawyer they sent me another.

7 Q. And do you remember the Court telling you prior to trial
8 that if you were sentenced he wouldn't have any discretion but
9 to sentence you to life without parole?

10 A. No, that was told to me after after my trial.

11 MR. SCHMECKPEPER: I can beg the Court's indulgence, I'm
12 sorry, I need to refer to my notes real quick.

13 (Pause.)

14 BY MR. SCHMECKPEPER:

15 Q. And I apologize, if you could refer to page, uh, uh, 9,
16 Mr. Thomas. Do you -- can you hear me, all right?

17 A. Yes, I heard you.

18 Q. And I think prior to this, and correct me if I'm wrong
19 but the State and and Mr. Robinson have put on the record that
20 there was a plea offer and that you had rejected it and the
21 Court said or the Court told you, "All right, very well,
22 that's fine and you understand ---

23 A. You said, you said page 9, right?

24 Q. Correct, page 9 right around line 4. Would you -- the
25 Court says, "You understand therefore that if the jury

EUGENE THOMAS - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 convicts you of the crime of armed robbery then my options
2 would be limit to life without parole," is that correct?

3 A. Yes, that's what it says.

4 Q. So the judge told you that you were facing a life without
5 parole sentence ---

6 A. Yes.

7 Q. --- and asked if you were sure you didn't wanna take the
8 plea offer?

9 A. Say it again.

10 Q. The judge asked if you understood ---

11 A. Yes, I heard that part, yes.

12 Q. --- and and then then insured that you and you you, that
13 you instructed your attorney to reject the plea offer.

14 A. Yes.

15 Q. Now let's move onto this next issue, uh, matter a facts,
16 they were talking about witnesses and you gave your attorney a
17 list of witnesses, is that correct, ---

18 A. Yes.

19 Q. --- and I know you're talking about something prior to
20 the trial, before the actual trial your attorney did in fact
21 subpoena those witnesses.

22 A. Yes.

23 Q. Now if you could turn your attention to page 282 and I
24 think you referenced this during your testimony but the judge
25 asked you whether or not you agreed with your attorney's

EUGENE THOMAS - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 decision not to call those witnesses, is that fair to say?

2 A. Yes, that was, that was before I knew I had affirm and a
3 right to a de, to a defense.

4 THE COURT: What page?

5 MR. SCHMECKPEPER: Your Honor, right around page 203.

6 THE COURT: All right, go ahead.

7 BY MR. SCHMECKPEPER:

8 Q. And and and I'm going back two hun -- page 282 your
9 attorney says that he went with you during lunch break and
10 that you and him talked about pros and cons of each
11 witness ---

12 A. Yes.

13 Q. --- and that you had decided that you didn't think they
14 they should be called.

15 A. No, he decided. He the one told me that he, that he
16 could beat their case, that we didn't need the witnesses and
17 that he could beat their case if he got the last argument.

18 Q. But he did tell you the reasoning for not wanting to call
19 them.

20 A. Say it again.

21 Q. But he did explain to you the reasoning for not wanting
22 to call them.

23 A. No, I just told you what he said. He said that we didn't
24 need the witnesses because he could beat the case if he had
25 got the last argument and but if we call the witnesses, he

EUGENE THOMAS - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 wouldn't be able to get the last argument and she say that
2 was, that was the rules.

3 Q. Let let's just go over the transcript real quick, 28 --
4 page 203 starting at line 20 ---

5 A. Page ---

6 Q. --- 4 ---

7 A. --- what now?

8 Q. 283.

9 A. Okay.

10 Q. I I apologize, let me know if I'm not talkin' loud
11 enough, however ---

12 A. I I ---

13 Q. --- I can slow it down.

14 A. --- I hear you now.

15 Q. The judge asks you, "But you agree that you and your
16 lawyer have talked about strategy," you said, "Yes, sir."
17 The Court said, "of presenting evidence and not presenting
18 evidence," and you said, "Yes, sir." Then on page 284 the
19 Court asked you, "Are you comfortable with the strategy he's
20 articulated," and you said, "Yes, sir." Is that a fair
21 assessment of what happened at the trial?

22 A. Well, you know, uh, you know, I can, I can understand by
23 you goin' to them words but you have to understand that before
24 when I've tried to, uh, and argue it, to put, tell the Court
25 about Mr. Robinson that the judge admonished me, man, and he

EUGENE THOMAS - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 he he made me feel like the only way I I had to, uh, I had to
2 go along with Mr., uh, Roberson, it's in my transcript where
3 he he was tellin' me that there, it's early in my transcript,
4 well, I wanna, like I was tellin' Mr. Robinson about
5 discoveratory [sic] witnesses and the judge had went into, he
6 went into, uh, you know, he he just got out on me like,
7 Listen, you ain't no lawyer, you need to list -- you need to
8 listen to your lawyer, you need to to, you you you you ain't
9 never tried no case, so he put, he put me in position that I
10 had to go along with anything like what Mr. Robinson said.

11 Q. So let let me just see if I can clarify this real quick.

12 A. I ---

13 Q. You're not saying, you're not saying that your attorney
14 forgot to call these witnesses.

15 A. Say again.

16 Q. You're not, you're not telling the Court that your
17 attorney forgot to call these witnesses, right?

18 A. No, I'm not ---

19 Q. What you're, ---

20 A. --- say ---

21 Q. --- what you're saying is that, and and correct me if I'm
22 wrong, what what if I understand what you're saying is that
23 your attorney chose not to and you disagreed with his choice.

24 A. He chose not to to to, uh, have my witness for my alibi
25 and I really wanted, I stressed to him clearly that I really

EUGENE THOMAS - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 wanted to go with my alibi 'cause that's what I, that's what
2 it wa -- was about for me but he was saying that he did --
3 that that ain't a route we need to go. His route was this
4 here: that if he got the last argument that he could prove
5 that the the robber didn't take place and was nothin' taken
6 enable for the robbery and that's was his assessment of the
7 matter was.

8 Q. And that I understand you disagree with that now but at
9 the trial you told the judge you agreed with that, is that
10 correct?

11 A. Once again I told you agreed with that because Mr., the
12 judge had admonished me about Mr. Robinson so I felt like, you
13 know, that I was really on my own, I had to go along whatever
14 he said, it's in my transcript if you will ---

15 THE COURT: What ---

16 A. --- give me a moment ---

17 THE COURT: --- what page?

18 A. --- to find it.

19 THE COURT: Yeah, we'll give ya time to find it.

20 A. Okay, thank you.

21 THE COURT: Let him have a chance find it.

22 A. Um, ---

23 (Pause.)

24 MR. SCHMECKPEPER: And, Your H -- Your Honor, if I can
25 assist, I believe what he may be referring to is on page 400

EUGENE THOMAS - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 or page 44.

2 A. Forty-four?

3 MR. SCHMECKPEPER: Page 43 to 44.

4 A. Oh, yes, thank you very much for that, sir. Uh Hm

5

6 BY MR. SCHMECKPEPER:

7 Q. And that that may not be what you're referring to.

8 A. Yeah. No, that's that's that's it 'cause it, uh, it said
9 that, uh, what it was I I had a bunch a letters that I was
10 tryin' that I had done wrote Mr. Scott Robinson, uh, tellin'
11 him 'bout my witnesses and other stuff and everything and that
12 es--- especially this exploratory witness, this lady name
13 Ms. Lucy Early, that he know, he knows, talked to this lady
14 and never subpoenaed this lady when he was my lawyer so I was
15 tryin' to like go on record, not knowin' the rules of the
16 Court I was tryin' to go on record but Mr. Robinson know
17 whatever whatever I was tryin' to do and so he told the judge
18 that I wanted to make a motion but I, which I really didn't
19 wanna, wasn't tryin' to make no motion, I just wanted to go on
20 record with my letter that I had sent to him and so and when
21 did and if I can read the transcript it went like, okay, it
22 say Mr. Robin [sic] say, uh, uh, "May it please the Court,"
23 and say, and, uh, the Court said, "Yes, sir, but remember you
24 you an officer a this court and you may not, you may not
25 advocate or present anything that you believe to be frivolous

EUGENE THOMAS - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 'cause you took an oath to do otherwise. If you want to make
2 a statement, I had a lawyer say this," this and this is the
3 judge talkin' now, he said, "I had a letter say that this is
4 what my client wants to do, there's no legal foundation for
5 it; however, Mr. Thomas need to understand that the rules that
6 apply to this proceeding so there's a motion that needs to be
7 made."

8 "No, sir, Your Honor, uh, thank you, we did that at a a
9 later date."

10 "Uh, Mr. Thomas, if you want to try to file some motion
11 as that I have stated, I just had about three weeks ago in
12 Charleston tried a weekly long case with a gentleman that
13 represented himself on twelve criminal sexual conduct cases,
14 he asked to have 'em all tried. He fired his lawyer the first
15 mistake, uh, will tell ya big mistake and at the end a the
16 trial he was about to, about to ready to make his closing
17 argument, he looked at me and I said now you understand why I
18 discourage you greatly and tried to get you not to fire your
19 lawyer," you know what his answer was, 'You're right,' so you,
20 if you want to fire your lawyer and handle this case, I talked
21 to you about it, what do you wanna say, what do you wanna say,
22 sir," and I said, I said, "I don't wanna fire my lawyer, yeah,
23 I'm just tryin' to put somethin' on record." "But what, put
24 what on record, sir? You can't put somethin' on record that
25 has no legal basis. If you want to fire your, uh, fire your

EUGENE THOMAS - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 lawyer, your lawyer has an obligation not to present somethin'
2 that's frivolous," and I said, "This won't be frivolous, Your
3 Honor, it's about a witness, exploratory witness."

4 "About exploratory witness, what about them?"

5 "What what I would like my," uh, and the Court say, "I'll
6 allow him to make a statement, what is it that you, uh, think
7 has not been done," and he he said, uh, I said, "What I can
8 pre," I say, "Well, can I present this to you, Your Honor,"
9 and the Court said, "No, sir, you can't. You can tell me what
10 it is, what it is you think that has not been done," and I
11 said, "A lady that's an exploratory witness I feel is very
12 important in my case that haven't been subpoenaed or haven't
13 been," he said, "That's that's at another time, that's called
14 "post-conviction relief," that's after you're convicted you
15 can file an action and say your lawyer didn't subpoena
16 somebody. Your lawyer has a duty to talk to the people and
17 subpoena people who are going to tell the truth and there, and
18 there lies the problem. You don't just subpoena people to
19 testify, that's what, that's exactly what that gentleman did,
20 he put people on the stand that testified to things that would
21 have never been able to to be introduced, that was the worst
22 mistake in the world but he didn't have a lawyer to to tell
23 him that. Your lawyer doin' you a service by not subpoenaing
24 somebody they could be detrimental to your case so you have
25 another opportunity to present that if that person is true

EUGENE THOMAS - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 then you could present that at that stage. Your lawyer has
2 made that decision. He is a lawyer, do you have a legal
3 degree," and I say, "No, Your Honor, and the Court say, "Well
4 have you ever tried a case," and I say, "No, Your Honor." He
5 said, "Have you ever prepared a case for trial," and and I
6 said, "No, Your Honor." He said, "You may have read some law
7 but you have, but you have ever taken taken any test
8 concernin' the law," and I say, "No, Your Honor," and so you
9 see I'm sayin' he put me in a position that I had to go along
10 with what Mr. Robin [sic] was sayin' and when he was talkin'
11 about 'bout, uh, Mr. Robinson had a a thing to decide about my
12 alibi witness, Mr. Robinson never subpoenaed this lady, he
13 never talked to this lady and she gave a, she gave a statement
14 to the sheriff, C.J. Flavell, which I have here and I would
15 like to present to the Court about seein' somebody else and it
16 wasn't me. Could I put -- is it, is it, is it possible that I
17 can present this to the Court?

18 THE COURT: I don't, I don't, I don't know what it is.

19 MR. JOHNSON: Um, ---

20 A. It's it's ---

21 MR. JOHNSON: --- I suppose I can, uh, or or on redirect
22 potentially question him regarding the document, Your Honor.

23 THE COURT: Well, uh, you can maybe do that on reply,
24 we'll hear what, uh, ---

25 A. What is, what it is off of, uh, Your Honor, it's of, uh,

EUGENE THOMAS - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 the police officer that the detective C. J. Flavell had went
2 and spoken to this lady and and, uh, it says, "Supplement
3 Report," where that he take, that he, that's tells what this
4 lady says.

5 THE COURT: Any objection to it comin' in?

6 MR. SCHMECKPEPER: I have no objection, Your Honor.

7 THE COURT: All right, you, I'll let you, somebody make a
8 copy and we'll take a look at it, make it court's exhibit, uh,
9 well not a court's exhibit, will have to be, uh, applicant's
10 exhibits.

11 MR. SCHMECKPEPER: And, Your Honor, for the record I ran
12 out of questions about five minutes ago or less.

13 (Laughter.)

14 (Whereupon, a discussion was held off the record.)

15 MR. JOHNSON: All right, Your Honor, I, uh, I'm gonna
16 discuss the issue with, uh, the potential piece of evidence
17 with him, uh, after he steps down, Your Honor, and I'll, uh,
18 permission to, uh, redirect, uh, the witness, Judge.

19 THE COURT: Well that ---

20 THE APPLICANT: That we ---

21 THE COURT: --- since this is a post-conviction relief
22 applica, uh, and we don't have a jury, I'll I'll allow that
23 although procedurally it's probly incorrect but we'll we'll
24 we'll allow it so any -- no further cross?

25 MR. SCHMECKPEPER: Nothing from the State, Your Honor.

EUGENE THOMAS - REDIRECT EXAMINATION BY MR. JOHNSON

1 THE COURT: Any redirect?

2 MR. JOHNSON: Yes, just briefly, Judge.

3 THE APPLICANT: So so, Your Honor, you're sayin' I could
4 find it then, uh, when you ---

5 THE COURT: You and your lawyer will talk about it here
6 in just a minute.

7 THE APPLICANT: Okay, thank you, Your Honor.

8 REDIRECT EXAMINATION BY MR. JOHNSON:

9 Q. All right, uh, you were just asked a series a questions
10 regarding, uh, plea strategy -- plea transcript where the
11 judge, uh, went on the record tellin' you 'bout turnin' down a
12 plea offer and, uh, also, uh, on a separate a -- separate
13 occasion asking essentially if, uh, you were okay with, uh,
14 Mr. Robinson's trial strategy, is that correct?

15 A. Yes.

16 Q. Okay. Now when you s -- you were served with the, uh,
17 notices, uh, well regarding life without possibility of of
18 parole twice, is that correct?

19 A. Yes.

20 Q. And on on what charge was your understanding you could
21 receive life without possibility of parole?

22 A. On the armed robbery charge.

23 Q. Okay. Now was it your understanding that that notice was
24 given on the attempted armed robbery charge?

25 A. Not at first, not until I got the second one it said it

EUGENE THOMAS - REDIRECT EXAMINATION BY MR. JOHNSON

1 listed both of the charges.

2 Q. Okay, and so with your conversations with Mr. Robinson
3 where he was going to pursue, uh, potentially attempted armed
4 robbery charge, um, what at what point did ya'll discuss that?
5 what was your understanding?

6 A. Wait, well see, see, Mr. Robinson he was, he was even
7 wrong on that because the way he explained it to me that
8 either I was gonna be char -- I'm gonna be charged with the
9 armed robbery charge or I was gonna be charged with the
10 attempted armed robbery charge but he didn't explain it to me
11 in a fashion of that I could be charged with the armed robbery
12 charge and the attempted armed robbery charge as a less
13 included offense, he had me under the notion that I was, when
14 I go into the courtroom, either I was gonna be goin' in
15 courtroom on the armed robbery charge or that they was gonna
16 drop the armed robbery charge and try to charge me with
17 attempted armed robbery charge but that's not, that's not what
18 happened, that, uh, uh, that that lady asked for a less
19 included offense which was different which both of them
20 charges if I don't be found guilty of this charge, I can be
21 found guilty -- let me rephrase it. If I, if I don't be found
22 guilty a the armed robbery charge then I could be found guilty
23 of the the less included offense or the tem -- the attempted
24 armed robbery charge, not that when I went to the courtroom
25 I'll be, I'll be fightin' either either or or, you you

EUGENE THOMAS - REDIRECT EXAMINATION BY MR. JOHNSON

1 understand what I'm tryin' to say?

2 Q. If if if I understand correctly, I believe you're tryin'
3 to communicate that you thought that they had selected armed
4 robbery and if they couldn't prove armed robbery then you
5 were, you were free, is that correct?

6 A. Yes, or I'll, or I'll be tried if -- this what I'm
7 sayin': they said if I be, and the way that Mr. Robin [sic]
8 explained to me that I was charged with armed robbery and when
9 I got, when I got that paper, when I seen, 'cause the first
10 paper didn't say, uh, uh, armed robbery or attempted armed
11 robbery, it just said that I will receive life without parole
12 but the second paper said that and if I was convicted of armed
13 robbery or attempted armed robbery that I'll receive life
14 without parole and this is how Mr. Roberson explained it, he
15 said that the armed -- it -- I was charged with armed robbery
16 and that either that they was gonna drop the char -- the armed
17 robbery charge and try to charge me with attempted armed
18 robbery, not that, not that the both 'em was together as a
19 less included offense, he didn't explain it to me like that as
20 a less included offense, you ---

21 Q. Okay.

22 A. --- see what, you see what I'm sayin'?

23 Q. And because you didn't understand that either either/or
24 would get you life you still decided to proceed to trial, is
25 that correct?

EUGENE THOMAS - REDIRECT EXAMINATION BY MR. JOHNSON

1 A. On the, on for what Mr. Robinson explained to me.

2 Q. Okay, and that's supported in the end a the transcript,
3 isn't that correct?

4 A. Yes, it is.

5 MR. JOHNSON: All right, uh, no further questions,
6 Judge.

7 MR. SCHMECKPEPER: Nothing from the State, Your Honor.

8 THE COURT: All right, you can step down, have a,
9 subject to being recalled, have a seat with your attorney.

10 (Whereupon, the applicant left the stand.)

11 MR. JOHNSON: Your Honor, subject to those other
12 witnesses being called, that's the applicant's case.

13 THE COURT: All right. Okay, State.

14 MR. SCHMECKPEPER: Your Honor, the State calls Scott
15 Robinson, the applicant's trial counsel..

16 THE COURT: All right, please come up to be sworn.

17 MR. JOHNSON: Yes, sir..

18 (Whereupon, a discussion was held of the record.)

19 (Whereupon, the witness came forward.)

20 THE WITNESS: Hey.

21 THE CLERK: Mr. Robinson, please ---

22 THE WITNESS: Yeah.

23 THE CLERK: --- place your left hand on the Bible and
24 raise ---

25 THE WITNESS: Yeah, sure.

SCOTT D. ROBINSON - DIRECT EXAMINATION BY MR. SCHMECKPEPER

1 THE CLERK: --- your right hand.

2 THE WITNESS: Okay.

3 SCOTT D. ROBINSON, having been
4 first duly sworn, testified as follows:

5 THE CLERK: Thank you.

6 THE WITNESS: Thank you.

7 THE CLERK: Please state your full name.

8 THE WITNESS: Scott D. Robinson.

9 THE CLERK: Thank you, you may be seated.

10 DIRECT EXAMINATION BY MR. SCHMECKPEPER:

11 Q. Good afternoon, Mr. Robinson.

12 A. Hi.

13 Q. And please let me know if I'm not speaking loudly enough
14 or ---

15 A. Sure.

16 Q. --- too quickly. Just briefly if you would explain to
17 the Court your background in criminal law and the practice of
18 criminal ---

19 A. My background?

20 Q. --- law.

21 A. Um, I was, uh, uh, sworn in in 1992 and, um, I've done, I
22 practice in criminal defense for about, uh, 20 years I think
23 and I handle, that right now it's all I handle was defense
24 work back on this day.

25 Q. And was this your first life without parole here at

SCOTT D. ROBINSON - DIRECT EXAMINATION BY MR. SCHMECKPEPER

1 trial?

2 A. No, no, um, no, I'm sorry.

3 Q. Now were you retained in this case?

4 A. Appointed.

5 Q. You were appointed in this case. When were you
6 appointed?

7 A. It would have been, um, October 5th 2010.

8 Q. So about two years before trial.

9 A. About, yeah, 'bout one month pri ---

10 Q. Now ---

11 A. --- shy of two years.

12 Q. --- now you weren't the applicant's first trial counsel
13 in this case.

14 A. No, that was, uh, Randy Chambers.

15 Q. Let's go over your preparation a bit for this case. When
16 you took over it for Mr. Chambers, did you get his file?

17 A. Okay. I don't, I normally would get, I would normally
18 order it myself 'cause I'm not sure exact whether I got from
19 Randy or got it for myself but I would have the whole file.

20 Q. And was it, was it -- was discovery included in that
21 file?

22 A. Yes.

23 Q. How many times did you meet with the applicant?

24 A. Eighteen times.

25 Q. Now in in any a those eighteen times did you review

SCOTT D. ROBINSON - DIRECT EXAMINATION BY MR. SCHMECKPEPER

1 discovery with him?

2 A. Yes, he actually, uh, he's actually signed for discovery,
3 um, he signed for discovery each time or he would go over,
4 he's gotten all the discovery in the case.

5 Q. And during the course of those eighteen meetings, did he
6 give you any witnesses to investigate?

7 A. He did and we investigated any witness that he had. We
8 had, uh, uh, Investigator Leah Connolly (phonetic) up from
9 Columbia and she, uh, would have, I would imagined talked to
10 all the witnesses in the case.

11 Q. And did you review Ms. Connolly's note, Connolly's notes?

12 A. Um, ---

13 Q. Would you have had -- you know, if you don't
14 remember ---

15 A. --- I woulda ---

16 Q. (Indiscernible cross-talk.)

17 A. --- spoke to her on the phone or talked to her about it
18 but, uh, I actually sent Mr., uh, actually met with Mr. Thomas
19 in preparation for the trial about the witnesses and, um, on,
20 uh, Au -- August 30th 2012 I actually met with him at the jail
21 to go through every witness that he wanted to, uh, that he was
22 interested in and he actually signed that on that same date,
23 um, on August 30th 2012 all the witnesses that he wanted in
24 this case and we subpoenaed, uh, six of them in this case, um,
25 and the person he ment -- Mr., uh, uh, Johnson mentioned some

SCOTT D. ROBINSON - DIRECT EXAMINATION BY MR. SCHMECKPEPER

1 sort of, I don't know what that person's name is, I don't
2 believe that was on the list that he signed for about
3 witnesses for alibi witnesses in this case.

4 Q. Well if he had given you that name after that list was
5 made, would you have investigated that witness?

6 A. We'd have talked to whoever it was, yes.

7 Q. You don't remember him telling you of that witness.

8 THE COURT: Which witness is that?

9 A. Which witness?

10 Q. The one he was referring to I think any witness. If he
11 had given you the name of any witness after that list, would
12 you investigated it.

13 A. We would have, uh, ---

14 Q. And do you, and do you remember any witnesses coming up
15 after that list?

16 A. The reason we went down or I went down to the jail to do
17 those because he had a lotta potential witnesses he was
18 talkin' about so wanted to make sure that we went over those
19 and he signed and he says in this this, in his letter that,
20 uh, he confirms that the above list people was everyone he
21 wanted subpoenaed for the trial.

22 Q. Now and I guess what I'm asking is did he give you
23 anymore names after that list was made?

24 A. I'm not sure if he -- I don't think so because I think
25 this was, I'm I'm not sure, if he did I I'm not aware of it.

SCOTT D. ROBINSON - DIRECT EXAMINATION BY MR. SCHMECKPEPER

1 Q. And and I think you just testified that if if he had
2 given you those you would have investigated 'em.

3 A. Yeah, we would -- Ms. Connolly would have gone out and
4 she'll have talked.

5 Q. And let's talk about those witnesses for a minute. You
6 said you subpoenaed six witnesses.

7 A. Yeah, we subpoenaed, yeah, six witnesses including that,
8 uh, Vicky McBee that he talked about. We subpoenaed Darlene
9 Gordon, Frank Frank Mansell, Karen Cruell, Demeco Thomas,
10 Melvin Coleman, uh, and he mentions this, uh, Lucy Earl person
11 that there's, I think he mentioned, we had her on our witness
12 list for the potential witnesses at trial but the problem with
13 that was that what she talked about, this is my recollection
14 of it, she re -- she talked about some guy that and she said
15 she saw in the area at the time or somethin' like that and
16 that really, and I think you'll see in the beginning of the
17 trial here Ms., uh, Tessitore talked about a motion in limine,
18 that's really conjectural that we did not, uh, put that person
19 forward as an alibi witness when you run -- what what can she
20 really say in the case, it's just some some person, some
21 person's walking around that area, there's not really much
22 else she could say and that's not really enough to be able to
23 put her in for third party guilt saying that person is the
24 person did this robbery.

25 Q. Now you you said subpoena those six people and transcript

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1 speaks for itself, you decided not to and it's fair to say you
2 did not call any of those people as witnesses during the
3 trial.

4 A. I did not, no.

5 Q. Now what was your reasoning for not calling as a witness?

6 A. Well this is, this is all with his approval. Let's,
7 Mr. Thomas is a pretty s -- he's a very smart man, he's a very
8 smart man and really he wouldn't have done anything unless he
9 thought about it and we met, not only do we meet the eighteen
10 times but at trial, we had, uh, both, in the beginning of the
11 trial Judge Dennis, we were, I was going back and forth from
12 down to, downstairs to where he was, to Judge Dennis's
13 chambers trying to to basically tell which is basically
14 saying, Here's what ya got, you get life without parole, Judge
15 Dennis was even gonna be allow, gonna allow him to do an
16 Alford plea in this case but he refused every offer that there
17 was but getting back to your question about the, uh, about the
18 witnesses, this was something I talked about with him at
19 length because, uh, you know, you have to be very careful when
20 you put witnesses up there because sometimes it backfires and
21 if it backfires you lose the last argument that is impor -- I
22 thought it was very important in this case 'cause this case
23 was a purely, uh, I believe a circumstantial case because the
24 person, Mr. Gordon I think his name was, the the guy that was
25 doing that, the the work at the apartment complex he didn't,

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1 he he said as far as the, uh, as far as the, um, uh, lineup
2 goes, I think what he said was that he wasn't a hundred
3 percent sure and that was someth -- that was an important part
4 a this whole thing, okay, because, um, the only thing I
5 believe that was taken was a lottery ticket I believe, um,
6 and, uh, but we talked at length. The judge, Judge Dennis did
7 everything in his power to help us make sure that he knew
8 everything that was going on, we did, we talked about it, ---

9 Q. Well and ---

10 A. --- it was purely strategy.

11 Q. --- and look at the eye eyewitness identification, just
12 just briefly, uh, if I'm, correct me if I'm wrong, factual
13 background in this is that the applicant or or the State
14 alleged that the applicant robbed the victim, I think
15 Mr. Gordon, uh, while he was doing some work on an at the
16 apartment complex and then left, the victim actually
17 identifi -- eyewitness identified the applicant, is that
18 correct?

19 A. That's correct. You know, Mr. Thomas is correct about
20 the fact that he's always maintained his innocence, always. I
21 think what, I think what he, uh, I think it's his position he
22 went there looking for an apartment and that's what he was
23 doing looking, going in the apartment, looking inside and so
24 forth, um, and that's where I think that fingerprint wound up
25 what, on the, on the door, whatever it was, um, but, um, you

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1 know, it was his decision to, um, to not call the alibi with
2 these people that he wanted to call, it's his decision only in
3 this case, not not mine, I can, I can only give him his
4 choices, pros and cons, but he has to make that decision, I
5 think Judge Dennis on the record asked him what he wanted to
6 do and that's what he wanted to do.

7 Q. Now if you had thought it been, it woulda been beneficial
8 to call those witnesses, what would you have done?

9 A. Woulda called, that I I would have called them but the,
10 but the issue again, I mean, if if you've got, what, I think
11 what they may, this is what I think they would have testified
12 to: they were at a party or playing cards or somethin' like
13 that, you know, I don't, I don't know, you ha -- it -- you
14 just don't know what they're gonna testify to. You you can,
15 you can say what they're they're going to testify to this but
16 ya really don't know until they get on the stand and they have
17 an attor -- an attorney cross-examining them you really don't
18 know how they're gonna hold up. The lady that, uh, they
19 talked about I don't, I think at one point the solicitor said
20 she had a fraudulent check or something but she didn't have a
21 fraudulent check on her record I don't think, uh, and I think
22 it's put in there but, um, but that was all explained to
23 Mr. Thomas in this case.

24 Um, over the course a the eighteen times that I met him
25 we went over this ca [sic] at length and we went over the life

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1 without parole, went over all the, all -- everything in this
2 case. I had, uh, Ms. Connolly who is from Columbia she
3 investigated the case, I had my staff go over and talk to him,
4 uh, to deliver him stuff and so forth but, you know, at the
5 end a the day this was his case and it was his decision to go
6 forward, it was his decision to to not call witnesses based on
7 my strategy, um, and it's unfor, I think Mr. Thomas is a fine,
8 fine fellow, I do but unfortunately, uh, uh, it worked out the
9 way it did.

10 Q. And and turning to life without parole issue, ---

11 A. Um.

12 Q. --- um, I think he pointed out in testimony, referenced
13 in the testimony you did in fact argue that maybe he shouldn't
14 get life without parole, is that ---

15 A. I I thought that murder conviction, that attempted
16 murder, it, I thought that was way too remote, I did, I really
17 did, and and I argued that and unfortunately the judge didn't
18 agree with me.

19 Q. And did you advise the applicant though that he could get
20 life without parole ---

21 A. Oh, I ---

22 Q. --- for this?

23 A. --- it -- not only did the judge advise him of that but
24 also, uh, myself and I believe Mr. Chambers probly did as well
25 but he he took that chance, ---

SCOTT D. ROBINSON - DIRECT EXAMINATION BY MR. SCHMECKPEPER

1 Q. And he did ---.

2 A. --- he took that chance.

3 Q. --- did you at any point tell him that he was convicted
4 he would not get life without parole?

5 A. No, never, never.

6 Q. And I I know we focus on focused on strategy a little
7 bit, ---

8 A. Um-hum.

9 Q. --- is it fair to say -- what what was your strategy,
10 what was your theory of the case?

11 A. My theory is that I did not think they had enough
12 evidence to convict Mr. Thomas, I didn't, I thought it was
13 purely circumstantial. The, uh, the, uh, the witness, the
14 the alleged victim in this case, um, he couldn't clearly
15 identify him, uh, he couldn't say a hundred percent, he could
16 just maybe, he could say, Well, almost a hundred percent,
17 that's where ---

18 Q. That's ---

19 A. --- this ---

20 Q. --- and that's possibly reasonable doubt, correct?

21 A. I thought so, I thought so.

22 Q. Mr. Robinson, I don't have anymore questions, ---

23 A. Sure.

24 Q. --- please answer any questions from Mr. Johnson.

25 CROSS-EXAMINATION BY MR. JOHNSON:

SCOTT D. ROBINSON - CROSS-EXAMINATION BY MR. JOHNSON

1 Q. Now, Mr. Robinson, when you, when you talk about the the
2 witness list, can I, can I see a copy of what you got there,
3 of of the one that he ---

4 A. Which one?

5 Q. --- si -- he he signed, ---

6 A. Yeah, ---

7 Q. --- uh, ---

8 A. Uh, ---

9 (Whereupon, a discussion was held off the record.)

10 Yeah, here you go. Here you go.

11 Q. So out of this, out of this list of people you ended up,
12 uh, subpoenaing, uh, six of them, is that correct?

13 A. Yes.

14 Q. Okay. Now when we're talkin' about what you said at the
15 end a trial with with regards to life without the possibility
16 of parole, it's my understanding from your testimony today is
17 that that's what you believed to be the truth, is that
18 correct, you believed that they couldn't use that 1981
19 conviction.

20 A. That's was I thought when I argue it up to the Court,
21 I've always thought that that was too remote, ---

22 Q. Okay, ---

23 A. --- I thought that.

24 Q. --- and, um, in your conversations meetin' with Mr., uh,
25 Thompson [sic], you would have had that type a communication

SCOTT D. ROBINSON - CROSS-EXAMINATION BY MR. JOHNSON

1 with him regarding that conviction as well, is that correct?

2 A. I would have, what I would have talked about that there's
3 no question that he was charged with this, the crime that he
4 had where were, uh, uh, gonna put him in a life without
5 parole, I could say that, yeah, I would argue if I had the
6 chance but it was too remote but I'm not the judge, the judge
7 makes that ultimate decision.

8 Q. Okay, so is your testimony today ---

9 A. Um-hum.

10 Q. --- that, uh, you would have had that, uh, conversation
11 with Eugene but that you would have told him that it was a
12 long shot?

13 A. I don't know if I'd put it in a long shot but I just
14 would say that ultimately I can argue that but it's up to the
15 judge what happens and I argued it and Judge Dennis denied me
16 in that regard.

17 Q. Okay. Um, do you believe in the course of your
18 conversations that you had with him that ya'll have always
19 understood each other?

20 A. I think Gene, uh, that we always understood each other.
21 I don't know if he understood, I I try to be as and just like
22 I'm talking now, pretty clear as far as what I'm doing. I met
23 with him eighteen times, um, I always had a good relatship
24 [sic] with him I thought, just, uh, you know, he he, uh, as I
25 said before he's a very smart guy, he's a very nice guy and so

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1 forth.

2 Q. Now there were some occasions, uh, for example, uh,
3 during this trial where he wanted to put some letters that he
4 wrote to you on the record, is that correct, do you recall?

5 A. I'm not, I don't recall that, he -- you can point it out
6 to me I can look at it.

7 Q. Well, I believe, uh, and maybe this'd correctly refreshes
8 your recollection, uh, this is when the judge admonished him,
9 told him that he wasn't an attorney and that he needed to
10 listen to you, do you recall that?

11 A. I, there was something in the transcript the attorney
12 general mentioned, um, I don't know what he was trying to put
13 in though, I don't know what that was.

14 Q. Okay. Um, do you, do you have a copy a the
15 transcript ---

16 A. I do.

17 Q. --- before you?

18 A. Yeah, I do.

19 Q. Take a look at, uh, see if I can just point it out to
20 you, ---

21 A. Um-hum.

22 Q. --- if I may approach, Your Honor.

23 THE COURT: Yes.

24 A. Go ahead. Thank you.

25 Q. I'm gonna point out ---

SCOTT D. ROBINSON - CROSS-EXAMINATION BY MR. JOHNSON

1 A. Yes.

2 Q. --- I'm on page 41 of the transcript, uh, line 20, if you
3 can just refresh your recollection ---

4 A. Sure.

5 Q. --- and then let me know when you're ready.

6 A. Sure.

7 (Pause.)

8 I think he mentions here he wants to file a motion.

9 Q. Okay, but do you, uh, do you recall what that motion was
10 about?

11 A. I don't recall be honest ya, I'm not really sure what the
12 motion was about.

13 Q. Okay.

14 A. This is, this doesn't really, this is from four years
15 ago, I'm not really, I don't know what the exact thing he was
16 talking about was.

17 Q. Had you ever -- that he ever had, uh, Mr. Thomas
18 previously testified that there was a, the trial date was set
19 earlier, is that correct?

20 A. Yeah, I think we had a hearing in fronta Judge Miller in
21 this case and, um, uh, yeah, it was.

22 Q. Okay, and in during that matter, uh, that that's when,
23 uh, Mr. Thomas first alleged that he sent you a letter with
24 regard to some witnesses, ---

25 A. I think ---

SCOTT D. ROBINSON - CROSS-EXAMINATION BY MR. JOHNSON

1 Q. --- is that correct?

2 A. --- he actually may have sent that to Paul Silvaggio my
3 investigator I think, I'm not sure exactly one hundred percent
4 on that one and, uh, after that Mr. Silvaggio and I had kind
5 of a falling out because of that, uh, but, uh, you know,
6 that's something that the judge admonished me for, uh, and we
7 made sure after that that everything was done, all his
8 witnesses and all his stuff was correct.

9 Q. Now, uh, when talking again about this day of trial ---

10 A. Um-hum.

11 Q. --- with regards to the portion of the transcript I was
12 referring to, ---

13 A. Um-hum.

14 Q. --- uh, in that transcript, and you can refresh yourself,
15 he he had some papers and things he wanted to put on the
16 record, is that correct?

17 A. All I can go from when you pointed at, pointed out page
18 40 -- you still talking about page 41?

19 Q. Well, you can, if it's, uh, later on if you'd like me to
20 point it ---

21 A. Why don't you tell me, tell me where it is.

22 Q. Again, I'm on, uh, now I'm on page 43, um, I'm on,
23 starting at line 13, if you'll read rest a that page.

24 (Whereupon, the witness complied.)

25 A. I think, yeah, he talks about, this this is my, what I

SCOTT D. ROBINSON - CROSS-EXAMINATION BY MR. JOHNSON

1 am, this is my interpretation: I think what he's talking
2 about, he's talking about the, uh, the third-party guilt
3 witness Lucy Earle, that's what I think he's talking
4 about, ---

5 Q. All right, ---

6 A. --- that's the one that I believe, uh, Officer Flavell
7 may have talked to and she had, I think she is, I think this
8 is with my recollection: I think she saw some black gentleman
9 around the same area ---

10 Q. All right.

11 A. --- but that was really not, uh, enough for third-party
12 guilt because you gotta have similar to sayin' something out
13 there, gotta have more than that.

14 Q. Well, Mr. Robinson, what I'm asking was he he wanted to
15 to put some paperwork on the record with ---

16 A. Okay.

17 Q. --- regard to that, is that correct?

18 A. I don't know what paperwork it was but he -- looks like
19 what he wanted was, uh, let's see, wanted to put something on
20 the record, um, and he says it wasn't frivolous and it's about
21 a witness, that's, I'm assuming that's the witness he's
22 talking about.

23 Q. Sure, and so when we're talkin' about, uh, that situation
24 there, that did ya'll discuss what he was going to potentially
25 file a motion about or were you just going to allow, simply

SCOTT D. ROBINSON - CROSS-EXAMINATION BY MR. JOHNSON

1 allow him to file a motion?

2 A. I don't know what the motion was. Uh, what is the
3 motion?

4 Q. I I suppose what I'm asking you is did ya'll discuss
5 what the motion was going to be?

6 MR. SCHMECKPEPER: Your Honor, I'd object, aksed -- asked
7 and answered, think he's answered doesn't know what the motion
8 was so . . .

9 THE COURT: Yeah, it's cross, I'll allow it.

10 MR. JOHNSON: Yes, sir, Your Honor.

11 A. I'm not really sure what motion you're talking about.
12 There's there's, in discovery you you have to give them
13 exculpatory witne -- exculpator -- get all the exculpatory
14 stuff and so forth. Um, we had an idea about Mrs. Earle, Lucy
15 Earle, uh, but the problem with her was that she couldn't, she
16 didn't say who it was, just some, just some, uh, ambiguous
17 person that she saw in the area at the time.

18 Q. That when he was, uh, going to do that, did you support
19 what he was doin'?

20 A. If I knew what it was, I would support it ---

21 Q. Okay.

22 A. --- of course.

23 Q. Did you know what it was at the time or are we talkin'
24 about you just don't remember because it's four years later?

25 A. This is my recoll -- I I don't recall exactly what it was

SCOTT D. ROBINSON - CROSS-EXAMINATION BY MR. JOHNSON

1 but in looking at this and listening to his testimony I think
2 he was talking about Lucy Earle is what I, that's what I think
3 he was talking about.

4 Q. And before ya'll went to trial, before, uh, he wanted to
5 to file this motion ---

6 A. Um-hum.

7 Q. --- obviously at some point in time he told you that he
8 wanted to do this because you asked the Court for permission,
9 is that correct?

10 A. Are you talking about me asking the Court's permission in
11 this trial?

12 Q. Yes, when it started on page 41 when you asked the Court
13 for permission for Mr. Thomas to file a motion or or or to
14 make a motion.

15 A. Yeah, I think if if he want, yeah, I think he may have
16 wanted to file a motion, whether or not I supported that, I I
17 don't know if I supported that or not ---

18 (Indiscernible cross-talk.)

19 Q. What I'm asking you is that ya'll at some point discussed
20 that he wanted to to do a motion, not necessarily the
21 substance of it but ---

22 A. I don't, I don't know if we did because I don't, as you
23 know about the the rules as far as hybrid representation and
24 so forth as far as a a a client or a a a layman standing up or
25 putting information in or testifying it's not really that,

SCOTT D. ROBINSON - CROSS-EXAMINATION BY MR. JOHNSON

1 something that's looked upon very favorably, um, but I'm not
2 sure exactly what motion he would be talking about it. As far
3 as, I'm not sure the m -- the motion, it looks like what he's
4 saying is he wants to put in something on the record about,
5 he's saying that someone has not been subpoenaed and he wants
6 to put that on the record that she wasn't subpoenaed, sounds
7 like, I think the judge said this is something for
8 post-conviction relief or something like that ---

9 Q. Okay.

10 A. --- but I'm not sure, I, that's what I, that's what I'm
11 thinking that would be.

12 Q. But in any case when it, when it come to that, you don't,
13 you don't really recall what all that was about clearly.

14 A. I don't, I don't but I'm ---

15 Q. Okay.

16 A. --- looking at, I'm looking at this now and that's what I
17 think it's about based on that but based on this and his
18 testimony a second ago.

19 Q. And so when we're talking about that type of conversation
20 or we're talkin' about, uh, what you said in regarding the,
21 uh, uh, your understanding of the Florida's the statute, you
22 believe that conversation that ya'll had ya'll essentially
23 understood one another.

24 A. You know my perspective is pro -- it may be di -- I don't
25 know, I thought we did but I thought we were on the same page

SCOTT D. ROBINSON - CROSS-EXAMINATION BY MR. JOHNSON

1 but if he had mentioned a witness like that, that he had no
2 idea what sh -- as far as Mr. Flavell's, uh, uh, interview or
3 that's really not a a real credible third-party guilt person
4 put on the stand.

5 Q. Now, when you, when you're talkin' about armed robbery
6 and the attempted armed robbery and that, and the life without
7 the possibility of parole notice, what specifically did you
8 a -- did you, did you advise him as to, uh, what what were the
9 potential outcomes at trial, do you recall?

10 A. If he were ch -- if he were pleading to any of those,
11 he'd be, he'd be, he'd be put in jail for life without
12 parole ---

13 Q. Okay.

14 A. --- and that actually and when he got served with, I
15 think he, when he got served with his, uh, his life without
16 parole the second time it actually says in there armed robbery
17 and attempted arm, attempt armed robbery I believe.

18 Q. Now with what you said, uh, at the end with your argument
19 there, did you tell him that you were going to make that
20 argument?

21 A. I think I would have told him I would argue about the not
22 the the the the murder being too far back, I would do that a
23 course, course.

24 Q. Did you file any sort of of objection when you received
25 the life without possibility of parole notice?

SCOTT D. ROBINSON - CROSS-EXAMINATION BY MR. JOHNSON

1 A. I didn't, no, sir, I did not.

2 Q. And the objection could have potentially had, uh, the
3 issue heard before trial, is that correct?

4 A. It could have been heard course ---

5 Q. Okay.

6 A. --- and ---

7 Q. Uh, ---

8 A. --- I think there was an appeal filed outta my objection
9 and the appeal was was rejected I think, affirmed.

10 Q. Now if if the, uh, if the issue or or the objection of
11 the or or your version or your your legal opinion regarding
12 the life without possibility of parole statute, if, for
13 example, the hearing was had and, uh, the judge decided that,
14 uh, it did apply or didn't apply, Mr. Thomas could potentially
15 be able to make a decision or a better decision on whether or
16 not he should proceed to trial, would you agree?

17 A. Wouldn't agree with that, I don't -- you you -- you're
18 you're putting together this question that the fact remains he
19 was served with life without parole twice, each time he was
20 served with life without parole two different attorneys. Last
21 time we had the, uh, that it says specifically attempted armed
22 robbery, armed robbery, both those were gonna trigger this
23 life without parole for him. There's, I don't know what the
24 argument is that, what you're, what you're trying to get me to
25 say.

SCOTT D. ROBINSON - CROSS-EXAMINATION BY MR. JOHNSON

1 Q. Now when you, uh, when you get those notices, you went
2 over the notice with Mr. Thomas, ---

3 A. Yep, he ---

4 Q. --- is that correct?

5 A. --- got a copy, yep, he signed for it.

6 Q. And, uh, and when you went over, uh, that copy, you you,
7 did you express your opinion that you didn't believe that that
8 was correct?

9 A. I didn't believe, my opinion only counts in terms of, uh,
10 what I believe, okay, what the law is may be a little bit
11 different because the statute says one thing, I would a course
12 argue for my client of course but I don't, I can't tell him
13 what's gonna happen in the case 'cause if he's convicted
14 either a those he can get life without parole. He was told
15 that not only by me and Mr. Chambers but also by the judge at
16 the trial this case.

17 MR. JOHNSON: Your Honor, no further questions.

18 THE APPLICANT: Oh, wait a minute. Wait a minute.

19 THE COURT: All right, I'll let you talk to your ---

20 MR. JOHNSON: Thank you, Judge..

21 (Attorney/client discussion held off the record.)

22 MR. JOHNSON: Your Honor, uh, one follow-up question.

23 THE COURT: Yes.

24 BY MR. JOHNSON:

25 Q. Uh, Mr. Robinson, uh, uh, are you, uh, do you recall

SCOTT D. ROBINSON - CROSS-EXAMINATION BY MR. JOHNSON

1 whi -- which statute it is that covers the the life without
2 the possibility of parole?

3 A. I mean, I I I can't make the ide -- I I don't remember
4 every statute in this case, I I'll have to go back to what the
5 judge, what the judge, uh, was referencing to do, I don't know
6 offhand the exact statute in this case.

7 Q. Well I'll rephrase. Do do you recall, uh, whether or not
8 you researched, uh, the statute, uh, in Florida for to see
9 whether or not it applied, did you specifically look at it?

10 A. I looked at the statute, our statute of life without
11 parole, what are the, uh, what are the, uh, ca -- the what
12 would happen, um, and I looked at our statutes but you're
13 asking if I pulled a Florida s -- Florida statute?

14 Q. Well did you see if the crime that, uh, he was convicted,
15 uh, of in Florida ---

16 A. Huh.

17 Q. --- did you specifically check and see whether it applied
18 to the South Carolina statute life without the possibility of
19 parole, did you specifically verify that?

20 A. As far as verifica -- I don't know, I don't think I did,
21 I don't think so, I really don't. I think I argued it at at
22 the trial, I think our Court of Appeals ruled on that, whether
23 I went and researched it independently I don't, I don't know
24 if I did or not, I don't think I did.

25 Q. All right. Okay, I have, I have no further question.

SCOTT D. ROBINSON - REDIRECT EXAMINATION BY MR. SCHMECKPEPER

1 REDIRECT EXAMINATION BY MR. SCHMECKPEPER:

2 Q. I have, I have just a few follow-up questions.

3 A. Sure.

4 Q. Um, it might seem like a simple question: Whose job is it
5 to try the case? It's your, ---

6 A. The attorney.

7 Q. --- it's your job, right?

8 A. The attorney, correct.

9 Q. Um, in in looking at the witnesses he provided for
10 you, ---

11 A. Um-hum.

12 Q. --- did you evaluate the potential impact of each of the
13 one of those witnesses on his trial?

14 A. Yes.

15 Q. And did you choose which witnesses to subpoena based on
16 that evaluation?

17 A. I did.

18 Q. And if if if one a those witnesses had been potentially
19 you you think, if you thought one a those witnesses would have
20 helped him at trial would you have called 'em?

21 A. Absolutely. Yes, course.

22 Q. Okay, so is it fair to say you had a strategic reason for
23 calling or not calling each potential witness?

24 A. Yes, that was all with his consent and reviewing it each
25 time with him at the trial. Um, Judge Dennis was great in the

SCOTT D. ROBINSON - REDIRECT EXAMINATION BY MR. SCHMECKPEPER

1 be -- he he allowed us at least a a good bit of time to go
2 back and forth, uh, with this with him and he made the
3 decision to go to trial in this case and we presented as good
4 a case we could in this matter.

5 Q. So he made that decision also after being called by you
6 and by Judge Dennis ---

7 A. Um-hum.

8 Q. --- and by Randy Chambers ---

9 A. Um-hum.

10 Q. --- that he was facing a life sentence if he proceeded to
11 trial.

12 A. Yes.

13 Q. Even though there may be some argument the New York
14 statute didn't apply, he knew this was a possibility that was
15 the maximum.

16 A. Yes.

17 Q. I have no further questions.

18 MR. JOHNSON: Your Honor, I have no recross.

19 THE COURT: All right, you can step down, thank you, ---

20 THE WITNESS: Thank you, Judge.

21 THE COURT: --- appreciate your time.

22 THE WITNESS: Thank you, Judge.

23 (Whereupon, the witness left the stand.)

24 MR. SCHMECKPEPER: That's the State's case, Your Honor.

25 THE COURT: All right, and understand that, uh,

MOTIONS AND MATTERS

1 Mr. Thomas has something else to add.

2 MR. JOHNSON: Well, Judge, I think where we are with it
3 is, uh, we're gonna see if we can get Romell talk to and we're
4 gonna see if we can get, uh, Vicky McBee here, ---

5 THE COURT: Okay, ---

6 MR. JOHNSON: --- I think that's where we are.

7 THE COURT: --- for Thursday mornin'.

8 MR. JOHNSON: Yes.

9 THE COURT: Okay.

10 MR. JOHNSON: Well Your Honor, for the record Lucy Earle
11 isn't someone who's coming to testify. I don't, I don't know
12 that I'd use, that that's not, uh, you, before the Court with
13 you. I can't, I I don't believe I can prepare this today,
14 judge, in exercising my judgment.

15 THE COURT: Lucy Earle?

16 MR. JOHNSON: Lucy Earle is the person that is is a
17 document for, uh, Detective Flayell or Flavell's, excuse me.

18 THE COURT: Said she saw, I I've ---

19 MR. JOHNSON: That's right.

20 THE COURT: --- I've read somewhere saw dread, somebody
21 with dreadlocks in the area some particular time.

22 MR. JOHNSON: That's correct. I, uh, that's someone who
23 I tried to find, I could not, I don't have here, her here to
24 prove credulous, I need -- I should elicit that testimony.
25 Uh, ---

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1 THE COURT: All right. All right, well we will reconvene
2 Thursday and hopefully have your witnesses here.

3 MR. JOHNSON: Thank Your Honor.

4 THE APPLICANT: Your Honor, may I address the Court,
5 please.

6 THE COURT: Sure.

7 THE APPLICANT: Well, Your Honor, I have -- my lawyer --
8 I have other issues besides that issue that I had just just
9 spoke with Mr., uh, so in other, in other words, Your Honor,
10 my understanding that we, when we address this court, Judge,
11 we just gonna address the Court on my, on my alibi witnesses,
12 right?

13 THE COURT: I I'm I'm having a little trouble following.
14 We ---

15 THE APPLICANT: Oh.

16 THE COURT: --- talked about your alibi witnesses.

17 THE APPLICANT: Okay, well so you, right now you
18 reviewin' my my PCR hearing for Thursday to give my lawyer
19 enough time to to address, to to get my alibi witness in,
20 right?

21 THE COURT: That's correct.

22 THE APPLICANT: And at that point that's the only thing
23 we're gonna address, right?

24 THE COURT: That's correct.

25 THE APPLICANT: But that's what I'm sayin', I got other

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1 issues too right now that I I supposed to address to have a
2 chance to have 'em all heard because I only got this one bite
3 at this apple. I got one ---

4 THE COURT: That's ---

5 THE APPLICANT: --- bite ---

6 THE COURT: --- what other issues do you have?

7 MR. JOHNSON: Well, Your Honor, you review and and
8 I'll just pull ---

9 THE COURT: I've looked at his, uh, why don't we do this,
10 uh, I don't wanna mess up everybody's day but could we break
11 for lunch and let, uh, uh, you talk to your client and, uh,
12 reconvene at, uh, say 2:15 and see if there's anything else
13 you wanna present.

14 MR. JOHNSON: Yes, sir, Your Honor, that's ---

15 THE COURT: All right, we'll break for lunch 2:15.

16 MR. ROBINSON: Your Your Honor, I have a 2:15 family
17 court ---

18 THE COURT: Yeah, ---

19 MR. ROBINSON: --- hearing.

20 THE COURT: --- I I don't know that you need to be here,
21 we'll we'll excuse you, ---

22 MR. ROBINSON: Yes, sir, I ---

23 THE COURT: --- I know you're ---

24 MR. ROBINSON: Thank you.

25 THE COURT: --- probly subpoenaed but we'll excuse you

MOTIONS AND MATTERS

1 and if we need you again, Thursday mornin' like everybody
2 else.

3 MR. ROBINSON: And you could, you could just as soon say,
4 Stay here, Scott, I wouldn't mind doin' ---

5 THE COURT: I know, I I couldn't interfere with family.

6 MR. ROBINSON: Thank you, Judge.

7 THE COURT: All right 2:15.

8 (Whereupon, a recess was taken.)

9 (Whereupon, a discussion was held off the record.)

10 THE COURT: Mr. Thomas, why don't you just c'mon up, take
11 the stand and -- he's gonna testify, right?

12 THE APPLICANT: Yes, sir.

13 THE COURT: Oh, okay, why don't you c'mon up, take the
14 stand, you're still under oath.

15 (Whereupon, the applicant returned to the stand.)

16 THE APPLICANT: Thank you.

17 THE COURT: Um-hum.

18 MR. SCHMECKPEPER: Your Honor, if I may briefly while
19 we're on the record, um, clarify that Mr. Robinson is coming
20 back Thursday and if I need to respond to any of these, his
21 additional testimony with him, I can call him witness?

22 THE COURT: That's correct.

23 MR. SCHMECKPEPER: Thank Your Honor.

24 MR. JOHNSON: Thank Your Honor.

25 DIRECT EXAMINATION BY MR. JOHNSON:

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 Q. All right, Mr. Thomas, uh, do you need more time to get
2 your papers ready, are you prepared to go forward?

3 A. Uh, c'mon up here.

4 Q. You're pr -- you're ready?

5 A. Yes.

6 Q. Okay. Uh, Mr. Thomas in your application you allege that
7 Mr. Robinson failed to investigate and research, ---

8 A. Yes.

9 Q. --- is that correct?

10 A. Yes.

11 Q. Uh, will you please portray to the Court, uh, the
12 background facts regarding that allegation.

13 A. Can -- uh, ---

14 Q. Can you hear me?

15 A. Yes, I can hear you.

16 Q. Okay.

17 A. I'm I'm -- I just wanna, uh, bring to the, uh, the
18 Court's attention that, uh, you know when Mr. Robinson
19 testified, he testified that he told me about ---

20 MR. SCHMECKPEPER: Your Honor, I I just wanna object at
21 this point, this isn't reply, this is -- these are new
22 allegations so to the extent he's testifying as to the
23 allegations in regar -- we've already heard testimony and ---

24 THE COURT: Yes, ---

25 MR. SCHMECKPEPER: --- I'd say it was inappropriate.

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 THE COURT: --- just the new stuff produ -- uh, go ahead.

2 BY MR. JOHNSON:

3 Q. Okay, and you just ta -- uh, judge the
4 decision-maker if you wanna talk to the judge.

5 A. Oh, and okay, Your Honor, I heard who he said, well he
6 true but Mr. Robinson already testified to what I'm sayin' so
7 it aint like I'm makin' somethin' up that he said, Your Honor.

8 THE COURT: All right, go ---

9 A. He told ---

10 THE COURT: --- ahead.

11 A. --- he he addressed this court and told this court that
12 he told anything but I, so I I'm just tryin' to show that when
13 Mr. La -- Mr., uh, Robinson first came my lawyer, he was given
14 a copy of this notice of life without parole too but he
15 testified that he told me this and he argued in this court so
16 it it didn't make since, uh, he was a, he was my lawyer for
17 almost two years so Mr. La -- Mr. Robinson was my lawyer for
18 almost two years and I received a notice and he received a
19 notice. He he had well enough time to research and find out
20 the theory that he had and the theory that he told me that I
21 couldn't receive life, he coulda kn -- he woulda known this
22 here, so why would he, if if he researched or or or he didn't
23 research, why would he say that he told me this here and then
24 he go into the courtroom and argue this issue, it it it just
25 don't make sense and the reason it don't make sense because

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 Mr. Robinson know that he didn't, he told he did tell me this
2 here and he didn't research that there because he did, he
3 woulda knew that there and he, then he wouldn't misled me.

4 Q. Okay, well little bit a background, you're talkin' about
5 the life without possibility of parole issue, is that correct?

6 A. Yes, but it's it's calls the the 7, it's called the South
7 Carolina Code a Laws 17-25-45 of a a person receivin' life
8 without parole, that's what I'm speakin' of.

9 Q. And you're sayin' he should have, he had two years to
10 investigate and verify whether or not the Florida conviction
11 applied to up here.

12 A. Exactly, because once I went to prison and began to to
13 research these things myself, it didn't, I'm not no lawyer and
14 it aint take me long to realize that, Hey, what them people
15 was sayin' was right, it didn't, it didn't matter about how
16 old my conviction was and that that, uh, the two things he
17 said is about the age of it and the particularly of the, uh,
18 of the, of the charge itself so I guess he basically sayin'
19 that bein' that it was a second degree murder charge that it
20 was enumerated as a charge that South Carolina had but that
21 that's, that was, that wasn't the truth, it, the law state
22 that it does, so he had enough time to to investigate, he had,
23 he should have known these things, he was my lawyer, I'm fa --
24 I was facin' life without parole, this ain't just somethin' he
25 shoulda, he just shoulda just played about with, he shoulda

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 known this here and for him to come in here and say that he
2 didn't, that, uh, he told me that this here, that's not right
3 because he didn't.

4 Q. All right. Okay. Now, uh, another one of your issues
5 that you, uh, allege is that he should have suppressed the gun
6 that was introduced at trial, is that correct?

7 A. Yes.

8 Q. Uh, the gun that was introduced at the trial, uh, please
9 communicate to the Court the circumstances by which they found
10 this gun.

11 A. The the, uh, the U.S. marshals came to my girl, to my
12 girlfriend's, uh, well really she's my baby mother's, motel
13 room and they've, uh, found this gun and they took this gun
14 and they used this gun at my, at my trial and this was, I
15 think it was, uh, maybe, wanna make sure, I know -- 'kay, that
16 happened in July, August, September, it's about three months
17 later they come to the motel room and they confiscate this
18 gun. They didn't find my fingerprints on the gun, nor the
19 clip, nor the bullets, what they did find was a dice game that
20 was in a bag and the dice game had my fingerprint on it so but
21 my, bein's that my fingerprint was on this dice game they took
22 this dice game, I mean, this -- they took the gun that was
23 found in the same bed the dice game was found and used this
24 gun at my trial, so when they came in to arrest me, it -- I
25 was, I was, I don't know, we'll say I was buck naked when

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 they, when I opened the door because they led me to believe
2 that they was, uh, maintenance and I als -- and I told them
3 that, uh, that I was naked but I was gonna, because they say
4 it was a gas leak and they had to check my room so I told them
5 that I was gonna, I was gonna unlock the door but for them to
6 wait till I got in the shower, we went back and got in the
7 shower before they came into the room because they didn't say
8 that they was sheriff office at the time, they sayin' they was
9 maintenance so when I, when I ch -- unlocked the door then
10 they rushed r -- they rushed in and they grabbed me, they
11 grabbed me right at the door, this was five officers, so when
12 they grabbed me at the door and they seen that I was naked
13 that that that one a the guys that was in charge he told two a
14 the guys to, uh, to go in and do do somethin', uh, they call
15 it's a, uh, a protective sweep so the two, the two a the
16 officers went in and they searched the bathroom, in the closet
17 or whatever and all that there then they came back and said
18 that everything was okay, so then the man that who had me that
19 was in charge he grabbed a chair from in the room and set it
20 right by the door and told me to sit and and and, uh, asked me
21 where my clothes was and I told him and he went and got my my
22 pants and stuff but he searched my pants to make sure wasn't
23 nuttin' in there then he gave 'em, he gave 'em to me but two
24 of the officers was searchin' the room and they went up under
25 the bed and pulled out a a tote bag and inside the tote bag

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 was a duffel bag and they took the the duffel bag out the tote
2 bag and he looks in and that he, the, uh, the the bag, the
3 pouch that it was in he took the gun out the pouch and they
4 used this gun at my trial. Now Mr. Mr. Aiken at my trial ---

5 Q. Who is Mr. Aiken?

6 A. He is, he is the, a detective and if I went, you can go
7 to the transcript ---

8 MR. SCHMECKPEPER: And just for the record I I believe
9 that's around page 261.

10 A. One moment please, Your Honor.

11 (Whereupon, a discussion was held off the record.)

12 A. If you go to the transcript, uh, page, um, 263 line 17 to
13 25, okay, at at the time, uh, Mr. Aiken he testified, uh, that
14 he had, that he had no information about the nature of the
15 warrant at that time and that he was just serving a warrant
16 and that's that's that's between, uh, line 17 to 25. If you
17 go on down to, uh, uh, page 272, page 272 line 16 that he
18 testify about, uh, searchin' the duffel bag and not just a
19 tote bag as they they tried to say it become but the duffel
20 bag because he he was tryin' to say that it wasn't no no no,
21 uh, it was just like in a tote bag but he he he he testified
22 here about searchin' it, uh, the duffel bag and if you go to
23 page 2 -- 259, uh, line 10 25, it it it showed that I was
24 i -- I was immediately arrested at the door by Deputy Hayes,
25 Downs, Evers, Russell and Mr. Jim C. Aiken and then if you go

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 to, uh, to uh, page 271, 271 line 8 to 15 Deputy Aiken also
2 testified that I was very corporate, wasn't like I was tryin'
3 to hide some or nothin' like that there

4 Q. Said cooperative?

5 A. Yes, cooperative, I'm sorry, yes.

6 Q. And so what you're trying to illustrate is that,
7 uh, ---

8 A. Well first let me finish 'cause ---

9 Q. Oh, ---

10 A. --- this the, ---

11 Q. --- I'm sorry, ---

12 A. --- this, ---

13 Q. --- sorry, Mr. Thomas.

14 A. --- it's, that that that that's most important part right
15 here and most important while I surrounded by the five
16 deputies and naked, Deputy Aiken testified that there was
17 absolutely no way applicant had the opportunity at any time or
18 point to put his hands on any a the bags and that's transcript
19 page 269 line line 11 to 18.

20 Q. And so what you're trying to communicate is, uh, how they
21 actually came to get the gun, is that correct?

22 A. E -- e -- exactly.

23 Q. Explain.

24 A. Exactly.

25 Q. Explain what you, explain what the problem was with how

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 they got the gun considering those circumstances.

2 A. Um, what you mean, I don't understand.

3 Q. Well what's the problem with the way they did it? What
4 are you trying to tell the Court?

5 A. I'm s -- first of all, they, although the incident run,
6 they didn't have a warrant for to be searchin' the room for a
7 gun.

8 Q. I'm gonna ask you to to to to restate that answer, say
9 although it was an incident to arrest they didn't have a
10 warrant to search the room, is that what you're sayin'?

11 A. Yes.

12 Q. Okay, so you're sayin' that if it was incident to arrest,
13 um, that that principle shouldn't apply and they should have
14 actually gotten a warrant if they wanted to get the gun out
15 the room.

16 A. That they'd a had, they'd a had plenty time because I
17 would, I woulda been arrested.

18 Q. Okay, and the fact that you were cooperative and the fact
19 that you were were naked, uh, tend to support the fact that
20 that there was, uh, no urgency in the situation.

21 A. And no urgency nor no danger.

22 Q. Okay. Um, and did -- on that basis, on the fact that
23 it would, could have been an illegal search or seizer, did
24 Mr. Robinson make any objection at trial on that basis?

25 A. No, he didn't and I, and I explained all that to

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 Mr. Robinson.

2 Q. Okay. How'd you explain that to him?

3 A. By by givin' him that information, by tellin' him what
4 had happened and everything and I told him to put in a motion
5 to suppress that gun.

6 Q. Okay. Now he did make, he did make some sort of
7 objection to the gun, is that right?

8 A. Yes, what Mr. Robinson did he put in a motion, uh, about
9 the gun up under, uh, no, he he did what they call a a "motion
10 in limine" or a "limine" and, uh, but but it was based on
11 relevance.

12 Q. Relevancy?

13 A. Yeah, revelancy [sic], yes.

14 Q. Okay, and he's sayin' he basically filed it 'cause he's
15 sayin' that the the gun was irrelevant ---

16 A. Exactly.

17 Q. --- to it. Okay.

18 A. Exactly, but ---

19 Q. Do ---

20 A. --- what he shoulda did, he shoulda suppressed that gun
21 because that gun that highly prejudiced me because they they
22 even deliberated all night with that gun at my trial.

23 Q. What do you mean "deliberated with that gun," you
24 mean ---

25 A. Well, they, that they sent the gun back there with with

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 the jury, they were sayin' like that that was the gun used at
2 this guy's, uh, uh, uh, this guy's robbery.

3 Q. Now when you're talkin' about, uh, also in your
4 application you had some objection to some of the closing
5 arguments that the solicitor may have had, is that correct?

6 A. Yes. Yes. Thank you. Thank you. Yes.

7 Q. All right, please, uh, communicate to the Court the
8 details of that allegation.

9 A. Uh, well durin' durin' the, uh, the prosetrutor's [sic]
10 openin' and closin' arguments she was talkin' about facts that
11 wasn't never admitted into the Court.

12 THE COURT: She said what?

13 A. She was talkin' about items or facts a items that wasn't
14 admit, wasn't admitted into the Court. She, uh, I was charged
15 with armed robbery and in, and then in indictment particularly
16 stated this guy was robbed for, uh, a lottery ticket so the
17 prosecutor began to to, uh, to lay a foundation down on the
18 attempted armed robbery charge by askin' askin', when this guy
19 he, this guy testified he testified that, uh, hold on, let me
20 get it right to show ya. He te -- when she asked him about
21 the items that he had and he testified about them items and
22 then if you go to transcript page 141 line 5 to 25 she be --
23 she had began to, she told, she say, Well do you have any
24 cash, but and which she had already testified and she -- and
25 he said, Oh, ye -- oh yes, I had some cash or some money, uh,

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1 tucked away and everything, okay, so she solicit that
2 statement from him but she go, she's, uh, this goes further,
3 let me get it right this witness whose testified, when the
4 solicitor solicitor statement of cash, I mean, I, I mean that
5 was, yeah, line transcript page 141 line 11 to 17 and then
6 that, uh, uh, she further made statements, uh, uh, in her
7 closin' oral arguments on transcript page 114 line 19 and
8 transcript page 115 line 8 to 12 in reference of her openin'
9 statements and in her closin' statement she made reference of
10 a tran -- on, uh, believe item transcript page 299 line 23 to
11 25 and transcript page 300 line, uh, line 1 and transcript
12 page 301 line 8 and transcripts page 302 line 14 and
13 transcript page 306 line 3 to 4, okay, and and and if you go
14 to, uh, transcript page the 300 and and between 300, 301 line
15 1 and 1, uh, between 1 and 11 she she she she she like
16 poisoned the jury's mind because she she begin to deviate from
17 the lottery ticket, she even told the jury that this wasn't
18 about the lottery ticket, so when she told the jury that it
19 wasn't about the lottery ticket and she talk about these items
20 that wasn't in, admitted in court, like she talked about that
21 the wallet, the debit card, the credit card, the Lowe's card
22 and the phone and all these things wasn't admitted into
23 evidence so that she she put in like these are the things that
24 was attempted to be, to be robbed from this guy because it --
25 she -- they couldn't deliberate on the lottery ticket because

EUGENE THOMAS - DIRECT EXAMINATION BY MR. JOHNSON

1 the lottery ticket wasn't admitted into evidence either.

2 Q. Mr. Thomas, as far as the, uh, your allegations are
3 concerned, is there another ground that you'd like to cover
4 with the Court?

5 A. No.

6 Q. Well if you'll please answer any questions, uh, the
7 attorney general has.

8 A. Yes.

9 MR. SCHMECKPEPER: Uh, just briefly, Your Honor, I'm in a
10 strange position not having, uh, Mr. Robinson here testify.
11 My only questions are really just pointing out portion of the
12 transcript, uh, and to refute the app -- applicant's
13 allegations, so I can do that by eliciting testimony or I can
14 make argument, there's just pretty much whatever your prefer.

15 THE COURT: Well, if if you just gonna point out stuff in
16 the transcript, ---

17 MR. SCHMECKPEPER: That's pretty mu ---

18 THE COURT: --- I don't think you need to. You can leave
19 him on the stand but what that he's gonna put in the record
20 some portions of the transcript, I mean, I've got the whole
21 transcript as part a the record, ---

22 THE APPLICANT: Yes, sir.

23 THE COURT: --- he's gonna point me to several items in
24 there. What we ---

25 MR. SCHMECKPEPER: And I could, I can submit something in

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1 writing if that makes, ---

2 THE COURT: All right, ---

3 MR. SCHMECKPEPER: --- that's easier ---

4 THE COURT: --- why don't ---

5 MR. SCHMECKPEPER: --- Your Honor.

6 THE COURT: --- you, why don't you submit a written s,
7 uh, items ---

8 THE APPLICANT: Sir, ---

9 THE COURT: --- i -- a written list of the, uh, page and
10 number, page, number and lines that you want me to look at
11 relevance a this testimony this afternoon.

12 MR. SCHMECKPEPER: Yes, Your Honor.

13 THE APPLICANT: So so, Your Honor, so you're sayin' that
14 he's not gonna talk about it, why can, why -- I'm sayin' is it
15 somethin' that he he don't wanna say while I'm here?

16 THE COURT: I don't think it's that. He he wants ---

17 MR. SCHMECKPEPER: I'll submit it to counsel, ---

18 THE COURT: He ---

19 MR. SCHMECKPEPER: --- provide ---

20 THE COURT: --- he's gonna give it to your attorney and
21 then if you have some issue with it we'll discuss that, you
22 can testify about it on, uh, ---

23 THE APPLICANT: So later on ---

24 THE COURT: --- Thursday.

25 THE APPLICANT: --- that once I read what he's sayin'

EUGENE THOMAS - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 then I can testify against it or somethin' like that matter?

2 THE COURT: Well we kinda gettin', uh, well let's just go
3 ahead and do it now, let's ---

4 THE APPLICANT: Yes.

5 THE COURT: --- let's let's go ahead and give him a
6 chance to, uh, comment on it, I I think that'd be quicker.

7 MR. SCHMECKPEPER: Yes, Your Honor.

8 CROSS-EXAMINATION BY MR. SCHMECKPEPER:

9 Q. Um, Mr. Thomas, and I think you you mention the life
10 without parole issue, I'm not gonna ask you so much about that
11 because it was testified to earlier, uh, but I will ask you
12 about and to start off you, I think your allegation was that
13 your trial attorney should have suppressed admission of the
14 gun, is that correct?

15 A. Yes.

16 Q. Now you said among other things that because you were
17 already arrested, you were already under arrest and in
18 handcuffs, there was no reason for him to look through the
19 bag, is that fair?

20 A. I'm sayin' to for the inci -- well you, an incident to
21 arrest, right, okay, ---

22 Q. No, I I'm just asking if that's what you're saying.

23 A. Well co -- well repeat what, repeat it, repeat it again,
24 make me su -- I wanna make sure I get this right.

25 Q. So if I'm correct you're saying that you were already

EUGENE THOMAS - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 under arrest, your hands were in handcuffs so there was no
2 reason for law enforcement to look in the bag without a
3 warrant.

4 A. To be searchin' the room without a warrant, to be
5 searchin' the room.

6 Q. Now if you look at page 261 ---

7 A. Yes.

8 Q. --- starting at line 1, I'm just gonna read this into the
9 record, "Well during the process as he," and I assume he means
10 you, "was getting dressed I remember feeling the pockets of
11 the pants that I gave to him to put on, make sure there was
12 nothing in there that would be a danger to anyone and as he
13 was sitting in the chair the bed was probly 5 to 6 feet, the
14 corner of it from where we were I notice a blue small zipper
15 bag and I didn't know what was in it so I picked it up in case
16 it was something that could have been a danger to me because
17 it was within arm's reach," and that that that was his
18 testimony, right?

19 A. Yes.

20 Q. So I thi -- I think what his testimony was, and correct
21 me if I'm wrong, is that before you were in handcuffs, while
22 you were still getting dressed he noticed a bag close to you
23 that was in arm's reach and he picked it up to see if there
24 was som -- to see if, to make sure there wasn't, there wasn't
25 a weapon in it, is that an accurate representation of what he

EUGENE THOMAS - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 testifi7 -- whether or not you agree to that testimony, is
2 that an accurate representation of what his testimony was?

3 A. That was at the, that was his testimony because that's
4 what the transcript say, that's not what happened.

5 Q. Okay, but that that's what he testified to?

6 A. Yes.

7 Q. And then as far as the closing arguments, I think you you
8 argued that your allegation is that the solicitor said things
9 in closing arguments that weren't in evidence.

10 A. Openin' arguments and closin' arguments.

11 Q. Now if you could turn your pa -- attention to page 299
12 right around line 7, roughly that general area, would you
13 agree that the trial judge in try ---

14 A. Two hundred and ninety-nine?

15 Q. Two hundred ninety-nine.

16 A. And what line?

17 Q. Right around line 6 and just just some background, this
18 is where the judge is talking to the jury prior to, I believe
19 prior to closing arguments and is it fair to say that the
20 trial judge told the jury the argument that his remarks as
21 well as the remarks of counsel and the solicitor were not in
22 evidence, they're just argument.

23 A. Yes, he s -- it says that.

24 Q. Thanks, I have no further questions.

25 THE COURT: All right, you can step down, thank you.

EUGENE THOMAS - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 THE APPLICANT: Thank you, sir.

2 (Whereupon, the applicant left the stand.)

3 THE COURT: All right, we'll be at ease in this case
4 until Thursday which know more about when to fit it into what
5 time.

6 MR. JOHNSON: And, Your Honor, actually if if, uh, and
7 the applicant knows I s -- we spoke with Vicky McBee, that she
8 said she would be here Thursday at 9:30 although ---

9 THE APPLICANT: Yes.

10 MR. JOHNSON: --- I was gonna give her a subpoena ---

11 THE COURT: Okay.

12 MR. JOHNSON: --- as well, I've got a solid address for
13 her currently as well.

14 THE COURT: Okay, good.

15 THE APPLICANT: This point, yeah, subpoena ---

16 THE COURT: Okay, ---

17 THE APPLICANT: --- as well.

18 THE COURT: --- I will see ya then.

19 MR. SCHMECKPEPER: Thank Your Honor.

20 (Proceedings October 27, 2016)

21 THE COURT: Counsel.

22 MR. JOHNSON: Thank Your Honor, may it please the Court.
23 Uh, I believe we adjourned, uh, give the applicant opportunity
24 to, uh, present his, uh, evidence of what his alibi witnesses
25 might have said.

DEMECO ROMERO THOMASON - DIRECT EXAMINATION BY MR. JOHNSON

1 THE COURT: All right, for the record this is Eugene
2 Thomas, uh, 2015-CP-23-2998. We did hear Monday, that we
3 we've heard part a this Monday and I delayed till today the
4 opportunity for Mr. Thomas to have individuals he purports to
5 be alibi witnesses which should have been interviewed and
6 called at trial by trial counsel.

7 MR. JOHNSON: Yes, sir, Your Honor, apologize.

8 THE COURT: All right, you wanna call your witness.

9 MR. JOHNSON: Yes, sir, Your Honor, we're prepared, gonna
10 call, uh, Romell Thomason.

11 (Whereupon, the witness came forward.)

12 THE CLERK: What's your last name, Thomason?

13 THE WITNESS: Yeah, Thomason.

14 THE CLERK: Okay. Please place your left hand on the
15 Bible and raise your right hand, Romell Thomason.

16 THE WITNESS: Yeah, Demeco Thomason.

17 DEMECO ROMERO THOMASON, having
18 been first duly sworn, testified as follows:

19 THE CLERK: Thank you, you may be seated and please state
20 your full name for the record.

21 THE WITNESS: Demeco Romero Thomason actually.

22 DIRECT EXAMINATION BY MR. JOHNSON:

23 Q. Now, Demeco, you go by different name?

24 A. Ro.

25 Q. You go by Ro?

DEMECO ROMERO THOMASON - DIRECT EXAMINATION BY MR. JOHNSON

1 A. Yeah.

2 THE COURT: All right, let's spell Deme -- and spell his
3 name for us, that's not an unusual name either.

4 A. D-E-M-E-C-O.

5 Q. And spell your middle ta -- name too or ---

6 A. R-O-M-E-R-O.

7 Q. All right, uh, Ro, do you, uh, do you know, uh, the
8 applicant in this case Eugene Thomas?

9 A. Yes, sir.

10 Q. Okay, and, uh, were you aware that he had been, uh,
11 arrested for, uh, an armed robbery back in, around 2009, did
12 you know about that that he'd been arrested for that ---

13 A. Yes, sir.

14 Q. --- crime? Okay. Now, um, at some point in time during
15 his case, did someone approach you about potentially
16 presenting a, uh, a an alibi witness on his behalf?

17 A. When they took to it trial that's all I remember,
18 somebody called.

19 Q. Okay, they called you and, uh, did they ask you to come
20 to trial and testify?

21 A. Uh, I think so yes, sir.

22 Q. Okay. Now, uh, I know it's a a, the alleged incident
23 happened back in 2009, uh, was alleged to happen on, uh, July
24 22nd of 2009, did, uh, were you prepared, uh, to say that, uh,
25 Mr. Thomas had been with you during a portion of that day?

DEMECO ROMERO THOMASON - DIRECT EXAMINATION BY MR. JOHNSON

1 A. Um, was I prepared?

2 Q. Well were were, at the time that you would, you would
3 have been called to trial in in in 20, uh, ---

4 A. Yeah, ---

5 Q. --- 12.

6 A. --- yeah.

7 Q. --- you were, were you prepared to to say that he had
8 been with you for a portion of that day?

9 A. He was with me, well, I mean, that day, that night.

10 Q. Okay, so let's let's tell the Court, uh, what you
11 remember about how long he was with you durin' that period a
12 time.

13 A. Uh, when I got up that it was around 'bout like five or
14 six, somewhere around there, I mean, we be playin' cards, we
15 gettin' gettin' together play cards all the time ---

16 Q. So you're talkin' ---

17 A. --- then ---

18 Q. --- about ---

19 A. --- I don't even know, I left around 'bout three or four
20 that mornin' then the next mornin' we go back up there, that's
21 when he came and said somebody said I robbed. I said how can
22 you rob, he was up here playin' a game but, I mean, you knows.

23 Q. Okay, ---

24 A. Yeah.

25 Q. --- and so from about five or six that afternoon of of of

DEMECO ROMERO THOMASON - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 the 22nd until that early morning is when you were with him.

2 A. Yeah, ---

3 Q. Okay. All right, please ans ---

4 A. --- there was a couple us.

5 Q. There's a whole, there's a ---

6 A. Yeah.

7 Q. --- bunch of ya?

8 A. Yeah.

9 Q. Where were ya'll playin' cards?

10 A. Uh, Furman Hall Road.

11 Q. Okay, you know whose house that was?

12 A. Uh, Ms. Vicky's.

13 Q. Um, how many people you think were up there?

14 A. Probly like two, two or three more people.

15 Q. All right, please answer any questions the attorney
16 general has.

17 CROSS-EXAMINATION BY MR. SCHMECKPEPER:

18 Q. Morning, Mr. Thomason, uh, what time did you say exactly
19 the applicant was with you that day and and what day was it?

20 A. I don't remember what day it is but I know was hot
21 outside but when the next day came back, next day he was with
22 us that night, all we, that's what we do every day, gamble. I
23 mean, I I didn't mean like that, play, you know, play cards
24 but, yeah, then the next day I get up there 'round 'bout five
25 or six the next day, that's when he said somebody goin' around

DEMECO ROMERO THOMASON - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 saying I robbed, then we ignored it and everything, kept on
2 playin' cards but, nah, I don't.

3 Q. So but do you know exactly, all right, not not not the
4 exact specific date ---

5 A. And that's ---

6 Q. --- that he would ---

7 A. --- a long time ago, man, I ---

8 Q. All right, so ---

9 A. --- can't tell you exactly what date but I I could tell
10 you what went on that day.

11 Q. So not the specific date but in relation to when he said,
12 did he say when somebody said he robbed somebody? Did he say,
13 Somebody said I was robbed yesterday?

14 A. That night we played cards all way till the sun rose, I
15 left 'round about three or four that mornin'. The next day we
16 came back, the next exact, the same next day after we got
17 through playin' cards, woke up and came back up there, did
18 what I had to do, come back up there 'round 'bout four, five
19 o'clock and that's when he came, said, Man, somebody said I
20 robbed 'em at such last night, I said, How can you rob
21 somebody last night, you was up here playin' cards with us.

22 Q. Uh, uh, I have no further questions.

23 THE COURT: Okay.

24 MR. JOHNSON: No redirect, Your Honor.

25 THE COURT: All right, you can step down, be excused, we

YVONNE DEE MCBEE - DIRECT EXAMINATION BY MR. JOHNSON

1 appreciate your time.

2 (Whereupon, the witness left the stand.)

3 THE COURT: All right, call your next witness.

4 MR. JOHNSON: Call, uh, Yvonne McBee.

5 THE COURT: Okay.

6 THE BAILIFF: Whoa.

7 (Whereupon, the witness came forward.)

8 (Whereupon, a discussion was held off the record.)

9 THE CLERK: Hi. Ms. McBee, ---

10 THE WITNESS: Hey.

11 THE CLERK: --- please place your left hand on the Bible
12 and raise your right hand.

13 YVONNE DEE MCBEE, having been
14 first duly sworn, testified as follows:

15 THE CLERK: Thank you, you may be seated.

16 THE WITNESS: Okay.

17 THE CLERK: Please state your full name for the record
18 and spell it, okay.

19 THE WITNESS: Yvonne Dee McBee, Y-V-O-N-N-E, Dee, D-E-E-,
20 McBee, M-C-B-E-E.

21 DIRECT EXAMINATION BY MR. JOHNSON:

22 Q. Yvonne, do you, do you go by Yvonne or you go by a
23 different name?

24 A. Yvonne, they just call me Vicky from a childhood name.

25 Q. Okay, and, Vicky, do you know Eugene Thomas?

YVONEE DEE MCBEE - DIRECT EXAMINATION BY MR. JOHNSON

- 1 A. I been knowin' him for years.
- 2 Q. 'bout how long you think?
- 3 A. Oh, 'bout 30, 40 years.
- 4 Q. Okay. Uh, for background, uh, where are you from
- 5 originally?
- 6 A. I'm from Greenville.
- 7 Q. Okay, you mean your whole life?
- 8 A. All my life.
- 9 Q. Okay. Are you currently employed? Are you ---
- 10 A. I'm ---
- 11 Q. --- drawing in cash?
- 12 A. --- on disability. I got heart problems, I've been ---
- 13 Q. Oh.
- 14 A. --- on disability about 25 years.
- 15 Q. Okay. Uh, you have any family in town?
- 16 A. Uh, all my family live here in Greenville.
- 17 Q. Okay. Now, uh, you're aware that, uh, Mr. Thomas was,
- 18 uh, around in 2009 he was, uh, accused of committing an armed
- 19 robbery, you're aware a that?
- 20 A. Yes, sir.
- 21 Q. And, uh, is it true that you were contacted, uh, at some
- 22 point regarding potentially providing an alibi witness for
- 23 him?
- 24 A. Yes.
- 25 Q. Do you remember the circumstances a that?

YVONEE DEE MCBEE - DIRECT EXAMINATION BY MR. JOHNSON

1 A. Yes, I remember.

2 Q. Okay. Do you know who contacted you or how that went?

3 A. Well we was havin' a cookout in the yard and Mr. Thompson
4 [sic] came to my house about 8:30 or 9 that morning and he was
5 in my yard all that day, we was cookin' out, we had people up
6 to my house and about five, six o'clock maybe everybody decide
7 to play cards so we played cards from 'bout five o'clock to
8 all in the mornin'.

9 Q. And whose house was this?

10 A. My house ---

11 Q. Okay.

12 A. --- and Mr. Thompson was at my house till 'bout four or
13 five o'clock in the mornin'. He didn't leave till about 4:30
14 somethin' to 5 that mornin' so Mr. Thompson was with us all
15 that day so when we was cookin' out in the yard, it was some
16 young boys walked up in my yard, I don't even know h -- who
17 these people was and they said somebody had robbed somebody,
18 I'm like Mr. Thompson's sittin' there havin' fun, he was with
19 everybody in the yard havin' a good time, he did not leave my
20 yard period.

21 Q. That so do you remember around about the day this stuff,
22 do you remember, I know it's long ---

23 (Indiscernible cross-talk.)

24 A. It was a, it was durin' the summer, it was real hot
25 outside so only thing I can tell you he was in my yard, he

YVONNE DEE MCBEE - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 did not leave period, so that's his alibi. I mean, I can't
2 say Mr. Thompson did nothin', he was at my house.

3 Q. Now you -- were you subpoenaed to testify at at his
4 trial?

5 A. Well I came one time, I've been comin' and comin' but
6 they wouldn't let me talk.

7 Q. Who is "they?"

8 A. The last time I was here when we was at, you know, court.
9 I came the last time and they would not let me say nothin'. I
10 was willin' to testify for him, I mean, every time I came
11 nobody wouldn't let me say nothin'. I I can't say this man
12 did nothin', he was at my house so I can't, I can't say he did
13 anything. I am his alibi, he was at my house, we was havin' a
14 great time that day.

15 Q. Will you please answer the questions that attorney
16 general has.

17 CROSS-EXAMINATION BY MR. SCHMECKPEPER:

18 Q. Mornin', Ms. McBee, I have a few questions for you. Uh,
19 what is your relationship with the applicant, ---

20 A. With him?

21 Q. --- ma'am?

22 A. We've been friends for years, I know his whole family.

23 Q. And I guess your testimony is, uh, obviously you weren't
24 there for, you you weren't there when the the victim was was
25 robbed, do you know exactly when the victim was robbed in

YVONNE DEE MCBEE - REDIRECT EXAMINATION BY MR. JOHNSON

1 relation to the barbecue?

2 A. I I don't, I don't know about the people was robbed, I
3 don't know. Only thing I know is somebody came in my yard
4 talkin' 'bout somebody done been robbed but Mr. Thompson was
5 at -- I -- my house, maybe they seen somebody different or
6 somebody look like him but Mr. Thompson was at my house.

7 I ---

8 THE COURT: You keep sayin' Ms. Thompson, I thought his
9 name was Thomas.

10 A. That's what I call him, Eugene Thompson.

11 Q. Gene Thompson.

12 A. Thompson, that's what I call him, well, I mean, Thompson.

13 THE COURT: Are you talkin' about that (indicating) man
14 in the orange jumpsuit?

15 A. Yes, I know him.

16 THE COURT: Okay, but but you call him Thompson.

17 A. I call -- well Thomas ---

18 THE COURT: I'm gonna make sure you're talkin' about
19 that ---

20 A. Yeah, I'm talkin' 'bout the same one, I just get it mixed
21 up, Thomas.

22 MR. SCHMECKPEPER: I don't have any further questions,
23 Your Honor.

24 REDIRECT EXAMINATION BY MR. JOHNSON:

25 Q. And, uh, I I know, uh, you don't remember dates right

YVONNE DEE MCBEE - RECROSS-EXAMINATION BY MR. SCHMECKPEPER

1 now, uh, 'cause it's been so long ago, is that correct, but
2 but at at the time you had, uh, kinda the context and you
3 would have known and remembered the time and dates and times I
4 think.

5 A. Yeah, I mean, I woulda known but I don't, at the time we
6 was havin' a good time in my yard, that's all I know, he was
7 at my house. If somebody talkin' about somebody done robbed
8 somebody, at the time this man was with us, ---

9 Q. I have ---

10 A. --- Your Honor.

11 Q. --- no further questions.

12 MR. SCHMECKPEPER: Might I ask one one follow-up, ---

13 THE COURT: Okay.

14 MR. SCHMECKPEPER: --- Your Honor?

15 THE COURT: All right.

16 RECROSS-EXAMINATION BY MR. SCHMECKPEPER:

17 Q. Uh, so you weren't there for the burglary so what you're
18 saying is you heard about the burglary or you heard about the
19 armed robbery when the applicant was with you.

20 A. Yeah, he was at my house.

21 Q. You don't necessarily know for a fact that the applicant
22 was at your house while the armed robbery was committed 'cause
23 you weren't there.

24 A. I don't know about all that, only thing I know he was at
25 my house and somebody mentioned sumtin' about a robbery ---

YVONNE DEE MCBEE - RE-CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 Q. Thank you, I have no ---

2 A. --- but ---

3 Q. --- further question.

4 A. --- when the person, when they s'posed to have got
5 robbed, he was at my house.

6 THE COURT: Thank you. We appreciate your time, ---

7 THE WITNESS: Thank you.

8 THE COURT: --- you can be excused.

9 THE WITNESS: Okay.

10 (Whereupon, the witness left the stand.)

11 THE COURT: Anything else on this case?

12 MR. JOHNSON: Well, Your Honor, uh, I know, uh, Monday we
13 stated that, uh, that's all we were were going to to to leave
14 open to do, now I'll tell ya I've spoken with my client, there
15 is, uh, after having conversations with him he was interested
16 in adding a couple more pieces of evidence, I don't know if
17 the Court's willing but I know, I know what we decided on
18 Monday that ---

19 THE COURT: Well let's at least make 'em court's exhibits
20 'cause we had determined whether or not to -- what what are
21 they?

22 MR. JOHNSON: Your Honor, uh, one is, uh, as it relates
23 to, uh, still regarding the, uh, potential, uh, witnesses,
24 there was an officer in the trial, uh, uh, Officer Flavell who
25 spoke to a, uh, someone who lived at the apartment complex

MOTIONS AND MATTERS

1 where the incident happened, uh, that person stated that he
2 saw, that she saw, uh, someone else there, um, around that,
3 uh, ---

4 THE COURT: Had dreadlocks, ---

5 MR. JOHNSON: Yes, ---

6 THE COURT: --- I remember that.

7 MR. JOHNSON: --- that's right and what what, uh, what my
8 client wanted to do was there is a a letter from the
9 solicitor, uh, from back in August of 2010 which was was long
10 before the trial that would have put Mr. Robinson on notice
11 that, uh, this witness potentially existed and Mr., uh, Thomas
12 wants to put that on the record as well as a letter that he
13 got from the apartment complex itself that's stating that that
14 person didn't move until July 11 so he wants to basically tell
15 the Court that he would have had time to contact this person.
16 I don't have this person, I tried reach her, I don't, uh, have
17 her here but I know he wanted to put that on ---

18 THE COURT: What's ---

19 MR. JOHNSON: --- the record.

20 THE COURT: --- what's State position?

21 MR. SCHMECKPEPER: Your Honor, I I haven't seen it, if I
22 can at least look at it.

23 THE COURT: All right.

24 (Whereupon, a discussion was held off the record.)

25 MR. SCHMECKPEPER: Your Honor, I'd object to rel -- on

MOTIONS AND MATTERS

1 relevance, just that it doesn't have anything to do with the
2 allegations, I'm not even sure it it it raise a prima facia
3 case to allow for a ---

4 THE COURT: Well let me ---

5 MR. SCHMECKPEPER: --- post-conviction ---

6 THE COURT: --- look at it and I'll at least make a
7 court's exhibit just for purpose of any appeal but let's, let
8 me see 'em 'fore I move on.

9 MR. JOHNSON: Yes, sir, Your Honor, and, uh, there was,
10 uh, 'scuse me, Your Honor, there was one more document. There
11 was a document written to the, uh, Supreme Court on, uh, June
12 June 14th of 2012 that kinda goes through the procedure and
13 what my client sees here is that when, uh, Mr. Robinson was
14 appointed as counsel and when, uh, any alibi defense was first
15 presented so it would show that he was was appointed on
16 October 14th 2010 and the first hearin' of an alibi defense
17 was given on one e-mail June 16th 2011 and he he'd like for
18 you to look at this too.

19 THE COURT: All right, let let me see 'em and and what
20 does the latter have to do with I think it was called to trial
21 and did not and that trial counsel had not given ---

22 MR. JOHNSON: The no ---

23 THE COURT: --- the required notice and case was carried
24 over.

25 MR. JOHNSON: Yes, sir, Your Honor, and, uh, I guess as

MOTIONS AND MATTERS

1 it, as it again relates to that Lucy Earle who, the one who
2 saw a different guy with dreadlocks, again that would have
3 been, uh, showing showing the the time frame within which he
4 would have had to contact that person.

5 THE COURT: All right, so what's the letter from
6 Ms. Tessitore to, uh, Dan Shearhouse clerk of court, the
7 Supreme Court dated June 14th 212, what's the relevance?

8 MR. JOHNSON: Uh, in that letter on the second page, uh,
9 it it goes through kinda procedural thing, it it shows when
10 Scott was appointed, I think it was October 2010, and it
11 shows, uh, basically it puts, um, it it allows, uh, Mr. Thomas
12 put the Court on notice when he would have gotten the case and
13 how much time he would have had to potentially look into, get
14 the, my client's witnesses or alibi witnesses.

15 THE COURT: All right. Well this a course is hearsay so,
16 uh, I'll make -- I'm -- I'll not allow it into evidence, I'll
17 make it court's, let you make a copy a court's exhibit but
18 that and I I say this: that is the June 14th 2012 letter I
19 referenced from Ms. Tessitore ---

20 MR. JOHNSON: Yes, sir, Your Honor.

21 THE COURT: --- uh, and as to the August 23rd 2010 letter
22 to Ms. Tessitore from Mr. Chambers, Mr. Chambers has been, has
23 already been testified, has testified and couldn't be examined
24 as to that letter while he was, uh, testifying, uh, I also
25 question its relevancy but I'm gonna make it a court's exhibit

MOTIONS AND MATTERS

1 but I'm not gonna allow it into evidence.

2 MR. JOHNSON: Yes, sir, Your Honor.

3 THE COURT: As to the Absolute Property Services of
4 August 17th 2011, uh, again, that's that's complete hearsay
5 and, uh, will allow, not allow it into evidence and make it
6 court's exhibit also.

7 MR. JOHNSON: Thank Your Honor and for the record I was
8 speaking with my client, if, uh, if if the Court, uh, instead
9 of taking it for the truth of the matter asserted if the Court
10 can, uh, take it, uh, more or less for the background
11 regarding, uh, my client's arguments just kinda showin' the
12 time that they've appeared, not necessarily for the truth of
13 the matter contained therein, uh, just for the sake of ---

14 THE COURT: Well ---

15 MR. JOHNSON: --- preserving the record for my client.

16 THE COURT: Okay, well I I'm not gonna do that, I just,
17 if I don't take for the truth then I can't give it any value
18 whatsoever ---

19 MR. JOHNSON: Yes, sir, Your Honor.

20 THE COURT: --- and if it, if it has no, uh, truth, it
21 has no value and that is if it doesn't doesn't relate to the
22 truth of the matter asserted, that is, that the matter
23 asserted in in that that letter would basically be that this
24 person did or did not have a lease and, uh, so, I mean, they,
25 I think they are being admitted or po -- proffered to prove

MOTIONS AND MATTERS

1 certain issues and, uh, therefore I find that they they
2 constitute hearsay and I'm not going to and I'll make a
3 court's exhibit.

4 MR. JOHNSON: Yes, sir, Your Honor, thank you.

5 THE COURT: All right, that it for this case?

6 MR. JOHNSON: As far as the applicant absolutely.

7 MR. SCHMECKPEPER: Your Honor, I think that's it for the
8 State as well.

9 THE COURT: Okay. All right, well I'll continue to take
10 it under advisement.

11 MR. JOHNSON: Thank Your Honor.

12 (Letter dated 8/17/11 from Absolute Property Services
13 marked Court's Exhibit No. 1, letter dated 8/23/10 from Randy
14 Chambers to Jennifer Tessitore marked Court's Exhibit
15 No. 2 and letter dated 6/14/12 from Jennifer Tessitore to
16 Dan Shearhouse marked Court's Exhibit No. 3 for
17 identification.)

18

19

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1 CERTIFICATE OF REPORTER

2
3 I, Margaret A. Woods, Court Reporter in and for the State
4 of South Carolina at Large, hereby certify that I reported the
5 preceding case on October 24 and 27, 2017 at the time and
6 place heretofore set forth; and that the foregoing pages
7 numbered from 3 through 107, inclusive, constitute a true and
8 accurate transcription of my stenographic notes of the said
9 proceeding.

10 I further certify that I am neither attorney nor counsel
11 for, nor related to or employed by any of the parties
12 connected to the action, nor am I financially interested in
13 the action.

14 March 26, 2017

15
16 Margaret A. Woods

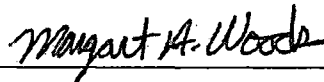
17 Margaret A. Woods, Court Reporter
18 in and for the State of South Carolina at Large.
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25

CERTIFICATE OF REPORTER

I, Margaret A. Woods, Court Reporter in and for the State of South Carolina at Large, hereby certify that I reported the preceding case on October 24 and 27, 2017 at the time and place heretofore set forth; and that the foregoing pages numbered from 3 through 107, inclusive, constitute a true and accurate transcription of my stenographic notes of the said proceeding.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties connected to the action, nor am I financially interested in the action.

March 26, 2017



Margaret A. Woods, Court Reporter
in and for the State of South Carolina at Large.

Exhibit (5) for ARGUMENT 4 of 11(1)

*Absolute Property Services, LLC**P.O. Box 424**Taylors, SC 29687**864-469-9880*

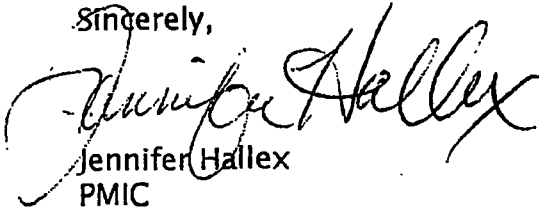
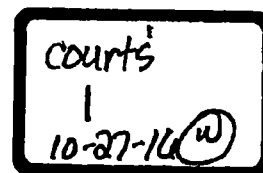
August 17, 2011

INFO, Inc.
P.O. Box 5415
Columbia, SC 29250

Dear Sir:

As requested, enclosed are documents pertaining to the existing leases in place during the dates of July 20, 2009 through July 23, 2009 at [REDACTED] Units A, B, C, and D Greenville, SC 29601. During that time frame, units A and D were vacant. Unit [REDACTED] was occupied by Evins and Cherika Carter and their children. Unit [REDACTED] was occupied by Lucy Early and her two grandchildren. I do not have an application for Ms. Early because when I took over management of the complex in 2008, she was an existing tenant. We signed a new lease and that is all. I have no other information on her other than the last known phone number on record. That number is [REDACTED] 9785. I have no idea if that is still a contact number for her because she vacated the premises in May 2011.

Sincerely,


Jennifer Hallex
PMIC

OFFICE OF THE PUBLIC DEFENDER
13th JUDICIAL CIRCUIT
Greenville County Courthouse
305 East North Street (Rm 123)
GREENVILLE, SOUTH CAROLINA 29601

John I. Mauldin
 Public Defender

TEL (864) 467-8522
 FAX (864) 467-8521

August 23, 2010

Jennifer Tessitore, Esq.
 Assistant Solicitor
 13th Circuit Solicitor's Office
 305 E. North St., Suite 323
 Greenville, SC 29601

Re: State v. Eugene Thomas

Dear Ms. Tessitore:

In reviewing the discovery material you provided me in this case, I noted the following entry in Inv. C.H. Flavell's supplemental report:

"While talking to the victim I learned that a female in apartment [redacted] stated she had seen a guy with dreadlocks in the area lately. On Thursday 07/30/09 I went to apartment [redacted] and spoke with a female resident. She stated she had been seeing a guy with dreadlocks. I showed her a photo of Eugene Thomas. She stated she had never seen him before. She stated she had lived in apartment [redacted] for approximately 4 years and had never seen Thomas."

I am hereby requesting the name and contact information of this witness. This information is clearly exculpatory and falls squarely in the area of Brady material. Given that we are scheduled for trial within the next couple of weeks, I need this information immediately.

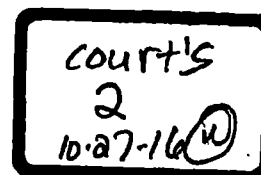
Thank you for your attention to this matter. I look forward to your prompt response.

Very truly yours,

GREENVILLE COUNTY PUBLIC DEFENDER

By: Randy Chambers/VLM
 Randy Chambers, Esq.
 Attorney for Defendant
 305 E. North Street, Suite 123
 Greenville, SC 29601
 (864) 467-8522

cc: Eugene Thomas
 20 McGee St.
 Greenville, SC 29601



State of South Carolina
Solicitor, Thirteenth Judicial Circuit

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Solicitor
W. Walter Wilkins

Greenville County Courthouse
205 E. North Street, Suite 325
Greenville, SC 29601-2185

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S.C. SUPREME COURT

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June 14, 2012

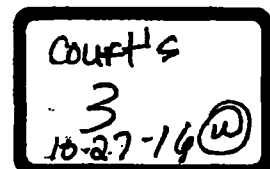
Mr. Daniel E. Shearhouse, Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: State v. Eugene Thomas
Ind. Nos. 2009-GS-23-9348, -9349, -9350; Armed Robbery, Poss. Weapon during
Commission of a Violent Crime, Burglary 3rd degree, & Point/Present Firearm

Dear Mr. Shearhouse,

I am writing in response to your request in the above-referenced matter and hope to elucidate the procedural history of this case. The case has been set for trial three times. In two of those instances, the case was continued due to issues relating to representation by the appointed defense attorneys. I will first briefly set forth the events prior to Mr. Robinson being appointed as defense counsel because those events contributed to the delay in this case. On Oct. 7, 2009, attorney Randall Chambers was appointed as counsel for the Defendant. The State extended an offer to Mr. Chambers and it was rejected. On July 9, 2010, the State notified the defense that the case would be set for trial during the August 9th, 2010 term of court. In July, 2010, the State served the Notice of Intent to Seek Life without Parole on the Defendant and Mr. Chambers.

The first time it was set for trial was on August 11, 2010. A week prior, on August 5, 2010, Attorney Chambers moved for a continuance and moved to be relieved as counsel due to significant attorney-client difficulties. A hearing was held and Judge Edward Miller found that the defense attorney required additional time to prepare for the trial given the serious nature of the case (with possible penalty of Life Without Parole); thus, the continuance was granted. The motion to be relieved as counsel was denied. Judge Miller noted that the mere filing of a grievance by the Defendant did not entitle him to new (appointed) counsel at that time.



The State was prepared to proceed to trial on September 8, 2010. On the morning of trial, the Defendant and Mr. Chambers raised their significant disagreements and aired their mutual disdain for each other on the record. Judge Robin Stilwell determined that Mr. Chambers should be relieved due to the serious nature of the charges and possible sentence and the fact that their attorney-client relationship was "so severely severed." Judge Stilwell continued the case and ordered that it could not be set for trial until after 60 days from the date of appointment of new counsel.

On Oct. 14, 2010, Mr. Robinson was appointed as counsel for the Defendant. In March of 2011 the case was set for trial a second time but was not called due to a State's critical witness, Officer Aiken, having to undergo emergency back surgery. The State duly notified defense counsel well in advance of trial. I would note that there had been no notice of an alibi defense or even the discussion of this possible defense at that time.

A third trial date of June 20, 2011, was set. The State was again prepared to proceed with its case. On the day of trial, the case was again continued due to Mr. Robinson's failure to comply with S.C. R. Crim. P. 5(e) relating to notice of alibi and his lack of preparedness as to the defense by not responding to the Defendant and his letters with witness names. The first hint of any alibi defense was presented in a casual statement in an email on June 16, 2011. He sent another email on Sunday, the day before trial, stating he had 5 alibi witnesses and their possible location on the day of the incident. Then, in a pretrial motion on June 20, the Defendant alerted the court that there were at least 3 additional witnesses that his attorney and the investigator for the defense had not yet spoken to. The defense attorney had not responded to his client's letters regarding these witnesses. The defendant made clear that he did not want the case tried until those witnesses were located and interviewed and expressed his concern that he had not communicated sufficiently with his defense counsel. Judge Edward Miller reviewed in camera letters previously given to the defense attorney by his client. Mr. Robinson admitted that his office was, in his words, "a little behind on the curve on the investigation of this case." The case was again continued specifically due to his failure to comply with the alibi notice requirement, allowing the State sufficient time to investigate the alibi, and because of the information from the defendant that had not been investigated by his attorney.

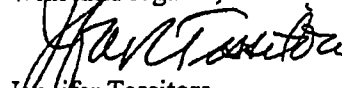
Shortly thereafter, on July 24, 2011, the defense attorney sought records pursuant to a Subpoena (with no court date). The case was then transferred to another prosecutor in our office due to my need to take some unexpected medical leave. The State filed a Motion to Quash the Subpoena as unenforceable, seeking irrelevant information, and the State further contended that the subpoena was vague, overbroad, and unduly burdensome. The investigative agency employed by the defense attorney and the Records Department then agreed to provide documents pursuant to a more narrowly-tailored list. Therefore, the State believes that this issue has been resolved.

I resumed the prosecution of the case in early 2012 and began to seek court terms to try this case on the above-referenced charges. Due to Mr. Robinson having so many cases in different counties and apparent conflicts, it was difficult to find a date in the first

few months of this year. Although Mr. Robinson obtained on Jan. 13, 2012, an ex parte Order for expenses to be paid to the investigative agency used to obtain records and reports on the alibi witnesses, he then filed a Motion to be Relieved as counsel on March 12, 2012, and cited S.C. R. Prof. Conduct Rules 1.16(b)(1), (6), and (7). The State indicated its position (opposing such relief) and it was set for a hearing before Judge Hill on April 20, 2012. The day before the hearing date, the defense attorney notified the State by letter that he was "withdrawing" his motion and he would not be present for the hearing. In reply, the State requested dates of trial terms when he would not have a conflict with his several previously scheduled murder trials in various counties. Mr. Robinson sent an email with 3 murder trials, noting his unavailability. There was no mention of the June 18th term (2012) and the State confirmed that all its witnesses were available that week for trial. Once notified by email on May 30th, Mr. Robinson quickly responded that he was already scheduled to re-try a murder case in Laurens County. This was verified by Assistant Solicitor Warren Mowry. The State then sent an email notifying Mr. Robinson that the State will seek to try the case in July or August 2012 and needed to determine his availability before determining that of the State's witnesses and also asking if there is any possibility of a plea. The defense attorney stated that he would discuss that with him and the State has not yet received a response as to the dates.

Pending the outcome of this inquiry into the allegations contained in the pro se document, the State would request a hearing in Greenville County General Sessions Court to determine if there are motions that need to be resolved prior to trial and to request the defense attorney to clarify his position on the motion that he suddenly withdrew. It would appear that there are again attorney-client issues that may need to be addressed prior to proceeding to trial. I am very eager to try this case and will continue to work with the defense to have a date certain. I would also note in closing that the State is prepared to provide supporting documentation as to this procedural timeline if necessary. Thank you for your attention to this matter.

With kind regards,


Jennifer Tessitore
Assistant Solicitor

cc: Scott Robinson, Esq.

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Eugene Thomas,
S.C.D.C. No. 222351,

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2015-CP-23-2998

ORDER

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Applicant filed this post-conviction relief application on May, 2015. The matter was heard October 24, 2016. Applicant was represented by Brian P. Johnson, Esq. The State was represented by Patrick Schmeckpeper, Esq.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the May 2010 term of General Sessions for third-degree burglary (2009-GS-23-9349), armed robbery (2009-GS-23-9350, count 1), and possession of a weapon during commission of a violent crime (2009-GS-23-93580, count 2). Scott D. Robinson, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On September 11, 2012, the Honorable Markley Dennis, Jr. sentenced the Applicant to concurrent terms of 5 years for third-degree burglary, life imprisonment without parole for armed robbery, and 5 years for possession of a weapon during commission of a violent crime.

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A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. *State v. Thomas*, Op. No. 2014-UP-360 (S.C. Ct. App. filed October 15, 2014). The Remittitur was sent on November 3, 2014.

In his application for post-conviction relief, Applicant alleges nine grounds for relief. At his hearing, these were compressed to four. Each will be addressed separately herein below.

First, Applicant alleges trial counsel was ineffective for failing to present his defense of alibi at trial. The first time Applicant's case was called for court, the testimony is that trial counsel had not complied with Rule 5(e)(1), South Carolina Rules of Criminal Procedure, which trial counsel acknowledged. At the first call, trial counsel had available two alibi witnesses and the State indicated it would waive notice if only one testified. This proposal was refused and the case continued.

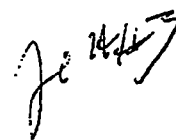
At the second call of Applicant's case, trial counsel had alibi witnesses available and notice was not an issue. At his post-conviction relief hearing, Applicant called two witnesses, Demeco Romero Thomason and Yvonne Dee McBee. Both testified that Applicant was with them during the day of the robbery from early until around 3:00 a.m. the following day. However, trial counsel, with Applicant's approval, utilized acceptable trial strategy to not present a defense to preserve his right to make the final closing argument. Trial counsel testified he advised Applicant as to the pros and cons of preserving final argument and Applicant agreed with trial counsel's strategy to not call witnesses. The record reflects Applicant's satisfaction with this strategy (Trial Record p. 283, l. 20 through p. 284, l. 3).

Where trial counsel articulates a valid reason for employing a certain strategy, such choice will not be deemed ineffective assistance of counsel. *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). In the instant case, the trial strategy exercised by trial counsel was well within the trial strategy which a reasonable competent attorney would have exercised under the same or similar circumstances.

Second, Applicant alleges trial counsel did not properly advise him that if he were convicted of armed robbery or attempted armed robbery, Applicant would be subject to a mandatory sentence of life without parole. The testimony at the hearing convinces the court that Applicant was well aware of his potential life without parole sentence. He received two notices that stated that the State would seek a life without parole sentence. One listed only armed robbery as a qualifying offense. The second listed both armed robbery and attempted armed robbery. Applicant acknowledged to the trial judge that he knew he would (not could) receive a sentence of life without parole (Trial Record p. 9, ll. 4-8).

As to this second allegation, Applicant testified that that trial counsel was ineffective for not "investigating" and "researching" whether or not Applicant's 1981 conviction for murder in Florida was a qualifying conviction. As to the latter point there can be no argument that murder is a qualifier for life without parole regardless of the state of conviction. *See* S.C. Code Ann. § 17-25-45 (1976 as amended).

Section 17-25-45 has no time parameters as to a time outside of which a qualifying conviction is too remote. In spite of this, trial counsel made a vigorous effort to get the trial judge to make a finding that the Florida conviction was too remote to be used as a qualifier (Trial Record p. 348, l. 10 through p. 349, l. 5).



Applicant argues that had trial counsel done proper research, he would have discovered the 1981 conviction was a qualifier. This is a convoluted argument that seems to have no logic. Applicant was repeatedly advised he was facing life without parole if convicted of armed robbery. Applicant seems to claim that if he was absolutely sure he was facing life without parole he would not have gone to trial. The record is clear that he was, in fact, absolutely sure that, if convicted of either armed robbery or attempted armed robbery, he was facing life without parole.

Third, Applicant alleges trial counsel should have moved to suppress the gun that was ultimately entered into evidence. This is based on a search and the ultimate seizure of the gun when applicant was being arrested on a warrant at a motel. Applicant argues at the time the bag, the dice game, and gun were found inside another bag, he was handcuffed and there was no necessity for a search of the room without law enforcement obtaining a search warrant. The testimony of one of the officers on the scene was that the bag containing the items was within Applicant's arms-reach while he was dressing. (See Trial Record p. 261, ll. 1-11). A search does not violate the Fourth Amendment to the Constitution of the United States when it is incident to an arrest and confined to the immediate vicinity of the arrest. *State v. Brown*, 289 S.C. 581, 347 S.E.2d 882 (1986); *Shipley v. California*, 395 U.S. 818, 89 S. Ct. 2053, 23 L. Ed. 732 (1969); *Stoner v. California*, 376 U.S. 483, 84 S. Ct. 889, 11 L. Ed. 2d 856 (1964). Trial counsel did object to admission of the gun on the grounds of relevance. This objection was overruled (See Trial Record p. 266, ll. 13-19).

Fourth, Applicant argues that the State in its opening and closing talked about "facts and items not put into evidence." Since the Applicant did not call the Court's attention to the specifics of this argument, the Court must find this claim without merit. Additionally, the trial

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judge made it clear to the jury that counsels' "remarks" were not evidence. (Trial Record p. 299, ll. 6-8).

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. *See Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by "its reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

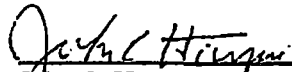
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Wherefore, I find Applicant has not proved by a preponderance of the evidence that trial counsel was ineffective on any of the grounds presented by Applicant at the post-conviction relief hearing. Therefore, Applicant's application for Post-Conviction Relief is denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Petition for Writ of Certiorari within thirty (30) days of the service of this Order to secure appellate review. See Rules 203 and 243, South Carolina Appellate Court Rules (SCACR). The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the Petition.

IT IS SO ORDERED.

October 27th, 2016
Greenville, South Carolina


John C. Hayes, III
Presiding Judge #6

WITNESSES

C. Flavell

Greenville Police Department

9/28/2009

ARREST WARRANT NUMBER

COUNT I - M380128 COUNT II - M380129

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Charge 1 Guilty of
attempted armed robbery

Charge 2 Guilty

Foreperson of Petit Jury

9-11-2012

Date:

DOCKET NO. 2009-GS-23-

JRT

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

9-11-12

May

TERM 2009

THE STATE

VS.

EUGENE THOMAS

0026

Indictment for

0439 and 0549

ARMED ROBBERY and POSSESSION OF A
WEAPON DURING THE COMMISSION OF A
VIOLENT CRIME

VIOLATION § 16-11-0330 and § 16-23-0490

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

INDICTMENT FOR
ARMED ROBBERY and POSSESSION OF A WEAPON DURING
THE COMMISSION OF A VIOLENT CRIME

MAY 04 2010

At a Court of General Sessions, convened on

the Grand Jurors of Greenville

County present upon their oath:

COUNT I

That EUGENE THOMAS did in Greenville County, on or about the 22nd day of July 2009, while armed with a deadly weapon, or while alleging either by action or words he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery would reasonably believe to be a deadly weapon, take by means of force or intimidation, goods or monies described as: a lottery ticket, from the person or presence of MICHAEL GORDON. This is in violation of §16-11-330 of the South Carolina Code of Laws (1976) as amended.

COUNT II

That EUGENE THOMAS did in Greenville County, on or about the 22nd day of July 2009, possess or visibly display a handgun during the commission or attempted commission of a violent crime, to wit: ARMED ROBBERY. This is in violation of §16-23-490 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

WITNESSES

C. Flavell

Greenville Police Department

9/28/2009

ARREST WARRANT NUMBER

M380131

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Guilty

Foreperson of Petit Jury

Date:

DOCKET NO. 2009-GS-23-
JRT

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

May

TERM 2009

9-11-12

THE STATE

vs.

EUGENE THOMAS

Indictment for

0427

BURGLARY THIRD DEGREE

VIOLATION § 16-11-0313

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
BURGLARY THIRD DEGREE

At a Court of General Sessions, convened on **MAY 04 2010** the Grand Jurors of Greenville

County present upon their oath:

That EUGENE THOMAS did in Greenville County, on or about the 22nd day of July 2009, willfully and unlawfully enter an apartment located at [REDACTED] Street, Greenville, South Carolina, without consent, and with the intent to commit a crime therein. This is in violation of §16-11-313 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR