

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Clyde N. Davis, Circuit Court Judge

Case No. 2003-CP-32-0759

Marcus Timmons

Petitioner,

v.

State of South Carolina,

Respondent.

APPENDIX- VOLUME THREE OF FOUR

William G. Yarborough, III
522 N. Church Street
Greenville, South Carolina 29601
(864) 331-1612
Attorney for Petitioner

Patrick Schmeckpeper
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549
Attorney for Respondent

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1 over the phone with a particular individual?

2 A. Yes.

3 Q. Now, let me ask you, Mr. Williams, was that particular
4 individual a white man or a black man?

5 A. He's a black guy.

6 Q. Okay. As a result of that argument between Marcus
7 Timmons and this other individual, what did Marcus do?

8 A. Well, he came out where me and Quincy was, and he told
9 Quincy, come on, man, this -- they said -- this cracker done
10 snatched the phone out my hand.

11 Q. And what did he want Quincy to do, Mr. Williams?

12 A. Well, I guess go back -- I can't say, but he told
13 Quincy to come on, let's -- they would go back to beat the guy
14 up. That's what it was.

15 Q. Now, did you -- Mr. Williams, what, if anything, did
16 you do? Did you try to intervene, or talk them out of going
17 back and fighting this man?

18 A. Yes, I did.

19 Q. Okay. What did you say to them, Mr. Williams?

20 A. I told Quincy and Marcus that we all was in there for
21 different charges, and I think Marcus also had a couple of
22 guys with him from West Columbia too, and I told them all, I
23 said that you are not going to do anything but add more
24 charges to what you already got, and the best thing to do is
25 just let that go.

1 Q. And what did he say in response to that, Mr. Williams?

2 A. He told he wasn't scared of no damn cracker, that he
3 had already killed one.

4 Q. He wasn't scared of no damn cracker and he had already
5 killed one?

6 A. Yes.

7 Q. At the time that he said he had already killed one, did
8 you believe him, Mr. Williams?

9 A. No, not necessarily, no.

10 Q. Okay. Did he just say that, or did he tell you more
11 about it?

12 A. Right then that's all he said, but when he came -- when
13 I -- after they got that settled he came back over to the
14 table where me and Quincy was, because we had been over there
15 at the side, and he sat down and then he went to telling me in
16 details about what he had did.

17 Q. Did he tell you, Mr. Williams, where he killed the
18 white man?

19 A. Yes, he did.

20 Q. Where did he say he killed him?

21 A. Off 321.

22 Q. And did he tell you how he killed the man?

23 A. Yes, he did.

24 Q. What did he tell you, Mr. Williams?

25 A. I'm telling -- he told me he shot him with a twenty

1 gauge shotgun.

2 Q. Did he tell you what part of the body he shot him in?

3 A. Told me he shot him in the back.

4 Q. Shot him in the back with a twenty gauge shotgun?

5 A. Yes.

6 Q. Did he tell you why they had the problem with the man,
7 or what happened with the man?

8 A. Yes, he did.

9 Q. What did he tell you, Mr. Williams?

10 A. He told me on this particular night they had been
11 riding around and -- he and Quincy also -- Quincy was also
12 there -- and they had been riding around looking for something
13 to hit, and he also explained to me about, that they did this
14 kind of stuff, you know, and I ---

15 Q. Now when you say something to hit, are you talking
16 about some place to rob?

17 A. Yes, some place or someone.

18 Q. Did something happen between Quincy and the man?

19 A. He told me that, when they rode down 321 they seen the
20 man coming across the street from a club or a bar.

21 Q. There was a bar in that area?

22 A. Yes.

23 Q. And what did they say they did after they saw the man
24 coming from the club?

25 A. He said they went down the street and parked, and they

1 got out and they -- Quincy went up the street facing the man,
2 whichever way he was going, and stopped the man to ask him
3 for light.

4 Q. Quincy asked the man for a light?

5 A. Yes.

6 Q. And then what happened? What did he tell you? What
7 did Marcus tell you about it?

8 A. He said that -- well, Quincy told me the man told him,
9 get out of my face, nigger, and they began to fight.

10 Q. They got in a physical fight?

11 A. Yes.

12 Q. During the time that they were in the physical fight,
13 did Marcus tell you what he did?

14 A. Yes, he did.

15 Q. What did he tell you about that, Mr. Williams?

16 A. He said he come up -- said the man was whipping up on
17 Quincy pretty good, then come up behind back, tell Quincy to
18 get the hell out the way.

19 Q. Told Quincy to get the hell out the way?

20 A. Yes.

21 Q. Okay. Because Quincy was losing this fight?

22 A. He said the guy was getting him pretty good, and then
23 he talked to us, and Quincy said he -- that he was winning,
24 but Marcus said the man was whipping up on Quincy pretty good.

25 Q. And he told Quincy to get the hell out the way?

1 A. Yes.

2 Q. And what did he do -- what did he tell you -- what did
3 Marcus Timmons say he did after he told Quincy to get the hell
4 out the way?

5 A. He told me he come up and shot him in the back.

6 Q. With what type of weapon?

7 A. A twenty gauge shotgun.

8 Q. Mr. Williams, are you from the Columbia area?

9 A. No, I'm not.

10 Q. Okay. Have you ever been down the stretch of 321 they
11 are talking about?

12 A. Yes, I've been down the stretch of 21 -- 321, coming
13 into Columbia and going out of Columbia. I never been down
14 this way before I went to jail.

15 Q. Okay. So prior to you being housed at the Detention
16 Center, you had never been down there?

17 A. No.

18 Q. You've been down there since?

19 A. I've been through there. I haven't been -- I don't
20 have no reason -- I don't have no relatives. I don't know
21 nobody in Columbia.

22 Q. Okay. And you haven't spent much time in the Columbia
23 area?

24 A. No.

25 Q. You are from York County?

1 A. That's right.

2 Q. Prior to meeting Quincy Timmons and Marcus Timmons at
3 the Detention Center, had you ever met them before in your
4 life?

5 A. No, I haven't.

6 Q. They are much younger men than you are, aren't they,
7 sir?

8 A. Oh yes.

9 Q. You don't know any of their family?

10 A. No, I don't.

11 Q. Did they tell you that something was a little funny
12 about the man that Marcus shot?

13 MR. AYER: Your Honor, I object. I object to the
14 leading.

15 THE COURT: I sustain the objection.

16 Q. Did they tell you something funny about what happened?

17 MR. AYER: Your Honor, I object to leading?

18 MR. SWARAT: What's leading about that, Your Honor?

19 MR. AYER: Well, he suggested it was funny.

20 MR. SWARAT: I -- that's not suggesting the answer,
21 Your Honor.

22 THE COURT: All right. I'll over rule the objection,
23 allow the witness to answer.

24 MR. SWARAT: Thank you, Your Honor.

25 Q. Did they tell you something funny about it, Mr.

1 Williams?

2 A. Yes. They told me that -- what was funny, the man had
3 some marijuana on him.

4 Q. That the white man that Marcus shot had some marijuana
5 on him?

6 A. Yes.

7 Q. Mr. Williams, on those Federal charges that we spoke of

8 ---

9 A. Uh huh (indicating positive)

10 Q. Did the State of South Carolina give you any help on
11 any of those charges?

12 A. No, they didn't.

13 Q. Did you receive anything for coming down here, for
14 testifying?

15 A. No, I didn't.

16 Q. Mr. Williams, you said at first, when Marcus told you
17 about it, you didn't believe him.

18 A. No, I didn't.

19 Q. Later on, did you come to believe what he had told you?

20 A. Yes, I did.

21 Q. And who did you tell about it first?

22 A. A minister. We had different ministers come in and
23 speak with us, and talk with us during our Bible study groups,
24 and at the time I was kind of down from being locked up in
25 jail, and I had losed a cousin the same -- about the same way,

1 and I talked to him about it.

2 Q. Now you say you had a cousin that had been killed
3 similar?

4 A. Yes.

5 Q. Was that crime ever solved, Mr. Williams?

6 A. No, it hasn't been solved till today.

7 Q. Did that affect you when Marcus told you about killing
8 this man?

9 A. Well, it didn't affect me when he told me about it, but
10 after I was told again about the crime, then and, you know you
11 had -- when it happened to my cousin then -- me and him was
12 close. We went in service together, you know. He's a
13 little -- about a year or two older than I was, but we both
14 were Veterans. We went to Vietnam together and all. We were
15 raised up like brothers, you know.

16 Q. So you went and talked to the minister about that?

17 A. Yes.

18 Q. -- Okay. -- After you spoke with your minister -- did you
19 also have a lawyer for those Federal charges?

20 A. Yes.

21 Q. What was his name; do you recall?

22 A. Mr. Littlejohn, I believe it was.

23 Q. Would that be Cam Littlejohn?

24 A. Yes.

25 Q. Did you tell him about the conversation with Marcus

1 about the man that was killed on 321?

2 A. Yes.

3 Q. Okay. And as a result of talking to Mr. Littlejohn,
4 did you talk with members of law enforcement about it as well?

5 A. Yes. At first I talked to the pastor -- the minister
6 about it, and we had -- I didn't go to Mr. Littlejohn or law
7 enforcement for a while. I talked to the pastor and he had --
8 me and him conversated about it and he came back and talked to
9 me like -- two or three days later about it, because he
10 basically wanted me to make up my own mind about what I wanted
11 to do about it, but he told me if I wanted to get my life
12 straight with God, and be truthful in the word or the Bible,
13 then, you know, I had to come to the decision of what I wanted
14 to do myself.

15 Q. Now, Mr. Williams, do you have anything personal
16 against Quincy Timmons?

17 A. No, I don't. I think he's alright with me.

18 Q. Do you have anything personally against Marcus Timmons?

19 A. No, I don't.

20 Q. And you know that, when you talked to law enforcement
21 about this, that -- that affected both of those individuals?

22 A. Yes.

23 Q. And you didn't receive any benefit from it, from
24 telling about what they had told you?

25 A. No, I didn't.

1 MR. SWARAT: Your Honor, that's all I have of this
2 witness.

3 Mr. Williams, please answer any questions the Defendants
4 may have for you.

5 MR. AYER: May it please the Court.

6 CROSS-EXAMINATION BY MR. AYER:

7 Q. Mr. Williams, Solicitor asked you about being in the
8 Lexington County Jail. You were in the Lexington County Jail
9 for distribution of cocaine; isn't that correct?

10 A. I was in there for conspiring with my son to distribute
11 cocaine.

12 Q. Conspiring with your son. How old was your son at the
13 time?

14 A. My son was nineteen.

15 Q. He was nineteen. Is that -- that's what you just said?

16 A. Yes.

17 Q. Then you got out of the Lexington County Jail shortly
18 after you talked to the police, didn't you?

19 A. I got out after I was tried on the charge.

20 Q. But it was shortly after you talked to the police that
21 you got out of jail; isn't that correct?

22 A. It was shortly after.

23 Q. How long after?

24 A. It was some months after.

25 Q. But you couldn't have served more than six months,

1 because you got -- your sentence was six months, time served,
2 correct?

3 A. I stayed in jail about nine months, six to eight --
4 eight or nine months, I think.

5 Q. Okay. And you were put out on probation, right?

6 A. That's right.

7 Q. All right. And then you got back in jail because you
8 had possession of a firearm in your possession, didn't you?

9 A. They found a firearm in my home, yes.

10 Q. And under your probation and house arrest, you are not
11 suppose to have a firearm, are you?

12 A. No, I'm not.

13 Q. And you were sentenced to thirty-three months; isn't
14 that right?

15 A. Yes.

16 Q. Okay. Thirty-three months, and you say nine months?
17 You said you served nine months and you had to go back and
18 serve thirty-three?

19 A. Yes.

20 Q. So that's forty-two months?

21 A. Yes.

22 Q. And you say, Mr. Williams, now, that you were a father
23 figure to Quincy and Marcus; is that correct?

24 A. I didn't -- I said Quincy looked upon me as a father.
25 I didn't say nothing about Marcus.

1 Q. Okay. Well, let me ask you this, Mr. Williams, who was
2 the father figure to your six children ---

3 MR. SWARAT: Objection.

4 Q. ---While you spent three and a half years ---

5 MR. SWARAT: Objection.

6 Q. ---In jail?

7 MR. SWARAT: Objection.

8 THE COURT: What's your objection?

9 MR. SWARAT: How is it relevant?

10 MR. AYER: It's cross-examination, Your Honor.

11 THE COURT: Wait a minute. What is it relevant to, Mr.
12 Ayer?

13 MR. AYER: His character.

14 THE COURT: All right. I overrule the objection. You
15 may continue.

16 Q. Who was the father figure to your six children, Mr.
17 Williams, while you were in jail for going on four years?

18 A. I had a mother and a father, and I've got -- I don't
19 know who else was there, because I wasn't there. I was in
20 jail.

21 Q. You don't know, do you?

22 A. I couldn't answer that.

23 Q. And I think you indicated -- I think I counted six
24 times you said the word Bible study, while you were in jail;
25 is that right?

1 A. That's right.

2 Q. Are you pretty familiar with the Bible?

3 A. I was trying to familiarize myself with the Bible while
4 I was in jail.

5 Q. As best you can. Well, Mr. Williams ---

6 MR. SWARAT: Your Honor, I object. What's the
7 relevance of that?

8 MR. AYER: Character again, Your Honor.

9 THE COURT: I overrule the objection. Go ahead.

10 Q. Look through there, if you will, Mr. Williams, Genesis
11 I through Revelations and ---

12 MR. SWARAT: Your Honor, I object. You can't inject
13 religious matters into this court.

14 THE COURT: Okay. What is the relevance?

15 MR. AYER: It's character again, Your Honor.

16 MR. SWARAT: No sir.

17 THE COURT: We are not going to have a short course in
18 the Bible here. You can ask him specific questions, but we
19 are not going to ---

20 MR. AYER: I'll ask the question then, Mr. Williams.
21 Did you know -- if you don't know -- is there anywhere in that
22 Bible that says who is suppose to look after your children
23 while you are in jail?

24 MR. SWARAT: Your Honor, I object. How is this
25 relevant to his testimony?

1 THE COURT: All right. I overrule the objection.
2 This is going to be the last question along this line and we
3 are going to move on.

4 Q. Is it in there, Mr. Williams?

5 A. I couldn't tell you.

6 Q. The Solicitor asked you about anything you would
7 receive from this information -- and this was a Federal
8 charge; isn't that right?

9 A. My charge?

10 Q. Right.

11 A. Yes sir.

12 Q. Federal charge?

13 A. Uh huh (indicating positive)

14 Q. Have you ever heard of downwards departure in the
15 Federal system, Mr. Williams?

16 A. No, I haven't.

17 Q. You have never heard of downward departure in the
18 Federal system?

19 A. No, I haven't.

20 Q. Okay. So the information that you brought to the
21 police, would you deny that that caused you to get a better
22 sentence in -- for your Federal crime?

23 A. Yes. I would deny it, because I served my time.

24 Didn't nobody do anything for me. The State, or Lexington, or
25 the Feds.

1 Q. Nobody did anything for you?

2 A. No sir.

3 Q. And I think you said earlier that you were closer --
4 you were closer to Quincy; isn't that correct?

5 A. I said Quincy was a part of our Bible study group, and
6 our exercise group. I was around Quincy more. Quincy stayed
7 around me more. Marcus hung with a different crowd.

8 Q. And Quincy stayed around you more?

9 A. Uh huh (indicating positive)

10 Q. Did you talk to Quincy a fair amount?

11 A. I didn't understand.

12 Q. Did you talk to Quincy a fair amount?

13 A. Did I talk ---

14 Q. Did you talk to Quincy a fair amount?

15 A. Yes. We talked every day, every night.

16 Q. You talked to him every day, every night?

17 A. Uh huh (indicating positive)

18 Q. And Quincy told you what he was in there for?

19 A. Yes. Marcus also did too. I talked to him every
20 night.

21 Q. Okay. And you say there was an incident with the
22 telephone; is that correct, where Marcus got into an
23 altercation with a white man; is that what you said?

24 A. Yes, over the telephone.

25 Q. And Marcus told you afterwards, or you overheard Marcus

1 say that he might kill that white man because he had killed
2 one before; is that what you said?

3 A. No. That ain't what I said.

4 Q. Tell me what they said then.

5 A. I said that Marcus come out there and told him -- tell
6 him to come on, they were going to go on back over there where
7 the white guy was; they were going to whip up on the white
8 guy.

9 Q. Okay. And you said it was later on that he gave you
10 the details; is that right?

11 A. It was the same night, but after this -- we got all
12 this disturbance settled down.

13 Q. All right. How long after the disturbance did he give
14 you the details?

15 A. It didn't last long, because after I talked to them --
16 him and the guy, they did not go over there, because -- I
17 guess they -- well, I figured they figured I was right, I was
18 telling them the truth. I didn't jump in and tell them, well,
19 yes, come on and let's go over here and beat the guy up. I
20 told them that lynching carries like ten to fifteen years, and
21 that wasn't going to do nothing but add more charges to them.

22 Q. So you tried to calm them down?\

23 A. Yes.

24 Q. All right. And you say later on they told you about
25 the details?

- 1 A. Yes.
- 2 Q. And isn't it true there are a lot of folks up there in
- 3 the day room, kind of strutting around, trying to impress each
- 4 other, Mr. Williams?
- 5 A. Yes, that happens.
- 6 Q. Everybody says various things?
- 7 A. Yes.
- 8 Q. A little bit of, can you top this, going on?
- 9 A. Yes.
- 10 Q. And now, into the details, you -- I think you told the
- 11 Solicitor 321 highway; isn't that correct?
- 12 A. That's what I was told, yes.
- 13 Q. All right. Twenty gauge shotgun?
- 14 A. Yes.
- 15 Q. Thomas Wise?
- 16 A. Pardon.
- 17 Q. Were you told the man's name?
- 18 A. No. -- I didn't know his name.
- 19 Q. Are you sure you didn't know his name?
- 20 A. Yes, I'm sure.
- 21 Q. Okay. You were told he was shot in the back?
- 22 A. He told me he shot him in the back.
- 23 Q. Okay. So you had that information?
- 24 A. Yes. I mean, that's what he told me. I didn't believe
- 25 him, but that's what he told me.

1 Q. And isn't it true, Mr. Williams, you were told 321
2 Highway, twenty gauge shotgun, shot in the back, and Thomas
3 Wise, by Thomas Wise's brother?

4 A. No.

5 Q. That's not true.

6 A. Tom -- I had -- Marcus had told me about this before I
7 even met this guy named Wylie or Wayne, or something. He was
8 locked up in -- before they even brought him in the room with
9 me.

10 Q. They put him in the room with you, didn't they?

11 A. He was in the room with me.

12 Q. What was his name?

13 A. Wylie or Wayne. My name is Willie. I know his name
14 starts with a (W) too.

15 Q. And it was Thomas Wise's brother, wasn't it?

16 A. That's what the guy told me. That's what I found out
17 later on.

18 Q. Okay. So you wound up in the room in the jail with, in
19 this crime, the deceased, the victim's brother, didn't you?

20 A. No. I didn't wind up in the jail with him; he wind up
21 in the jail with me.

22 Q. Okay. He wound up in the jail with you?

23 A. That's correct.

24 Q. Okay. Did he ever tell you that he had a brother that
25 was killed on Highway 321?

1 A. No at first, no. He -- later on we got in a
2 discussion. We was talking about things had happened to us in
3 our lifetime, and he was telling me about he had got busted
4 and all, and then the conversation came up.

5 Q. So at some point he told you that he had a brother
6 named Thomas Wise, and he was killed on Highway 321, didn't
7 he?

8 A. He didn't tell me his name.

9 Q. He didn't tell you his brother's name?

10 A. No. He told me he had a brother that was killed on
11 321.

12 Q. Twenty gauge shotgun?

13 A. Yes. He told me he was shot with a shotgun.

14 Q. In the back?

15 A. Yes.

16 Q. How long did you and Thomas Wise's brother stay in the
17 same room? How long were y'all roommates at the Lexington
18 County Jail?

19 A. About a week, something like that.

20 Q. Could it have been more than a week?

21 A. If it was it wasn't much more than a week. The guy got
22 out on bond.

23 Q. Did you ever tell Thomas Wise's brother, I heard some
24 people talking and I might know who killed your brother?

25 A. No.

1 Q. Never told him that?

2 A. No. I wouldn't have, because like all of us in the
3 same -- on the same floor. I wouldn't have did that.

4 Q. So isn't it true, Mr. Williams, that what happened is
5 you hear -- you are in jail for a number of months, you see
6 yourself as a father figure you said, right?

7 A. I'm a father figure to my kids. I ---

8 Can I say something, Your Honor?

9 THE COURT: You -- just ans -- listen to the question
10 and answer the question.

11 Q. And you spent a number of days, months, at least
12 talking to Quincy Timmons, didn't you?

13 A. Not only Quincy. I talked to a lot of people in jail.

14 Q. You talked to a lot of people, and you said earlier
15 that there's a lot of strutting and a lot of, can you top
16 this, going on up there, isn't there?

17 A. People talk.

18 Q. Okay. And you happened to room in the same cell with
19 the deceased, in this trial's, brother; isn't that correct?

20 A. No.

21 Q. He roomed with you?

22 A. They brought -- I didn't even know who he was. He was
23 put in the room ---

24 Q. But he was -- he was Mr. Wise's brother, wasn't he?

25 A. I don't know.

1 Q. You said earlier that he was.

2 A. He said he had a brother that was killed on 321.

3 Q. With a twenty gauge shotgun ---

4 A. Yes.

5 Q. ---Shot in the back.

6 A. I didn't even know his last name.

7 Q. So isn't it true, Mr. Williams, is what you do is, you
8 take some statement that you've heard somebody up there say,
9 playing, can you top this, and then you take the facts that
10 you get from Thomas Wise's brother, and you merge the two
11 together, and you see yourself a way out of jail, and you go
12 to the police, and you do it through your minister; isn't that
13 correct?

14 A. No, that's not correct. It's up to the State of
15 Lexington, or the Fed, or whatever, to get the facts on and
16 convict him or whatever. That's not my job. I just told my
17 minister what I was going through, and about I had a cousin to
18 get killed. I'm not here to convict -- or try nobody, convict
19 nobody. That's up to them.

20 Q. And tell me again why you went to your minister.

21 A. Why did I go to him?

22 Q. Yes sir. Why did you go to your minister?

23 A. Because he's the only person I figured I could talk to
24 down there. He's all the one we had that would have
25 conversation with us. The guards, they didn't -- I couldn't

1 talk to them.

2 Q. And I think you said on direct, you went to your
3 minister's; you were trying to get your life back in order or
4 something.

5 A. I was under a lot of pressure, a lot of things.

6 Q. Okay.

7 A. I was searching myself, trying to get myself straight.

8 Q. And not too long after you got out of Lexington there
9 you went right back in for thirty-three months, didn't you?

10 A. Yes, for violating -- well, the firearm, but the
11 firearm was in my house before I got locked up. That's just
12 something they didn't find.

13 MR. AYER: Thank you, Mr. Williams.

14 REDIRECT-EXAMINATION BY MR. SWARAT:

15 Q. Mr. Williams, who was the first person that told you
16 about the man getting killed on 321?

17 A. Marcus.

18 Q. Marcus Timmons?

19 A. Yes.

20 Q. Who was the first person that told you about him being
21 shot with a shotgun?

22 A. Marcus.

23 Q. And who told you it was a twenty gauge shotgun?

24 A. Marcus.

25 Q. This individual that was in the cell with you later on

1 down the road, did he even know what gauge of shotgun it was?

2 A. He didn't say. He said his brother got shot in the
3 back with a shotgun.

4 Q. Now I asked you on direct whether you believed Marcus
5 when he first told you. Did you believe him at first?

6 A. No, I didn't.

7 Q. When did you finally believe him?

8 A. After I talked to this guy. I think his name was
9 Wayne. He was -- they put him in the cell with me, and the
10 first two or three nights we never spoke to each other. And
11 one night he was in there and he just broke down, you know,
12 and he -- I guess the stress of being locked up and
13 everything, and he, you know, began to talk, and was telling
14 me about he had been busted, and about his wife or girlfriend,
15 they had her in jail, and you know, we tried to console each
16 other. We was talking, and I was telling him about my
17 problems, you know, and he -- and I told him I had -- you
18 know, what I was down there for, and I had just lost a cousin
19 that had got killed, and hadn't nobody -- they hadn't found
20 out who did it, and he told me, he say, oh really, say I had
21 a brother to get killed, you know, and they ain't found out
22 who did that, and we talked and talked, and he told me -- gave
23 me the facts of where his brother got killed at and
24 everything. That's when I thought about what Marcus had said.
25 Q. You put two and two together then?

1 A. Yes.

2 Q. Who was the first person that told you the man was shot
3 in the back?

4 A. Marcus.

5 Q. Who told you about Quincy fighting with him?

6 A. Marcus.

7 Q. Did the man, Wayne, that you talked to, did he even
8 know about a man fighting with his brother?

9 A. He didn't mention nothing about that.

10 Q. He didn't know there were two men involved?

11 A. He just said -- he say he had a brother that get killed
12 on 321.

13 Q. Who was the first person that told you about the man
14 that was coming from a club?

15 A. Marcus.

16 Q. And who was the first person told you about that
17 marijuana?

18 A. Marcus did.

19 Q. Who told you about Quincy getting out of the car when
20 they drove up to him and asking him for a light?

21 A. Marcus.

22 Q. And who told you about the slur that the white man had
23 said to Quincy?

24 A. Well, when it got to slur they said -- both of them was
25 there, but Quincy told him, said, yes, say, when I asked him

1 for a light, said the man told him he wasn't going to give him
2 no damn light, and called him a nigger.

3 Q. And then Quincy started fighting with him?

4 A. Yes.

5 Q. And Marcus Timmons told you that information?

6 A. Yes.

7 Q. How much later on, from the time of the conversation
8 with Marcus, did you meet this other individual that you say
9 you think his name is Wayne?

10 A. It was about -- it was maybe a couple of months, a
11 month or so. I had -- probably a couple of months, might have
12 been.

13 Q. Couple of months?

14 A. Uh huh (indicating positive)

15 Q. And after this individual, Wayne, talked with you, and
16 you put two and two together, is that when you talked to your
17 minister?

18 A. No, not right away.

19 Q. You waited some time to even tell the minister?

20 A. Yes.

21 Q. After you told the minister, you told your lawyer?

22 A. He told me that -- after I talked to the minister we
23 talked, not much, maybe two or three times on this subject,
24 and about some of the things that I had been going through,
25 then it was, like I said, he basically let me make up my own

1 mind, but he told me that, if I was going to do ---

2 MR. AYER: Your Honor, I object to what the minister
3 said.

4 THE COURT: I sustain the objection.

5 Q. Just -- not saying what your minister told you, but
6 what did you do, Mr. Williams?

7 A. Basically I made up my mind that the right thing to do
8 was to -- you know, if -- let my lawyer know about what had --
9 what was told to me.

10 Q. And as a result of talking to Mr. Littlejohn, your
11 lawyer ---

12 A. Yes.

13 Q. ---You spoke to law enforcement?

14 A. Yes. Law enforcement, they came down, along with Mr.
15 Littlejohn.

16 Q. Do you remember an individual by the name of Detective
17 Hickman?

18 A. Yes.

19 Q. And you've seen him in and around the courtroom this
20 week?

21 A. I think I saw him once.

22 Q. Grey haired gentleman with glasses, wearing a uniform?

23 A. Yes.

24 Q. Do you recall speaking with him back then?

25 A. Yes.

1 Q. Mr. Williams, Mr. Ayer asked you a lot about your
2 Federal charges.

3 A. Yes sir.

4 Q. Did anything about the conversation with Marcus, and
5 telling law enforcement, did any of that have any effect on
6 your sentence in the Federal Court?

7 A. No, it didn't.

8 Q. Did the State of South Carolina, Solicitor's Office,
9 anyone give you any assistance or help as a result of what you
10 told law enforcement?

11 A. No, they haven't.

12 MR. SWARAT: That's all I have.

13 THE COURT: All right. Does anyone object to the
14 witness being excused?

15 MR. SWARAT: No, Your Honor.

16 MR. AYER: Nothing, Your Honor.

17 THE COURT: All right. The witness is excused.

18 MR. RIDDLE: State calls Vello Paavel, Your Honor.

19 MR. AYER: Your Honor, could we approach the bench for
20 just a moment?

21 THE COURT: Okay.

22 (BENCH CONFERENCE TAKES PLACE OFF THE RECORD.)

23 THE COURT: Mr. Foreman, ladies and gentlemen of the
24 jury, let me ask that you go out briefly, and while you are
25 out, do not discuss the case.

1 THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE
2 JURY.)

3 THE COURT: All right. Mr. Ayer.

4 MR. AYER: Your Honor, does the Defendant need to be in
5 here?

6 THE COURT: Yes. He should be. Where did he go? Why
7 did they take him out?

8 MR. AYER: I don't ---

9 THE COURT: Can they bring him back in? We are not
10 taking a break. We are just taking a time to ---

11 MR. AYER: Right.

12 (DEFENDANT ENTERS THE COURTROOM.)

13 THE COURT: Okay, Mr. Ayer.

14 MR. AYER: Yes sir. May it please the Court. Your
15 Honor, it is my understanding, in Mr. Willie Williams'
16 testimony, that he indicated that he was -- he roomed with the
17 deceased's brother, and that he had a conversation with the
18 deceased's brother, wherein the brother told him that they had
19 not yet -- words to this effect, caught the people that killed
20 my brother, and again, we are back to my motion to suppress
21 his testimony to begin with, because obviously the jury can
22 figure out, if they haven't caught the person then Marcus
23 Timmons was not in jail for the arrest on this crime, and I
24 would move to strike that testimony, or in the alternative,
25 for a mistrial.

1 THE COURT: Okay. I don't remember those exact words.
2 The only way we could do it, I guess, is to ask the Court
3 Reporter to go back, unless the State heard the same thing.

4 MR. SWARAT: Your Honor, it's my understanding that the
5 conversation with the deceased's brother was brought out by
6 the defense. I don't think they can bring something out and
7 then ask for a mistrial on it, first of all.

8 Second of all, I think it was that Mr. Williams' cousin
9 had been killed, and that nobody had ever been charged with
10 that crime, and then it folded into the conversation about Mr.
11 Wise being killed on 321, and I think it was a small part of
12 the testimony, but it was brought out by the defense.

13 And Your Honor, one other thing I wanted to put on the
14 record. When I objected as to bringing out religious matters,
15 I was objecting under State versus Coleman. I can't quote the
16 Bible; he can't quote the Bible.

17 THE COURT: Nobody quoted the Bible.

18 MR. SWARAT: Well, that was my objection, to him
19 opening the Bible, going into James I, or Genesis, whatever it
20 was he asked Mr. Williams about.

21 THE COURT: No. He asked him to look at the Bible from
22 Genesis through Revelation, and then you objected at that
23 time, and I told him we weren't going to get into a discussion
24 on the Bible, and that ---

25 MR. SWARAT: Well, that was the case law I was basing

1 my objection on, Your Honor. I just wanted to make that clear
2 on the record.

3 THE COURT: Okay.

4 MR. AYER: Your Honor, I think Mr. Williams said what
5 the Solicitor said about his cousin, and he said about that
6 his roommate, the deceased's brother -- and I think -- I may
7 be wrong, but we can play the record back -- I think he said
8 it on redirect, when the Solicitor asked him the question, not
9 when I asked him the question. He may have said it both, but
10 I think he said it on redirect.

11 MR. SWARAT: Your Honor, my point is, he can't open the
12 door to something, he can't bring up the subject and then ask
13 for a mistrial on it. I didn't talk about ---

14 THE COURT: I'm not going to grant a mistrial. Y'all
15 need not worry about that. I think if, in fact, it was said,
16 we can give another curative instruction to the jury on it. I
17 didn't remember hearing it that way. Do you -- y'all have any
18 earthly idea of what point in this examination it occurred?

19 MR. AYER: I think it was redirect, Your Honor, but I
20 mean, I wouldn't bet my life on it.

21 THE COURT: And you -- you are saying -- you are
22 objecting to this witness that just testified, Mr. Williams.
23 Once again he testified to what? What is the part you are
24 objecting to?

25 MR. AYER: He's testified that he was in jail, in the

1 room with the deceased's brother, and the deceased's brother
2 testified that they had not caught the people that killed his
3 brother, and this is at the same thing Mr. Williams is having
4 conversations with Marcus Timmons, so again, most -- most
5 people would conclude that, if they had not caught the person,
6 that Mr. Timmons would not have been arrested yet, so why was
7 he, Mr. Timmons, in jail.

8 THE COURT: Okay. Well, I gave that curative
9 instruction on time. I'll be glad to give it again, if you
10 want me to.

11 MR. AYER: That's all right. That's all right.

12 THE COURT: All right. All right. I deny the
13 motion. They've asked the Court not to give the curative
14 instruction again.

15 Are we ready with the next witness?

16 MR. RIDDLE: The State is ready, Your Honor.

17 THE COURT: All right. You can bring in the jury.

18 (THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE
19 JURY.)

20 THE COURT: You may call your next witness.

21 MR. RIDDLE: State calls Vello Paavel.

22 VELLO PAAVEL, first duly sworn,
23 testified as follows:

24 DIRECT-EXAMINATION BY MR. RIDDLE:

25 Q. Mr. Paavel, where are you employed?

1 A. I work for the South Carolina Law Enforcement Division,
2 which is commonly known as S.L.E.D.. In particular, I work in
3 the Forensic Services Laboratory, in the Firearms Department,
4 where I am a Firearm and tool mark examiner.

5 Q. Explain to the jury exactly what you do as a fire
6 mark -- excuse me -- firearm and tool mark examiner, sir.

7 A. Most of the time what I do is examine firearms, and
8 examine ammunition components, bullets, cartridge casings,
9 shotgun shells, and the like, and try to Detention Center
10 whether or not those components were fired by those particular
11 guns. I also will examine the firearms to Detention Center
12 whether they are working properly. I do serial number
13 restoration, and any other physical type of examination as
14 related to firearms or tool marks.

15 Now, in tool marks, that's a general category in which I
16 examine tools, such as screwdrivers, pry bars, hammers and the
17 like, that might have been used in burglaries and other
18 crimes, and to see whether or not the marks that are left on
19 doors, or windows or safes were made by those tools.

20 Q. And how long have you been doing this at S.L.E.D.?

21 A. I have been at S.L.E.D. a little over thirteen years,
22 and I've been in the firearms department all that time.

23 Q. Agent Paavel, do you have any training and education in
24 this particular area to qualify you to do this?

25 A. Yes sir. As a requirement to work in the Forensic

1 Services Laboratory, I have a four-year degree. I have a
2 Bachelors of Science -- a Bachelor of Science. I majored in
3 Chemistry. I have also attended the South Carolina Criminal
4 Justice Academy and completed that course. I have had courses
5 in crime scene investigation, latent fingerprint
6 identification, and firearms identification. I have also had
7 the opportunity to take courses or tours at the various
8 manufacturing facilities where firearms are made, so I can
9 learn how they are made, and to learn any of the problems that
10 are associated with the firearms. I have also attended
11 seminars and training programs that are offered by the
12 Association of Firearms and Tool Mark Examiners.

13 But the bulk of my training, in the area of firearms
14 identification, meaning being able to look at bullets and
15 cartridge casings, and determine whether they were fired by a
16 particular gun. Came from a training program that was
17 administered by S.L.E.D.. What I had to do was work under the
18 supervision of court-qualified firearms examiners. I did
19 extensive reading. I was tested on the reading. I helped
20 those examiners work cases and prepare cases. I was given
21 proficiency tests, and after I successfully completed that
22 training program, I was allowed to work cases on my own, and
23 to testify in court as an expert in the area of firearms
24 identification.

25 Q. And you have been doing this for thirteen years?

1 A. Yes sir.

2 Q. Can you tell the jury approximately how many times you
3 have been qualified as an expert in this area?

4 A. In the area of firearms identification, a little over
5 two hundred and twenty-five times.

6 Q. And that has been in probably every county in this
7 State; is that right?

8 A. Virtually every county, and in Federal Court.

9 MR. RIDDLE: Your Honor, at this time I would move that
10 he be qualified as an expert.

11 MR. AYER: No objection, Your Honor.

12 THE COURT: All right. Hearing no objection, this
13 witness is qualified as an expert in firearms identification.

14 Q. Agent Paavel, step down from the stand, if you would.

15 A. Yes sir.

16 Q. First of all, Agent Paavel, you received some evidence
17 in connection with the case involving Marcus Timmons; is that
18 correct?

19 A. Yes sir.

20 Q. All right. And you received some of the evidence from
21 Lexington County Sheriff's Department, and some from the Cayce
22 Department of Public Safety; is that correct?

23 A. That's correct.

24 Q. All right. Now, previously -- before the jury came
25 out here, did I get you to review these two firearms, and

1 these items laying on the jury rails, to determine whether or
2 not you recognized them?

3 A. Yes sir.

4 Q. And are these all items which you analyzed in
5 connection with your review of these at S.L.E.D.?

6 A. Yes sir. These items have been examined by me before.

7 Q. And the initials that appear on some of these things,
8 "V.P.", that's Vello Paavel?

9 A. Correct.

10 Q. All right. Let me start, if we could, with State's
11 Exhibit Number 3. Tell the jury what you do when you receive
12 a weapon such as that.

13 A. What I would do is examine the firearm, and document
14 it's condition. What I will do is get it make, it's model,
15 serial number if it has it, also if there are any defects with
16 the firearm. In this particular instance, this is a .410
17 bore, double barrel shotgun. If you notice, it appears to be
18 damaged. The butt, or rear of this firearm has been cut off.
19 Normally there would be a wood stock that extends out of here
20 approximately another foot. Also in this firearm, the barrel
21 has been cut off. Normally these barrels would be about two
22 and a half times this length.

23 Once I do this, and document it's condition, I will test
24 fire the firearm, if I have components that need to be
25 compared to the firearm, and I determine whether or not it is

1 working properly.

2 Q. All right. And did you have any components that would
3 match .410 gauge shotguns in this case?

4 A. In any of the items that I had for comparisons, none
5 were consistent with being .410 bore.

6 Q. All right. Now, is this shotgun in proper working
7 order?

8 A. Yes and no. It's in proper working order in the sense
9 that I can put shells into it, close it, and I can fire it.
10 It is not in proper working order in the sense that someone
11 has sawed this butt stock off, the stock is cracked and split,
12 and you notice there is a rubber band and tape keeping it on
13 here, and the barrels have been cut off, so from that point of
14 view, it is not in proper working order.

15 However, again, if I took .410 bore shells and put them
16 in here, closed this, and deactivate the safety, it would
17 fire.

18 Q. All right. That gun right there, is that a legal
19 firearm?

20 A. No sir. By Federal law and State law, it is illegal to
21 have if the barrel has been sawed off below the minimum
22 length, and the overall length of the firearm is too short,
23 based on Federal and State law.

24 Q. Agent Paavel, as that gun would have been originally
25 manufactured, would it have been similar in size and design to

1 this, with the exception that it's a double barrel and
2 different gauge, and that type of thing?

3 A. Yes sir. It would have been approximately this size,
4 as the long gun that Mr. Riddle has in his hand. It has two
5 barrels that are side by side. The firearm that Mr. Riddle
6 has has two barrels on top of each other. This gun that Mr.
7 Riddle has has an exposed hammer. You can see this here. And
8 this particular firearm does not have an exposed hammer. It
9 has internal, or hidden hammers.

10 Q. All right. Now let's go to this gun that I've got
11 here, Agent Paavel -- and that would be State's Exhibit Number
12 2. What did you do with this weapon when you received it?

13 A. Same thing. I would document the condition of the
14 firearm as I received it. I would get it's make, model,
15 serial number, if it has it, what caliber it is, the
16 dimensions of the firearm, and then I would test fire if I had
17 components to compare to it. I would also note if there was
18 any problem with it, as a matter of functioning or missing
19 parts.

20 Q. All right. And when you examined this gun, what were
21 your findings as to the weapon itself?

22 A. Other than the fact it has a few minor parts missing,
23 such as the butt plate, and a screw which holds this butt
24 plate on here, and a small piece of the rear sight is missing,
25 this firearm is capable of firing as it was submitted to me.

1 If I took the proper size of shells and placed it into it,
2 closed it, if I were to cock it, and pull the trigger, it
3 would fire.

4 Q. All right. And did I ask you to bring an unfired
5 twenty gauge shotgun shell with you here today?

6 A. Yes sir, you did.

7 Q. All right. If you put that twenty gauge shotgun shell
8 in there, what would you have to do in order to fire that
9 weapon?

10 A. I'm obviously not going to put a live shell into this
11 gun, but you would -- I'm going to show you the shell, what it
12 looks like. You would insert it into the barrel, and it would
13 sit in the barrel. Now, I'm going to take it out of here,
14 since we are going to be doing a demonstration, and put it
15 back in my pocket, so there is no chance of a problem here.

16 You would place the shell into the barrel, close the
17 firearm, and then you would have to cock the hammer in order
18 to make the gun shoot.

19 Now this particular gun has two barrels. One is a rifle
20 barrel, a .22 caliber rifle barrel, the other is a shotgun
21 barrel. On the hammer is a small device which is a selector.
22 That allows you to choose whichever barrel you want to fire.
23 All right. If you so desire, you can pick which barrel you
24 are going to shoot, or you can leave the selector wherever it
25 was, and it will fire that particular barrel that you have

1 selected, or that was previously selected. So in order to
2 fire it, I simply pull the trigger, and the hammer will fly
3 forward, and strike the firing pen, and the firing pen strikes
4 the back of the shell, which ignites the primer, which causes
5 the gunpowder to burn, which causes the projectile to come out
6 of the end of the barrel.

7 Then, if I wanted to shoot again, I would open it. If
8 I'm going to shoot the same type of shell -- let's say I was
9 going to shoot that twenty gauge shell again, I would take the
10 shell which is fired out of the gun. I would have to put
11 another one into the gun, close it, cock the hammer, pull the
12 trigger again in order -- and you would have to do that for
13 each shot that you fire, in the same type of shell, meaning,
14 if I'm shooting a shotgun barrel, I would just keep on doing
15 this. You could conceivably, after shooting the shotgun
16 barrel, you could move the selector, and then you could fire
17 the .22 barrel, if it had a shell in it, if you wanted to do
18 that, or the other way around, or any combination of that.

19 Q. All right. Agent Paavel, you didn't have anything, in
20 connection with this case, that would really implicate that
21 .22 barrel, did you?

22 A. No sir. None of the components that I examined were
23 consistent with .22 caliber ammunition.

24 Q. Everything about this case that you've examined is
25 consistent with the twenty gauge barrel?

1 A. Yes sir. The components that I examined are either
2 twenty gauge ammunition components, or projectiles that would
3 be loaded in at some point to gauge shells.

4 Q. All right. So if you are going to shoot this gun, you
5 load a shell, and then you have to manually cock it?

6 A. Yes sir. You would have to manually cock it.

7 Q. Can you just pull the trigger and it shoots?

8 A. If it was not cocked before, no, it would not shoot.
9 You have to have the hammer cocked, at some point. Now, the
10 hammer could have conceivably -- for instance, I can take the
11 gun, load it, cock it, and hand it to Mr. Riddle. Now all he
12 would have to do is pull the trigger to fire the gun. But
13 normally what you would do, since this is not a safe thing to
14 have the gun sitting like this, cocked, normally what a person
15 would do would have the shell in the gun, have the hammer in
16 the safety position, and then when you are getting to fire the
17 gun, you would have to cock the hammer and then shoot it.

18 Q. All right. So after loading a shell, you have to take
19 two distinct steps, at least, for this gun to fire?

20 A. After you load it you have to cock the hammer at some
21 time, and then you have to pull the trigger.

22 Q. Now, let's talk about these components for a minute, if
23 you can. You brought a live twenty gauge shotgun shell?

24 A. Yes sir.

25 Q. All right. If we start at the bottom, or the back of

1 this shotgun shell, tell the jury sort of sequentially up the
2 shell, what you would find in a shotgun shell such as that.

3 A. In the shotgun shell, in the bottom or in the head --
4 this is called the head of the shotgun shell -- there is a
5 small metal cap, and I'm going to kind of show it to you.
6 Looks like a little circular, cylindrical area, that's the
7 primer. That's a small metal cap that contains an explosive
8 compound. We will see it in the middle of the shell. The
9 purpose of that primer is to cause the gunpowder to burn after
10 the primer has been struck by the firing pen.

11 So as we go up the shell, the next thing beyond the
12 primer, inside is actual gunpowder, and that is a powder
13 that's designed to burn very fast. It burns very fast, almost
14 like it explodes. It's not like setting a piece of paper on
15 fire, or anything like that. It goes off very rapidly.

16 The next component that's inside the shell is what's
17 known as a wad. Now the wad is designed to separate the
18 powder from the projectiles, and the projectiles are those
19 objects that come out the end of the barrel and travel toward
20 the target. Wads can be of many shapes, colors, forms and
21 designs, depending on the manufacturer, but normally there is
22 a wad that sits next to the powder, then there's a wad that is
23 a spacer, or a filler wad, that kind of cushions the pellets
24 as the shell is fired.

25 Beyond the wads, again, you've got the pellets

1 themselves, or the projectiles, and then at the end, you have
2 the shell casing itself, or the shotgun shell which covers, or
3 hold everything. That's the container for it. At the end of
4 that container is the crimp, and that's the pie-shaped area in
5 the -- where it's folder over and sealed, and that keeps all
6 the stuff from falling out of the shell as you handle it. And
7 as the shell is fired, again, the primer ignites, ignites the
8 powder, it generates a tremendous amount of pressure. It
9 tries to push all out of the shell, but it's being held inside
10 the gun barrel, inside the chamber, so what happens is, the
11 path of least resistant is out the mouth of the shell, and it
12 opens that crimp, and pushes everything down the barrel, and
13 outside, and travels toward the target.

14 Q. All right. Agent Paavel, you received, along with
15 that twenty gauge shotgun, two unfired shotgun shells; is that
16 correct?

17 A. That's correct, sir.

18 Q. All right. And let me show you State's Number 20, and
19 State's Number 19. Are those the shells that you received?

20 A. Yes sir, they are.

21 Q. All right. Now, referring to State's Number 20, is
22 that a Concord brand shell?

23 A. Yes sir. This is a Concord brand shell, but Concord
24 doesn't actually manufacture the shell. Basically it's a name
25 that's placed on a shell that imported by another company.

1 Most of the shells are European manufactured, but they are
2 called Concord, and this particular one is a twenty gauge
3 shell.

4 And when I received it, it was intact. It was intact
5 like the shell that Mr. Riddle is holding in his hand;
6 however, I cut this shell apart, had it cut apart during my
7 examination, to examine the components that were inside the
8 shell.

9 Q. All right. Now that shell was loaded with what type
10 of ammunition?

11 A. This shell has what is known as birdshot pellets, and
12 to give you an idea of the different types of pellets that you
13 normally see in shotguns, there are three common kinds,
14 birdshot, buckshot, and what is known as a slug. The slug is
15 a single, large projectile, which is normally used to hunt
16 deer, bear, or any sort of game like that. Buckshot is a
17 larger type of pellet, usually a pellet that's at least a
18 quarter of an inch in diameter, or somewhere close to a
19 quarter of an inch in diameter. Birdshot is very small.
20 Birdshot can be as small as the head of a pin, and get's
21 progressively larger, till it gets to the point where it
22 approaches buckshot size.

23 Now, the Concord shell has birdshot pellets in it, so it
24 has several hundred very small pellets in it.

25 Q. And you could actually see the size of those pellets in

1 this bag here?

2 A. Yes sir. If you passed this around you could see the
3 dark grey area here that's sort of a grey mass, that's
4 actually a collection of the birdshot pellets. You'll have to
5 look at it close to see the -- these are the very, very small
6 pellets.

7 Q. Now, State's Exhibit Number 19, what did -- what kind
8 of shell is that?

9 A. This is a twenty gauge shell also, and again, this one
10 was intact also when I received it, but I took it apart -- had
11 it taken apart during examination, to examine the components.

12 This is a Winchester brand shell, Winchester being a
13 fairly common ammunition maker. This particular shell holds
14 buckshot, and again, buckshot is a larger size of pellet that
15 is used for hunting deer, as the name implies, buckshot. It
16 is also used in self-defense purposes, law enforcement
17 purposes.

18 You can see, in this container, the yellow part that's
19 the shell, has been disassembled, and what's in the bottom are
20 the buckshot pellets, and a white granular material that's
21 used to cushion the pellets.

22 In this particular instance Winchester uses this white
23 plastic material to help protect the pellets inside the
24 shotgun shell, so they don't get badly deformed inside the gun
25 barrel when they are fired. But you can see the difference of

1 the size of the pellets. There are twenty fairly large
2 pellets inside this particular shell, and then you have an
3 amount of that white granular material.

4 Q. Now that particular shell that you received in this
5 case, from Cayce Department of Public Safety, that is a
6 Winchester shell?

7 A. That's correct.

8 Q. And it is a buckshot shell?

9 A. Correct.

10 Q. Does buckshot come in different sizes?

11 A. Yes sir. Buckshot does come in various sizes, and it's
12 kind of confusing how they are sized. Number four buckshot is
13 the smaller common buckshot that you will find in commercial
14 shells. The next size larger, number three, then number two,
15 then number one, then it goes to 0, double-0, and triple-0,
16 with triple-0 being the largest. So again, number four is the
17 smallest, commercially available, and number three is the next
18 size up. This particular shell, State's Exhibit Number 19,
19 the twenty gauge Winchester shell, has twenty pellets of
20 number three buckshot in it.

21 Q. All right. Now, you also received from Cayce
22 Department of Public Safety, State's Exhibit Number 10, did
23 you not?

24 A. A piece of wadding, yes, was submitted to me.

25 Q. And that is found at the E-Z Coin?

1 A. It indicates on the container, E-Z Coin Laundromat.

2 Q. Okay. Now, did you examine that piece of wadding?

3 A. Yes sir, I did.

4 Q. And what did you find when you examined -- what is
5 that, exactly?

6 A. This is a piece of a shotgun shell wad. It is a piece
7 of a wad that is the so-called filler wad. If you remember I
8 told you there was some over-powder wad, and there's filler
9 type wad, or a cushion. This is a piece of one of the cushion
10 type wads.

11 By measuring the diameter of this wad, I can determine
12 that it originated from a twenty gauge shell.

13 Q. Based on how big around it is?

14 A. Yes. Based on it's diameter, it's size. I can tell
15 that it originated from a twenty gauge wad, which should have
16 originated from the twenty gauge shell.

17 Q. Is there enough of that wad there for you to make any
18 further determination on that particular piece of evidence?

19 A. No sir. I can't tell you anything as to what make it
20 is, positively, because I don't have the whole wad, or most of
21 the wad. Most of these filler and fiber-type wads are layers
22 of paper or fiber that are pressed together, and when they get
23 fired they tend to delaminate, or come apart, and so what I
24 had was a very small section of a wad, and I cannot tell what
25 make it is, positively, but I can tell that it's from a twenty

1 gauge shell.

2 Q. All right. Now, did you also receive State's Exhibit
3 Numbers 21 and 22?

4 A. Yes sir, I did.

5 Q. And those came from the Sheriff's Department, did they
6 not?

7 A. Yes sir.

8 Q. And do they have an individual's name on there?

9 A. It has Wise dash "T". It has Wise dash "T" on these,
10 and a date and some other items and numbers on it.

11 Q. Now, when you examined those, Agent Paavel, what were
12 you able to tell about those particular wads?

13 A. These wads, again, I examined them, and I concluded
14 that they are twenty gauge wads, again, by their size, their
15 diameter. The way I'm holding it, I would measure it across
16 the distance that I'm -- where my fingers are. In this
17 particular wad, the second wad -- this is an over-powder wad.
18 I measured apart, again, as my fingers are holding, because
19 that is the actual diameter of the wad as it sits in it's
20 shell, and again, based on the measurement, I concluded that
21 these are twenty gauge wads.

22 Q. Now these -- one shotgun shell would have two wads like
23 that in it; is that right?

24 A. One shotgun shell, depending on the type, would have an
25 over-powder wad, and usually will have at least one filler

1 was. Some shotgun shells, depending on the type, may have
2 just one large one-piece plastic wad; however, if you have
3 separate wads, like an over-powder wad, and a filler wad --
4 normally you have at least two of these, the one that sits
5 over the powder, and seals the powder, and the other one which
6 cushions the pellets.

7 Q. Agent Paavel, based on your experience, and your
8 examination, is that a common wad used in shotgun shells?

9 A. Yes sir. This is a common type of wad used in shotgun
10 shells. It also is a shotgun -- a was, or wad components that
11 are used in Winchester brand shotgun shells. This type of wad
12 is consistent with the type of wad that's manufactured by
13 Winchester, in fact they have a trademark on this type of wad,
14 which uses this over-powder type of wad, and then uses a
15 series of cushion-type wads.

16 Q. The wadding that was found on the homicide scene of Mr.
17 Wise, is that consistent with the wadding that was contained
18 in the gun fired, State's Exhibit Number 19, recovered from
19 the Pantry?

20 A. Yes sir. It is consistent with the Winchester buckshot
21 shell, which is State's Exhibit Number 19.

22 Q. All right. Now, did you also, Agent Paavel, receive
23 State's Exhibit Number 23?

24 A. Yes sir. I examined these also. These are listed as
25 shot removed from victim, and it has the name Wise dash "T" on

1 it. When I examined these I found these to be buckshot
2 pellets, and they are fired buckshot pellets, because they are
3 damaged. By measuring and weighing these pellets, I found
4 these pellets to be most consistent with being number three
5 buckshot pellets.

6 Q. These pellets are deformed and flattened ---

7 A. Yes sir, they are.

8 Q. What causes that?

9 A. Some of this deformation, or flattening to the pellets
10 is caused by the buckshot going through the barrel. Much of
11 it, however, is caused by the buckshot striking some sort of
12 target.

13 Q. All right. If these pellets were recovered from
14 inside the body of Mr. Wise, would striking Mr. Wise cause
15 that kind of deformation to these?

16 A. Yes sir, it could.

17 Q. All right. Agent Paavel, in examining these pellets,
18 State's Exhibit Number 23, they are consistent with number
19 three buckshot?

20 A. Yes sir, they are.

21 Q. And comparing that to State's Exhibit Number 19, the
22 shell that was found at the Pantry, are they consistent with
23 the pellet size, and the marking on that shell?

24 A. Yes sir. The pellets, in State's Exhibit Number 23,
25 are consistent with the pellets that were found inside State's

1 Exhibit Number 19. They are the same size, and the same
2 height pellet.

3 Q. So these twenty gauge wads are consistent with State's
4 19?

5 A. Yes sir, they are consistent with the components, or
6 the wad that will be found in a shell such as State's 19.

7 Q. And as a matter of fact, these are consistent with wads
8 that would be found in a Winchester twenty gauge shell; is
9 that correct?

10 A. Yes sir.

11 Q. These pellets here are consistent with the pellets that
12 would be found in a Winchester number three buckshot shell?

13 A. Yes sir. These pellets are consistent with number
14 three buckshot pellets.

15 Q. The wadding found at the E-Z Coin Laundry is consistent
16 with a twenty gauge shotgun?

17 A. Yes sir. It's consistent with a twenty gauge shotgun
18 shell wad, yes sir.

19 MR. RIDDLE: Hold on one second for me if you would,
20 Agent Paavel.

21 Q. Agent Paavel, as a general rule, when you are dealing
22 with shotguns, can you say that a particular gun fired a
23 particular shell?

24 A. Normally I can tell whether a particular gun fired a
25 particular shell, if I have that fired shell casing for

1 comparison.

2 Q. And you are talking about the yellow plastic part, and
3 the head of it?

4 A. I'm talking about the part that's left over, the
5 container, the shell casing that's left over after it's fired.
6 I can normally identify that as being fired by a particular
7 gun, by the markings that are left on that shell casing as a
8 result of being fired from that gun.

9 Q. Let me try to ask that a little more artfully. Can you
10 usually tell from these type of components, State's 23, 22 and
11 21, whether they have been fired by a particular shotgun?

12 A. Normally no. The projectiles, and the wad components I
13 normally cannot match, or identify with a particular gun, the
14 reason being, in the case of paper wads, or fiber-type wads,
15 they will not take markings that are inside the barrel, if
16 there are any markings inside the barrel, mainly because the
17 inside of a shotgun barrel is smooth. It's designed to be
18 smooth and shiny. A shotgun barrel normally does not have
19 rifling like the rifle barrel does, so it's very difficult to
20 identify projectiles for was components as being fired from a
21 particular shotgun.

22 Again, these pellets, while they are deformed, there are
23 no markings on the pellets that can be used to identify the
24 inside of a gun barrel, and again, because the gun barrel is
25 smooth.

1 Q. All right. So you are not telling this jury that this
2 gun fired those items?

3 A. No sir. I cannot tell you that. It could have fired
4 these items, but could never positively tell you that.

5 Q. These items, these fired components that you examined,
6 State's 10, State's 21, 22 and 23, is there anything about any
7 of those items that is inconsistent with them being fired by
8 State's Number 2?

9 A. No sir.

10 MR. RIDDLE: Thank you, Agent Paavel. Please answer
11 any of the defense's questions.

12 MR. AYER: Defense does not have any questions for
13 Agent Paavel.

14 THE COURT: All right. Anyone object to the witness
15 being excused?

16 MR. RIDDLE: No sir.

17 THE COURT: All right. The witness is excused.

18 A. Thank you, Your Honor.

19 MR. SWARAT: State calls Dr. Kitt McMaster.

20 KITT McMASTER, M.D., first duly
21 sworn, testified as follows:

22 DIRECT-EXAMINATION BY MR. SWARAT:

23 A. I'm Dr. Kitt McMaster, Pathologist at Lexington Medical
24 Center, West Columbia.

25 Q. Dr. McMaster, could you please relay to the jury your

1 education and training since high school?

2 A. I went to college in Spartanburg, Wofford College,
3 graduated in 1970, then went to medical school in Charleston,
4 South Carolina, graduated in '75. Then I did several
5 different residency programs, and did my anatomic pathology
6 training in Charleston, and my laboratory medicine training at
7 University of North Carolina at Chapel Hill, then I did a one
8 year of cancer fellowship in New York City. And I finished
9 all of that in about 1982, went to Jacksonville, Florida where
10 I practiced private pathology. Moved to this area in 1988,
11 and have been practicing at Lexington Medical Center ever
12 since.

13 Q. So you've been practicing at Lexington Medical Center
14 for about twelve years now?

15 A. That's correct.

16 MR. SWARAT: Your Honor, at this time I move to have
17 him qualified as an expert in Pathology.

18 MR. AYER: No objection, Your Honor.

19 THE COURT: All right. Hearing no objection, the
20 witness is qualified as an expert in Pathology.

21 Q. In your line of work, Dr. McMaster, do you perform
22 autopsies?

23 A. Yes.

24 Q. Did you have the occasion to perform an autopsy on an
25 individual by the name of Thomas Wise?

1 A. Yes, I did.

2 Q. Was that on February the 27th of '93?

3 A. Yes.

4 Q. Now, how was it that Mr. Wise came to Lexington Medical
5 Center?

6 A. We were notified by law enforcement that there had been
7 a death near -- out on the side of a road near Gaston, South
8 Carolina, and we perform all of the forensic autopsies for the
9 County, and so we were just notified of the incident, and were
10 asked to perform the autopsy.

11 Q. What can you tell the jury about the nature of his
12 injuries?

13 A. Well, I discovered a shotgun entrance wound that
14 entered, and was located right over his left hip, over his
15 flank area, and it consisted of about sixteen different holes
16 where the individual pellets went in, so I think there was a
17 single gunshot wound -- or -- well, a shotgun wound, that then
18 the pellets went through -- actually went through the hip
19 bone, and that caused a lot of scatter, and they scattered all
20 throughout the abdominal, or the stomach region, and four of
21 them exited, or almost exited. I found them just beneath the
22 skin, on the right side of his lower stomach area, and one in
23 his groin area. And then the rest of the pellets I found
24 inside when I performed the autopsy.

25 MR. AYER: Your Honor, I have a matter I would like to

1 take up with the Court, please.

2 THE COURT: Mr. Foreman, ladies and gentlemen of the
3 jury, let me ask that you go to jury room at this time. Do
4 not discuss the case.

5 THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE
6 JURY.)

7 THE COURT: All right. Mr. Ayer.

8 MR. AYER: Your Honor, I'm not exactly sure where this
9 testimony is going, but Your Honor, there is no question in
10 this case that Mr. Wise was killed. It seems to me that Dr.
11 McMaster's testimony is just cumulative to what has been
12 testified before.

13 THE COURT: No sir, he -- the State has the burden of
14 proving that there was a homicide in the case. You can't have
15 murder without a homicide.

16 MR. AYER: Well, I thought that had already been
17 proven. I'm sorry.

18 THE COURT: I'm not going to tell them how to try their
19 case, but I mean, they have that -- that's a -- one of the big
20 hurdles in a murder trial, is you've got to prove that it
21 wasn't a homicide, that some extraneous force caused the
22 death.

23 MR. AYER: All right. I -- I would -- I apologize for
24 taking the Court's time.

25 THE COURT: I mean, if it was natural causes your

1 client wouldn't be charged with the offense, I don't think.

2 All right. Bring in the jury.

3 I suppose y'all could enter some kind of stipulation
4 that -- to the cause of death and stuff, you know, but they
5 don't have to agree to that. I mean ---

6 MR. RIDDLE: We want to prove our case, Your Honor.

7 (THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE
8 JURY.)

9 THE COURT: You may continue.

10 MR. SWARAT: Thank you, Your Honor.

11 May it please the Court.

12 Q. Dr. McMaster, I believe we were talking about entrance
13 wounds and shotgun blasts. And you say it went through the
14 pelvic bone, went through the hip bone?

15 A. The hip bone.

16 Q. And as it traveled -- as the shotgun blast traveled
17 through the hip bone, what would happen to the pellets as they
18 hit that structure, hit that bone?

19 A. Well, since the bone is so fine, and it -- the pellets
20 meet a lot of resistance, and they tend to scatter in a lot of
21 different directions.

22 Q. Did all of the pellets that entered Mr. Wise's body
23 remain in his body?

24 A. They -- I believe that they did, and I retrieved four
25 of them just beneath the skin, so they almost exited his body.

1 Q. Okay. And where were those found on his body, Dr.
2 McMaster?

3 A. They were in his lower -- lower right side abdominal
4 area, or the stomach area.

5 Q. Where was the entrance wound, or the shotgun blast?
6 Where was that located on his body?

7 A. It was over the left flank, just at the top of the left
8 hip bone. That ---

9 Q. Would that be toward the back of his body, or more
10 toward to front?

11 A. Yes. Just a little bit to the back.

12 Q. Kind of back and to the side ---

13 A. That's right.

14 Q. ---On his left flank?

15 A. Exactly. Back and to the side.

16 Q. And some of the pellets were recovered toward his
17 abdominal area?

18 A. ---Right.

19 Q. Now, Dr. McMaster, can you explain to the jury what
20 stippling is, and gunshot residue?

21 A. Yes. Stippling refers to -- when a projectile is
22 fired, a lot of the -- there's a lot of the gunpowder comes
23 out the end of the muzzle of the gun, and a lot of it is still
24 burning at the time. It burns very rapidly. But if the
25 weapon is very close to the skin, some of that will light on

1 the skin, and since it's burning it will form a little
2 stippling pattern, where actually the skin is burned in kind
3 of a salt and pepper like look, and that -- the significance
4 of that is usually that that's a fairly close range injury,
5 since the -- if it was a long range all of the powder would
6 burn up before it got to the skin.

7 Q. And so if you find that burning you can determine -- or
8 it aids you in determining the distance of the shot?

9 A. That's correct. And you would know then that it was a
10 fairly short range, or even near contact, rather than an
11 intermediate range or a long range.

12 Q. And it would depend a little bit on the type of weapon
13 used, as to the distance of the shot, based on that stippling
14 or gunshot residue?

15 A. Yes sir.

16 Q. And do you take pictures at an autopsy to preserve that
17 type of information so you can refer to it later?

18 A. Yes, we do.

19 Q. Doctor, I'm referring to State's Exhibit Number 34 for
20 identification, and 35. Without showing these to the jury at
21 this time, are these photographs of the shotgun entrance wound
22 to Mr. Wise's body?

23 A. Yes, they are.

24 Q. Would these aid you in your testimony about gunshot
25 residue and stippling?

1 A. Yes, I think they would -- and scatter.

2 Q. The scatter as well?

3 A. Scatter.

4 Q. Would that also aid you in showing the orientation of
5 the shotgun blast on his body?

6 A. Yes.

7 MR. SWARAT: Your Honor, I move these into evidence at
8 this time.

9 MR. AYER: Your Honor, we would object. I don't think
10 the State needs these photographs to prove Mr. Wise died as a
11 result of this gunshot wound. I think they are offered to
12 inflame the jury.

13 THE COURT: All right. Over the Defendant's
14 objection, those photos would be admitted. That's -- I can't
15 see the numbers.

16 MR. SWARAT: State's 34 for identification, and 35,
17 Your Honor.

18 THE COURT: State's 34 and 35.

19 (AUTOPSY PHOTOGRAPHS ADMITTED INTO EVIDENCE AS STATE'S
20 EXHIBIT NUMBER 34 AND 35.)

21 Q. Dr. McMaster, referring to State's 34 now in evidence,
22 can you indicate on here where the entrance wounds are of the
23 shotgun blast?

24 A. Yes. All of these are individual pellet entrance
25 wounds, representing one single shotgun blast.

1 Q. And the area -- and those would be above my fingers
2 now?

3 A. That's correct.

4 Q. To this side, what area of his body would this be?

5 A. That's the buttock region.

6 Q. And that would be going up his back?

7 A. That's correct.

8 Q. Dr. McMaster, did you find any gunshot residue, or
9 stippling associated with these particular entrance wounds?

10 A. No sir.

11 Q. And based on what you did find, were you able to
12 determine the approximate distance of the shot?

13 A. Given the absence of stippling, and probably more
14 importantly, the fact that there were separate pellet entry
15 wounds, we can say that that happened at least five or six
16 feet away, probably a little bit further away than that. If
17 it were closer than that you might -- you would just -- even
18 though there are multiple different pellets, you would just
19 get a single hole, and so given the fact that there is
20 scattering, we can say that it is at least around two yards
21 away.

22 Q. And referring to State's Exhibit Number 35, you are
23 talking about scatter here?

24 A. That's correct.

25 Q. And if it were one hole there would be a closer blast?

1 A. That's correct.

2 Q. So based on your observations, with your knowledge and
3 expertise, you determined this to be around two yards?

4 A. Correct.

5 Q. Doctor, what steps do you take in recovering any
6 foreign material out of the body of Mr. Wise? What steps did
7 you take?

8 A. Pardon me.

9 Q. What steps did you take to recover any of the foreign
10 matter out of Mr. Wise's body?

11 A. In performing the complete autopsy we retrieved all of
12 the individual pellets that we found inside the body.

13 Q. Prior to doing that, what would you do to determine
14 where they are located inside his body?

15 A. We took -- we always take x-rays in any kind of gunshot
16 wounds, since the metallic pellets show up very nicely on an
17 x-ray, and so that gives you an idea of where to look for, and
18 how many you might be looking for, this type of thing.

19 Q. Doctor, I'm showing you State's Exhibit Number 32 and
20 33 in evidence. Can you see those metallic particles in
21 either of these photographs?

22 A. Yes, I do.

23 Q. Could you point to one of those for me, please?

24 A. (INDICATING)

25 Q. And those would be the white areas that are depicted --

1 -

2 A. That's correct.

3 Q. ---In these x-rays. And what would those items be, Dr.
4 McMaster?

5 A. Those are the individual shotgun pellets that made each
6 of those different holes in the wound.

7 Q. After you determined where the pellets are inside Mr.
8 Wise's body, you go in and recover those items?

9 A. That's correct.

10 Q. And did you recover those items, Dr. McMaster?

11 A. Yes, we did.

12 Q. I'm showing you what's been marked as State's Exhibit
13 Number 23, and ask you if you recognize those.

14 A. Those are at least similar to the ones that I removed,
15 certainly.

16 Q. Do you believe those to be the ones you removed?

17 A. I did.

18 Q. And you would have taken those out of the body of Mr.
19 Wise?

20 A. Yes.

21 Q. And that's what you found when you did the x-ray of
22 body?

23 A. That's correct.

24 Q. Dr. McMaster, what organs were damaged inside the body
25 of Mr. Wise by this shotgun blast?

1 A. Well, the pellets went through the intestines, and the
2 soft tissues that attach the intestines to the back of the
3 body. They went through the bladder, and some of the soft
4 tissue around the bladder.

5 Q. Did any of the pellets strike vital organs?

6 A. Not really vital -- generally by vital organs we
7 consider a brain, heart, a lung, so this did not hit any of
8 those.

9 Q. Could he have lived for some time after he had been
10 shot with this shotgun?

11 A. I think definitely.

12 Q. How actually did he die? How did you determine that he
13 died as a result of these injuries?

14 A. Well, given that it didn't immediately destroy any of
15 those vital organs, I think that he just lost so much blood
16 that he -- and when you lose a certain amount of blood you go
17 into shock, and then are unable to continue pumping blood, so
18 I think he basically bled out, as we refer to it sometimes.

19 Q. He would have bled to death?

20 A. Bled to death.

21 Q. But he could have lived for some period of time after
22 this injury?

23 A. Yes.

24 Q. Doctor, also in your autopsy of Mr. Wise, did you draw
25 any blood from his body?

1 A. Yes.

2 Q. And was that sent for toxicology?

3 A. Yes, it was.

4 Q. And could you explain to the jury what toxicology is?

5 A. That's looking for any kind of drugs or alcohol that
6 might have been in the body's system at the time.

7 Q. And did you get a result on the toxicology of Mr.
8 Wise's blood?

9 A. Yes. I found the blood alcohol was point one five
10 percent, which usually indicates certainly some degree of
11 being under the influence, but not really a fully drunk state,
12 usually.

13 The drug screen showed that there were some barbiturates
14 in the blood, but that was the only other drug we found.

15 Q. So he had some alcohol in his system when he was
16 killed?

17 A. That's right.

18 Q. After somebody dies, does that continue to metabolize,
19 or does it stop?

20 A. At a certain point the putrefaction, or the
21 degeneration of the body begins to make some different
22 alcohols, so it is important to get the sample relatively
23 early, but at this stage, when we did this autopsy, I think
24 this would be an accurate reading.

25 Q. This was the afternoon after he had been killed?

1 A. (NODS HEAD AFFIRMATIVE)

2 MR. SWARAT: Thank you, Dr. McMaster. That's all I
3 have.

4 MR. AYER: Defense has no questions for Dr. McMaster.

5 MR. SWARAT: Your Honor, I would ask that he be
6 excused.

7 THE COURT: Any objection?

8 MR. AYER: No objection.

9 THE COURT: All right. The witness is excused.

10 MR. RIDDLE: Your Honor, at this time the State rests.

11 THE COURT: Mr. Foreman, ladies and gentlemen of the
12 jury, at this time we will take our mid-morning break. We
13 will be fifteen or twenty minutes. There's refreshments
14 available.

15 Once again, while you are in the jury room, do not
16 discuss the case.

17 Please follow the bailiff to the jury room.

18 THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE
19 JURY.)

20 THE COURT: All right. Any motions, Mr. Ayer?

21 MR. AYER: Yes sir, Your Honor. May I ask the Court's
22 indulgence for just a minute, before I make my motions. It's
23 my understanding that I have to move for a directed verdict,
24 and mention each identical charge, and I don't have those
25 listed out in front of me, and I don't want to overlook one.

1 THE COURT: Okay. How much time do you ---

2 MR. AYER: Well, I was going to ask Ms. Frick if she
3 had the indictments, if I could just take a look at the
4 indictments and go down them.

5 THE COURT: Okay. I think we have them.
6 You have not been given copies of the indictments?

7 MR. AYER: I may have.

8 THE COURT: Ask my law clerk to bring the indictments
9 in. I think she's doing the verdict forms. She may have
10 them.

11 Just pass them over to Mr. Ayer.

12 While we are on break, let me ask that you bring the
13 Defendant around. I want to advise him of his Fifth Amendment
14 Rights, and y'all can be discussing that during the break
15 also.

16 MR. AYER: All right.

17 THE COURT: If he would come around and stand in front
18 of the bench there. If the Clerk would place him under oath.

19 MR. AYER: You want to do that right now?

20 THE COURT: Yes sir. I'm not going to make him make a
21 decision. I just want to advise him of his rights, and during
22 the break y'all can confer on that.

23 MR. AYER: All right.

24 (DEFENDANT APPROACHES THE BAR AND IS SWORN.)

25 THE COURT: Would you state your full name, please?

1 A. Marcus Dwain Timmons.

2 THE COURT: And how old are you, Mr. Timmons?

3 A. I'm all right today.

4 THE COURT: Huh?

5 A. Did you say how old?

6 THE COURT: Uh huh (indicating positive)

7 A. Twenty-four.

8 THE COURT: And tell me about your education.

9 A. I went to the eleventh grade, till I was incarcerated,
10 and I gained a G.E.D. once I'm in the institution.

11 THE COURT: Are you taking any kind of medication?

12 A. None.

13 THE COURT: Have you had any alcoholic beverages,
14 drugs, or any other substances in the last forty-eight hours?

15 A. No sir.

16 THE COURT: Are you, today, aware of any physical,
17 emotional, or nervous problem that you have that would keep
18 you from understanding what you are doing today?

19 A. No sir.

20 THE COURT: Mr. Timmons, you may be called as a witness
21 to testify in your own behalf in this case. I now advise you
22 that you have the right to invoke the protections given you by
23 the Fifth Amendment to the Constitution of the United States,
24 and a similar counterpart provision of the Constitution of the
25 State of South Carolina. The Fifth Amendment to the

1 Constitution of the United States provides, in part, that no
2 person shall be compelled, in any criminal case, to be a
3 witness against himself. This provision of Constitutional law
4 means that you cannot be compelled, or required to testify in
5 this case. This is a right and a privilege which the law
6 extends to you. This is a personal privilege, and no one can
7 waive or give up this right except you. You have the right
8 not to testify, but you also have the right to testify.

9 I am going to grant you the -- some time to consult with
10 your attorneys before you make this decision. If you elect
11 not to testify your failure to testify cannot be used by the
12 State as an inference of guilt, and your failure to testify
13 cannot be considered by the jury in it's deliberations. If
14 you elect to testify, and waive the privilege extended to you
15 by the Fifth Amendment to the Constitution of the United
16 States, I advise you now that you will then assume the role of
17 a witness in this case, and you then waive or give up your
18 Constitutional privilege against self-incrimination.

19 Mr. Timmons, this means that if you voluntarily take the
20 witness stand and testify in this case, you will then subject
21 yourself to the same rules that govern other witnesses, and
22 you may be examined and cross-examined on any relevant issue
23 in this case, and you may be impeached to the same extent as
24 any other witness, all of which is subject, however, to the
25 rules of law.

1 I further advise you that, if you elect to take the
2 witness stand and testify, that this decision on your part
3 must be made freely, voluntarily, intelligently, and with
4 knowledge of the protections given you by the Fifth Amendment
5 to the Constitution of the United States, and with knowledge
6 of the consequences of your election to testify.

7 We are going to take a break at this time, Mr. Timmons,
8 and I'm going to let you discuss, or confer with your
9 attorneys on this matter, and when we come back from the
10 break, I have some additional questions I want to ask you
11 about this.

12 A. Okay.

13 THE COURT: Okay. All right. We'll be at ease a few
14 minutes.

15 (THE FOLLOWING TAKES PLACE AFTER A BREAK, AND OUTSIDE
16 THE PRESENCE OF THE JURY.)

17 THE COURT: Mr. Ayer, I'll be glad to hear from you.

18 MR. AYER: Okay. Your Honor, at this time the
19 Defendant would move for a directed verdict, on the grounds
20 that the State has failed to present competent evidence
21 tending to prove the charges as outlined in the indictment.

22 THE COURT: This is a directed verdict on all of the
23 charges?

24 MR. AYER: Yes sir, Your Honor. And Your Honor, I will
25 take guidance from the Court. Do you want me to go through

1 each individual indictment, or would you have me to do it the
2 way I choose to do it?

3 THE COURT: Just however you wish to do it. I just
4 wanted to make sure that your remarks are directed toward all
5 indictments.

6 MR. AYER: Yes sir.

7 THE COURT: If you want to argue that way, that's fine.

8 MR. AYER: All right, sir. That's what I would do,
9 rather than to go through that same language in the motion for
10 each one.

11 (94-GS-32-0362), count one, for murder, in Lexington
12 County, on February 27th, 1993, the murder of Thomas Wise,
13 count two in that same indictment is armed robbery, in
14 connection with Mr. Wise, also -- Your Honor, regarding the
15 armed robbery, I don't -- I don't recall every piece of
16 evidence, but I don't know that any competent evidence was
17 introduced that Mr. Wise was, indeed, robbed. Perhaps it was
18 and I have overlooked it.

19 (94-GS-32-0364) is, count one, criminal conspiracy, that
20 Mr. Timmons conspired with Quincy Timmons for the purpose of
21 committing armed robbery on February 27th of 1993, move for a
22 directed verdict on the same grounds.

23 (94-GS-32-0367), count one, armed robbery, this concerns
24 the E-Z Coin Laundry on Dunbar Road in Cayce, involving the
25 robbery in the presence of Doris Kirby, and count two in that

1 same indictment, pointing a firearm, move for a directed
2 verdict on those same ground, Your Honor.

3 (94-GS-32-2738), count one is attempted armed robbery,
4 Marcus Timmons, in the presence of Susan Rogers, on Charleston
5 Highway in West Columbia, count two in that indictment is
6 pointing and presenting a firearm, a shotgun at Ms. Rogers,
7 move that indictment on the same grounds, Your Honor.

8 (00-GS-32-3326) is pointing and presenting a firearm on
9 February 27th, 1993, in the presence of Peggy Williams, move
10 for a directed verdict, the same grounds, on that indictment
11 also, Your Honor.

12 (00-GS-32-3327) is pointing and presenting a firearm in
13 the presence of George Cullifer, on February 27th, 1993. I
14 don't think, Your Honor, that -- Your Honor, I don't think --
15 regarding pointing and presenting a firearm at Ms. Williams
16 and Mr. Cullifer, I don't think there was any evidence that
17 the same individual pointed a firearm at each -- at both Mr.
18 Cullifer and Ms. Williams. I assume there was evidence that
19 someone pointed one at Ms. Williams and Mr. Cullifer. But I
20 would move for a directed verdict on those indictments also.

21 (00-GS-3328) is attempted armed robbery with a deadly
22 weapon. This involves the Pantry, on February 27th, in the
23 presence of George Cullifer, and I would move -- I don't think
24 there is any -- strike that -- just move for a directed
25 verdict on that indictment also, Your Honor.

1 THE COURT: Mr. Riddle, any response?

2 MR. RIDDLE: Yes sir. If it please the Court. In
3 reference to the indictment involving Thomas Wise, (0362),
4 specifically, Your Honor, as to count two, Mr. Ayer indicated
5 there was no evidence that anything was taken. Circumstantial
6 evidence, in fact, does exist, that items were taken from Mr.
7 Wise. If Your Honor recalls, Terry Snead, the great big
8 fellow from the Sheriff's Department who testified that he was
9 with Mr. Wise a short time prior to that. Mr. Wise indicated
10 that he had Seventy-Five Dollars, and Mr. Snead actually saw
11 Sixty Dollars in his possession, and then an hour or so later
12 he was there when the E.M.T.s emptied his pockets, and there
13 was no money present, so I think circumstantially there is
14 evidence that the armed robbery had, in fact, occurred.

15 Additionally, Your Honor, there was the testimony from
16 Mr. Williams about Quincy Timmons and Marcus Timmons
17 indicating to him that Mr. Wise had some marijuana on him.
18 That marijuana was not found in his pockets. That marijuana
19 was found beside Mr. Wise, indicating that someone had
20 previously been through his pockets, and so I believe there is
21 sufficient evidence for that count to go to the jury, and for
22 the jury to make a determination whether or not the State has
23 proven that an armed robbery occurred, beyond a reasonable
24 doubt.

25 Your Honor, Mr. Ayer did not specifically mention count

1 three of the indictment, which was a conspiracy count, but I
2 presume that his motion relates to all counts and all
3 indictments.

4 Likewise, Your Honor, on indictment number (0367), Mr.
5 Ayer did not mention count three, four, five and six of the
6 indictment. That indictment deals with the E-Z Coin, and I
7 would -- I am assuming -- I would stipulate that his motion
8 goes toward all counts in the indictments, even though they
9 weren't specifically mentioned.

10 Your Honor, the only other response I have -- and it's
11 in reference to indictment number (3326), (3327). Those are
12 the two pointing and presentings from the Pantry. Your Honor,
13 the State is relying, as you know, on the theory of hand of
14 one, hand of all, accomplice liability, and I think if Mr.
15 Quincy Timmons and Marcus Timmons are acting in concert, the
16 hand of Quincy is the hand of Marcus, and so pointing or
17 presenting a shotgun, or a sawed-off shotgun, by either, or at
18 either one of the two victims is sufficient to take the case
19 to the jury.

20 Additionally, on those grounds, Your Honor, you don't
21 have to specifically point the firearm, you just need to
22 present the firearm, and there has certainly been evidence of
23 pointing and presenting from both Ms. Williams and Mr.
24 Cullifer.

25 On the last indictment, Your Honor, the indictment for

1 armed robbery, Your Honor, that indictment was apparently
2 drawn using some of the new language from the new armed
3 robbery statute. I think it sufficiently alleges the
4 offenses, but in the body of that indictment it does allege,
5 or while, either through words or deeds, that he was armed
6 while using a representation. We just move to strike that
7 language from the indictment as surplusage. If you strike
8 that it still charges Mr. Timmons with the armed robbery,
9 while armed with a deadly weapon, to wit, a firearm, and that
10 he attempted to take it.

11 Additionally, Your Honor, that indictment mistakenly
12 labels this as an attempted armed robbery, under subsection
13 (B). At the time that statute was amended they changed it
14 from one and two to (A) and (B), and that's simply a
15 scrivener's error. That actually should say 16-11-332, and
16 not (B), because they just changed the way they denominated
17 the paragraphs of that statute, so ---

18 THE COURT: What's that indictment number?

19 MR. RIDDLE: That's (3328), Your Honor.

20 THE COURT: (00-3328)?

21 MR. RIDDLE: Yes sir. Yes sir, it's the last one.

22 THE COURT: And how is it characterized on the
23 indictment itself?

24 This says indictment for attempted armed robbery with a
25 deadly weapon ---

1 MR. RIDDLE: Yes sir.

2 THE COURT: ---On the back, and then on the inside, or
3 the face of the indictment it says, in bold print, attempted
4 armed robbery with a deadly weapon.

5 MR. RIDDLE: Right.

6 THE COURT: And what is the crime that ---

7 MR. RIDDLE: It should be attempted armed robbery with
8 a deadly weapon, as the indictment charges ---

9 THE COURT: So it would be attempted armed robbery?

10 MR. RIDDLE: Yes sir. Yes. I -- but instead of saying
11 16-11-330(B), I think the law in effect at the time was
12 actually denominated 16-11-330-2, Section 2 as opposed to
13 Section (B). They -- when they amended the statute they
14 changed the way that the paragraphs were denominated.

15 THE COURT: Okay. And you also are going to strike the
16 words -- repeat those for the record again.

17 MR. RIDDLE: The indictment reads that Marcus Timmons,
18 along with a co-defendant, did, in Lexington County, on or
19 about February 27, 1993, while armed with a deadly weapon,
20 comma -- and what we would move to strike is the language, "or
21 while alleging, either by actions or words, that he was armed
22 while using a representation of a deadly weapon, or any object
23 which a person present reasonably believed to be a deadly
24 weapon", and that would be the end of the material that we
25 would move to strike from the indictment. I do not believe

1 that it changes the charge any. He is charged with attempted
2 armed robbery, and it reflects the language as it existed back
3 in '93, Your Honor.

4 THE COURT: All right. Mr. Ayer, what say you to the
5 striking of those words that the Solicitor just mentioned?

6 MR. AYER: Your Honor, I have no objection to that.

7 THE COURT: All right. Hearing no objection, the
8 indictment will be amended. I'm going to pass it down, and if
9 the Solicitor wants to draw a line through the words to be
10 deleted, and if you would initial that, please.

11 MR. RIDDLE: Yes sir.

12 THE COURT: Mr. Ayer, any response to the Solicitor's
13 argument on Defendant's motion for a directed verdict?

14 MR. AYER: No sir, Your Honor.

15 THE COURT: All right. As you know, when ruling on a
16 defendant's motion for a directed verdict, the trial court
17 must view the evidence in a light most favorable to the State,
18 therefore I'm going to deny all the motions for a directed
19 verdict that have been made by the Defendant.

20 MR. AYER: Thank you, Your Honor.

21 THE COURT: Any other motions by the Defendant?

22 MR. AYER: None, Your Honor.

23 THE COURT: All right. Let me ask that the Defendant,
24 Marcus Timmons, come back to the Clerk's bench, and I'll
25 finish with his Fifth Amendment rights.

1 Mr. Ayer, if you want to stand with him, you are welcome
2 to stand with him.

3 MR. AYER: Thank you.

4 (MR. TIMMONS AND MR. AYER APPROACH THE BAR.)

5 THE COURT: Mr. Timmons, prior to taking our break we
6 advised you of your Fifth Amendment rights, and I wanted you
7 to consult with your attorneys during the break. Did you have
8 time to consult with your attorneys concerning your Fifth
9 Amendment rights?

10 A. Yes sir.

11 THE COURT: And have you discussed with your attorneys
12 whether you should or should not testify in this case?

13 A. Yes sir.

14 THE COURT: And do you understand what I just explained
15 to you before the break?

16 A. Yes, I do.

17 THE COURT: Do you need for me to repeat any of that?

18 A. No sir.

19 THE COURT: Do you have any questions about what I
20 explained to you about your Fifth Amendment rights?

21 A. No sir.

22 THE COURT: And Mr. Timmons, do you wish to testify in
23 this case?

24 A. I do not.

25 THE COURT: All right.

1 Mr. Ayer, any questions on this matter, or your client?

2 MR. AYER: No sir, Your Honor.

3 THE COURT: All right. The Court would find, as a
4 fact, that the decision by the Defendant, Marcus D. Timmons,
5 not to testify, has been made freely, voluntarily,
6 intelligently, and with knowledge of the protections given him
7 by the Fifth Amendment to the Constitution of the United
8 States, and with knowledge of the consequences of his election
9 not to testify in this case.

10 All right. You may return to your seat.

11 Mr. Ayer, are you ready to proceed with your defense?

12 MR. AYER: Yes sir.

13 THE COURT: All right. How many witnesses do you ---

14 MR. AYER: I'm ready to proceed, Your Honor, but the
15 defense will elect to call no witnesses.

16 THE COURT: All right. Let's see, it's about quarter
17 of twelve. We will -- I want to go over my charge with you.
18 I'm going to excuse the jury for lunch while we do that, and
19 we'll come back and have closing arguments.

20 Do y'all think you would be ready to start back at one
21 or one-fifteen?

22 MR. RIDDLE: We can be, Your Honor.

23 MR. AYER: Charge conference is going to be before
24 lunch?

25 THE COURT: We are going to do that right now. I'm

1 just going to let the jury go to lunch, and we'll stay a few
2 minutes and do the charge conference, and I can have them come
3 back at, you know, one-fifteen, would give them about an hour
4 and a half. We should be through the charge conference. It
5 shouldn't take that long.

6 MR. AYER: If we could have ten minutes before the
7 charge conference to make a few copies on some things.
8 Whatever Your Honor wants to do.

9 THE COURT: Okay. All right. What I'll do is, I'll
10 just excuse the jury for lunch, and have them come back at
11 1:15. We will stay and go through the charge conference, and
12 then we'll break and have closing arguments.

13 If memory serves me correctly, the defense did offer
14 some evidence, so you lose your right to last argument.

15 MR. AYER: We did not offer any evidence.

16 THE COURT: You had something introduced. I'm not sure

17 ---

18 MR. RIDDLE: It was a baseball cap, Your Honor.

19 MR. SWARAT: That hat is in evidence.

20 MR. AYER: Your Honor, I offered that in the State's
21 case.

22 THE COURT: Yes, but it's still a defense exhibit, and
23 I -- based on that you would lose your right to last argument.

24 MR. SWARAT: Yes sir.

25 THE COURT: So what we will do then, the State would

1 have to open in full on the law, and the Defendant would argue
2 next, and then the State would have a right to close.

3 I'm going to check with the Court Reporter, but I'm
4 pretty sure that that object was marked as a Defendant's
5 exhibit.

6 COURT REPORTER: Yes sir, it was.

7 THE COURT: Can you call out the number of that,
8 please?

9 COURT REPORTER: Number one.

10 THE COURT: Number one. Defendant's Number 1, okay,
11 and that was a cap, baseball cap?

12 COURT REPORTER: Yes sir.

13 THE COURT: Okay.

14 All right. I'll bring in the jury. We will excuse
15 them for lunch, and then we will go through the charge.

16 You want to have the jury come in, please?

17 BAILIFF: Yes sir.

18 MR. AYER: Your Honor, I have something before we bring
19 the jury in.

20 I thought -- but your ruling just changed something,
21 perhaps.

22 THE COURT: All right. Just hold the jury then.

23 MR. AYER: Your Honor, part of our -- my discussions
24 with Mr. Timmons -- some of our decision to not present any
25 evidence had to do with my having the last argument, at least

1 my understanding that I would have the last argument. I was
2 not aware that, simply by introducing a hat, in the State's
3 evidence -- in the State's case, would lose the last argument
4 for me, and I ---

5 THE COURT: I might be wrong, but I don't think so.
6 The law is very clear on that. If a defendant does not offer
7 any evidence, they get last argument, but if they offer one
8 item of evidence then they lose the right to last argument.

9 MR. AYER: Well, I -- and you may be right. I thought
10 it was in my case, but nevertheless, the reason I wanted to
11 hesitate is because, now that that is the decision -- and I
12 respect the decision -- I would like to talk to my client
13 further about his right to testify.

14 THE COURT: All right. Well, you -- how -- can you do
15 that now?

16 MR. AYER: Yes sir.

17 THE COURT: Okay. Well, we will just take a few
18 minutes. We will be at ease a few minutes.

19 (THE FOLLOWING TAKES PLACE AFTER A BREAK, AND OUTSIDE
20 THE PRESENCE OF THE JURY.)

21 MR. AYER: Your Honor, thank you for the indulgence.
22 The defense is -- still remains in the position of not
23 offering any evidence.

24 THE COURT: All right. So you -- defense will not put
25 up any evidence ---

1 MR. AYER: That's correct, Your Honor.

2 THE COURT: ---Other than the one item that's already

3 been admitted?

4 MR. AYER: Other than the one blue hat.

5 THE COURT: All right. Well, what I'll do then, I'll

6 just bring the jury in, send them on to lunch. I'll have them

7 come back at 1:30, to give them time -- it's now about five

8 after -- and we'll do closing arguments at 1:30, and followed

9 by the charge, but we will remain for a few minutes and I will

10 go through the charge with you. We will have the charge

11 conference.

12 Okay. You can bring in the jury.

13 MR. RIDDLE: And you are going to let them rest?

14 THE COURT: Huh?

15 MR. RIDDLE: You are going to let them rest?

16 THE COURT: Isn't that what he said?

17 MR. RIDDLE: Yes sir.

18 THE COURT: You want to just state that on the record

19 then?

20 MR. AYER: All right, sir.

21 MR. RIDDLE: Yes sir.

22 THE COURT: Mr. Ayer.

23 MR. AYER: Say in front of the jury or say it now?

24 MR. SWARAT: In front of the jury, right?

25 MR. RIDDLE: That's what I was asking ---

1 THE COURT: Usually we do it in front of the jury.

2 MR. AYER: Right. That's what I was thought.

3 THE COURT: We'll get them in here and ---

4 (THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE
5 JURY.)

6 THE COURT: All right. Mr. Ayer, you may proceed.

7 MR. AYER: Your Honor, the defense rests.

8 THE COURT: Going to be anything in reply by the State?

9 MR. RIDDLE: No sir.

10 THE COURT: Mr. Foreman, ladies and gentlemen of the
11 jury, we will let you go to lunch at this time. Please follow
12 the same instructions I have given throughout the trial. Do
13 not discuss the case among yourselves or with anyone else.

14 Should there be a report in the media, that is, a
15 newspapers or a similar publication, radio or television, or
16 even something on the internet, do not read, listen to or view
17 those reports. You are to base your verdict in the case
18 solely on the evidence and the law that you receive in this
19 courtroom.

20 I'm going to ask that you be back in the jury room at
21 1:30. At that time we will move into the next phase of the
22 case, which will be the closing arguments, so if everyone
23 would please be prompt, and be back in the jury room at 1:30.

24 Everyone else please remain in your seats.

25 The jury is excused for lunch until 1:30 P.M.

1 THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE
2 JURY.)

3 (AT THIS TIME A CHARGE CONFERENCE WAS HELD. THIS
4 CONFERENCE WAS RECORDED BUT IS NOT TRANSCRIBED HEREIN.)

5 (SEE COURT'S EXHIBIT NUMBER 5 FOR DEFENDANT'S REQUESTS
6 TO CHARGE. DEFENDANT'S REQUESTS TO CHARGE ARE MARKED COURT'S
7 EXHIBIT NUMBER 5 LATER IN THIS TRANSCRIPT. THE STATE DID NOT
8 SUBMIT ANY REQUESTS TO CHARGE.)

9 (THE FOLLOWING TAKES PLACE AFTER THE LUNCH BREAK, AND
10 OUTSIDE THE PRESENCE OF THE JURY.)

11 MR. AYER: Your Honor, prior to the jury coming back
12 in, can I submit a case to the Court regarding the defendant's
13 right to take -- to make final argument?

14 THE COURT: Sure.

15 MR. AYER: Your Honor, this is State versus Muzon, 485
16 9 S.E. 2d 4, 918. Your Honor, in that case the jury viewed a
17 scene, and the issue was whether or not viewing the scene was
18 considered to have introduced evidence or testimony. Your
19 Honor may be familiar with it. The Court indicated that
20 viewing the scene was not evidence, and allowed the defendant
21 to have closing -- the final argument.

22 The Court does say, in note three there, that in a
23 prosecution -- criminal prosecution, where a defendant
24 introduces no testimony, he is entitled to the final closing
25 argument to jury -- it does not use the word evidence -- it

1 uses the word testimony -- and Mr. Timmons has not introduced
2 any testimony. We have introduced a blue hat, which I would
3 submit to the Court is evidence, but it is not testimony, and
4 that appears to me to be the holding in that case. It's on
5 the front page under the note three there that just says, when
6 a criminal defendant introduces no testimony he is entitled to
7 the final closing argument to the jury, and again, we did not
8 introduce any testimony.

9 THE COURT: I don't have the case at hand. They cite
10 State versus Crowe. The thing that's confusing is, the next
11 sentence says, "because the jury view was not evidence, and
12 because Muzon presented no other testimony he was entitled to
13 the last closing argument", so what say the State on this
14 issue?

15 MR. RIDDLE: Your Honor, I thought the issue was
16 handled. I don't have any of that material. Mr. Swarat is
17 going to go into the Grand Jury room and pull Crowe out of
18 there right now.

19 MR. AYER: Your Honor, this is the State versus Crowe
20 case. I don't know that it sheds a lot of light on our issue.
21 I think the facts are a little bit different. There were two
22 co-defendants in that case. I think one offered evidence and
23 one did not.

24 And again, I -- Your Honor, I submit, or concede, the
25 factual situations are a little different. I'm relying mostly

1 on that boiler plate holding law that just says, in a criminal
2 prosecution, where a defendant introduces no testimony -- and
3 the Court did not add the word evidence.

4 MR. RIDDLE: Your Honor, I would simply submit that the
5 whole thing leading up to that ---

6 THE COURT: Huh?

7 MR. RIDDLE: The whole -- in this case, the Muzon case,
8 if you start with -- right under the heading, Law Analysis,
9 you know, the whole setup for this ruling is -- is that the
10 Court considered a jury view as evidence, and the admission of
11 evidence bars the defendant from having the last closing
12 argument.

13 MR. AYER: Your Honor, not to interrupt the Solicitor,
14 but in that case -- and I agree the facts aren't exactly
15 right, but the Court did not view it as being evidence because
16 the jury viewed the scene. They said it wasn't evidence.

17 And again, those facts are different from mine.

18 THE COURT: There's no doubt that viewing the scene is
19 not evidence.

20 MR. RIDDLE: Right. I was saying the Trial Court
21 viewed that ---

22 THE COURT: Right.

23 MR. AYER: That's not an issue. But Your Honor, I
24 would say, the Court does say that, because the jury view was
25 not evidence, and because Muzon presented no other testimony,

1 he was entitled to the last closing argument. That does not
2 necessarily have to infer that, because you do introduce
3 evidence, that you ---

4 THE COURT: I'm not sure what the Court's meaning is,
5 because in the State versus Crowe, on page six of the Opinion
6 you passed up it says, "Where a defendant is separately tried,
7 and introduces no testimony", and then it goes, the next
8 sentence, "however, where defendants are jointly indicted, and
9 any one of them introduces evidence, the State is entitled to
10 closing argument." So then the part you highlighted says,
11 "the fact that upon a trial a defendant is jointly indicted,
12 the introduce -- the introduction of evidence by one defendant
13 may operate to deprive a co-defendant, who offer no evidence,
14 of the right to the closing argument, or where, to which such
15 co-defendant would be entitled if tried separately...", I'm
16 concerned about whether the use of testimony and evidence is
17 just -- was not intentional at the time the Opinion was
18 written.

19 MR. AYER: Your Honor, it does seem, in some cases,
20 they are used interchangeably. In the Muzon case -- in the
21 Muzon case I would submit that they are not, because they are
22 both in the very same paragraph, with the boiler plate
23 language that, when you don't introduce any testimony, you
24 have the final argument, and then the sentence on down it
25 uses, testimony and evidence, so you could -- there's an

1 argument that they are distinguishing between evidence and
2 testimony in the same paragraph there.

3 THE COURT: All right. I'm going to stick with my
4 initial ruling. In reading Muzon I think that they were
5 saying, "Where a defendant introduces no testimony he's
6 entitled to final closing argument because the jury view was
7 not evidence, and because Muzon presented no other testimony
8 he was entitled to last closing argument." I'm going to take
9 that to mean that, if evidence is introduced the defendant
10 would foreclose his right to the last argument. And I'll note
11 your objection for the record, and you've cited your cases.

12 Anything else you want to put on the record on that
13 point?

14 MR. AYER: No sir, Your Honor. Thank you.

15 THE COURT: Okay.

16 All right. I've also considered the Defendant's
17 Request to Charge Number One, Number Two and Number Three.
18 They all deal with a charge on identification. I'm going to
19 decline to charge those. I'm going to stick with the charge
20 that I have on identification. I think it covers that
21 accurately and correctly, so I'm going to mark your request,
22 and I'll just stick with the charge that I have.

23 MR. AYER: Just note the objection for the record, Your
24 Honor.

25 THE COURT: Yes, you ---

JURY OUT - CHARGE CONFERENCE

1 MR. AYER: Thank you.

2 THE COURT: Those will be marked as Court's Exhibits.

3 Any other matters before we bring in the jury?

4 MR. RIDDLE: None from the State, Your Honor.

5 MR. AYER: Nothing from the defense, Your Honor.

6 THE COURT: Okay.

7 You may bring in the jury.

8 (THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE
9 JURY.)

10 THE COURT: Mr. Foreman, ladies and gentlemen of the
11 jury, we have reached the stage of the trial where you will
12 now hear the closing arguments by the attorneys for each side.
13 Our rules provide for the attorneys to have an opportunity to
14 address you, and they will, perhaps, review the evidence that
15 has been introduced in the trial of the case. Their
16 interpretation of the evidence is not binding on you. You
17 have heard the evidence. You will have the exhibits with you
18 in the jury room during your deliberations, and as I told you
19 at the beginning of the trial, you, the jury, are the finders
20 of the facts in this case, so you are not bound by the
21 interpretation, or what the attorneys may argue to you are the
22 facts. You are only bound by your position as a juror, to
23 judge the facts as you see them, as they have been presented
24 in the case.

25 Now once we finish the closing argument I will instruct

1 you on the law that applies in the case. After you receive
2 those instructions you will be asked to retire to the jury
3 room to begin your deliberations.

4 Once again, all of the exhibits that have been allowed
5 in evidence by the Court will be with you in the jury room, so
6 if you have not had an adequate opportunity to review those
7 exhibits you will have the opportunity during your
8 deliberations.

9 At this time we will continue the trial with the closing
10 argument.

11 Solicitor.

12 MR. RIDDLE: If it please the Court, Your Honor.

13 Good afternoon, ladies and gentlemen. My name is Dayton
14 Riddle. I'm the Deputy Solicitor here in Lexington. I didn't
15 get to introduce myself previously to y'all because I didn't
16 open. I wanted to do that at this time, and I wanted to start
17 by thanking y'all for what y'all have done. Y'all have sat
18 here -- I guess this is the third day -- if you don't count
19 Monday, jury selection, but this is the third day of
20 testimony, and the State appreciate y'all's service in this
21 case. Without y'all, the fourteen of you, and the twelve of
22 you that will actually decide this case, this whole system
23 grinds to a halt, because without a jury, this court can't
24 function. The reason that this court can't function without a
25 jury is because he is the Judge of the Law, and he's going to

1 tell y'all in a few minutes what the law is. Y'all are bound
2 by your oath to take your law from him. And he's going to
3 tell you that it's not what you think the law is; it's not
4 even what you think the law ought to be, but it's what he says
5 the law is.

6 And let me tell you something else. The twelve of y'all
7 are the judges of the facts. Y'all think about that. You
8 all, the twelve of you as a group, decide what the facts are
9 in this case. And we take those facts from y'all, and we
10 can't change those facts that y'all decide they are. The
11 Judge can't change those facts that y'all decide they are,
12 y'all kind of have equal roles, but different roles. Y'all
13 have to take the law from him. He has to take the facts from
14 you, and that's your role here.

15 Now, ladies and gentlemen, what we have reached is the
16 part of the trial where the attorneys get to give closing
17 arguments, and what I say is not evidence; what Mr. Swarat is
18 going to tell you later on is not evidence; what Mr. Ayer says
19 is not evidence. The evidence is what you heard from that
20 witness stand, and all these exhibits that are before you, and
21 that's what y'all determine the facts from, just from the
22 evidence, not from the lawyers, not from the arguments, from
23 the evidence, because that's part of what the Judge is going
24 to tell you the law is, that you are to decide the case based
25 on the evidence and only the evidence.

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1 Now, under our rules, ladies and gentlemen, the way that
2 it works is this. The State has the burden of proof, and
3 because we have the burden of proof we go twice, okay. Our
4 rules say we have to open on the law, then the defense goes,
5 and then we close on the facts. So what I'm going to do with
6 y'all now is open on the law, and I'm going to talk to y'all a
7 little bit about the law, but I'm really not going to get into
8 the evidence and the exhibits, and that type of thing. I'm
9 just going to talk to you about the law in this particular
10 case.

11 Now, I started all this by thanking y'all, and what I'm
12 thanking you for is for fulfilling your oath. I don't know if
13 y'all remember on Tuesday morning, y'all stood up and the
14 Clerk came over and said, raise your right hands. She gave
15 you an oath, and I don't know if y'all remember what that oath
16 was or not, but there were essentially two parts of that. The
17 first part was, you shall well and truly try, and until now
18 each and every one of y'all has done that. Y'all have sat,
19 you have been attentive; you have listened to the testimony.
20 Nobody has been sleeping, nobody has been, you know, kind of
21 doing all that, and we get that sometimes, I'll just tell you,
22 we do, but y'all have been a very, very good group of jurors,
23 and the State appreciates that in this case, because y'all
24 have, in fact, fulfilled the first half of your jury oath.

25 And when the Judge has finished telling y'all what the

1 law is in a few minutes, he's going to ask y'all to go back
2 and fulfill that second part, because the second part of your
3 oath went something like, and true deliverance of a verdict
4 render, and basically what that means is to go back in the
5 jury room and read through the evidence, figure out what the
6 facts are, apply it to the law, and reach a verdict.

7 Now, I can't tell y'all how y'all are going to go about
8 doing that. That's up to y'all, but that's essentially the
9 process you are going to go through. Y'all will decide the
10 facts, and apply it to the law, and reach a verdict.

11 Now, basically, when I talk about the law I kind of
12 break it down into what I call the general law and the
13 specific law, and the general law is the law that applies to
14 any criminal case in South Carolina, or the United States. It
15 doesn't matter if it's a murder; it doesn't matter if it's a
16 rape, D.U.I., shoplifting, loitering, what have you. It's the
17 same law that applies in each and every criminal case.

18 Now I'll talk to you a little bit about the specific
19 law, and that law, in this case, is going to be the law of
20 murder, and armed robbery, and that type of stuff.

21 But let's talk about the general law briefly. The Judge
22 is going to tell you, when he charges the law, that the
23 Defendant is presumed innocent, and that's right. That's how
24 it should be. And the State doesn't have any exception or any
25 gripe about that, because that's what our Constitution says,

1 and that's a right that is protected in this Country, and we
2 agree with it. He's presumed innocent.

3 The Judge is also going to tell you that that
4 presumption of innocence lasts until you, the jury, find that
5 he's guilty, beyond a reasonable doubt. How would you decide
6 that? Evidence from that chair, and any exhibits.

7 Now what is a reasonable doubt? The Judge is going to
8 talk to you a little bit about that. The Judge is going to
9 tell you that a r defendant is evidence that leaves you firmly
10 convinced of the Defendant's guilt, proof beyond a reasonable
11 doubt. That's what the State's burden is. Firmly convinced
12 of a defendant's guilt. The Judge is going to tell you that
13 the State doesn't have to prove beyond all doubt, because
14 that's an impossibility. There are people out there that
15 doubt the sun is going to rise tomorrow. There is no way I
16 can prove it will, unless you just wait till tomorrow and see.
17 But that's not a reasonable doubt, and the State doesn't have
18 to prove it beyond all doubt, but beyond a reasonable doubt.
19 You have to be firmly convinced of the Defendant's guilt, and
20 if you are, you should vote guilty, and if you are not, you
21 should vote not guilty. That's the burden that the State has
22 in this case.

23 Now, in order to vote guilty or not guilty you, of
24 course, have to decide what the facts are, and in order to do
25 that you have to decide the credibility or the believability

1 of the witnesses. The Judge is going to give you a definition
2 and some factors for y'all to consider in determining
3 credibility or believability of witnesses. I submit to you,
4 ladies and gentlemen, that it is your good old common horse
5 sense, all right. Use your common sense. Use the same thing
6 that you would use when you are trying to make an important
7 decision in your lives. Let's say you go to buy a used car,
8 and you are talking to the salesman, and the salesman may tell
9 you, oh, this car has got twenty-five thousand miles on it;
10 oh, this car is in the finest mechanical condition. Well,
11 y'all all know that that salesman is going to make a
12 commission; y'all all know he's got something to gain or lose
13 by telling you this, or telling you that. Y'all all know he's
14 got the interest in the outcome of that transaction, that he
15 may be biased, or have a motive or a reason to tell you a lie.
16 Y'all know those things. And the Judge is going to list every
17 one of those things. He's going to tell you that you should
18 decide whether or not a witness had an opportunity to observe
19 what they testified to, and whether, you know, the lighting
20 was good enough, or the circumstances were long enough.

21 Again, ladies and gentlemen, it's all common sense.
22 Credibility boils down to y'all's common sense. And you know,
23 we ask you to decide the evidence -- or excuse me -- decide
24 the case, based only on the evidence from the courtroom, but
25 that doesn't mean we are asking you to check your common sense

1 at the jury room door. We picked twelve people to serve on
2 the jury, because there is no one person in the world that is
3 smarter, or better able, or better equipped than the twelve of
4 y'all acting as a unit, to decide what the truth in this case
5 is. Twelve sets of eyes, twelve sets of ears, twelve brains,
6 twelve hearts, twelve groups of backgrounds and experience
7 brings a wealth of information, and a wealth of knowledge, and
8 a wealth of ability to decide a case, and I submit that that
9 wealth is a wealth that cannot be equaled by any single person
10 anywhere, anywhere. So use your common sense when you are
11 determining the credibility of the witnesses. Use all those
12 factors you would use when trying to make a decision in your
13 every day lives.

14 The Judge is going to talk to you about two different
15 kinds of evidence in this case. He's going to talk about
16 direct evidence. I saw; I heard; I smelled; I tasted or I
17 touched, your five senses, direct evidence, that which a
18 witness directly perceives, saw, heard, smelled.

19 There is also another kind of evidence called
20 circumstantial evidence, and the Judge is going to tell you
21 that both kinds of evidence are equally as good. Here is what
22 circumstantial evidence is. Let's say you go to a movie
23 theater, and when you go in the sun is shining, the sky is
24 bright; it's a normal day. When you come out, the ground is
25 wet, the car is wet, and you get in your car and you drive

1 away, and the streets are wet for miles and miles around, but
2 the sun is shining, and the sky is clear. Well, y'all didn't
3 see it rain; nobody heard it rain in the movie theater with
4 all the noise going on in there. Smelled it, touched it,
5 tasted it. But from the facts and circumstances that you see
6 when you come out of that movie theater, you know that it
7 rained while you were inside, because everything, as far as
8 you can see, is wet. So those are the two kinds of evidence.
9 If you saw it rain that would be direct evidence, but if you
10 came out and things were wet for miles around, that's
11 circumstantial. And the Judge will tell you that each is
12 equally as good.

13 The Judge is going to talk to you about expert witnesses
14 a little bit. And there was three experts that testified, if
15 I remember correctly. There was the fingerprint expert,
16 firearms expert, and a doctor. And what the Judge is going to
17 tell you about them is this. Under our rules people normally
18 can't give an opinion about what they think. They can only
19 tell what they know, or what they saw or heard. But experts,
20 because of their training and their background, and their
21 knowledge of a particular area, are allowed to give opinions
22 about certain things, because their opinions will assist the
23 jury in determining the facts.

24 Here is what the Judge is going to tell you about an
25 expert. They can give you an opinion, and you give the

1 opinion whatever weight you want to give it. If you don't
2 think the opinion is worth anything, you don't give it any
3 weight, but if you think that witness was credible, and that
4 his opinion deserves weight, based on their background and
5 training, you give it what weight you think it deserves.
6 That's all. That's all expert testimony is, opinion testimony
7 about what they saw, and they can give that opinion provided
8 they have some specialized training in a particular field, but
9 y'all decide what the facts are, the twelve of y'all.

10 The Judge is going to tell you that one element that the
11 State has to prove in all this is the identification of the
12 person. I don't exactly know how to address that, but that --
13 it's something that needs to be said, because that is clearly
14 an element, but it's almost so basic that you don't know how
15 to handle it. You want to say something to the effect of,
16 well, yes, of course.

17 Here is the deal, ladies and gentlemen, we've got to
18 prove, beyond a reasonable doubt, it was Marcus Timmons. It's
19 as simple as that. That's one of the things we've got to
20 prove. If y'all don't believe it was Marcus Timmons, you
21 would bring a verdict of not guilty. If y'all do believe it
22 was Marcus Timmons, then y'all decide that he committed the
23 crimes that were involved in this spree on February the 27th.

24 I'm not going to get into a lot of about I.D. Y'all
25 know what this case is about. Y'all have listened. Y'all

1 know what the issues are. I'm not going to address that. The
2 State has to prove it. We submit we have. If y'all don't
3 believe that, I submit that you would write a verdict of not
4 guilty. If you do, then let's talk about the specific law.

5 The specific law in this case is this. Start with the
6 biggest one, murder. The Judge will tell you that murder is
7 the unlawful killing of another human being, with malice
8 aforethought. Is there any dispute that there has been a
9 killing in this case? I don't think so. I don't even think
10 there is any dispute that it's an unlawful killing. Malice
11 aforethought is a -- what's called a term of art, and the
12 Judge is going to define it for you. He is going to tell you
13 that it is a heart fatally bent on wrongdoing; it is a person
14 who is devoid of social responsibility. Ladies and gentlemen,
15 it's willful, it's evil, it's intent. It's just like
16 maliciousness, malice, maliciousness. Y'all know what it is.
17 Malice aforethought. What does that mean? Aforethought means
18 that the malice has to occur at some point before the shooting
19 takes place. That can be a day, a week, a month, or an
20 instant. Malice aforethought means that there has to be
21 malice just preceding, and at the time that the fatal blow was
22 struck. Unlawful killing with malice aforethought.

23 The Judge is going to tell you this, ladies and
24 gentlemen. There's two ways that say you can show malice, two
25 ways, expressed malice. I'm going to kill you. I'm going to

1 kill you. That's an expression of malice. But y'all's common
2 sense tells you, that doesn't happen very often. You don't
3 generally have someone say I'm going to kill somebody else and
4 then follow through with it. What's the other way? Inferred
5 malice, or implied malice. Essentially, ladies and gentlemen,
6 that's circumstantial evidence that malice exists, inferred or
7 implied malice.

8 The Judge is going to tell you this. The Judge is going
9 to tell you you can infer malice through the use of a deadly
10 weapon. If someone uses a deadly weapon, like a twenty gauge
11 shotgun, and shoots someone, the jury can infer malice through
12 the use of this object alone. You don't have to. You don't
13 have to infer malice. The Judge isn't going to tell you you
14 have to find malice from the use of a deadly weapon, but you
15 can. Again, that's for y'all to decide. Y'all are the judges
16 of the facts.

17 The Judge is also going to tell you, ladies and
18 gentlemen, that you can infer malice when a killing takes
19 place during the commission of a felony, like armed robbery.
20 You can infer malice from that alone, use of a deadly weapon,
21 commission of a robbery, and other elements of malice that you
22 may find. But again, ladies and gentlemen, that's for y'all
23 to decide.

24 Let's talk about armed robbery for a minute. The
25 definition of armed robbery is long, because the definition of

1 armed robbery includes the use of the word larceny, and for
2 some reason our law defines larceny in a very long and
3 convoluted fashion. Y'all know what larceny is. It's
4 stealing, plain and simple. The law says it is the taking and
5 carrying away of someone else's goods, and it goes further
6 than that. It's stealing. Armed robbery includes larceny,
7 stealing.

8 What's robbery? Robbery is stealing from another person
9 by placing that person in fear. I'll give you the difference
10 between robbery and larceny. If I was to go to your house and
11 steal your car, that's a larceny of that automobile. If I was
12 to go to your house and you were getting in your car and
13 starting it up and I snatched the door open and yanked you out
14 of your car and then drove off with it, that's robbery,
15 because I submit, that would have placed you in fear. If I
16 come over to your house with a gun, and point it at you, and
17 say get out of that car; I'm taking it, that's armed robbery.
18 So we start with larceny, stealing, and then you add the
19 element of placing someone in fear, taking the property from
20 their presence or their person, as opposed to just taking the
21 property, and then if they have a weapon, then it's an armed
22 robbery.

23 Now, in this case we have an armed robbery. Doris Kirby
24 was robbed at the E-Z Coin. We have an armed robbery. Thomas
25 Wise was robbed. We also have some attempts, attempted

1 robberies, because you remember, they couldn't get into the
2 Conoco, and poor old George Cullifer couldn't even get the
3 cash register open he was so scared.

4 What's an attempt, ladies and gentlemen? It's more than
5 just thinking about it. It's not riding around in your car
6 going, ah, I might go over there and rob that gas station. An
7 attempt, essentially, is taking some act, some step in
8 furtherance of the crime, like putting on a disguise, like
9 getting a gun and going in the front door, like going in and
10 sticking a gun to somebody, but then the poor old fellow can't
11 get the cash register open. There is nothing magical about
12 the language of attempt. It's not just thinking about it.
13 Just entertaining the thought isn't an attempt. It's taking
14 some step toward the completion of the crime, but for some
15 reason the crime doesn't get completed, maybe because the door
16 is locked, maybe because the guy can't open the cash register,
17 maybe because somebody scares them off, whatever reason.

18 Y'all all know what an attempt is.

19 Also in this case there are some charges of assault and
20 battery of a high and aggravated nature. I'm going to define
21 those terms for you as simply as I can do. I'll tell you this
22 -- and I've been telling y'all a lot about the law. If I tell
23 you something about the law that differs from what His Honor
24 says, y'all take it from him. Don't take it from me; take it
25 from him. He is required by law to tell you what the law

1 says. What I'm trying to do is break it down a little bit
2 into every day language. Assault and battery of a high and
3 aggravated nature, what is that? What's an assault? That's
4 placing somebody in fear. If I was to walk up to somebody and
5 draw my fist back like I was going to hit them, and they
6 thought I was going to, that would be an assault. What's the
7 battery? Well, if I draw my fist back and then come through
8 and actually do hit her, that's a battery. The touching is
9 the battery. The assault is placing in fear; the battery is
10 the hitting. Assault and battery of a high and aggravated
11 nature, circumstances of aggravation, use of a deadly weapon,
12 difference in the ages and the sexes, or the physical
13 condition of the people, maybe there's some children involved,
14 women, men or women, maybe there's a weapon involved, those
15 are all circumstances of aggravation.

16 The Judge is going to tell you the law. Y'all are going
17 to apply the facts to it.

18 There's a couple of other different kinds of charges
19 here in this case that y'all need to know about. Conspiracy.
20 Conspiracy. That's an agreement to commit an unlawful act,
21 agreement to commit a crime. Does it have to be a formal
22 agreement? Do you have to sit down and write, I, Quincy, and
23 I, Marcus, agree to go rob the Conoco and the E-Z Coin? No.
24 It doesn't have to be a formal agreement. It has to be an
25 understanding. And how does the State prove an understanding?

1 Essentially you prove that understanding through the conduct
2 of the parties, conduct such as stealing a get-away car before
3 you start, getting disguises, getting guns, scouting out the
4 scenes. That's the way you prove that the agreement existed.
5 Joint conduct as you go to the stores, or inside the stores,
6 who is going to cover who, are they acting together and in
7 concert, that's how the agreement gets proved.

8 The Judge is going to tell you that mere knowledge that
9 somebody is going to commit a crime is not enough to prove a
10 conspiracy. What that means is that both people have to play
11 a part. I may know that someone is going to go out and commit
12 a crime, but if I don't take a role and play a part, I'm not
13 guilty of conspiracy.

14 There is another charge called pointing and presenting a
15 firearm. We all know what pointing a firearm is. That's
16 putting the business in, right in somebody's face, or your
17 chest, so that they are looking down the barrel. The law
18 doesn't require you to point the firearm to be guilty of that
19 charge, because presenting the firearm in a capacity where you
20 want -- like you can use it, or you are going to use it,
21 that's why the statute says pointing or presenting a firearm.
22 This is the presentment. You don't have to level it at a
23 person.

24 I submit that, if you show up in ski masks, bandannas,
25 stocking caps, whatever, with firearms, at two o'clock in the

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1 morning, the mouth of a convenience store -- the doors of the
2 convenience store, that's a pointing and presenting.

3 One last one I want to talk to you about, the charge
4 called possession of a firearm during the commission of a
5 violent crime. I want y'all to consider that one last. I
6 won't tell you how to do your deliberation, other than tell
7 you to consider it last, and the reason is this. In order for
8 someone to be guilty of point -- or excuse me -- possession of
9 a firearm during the commission of a violent crime, one of the
10 things the State has to prove is that they are guilty of a
11 violent crime. So you can't consider that one, at least until
12 you have considered the violent crimes that are on there.

13 Okay. So consider that charge last. And what are violent
14 crimes? Our Legislature has defined murder as a violent
15 crime. Our Legislature has defined armed robbery as a violent
16 crime, so at least consider those charges before you consider
17 possession during a violent crime, because you need to know
18 what your finding is as far as a violent crime before you can
19 consider that charge.

20 Now, what does the State have to show on that charge?
21 They have to show that the person was the victim of a violent
22 crime -- or did a violent crime, and they have to show that
23 that person was in possession of a gun at the time of the
24 offense, so you have to get to that -- have to jump over that
25 first hurdle first.

1 Now, one last thing the Judge is going to tell you about
2 the law in this case, ladies and gentlemen -- and this is the
3 last thing I'm going to talk to you about. The Judge is going
4 to tell you that, in a case where two or more people get
5 together, and act in concert, and essentially conduct a joint
6 enterprise, that the hand of one is hand of all, and what that
7 means is this. If myself and my buddy get together and
8 decide to commit crimes, I'm responsible for what he does, and
9 he's responsible for what I do. If you get together with
10 somebody, and you start committing crimes, you share and share
11 alike on the responsibilities. So if I was the get-away
12 driver in an armed robbery, and my partner went in, tried to
13 rob a store and shot, I'm guilty of armed robbery; I'm guilty
14 of murder, because a person is responsible for the natural and
15 probable consequences of their acts. And if you commit an
16 armed robbery, I submit a natural and probable consequence of
17 an armed robbery may well be a murder. It may well be a
18 murder.

19 The Judge is going to tell you about the hand of one is
20 the hand of all, and I tell you that, not because I believe
21 Quincy Timmons pulled the trigger. I just tell you because it
22 really doesn't matter if he pulled the trigger. It doesn't
23 matter if it was Quincy; it doesn't matter if it was Marcus;
24 they are both responsible. I submit to you that the evidence
25 shows that Marcus Timmons pulled the trigger. I submit to you

1 that the evidence shows that Marcus is the one that shot him,
2 but I submit to you as well, it doesn't really make a
3 difference, if you go out on a crime spree, and go to the
4 Conoco, and then to the E-Z Coin, and then go out where that
5 killing takes place, and then just a few minutes later, go and
6 rob another place, it doesn't really matter.

7 You shall well and truly try -- you have done that --
8 you have done that -- and true deliverance of a verdict
9 render. A verdict is a Latin term, two words, actually, veri
10 and dicta. Dicta means to speak, like dictation, dictaphone,
11 and veri, as in verify, the truth. That's what the State is
12 asking y'all to do, fulfill that second part of your oath,
13 true deliverance, and speak the truth. The State is not
14 asking for anything more, and we don't expect anything less.

15 Thank you.

16 MR. AYER: May it please the Court.

17 Ladies and gentlemen, on behalf of Marcus Timmons I too
18 appreciate your time and your attention over the last, I guess
19 four days now. Let me say at the outset that, if I have said
20 anything in the last four days to one of the witnesses, if I
21 were on one of the witnesses or anything to offend the
22 victim's family, I apologize. Don't hold it against Marcus
23 Timmons; hold it against me, because where the victim's family
24 is concerned, there is no question that tragedy has occurred
25 here, there is no doubt about that, and the victim's family is

1 clearly entitled to justice. As the Solicitor said, I think
2 on Monday or Tuesday, they are clearly entitled to justice,
3 but justice is for all of us. Marcus Timmons is also entitled
4 to justice, just like the victim's family.

5 As I mentioned to you on Tuesday, one of my biggest
6 concerns and fears in this case is that this is a tragic
7 incident, someone was killed, people were robbed; it happened,
8 and it's easy to get mad. You should be mad, you should be
9 angry; you should be upset. And in just a few minutes I'm
10 sure that Solicitor Swarat is going to take this gun, and be
11 very theatrical. He's going to place it to portions of his
12 body. He's going to imitate what happened to Peggy Williams,
13 and he's going to imitate what happened to Thomas Wise, to
14 have an effect on you, and it should have an effect on you.
15 It should have an effect on anybody, but don't let it -- don't
16 let it project onto Marcus Timmons those feelings of guilt
17 that we talked about the other day, because somebody held that
18 gun to Peggy Williams, somebody shot Mr. Wise, but I submit to
19 you, it wasn't Marcus Timmons.

20 You've heard a lot in this case about the State's duty
21 to prove to you reasonable doubt. The Judge will tell you
22 later on that reasonable doubt is a doubt which would cause a
23 reasonable person to hesitate to act, a doubt which would
24 cause a reasonable person to hesitate. That's what the State
25 has to prove. And you will also hear later on -- the Judge

1 will tell you, the defense does not have to put up a case.
2 The defense has a Constitutional Right not to do that. And as
3 a lawyer, when you are analyzing a case, during the -- before
4 the case and during the case, you look at where you are after
5 the State closes it's case, knowing what the rules are, and
6 knowing what the burden on the State is, that it has to prove
7 it's case beyond a reasonable doubt -- and that being a doubt
8 which a reasonable person would hesitate to act on -- and
9 knowing that the defendant -- the defense does not have to put
10 up a case, and that can't be held against them, as an
11 attorney, a decision is made, a call is made. The law
12 requires you not hold it against the defense; if you do, hold
13 it against me, and not Mr. Timmons.

14 Getting into the facts of our case. We talked on
15 Tuesday about the hour glass analogy, the trial being your
16 hour glass, the sand in that hour glass being the evidence.
17 And let's look a little bit at what's in that hour glass. Is
18 ~~there something in there?~~ Sure there is something in there.
19 There was physical evidence introduced. There were no
20 fingerprints that brought Marcus Timmons to this scene. There
21 were no footprints. There were prints taken, but were not
22 identified as Marcus Timmons. There were items found in the
23 van that Detective Wright talked about. I think you will
24 remember that the Solicitor asked the question items that were
25 in possession of Marcus Timmons. Detective Wright, to his

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1 credit, he said no, they were found in the van. There were
2 three people in the van, Stacey Wright, Marcus Timmons, Quincy
3 Timmons. There were other items in the van.

4 The Solicitor told you on Thursday, as it relates to
5 testimonial evidence -- excuse me -- on Tuesday, as it relates
6 to testimonial evidence -- the Solicitor said, pay very close
7 attention to three witnesses, Peggy Williams, Quincy Timmons,
8 and Willie Williams. Those were the three people the
9 Solicitor asked you to pay close attention to, and I hope you
10 did. I hope you did. I hope you paid real close attention in
11 judging them on their reliability, credibility, and
12 believability, just like we talked about on Tuesday. In that
13 group, ladies and gentlemen, I think you've got about six or
14 seven armed robbers; you've got murder convictions; you've got
15 a man that pled guilty to conspiracy to distribute cocaine
16 with his nineteen year old son; you've got a lady who is out
17 at 3:30 at night, who is not sure where she is, and her
18 friends let her off a mile and a half from her house. That's
19 who the State told you, on Tuesday, to rely on, and pay close
20 attention to, pay close attention to.

21 A reasonable doubt is a doubt for which a reasonable
22 person would hesitate to act. I would submit to you that you
23 would hesitate to allow any of those three people, any of
24 those three people, to be your doctor, to be your nurse, teach
25 your children in school. I submit to you, you wouldn't let

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1 one of those three people take your child to school. You
2 wouldn't rely on one of those people to transport your child
3 to school. You would hesitate before you did that. You would
4 hesitate a lot. And why is it that you will let -- that you
5 won't hesitate to let one of those three people convince and
6 persuade you to find Marcus guilty, guilty. I submit to you,
7 the State has got to do better than that. The State can't
8 rely on those three people to cause you not to hesitate.
9 That's hesitation. That's hesitation.

10 Let's look a little bit at what Ms. Peggy Williams had
11 to say -- and again, ladies and gentlemen, I apologize if I
12 crossed the line with Ms. Williams. My goal was not to be
13 popular; my goal was to ascertain the truth. Marcus Timmons
14 is on trial for murder. My goal was to ascertain the truth.
15 If I crossed the line with Ms. Williams, you hold it against
16 me. Don't hold it against Marcus Timmons.

17 Also, ladies and gentlemen, don't get the idea that I
18 think everybody in the world is suppose to be a perfect
19 person, and I'm not saying that that's the standard we all
20 ought to reach, because we have to address the witnesses, and
21 I have to address the witnesses that the State puts up,
22 proving it's case, proving Marcus Timmons' guilt, and that the
23 State told you that they want you to pay a special close
24 attention to these three people.

25 And Ms. Williams, she's out at 3:30 in the morning, not

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1 that that, in and of itself, means she's a bad person. I'm
2 sure at some point in everybody's life they've been out at
3 3:30 in the morning. She said she had been out to a bar
4 called Checkers, and she had had two glasses of wine. I don't
5 know if she had two glasses of wine or five glasses of wine.
6 You are the judge of the facts. And for whatever reason, her
7 friends would not take her home. She lives a mile and a half
8 from the Pantry, and her friends wouldn't take her home,
9 knowing she didn't have a driver's license. And on testimony
10 on direct -- or rather, cross-examination, I think she said
11 she didn't really know where she was. She's a mile and a half
12 from her house, at 3:30 in the morning, having consumed
13 alcohol, let off by her friends, she doesn't know where she
14 is. Her friends drive off. She's mad. She indicates that
15 she's crying. She goes to use the telephone. She says she
16 has tears in her eyes. And then this tragic situation
17 happened, and it is tragic, and you run the risk here of
18 beating up Ms. Williams because what happened to her is
19 tragic, but that doesn't mean that Marcus Timmons did it, even
20 though it is tragic.

21 She didn't have her glasses on that night. It was
22 interesting how the first day she came she had on glasses, the
23 second day, when she appeared before you, she didn't have her
24 glasses on that day, but on that day she did not have her
25 glasses. She said she could see for a certain distance. You

1 be the judges of the facts. She indicates that, whoever the
2 person was had doe-shaped eyes, and I have no more knowledge
3 about what doe-shaped eyes are than any of you. You be the
4 judge of that. And then Ms. Williams testified later on, two
5 days following the incident she gave a statement, and she said
6 the person holding her had on a ski mask, with eye openings
7 and mouth openings, two days later, and then sometime later,
8 in a proceeding, she testified under oath that the individual
9 holding her had something over his mouth; his mouth was
10 muffled. The Judge will tell -- charge you on the reliability
11 -- the reliability of eyewitness identification. You be the
12 judge of that testimony.

13 Quincy Timmons testified, the third person -- or the
14 second person that the State indicated to you they were
15 relying on. Now Quincy Timmons, ladies and gentlemen, is
16 somewhat of a challenge for me, because Quincy sort of cuts
17 both ways. He clearly has said in the past that Marcus was
18 ~~that, that it was Marcus. No question he said that.~~ Probably
19 no question that he had a conversation with Willie Williams in
20 the Lexington County Jail. Mr. Williams said they got close.
21 He talked about that. Two days ago on this stand, Quincy
22 Timmons, one of the witnesses told the State told you you
23 could rely on to find Marcus Timmons guilty beyond a
24 reasonable doubt, said Marcus Timmons wasn't there, two days
25 ago, wasn't there.

1 Willie Williams was the third person that the State is
2 relying on -- and I apologize again if I was a little too hard
3 on Mr. Williams this morning. If I crossed the line, hold it
4 against me. Don't hold it against Mr. Timmons. But it just
5 interests me -- it just interests me that a man gets up here
6 and pretends to be a father to certain people, and has six
7 children at home, and he can't manage to stay out of jail, and
8 the reason he got in jail was conspiring with his nineteen
9 year old son to sell cocaine, but yet he gets up here on this
10 stand and tells -- acts like he's a father figure, and that
11 has to do with character, ladies and gentlemen. It has to do
12 with character, and character has to do with his
13 believability, reliability, and what he says on that stand.
14 And not only that, I think the testimony came out, when Mr.
15 Williams got out of jail, six months time served, house
16 arrest, probation, he managed to get back in violating his
17 probation, because he had a shotgun, went back in for thirty-
18 three months. The kind of stuff has to do with character and
19 reliability, and believability.

20 It interests me also, ladies and gentlemen, that on
21 direct Mr. Williams would say absolutely nothing to you -- or
22 wasn't asked the question. He was asked nothing about staying
23 in jail, staying in jail with Thomas Wise's brother, the
24 victim's brother. Now how unusual is that? Come in here --
25 and Mr. Williams actually was a roommate, and of course he

1 sort of denied being a roommate. I guess he said, because
2 Thomas Wise's brother came later, that he roomed with him
3 rather than vice-versa. In any event, they were in the room
4 together. But now that wasn't where he picked up on any of
5 this information, about 321, twenty gauge, shot in the back.
6 That wasn't where he picked up on any of that information.
7 You be the judge of that. You be the judge of that.

8 And ladies and gentlemen, if you believe -- and I don't
9 think you do, but you be the judge of the facts. Willie
10 Williams was offered something to testify. People don't just
11 come up and testify.

12 MR. SWARAT: Your Honor, I object to that. It's not in
13 the record.

14 MR. AYER: I agree it's not in the record, Your Honor.

15 THE COURT: I -- I overrule the objection. Continue
16 please. Argue just those matters that are in evidence.

17 MR. AYER: You be the judge of that, ladies and
18 gentlemen. ~~You be the judge of that.~~

19 Ladies and gentlemen, you've heard the old adage, you
20 live by the sword; you die by the sword. And I had indicated
21 to you that the State has not proven, beyond a reasonable
22 doubt, the guilt of Mr. Timmons. If you think they have,
23 obviously you find him guilty. You find him guilty if you
24 think they have. I don't think the sand in that hour glass is
25 to the line if there's a reasonable doubt. I don't think it's

1 there. A reasonable doubt, again, is a doubt which would
2 cause a reasonable person to hesitate to act, and again, the
3 State has come in here with these three witnesses, and that's
4 who they want to prove that Marcus Timmons committed these
5 crimes. And I submit to you, those people would cause those
6 people the hesitate to act. You chose the credibility; you
7 chose the believability, and reliability of those folks
8 whenever you are deliberating.

9 And again, ladies and gentlemen, what we are all here
10 about essentially is justice, and I don't like to wave the
11 flag or anything like that, but the truth of the matter is, we
12 really are in awe. We are in awe at the State of South
13 Carolina. When the Solicitor says the State calls such and
14 such, Tav Swarat doesn't call such and such, and Dayton Riddle
15 doesn't call such and such. You and me, and the Judge and the
16 law clerk, and everybody in this courtroom calls such and
17 such, because we are all the State of South Carolina. That's
18 what the State of South Carolina is, all of us. Every one of
19 us has a Constitutional Right, just like Marcus Timmons has,
20 and every one of us is entitled to a trial in which that State
21 of South Carolina would have to convince twelve people, twelve
22 people, not eleven people, but twelve people, to not hesitate
23 to act. Everybody in here is entitled to that, include Marcus
24 Timmons. And I submit to you that, in a case like this, the
25 State has to do better than to come in with Willie Williams,

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1 Quincy Timmons and Peggy Williams, to try and convince twelve
2 people not to hesitate to act. The State has got to do better
3 than that. The State of South Carolina has to do better than
4 that. It's not Tav Swarat and Dayton Riddle. It's all of it.
5 It's the entire State.

6 Ladies and gentlemen, I'll just take a -- in closing. I
7 challenged you on Tuesday to keep everything, everything, out
8 of that glass, except the evidence, except the evidence. You
9 keep everything out of that glass, which includes a tragic
10 situation, which clearly happened, which calls for projections
11 of guilt onto somebody, and because Marcus Timmons is the
12 person in here it's just so easy to project onto him. You
13 keep everything out of that glass but the evidence, the
14 evidence that you see, which the State told you on Tuesday,
15 primarily -- and they based a lot of their case on the
16 testimony of those three people that we've gone through -- you
17 keep everything out of there but that, and I submit to you
18 ~~that the line of reasonable doubt is just not there, and~~
19 there's a lot of hesitation. That glass, I submit to you, is
20 consumed with hesitation, and consumed with reasonable doubt,
21 and you keep everything out of that glass but the evidence.
22 I ask you to deliberate, go through what's in that glass, go
23 through it and measure it and weigh it, probe it, and delve
24 into it, for it's reliability, it's credibility, it's
25 believability, and what we talked about on Tuesday, and you

1 talk about it among yourself, and every one of you, each one
2 of you, has just as much right to deliberate as the other.

3 And the Judge will tell you the verdict has to be
4 unanimous, and that means if one person hesitates to act,
5 under the reasonable doubt standard, that you can't find
6 Marcus Timmons guilty. And look at the evidence, and try as
7 best you can -- and I know it's hard because a heinous crime
8 happened here. The victim's family sits here, and they want
9 justice, and they are entitled to justice, but justice doesn't
10 necessarily just mean conviction of somebody. It doesn't mean
11 convicting somebody so we can have closure and finality, and
12 everybody can go on about their way. Justice means convicting
13 the right person. And I submit to you that a reasonable
14 person would hesitate before deciding that Marcus Timmons is
15 guilty. And I ask you to bring back a verdict of not guilty
16 for Marcus Timmons.

17 Thank you.

18 MR. SWARAT: May it please the Court.

19 Mr. Foreman, ladies and gentlemen, again I thank you.
20 As Deputy Solicitor Riddle told you earlier, you've done your
21 job well. We try not to watch jurys too often. We need to
22 focus on our job, on the presentation of the evidence, on
23 doing everything we can to point you in the direction of
24 truth. That is our job. Our job is the lead you toward the
25 truth. Mr. Ayer told you that's his job. I disagree with

1 that. His job is to defend Marcus Timmons. Our job is to
2 point you in the direction of truth.

3 I have noticed when we have put witnesses up on the
4 stand, that you have watched them; you have listened to their
5 testimony. When we have put exhibits into evidence you have
6 looked them over. I've seen you point to things on some of
7 the items, look over a picture, listen to the people that are
8 presented, testimony, looked over the evidence, using those
9 good common sense skills that you brought with you. That's
10 all we ask of you. You perform one of the highest services in
11 our society, and I'm not the one that says that. Many have
12 said that over the years, and probably the most notable was
13 Winston Churchill, one of the greatest leaders, probably, of
14 the Twentieth Century. He said that jury service is the
15 highest form of service that you can serve to your Country in
16 peace times, that just short of fighting in a war on foreign
17 soil to defend your Country, jury service is the highest. I
18 submit to you that's true. Instead of protecting your Country
19 against a foreign enemy, you protect it against those domestic
20 enemies, the ones that live around you, the ones that walk
21 among you, in your community, those that can't conform their
22 conduct to the standards of society that we have all sworn to
23 live by, murderers, armed robbers, conspirators, the people
24 that we are dealing with in this case.

25 And I know it's not easy for you to sit there. It is a

1 hardship. And many times I wish we could change our system,
2 let y'all ask some questions. I bet you had some good ones.
3 Fourteen of you, fourteen brains instead of the two of us,
4 myself and Mr. Riddle. I'm sure there are questions you
5 wanted to have answered, and I'm sure there are times when you
6 said, Solicitor, please sit down, we get the point; we
7 understand. But we can't sit down, because, ladies and
8 gentlemen, our voices will be the last voices you will ever
9 hear on behalf of the Wise family, who lost Thomas Wise, a
10 father of two children, a brother, a cousin, their kin, their
11 loved one. They are out there in the courtroom right now, and
12 they are asking for justice, and we are the only ones that are
13 presenting this case and that can give it to them, that can
14 put it before you, put it before you the best we can, so if
15 we've talked on too long, if we have offended you in some way,
16 that's why we do it. We don't do this job for the money. Mr.
17 Riddle and myself, we do this job because, in these cases
18 sometimes we find people like the Wise family, some of the
19 victims in this case, that add to the quality of our lives,
20 and we try to add to theirs by giving them justice, and we can
21 only do it with your help.

22 I told you we would present this case in kind of a
23 chronological order, these crimes, murder, armed robbery,
24 conspiracy. This crime happened in 1993, and one thing I want
25 to tell you, you won't hear anything about the statute of

1 limitations. In South Carolina there is no statute of
2 limitations on any crime. If you commit a crime and it
3 catches up with you one day, and you are brought before the
4 good people of that community, and they sit and they listen to
5 that evidence, and they find that you committed that crime,
6 you are guilty. It doesn't matter whether you get caught
7 seven years later, fifty years later, or that day, so don't
8 concern yourselves with something like that. Concern
9 yourselves with whether or not Marcus Timmons, Quincy Timmons,
10 were the two men involved in this crime spree.

11 And can't we agree on something from our good common
12 sense, that the two men who started this crime spree that
13 particular night are the two men that went through the middle
14 of it and got to the end of it, the same two, the same ones
15 that stole Mr. Glover's car, the elderly gentleman, the
16 elderly black gentleman that worked for Hancock Buick. He's
17 seventy years old now and he couldn't be here. He's in a
18 wheel chair. He's got Alzheimer's. I would have loved to
19 have brought Mr. Glover in here to meet y'all. He wants some
20 justice.

21 The two that robbed the Conoco -- and did you listen to
22 Susan Rogers? That lady came from Georgia to be here. She
23 didn't want to come here. She came here because she's a part
24 in the puzzle, and it's important. She drove all the way from
25 Georgia. She left that truck-driving school that she's in,

1 something that's important to her life, to be put on the
2 stand. She was a victim of crime that night, February the
3 27th, 1993. And I submit to you, she got to be victimized
4 again by sitting in that witness chair. She got victimized
5 again. You saw what she went through. You saw what an effect
6 it had on her seven years later. What did she tell you about
7 it? Man with a ski mask, shorter, stockier man, had the short
8 gun, the shorter, stockier man with the shorter gun, ski mask.
9 What was the other man like, Ms. Rogers? Taller, thinner man,
10 slim build, with a longer gun. You saw Quincy Timmons, ladies
11 and gentlemen, short, stocky. Is that consistent with the man
12 with the short gun? Marcus Timmons, stood right before you.
13 You got to take a look at him. Tall thin man, consistent
14 with what Ms. Rogers said. Yes sir, yes Ma'am, absolutely
15 consistent. They tried to play a little game with you. Told
16 her, well, you didn't say that in 1994 in that court
17 proceeding, did you, Ms. Rogers, trying to make her look like
18 maybe she's telling some kind of tall tale. Do you remember
19 what happened? She had never been asked that question. Was
20 that fair to her to do that to her, to do that to that victim
21 of crime? She was never asked the question. How can you give
22 the answer when you are not asked the question? So she's
23 lying? She's a liar, that lady who had a gun pointed at her,
24 who they tried to rob? She's not credible, she's not
25 believable? I'll never forget those eyes. Remember her

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1 words, I'll never forget those eyes. Does that sound
2 consistent with another witness in this case?

3 It goes on, down to the E-Z Coin. What happened at the
4 E-Z Coin? Anything inconsistent with Marcus Timmons and
5 Quincy Timmons? One man a little bit shorter, short-barreled
6 gun, ski mask, one man with a longer gun, little bit taller,
7 little bit thinner, completely consistent. And what happened
8 at the E-Z Coin? Shot that shotgun. And what gauge was it,
9 ladies and gentlemen? Twenty gauge was found at the E-Z Coin,
10 twenty gauge. That freshly fired shotgun from the E-Z Coin
11 goes on up the road toward Swansea, on 321, and whose hands
12 are it in -- whose hands are that -- is that gun in? The two
13 robbers, Quincy Timmons and Marcus Timmons, nothing
14 inconsistent with them at that point at all. What happens
15 there on the side of the road on 321?

16 And ladies and gentlemen, I don't like you having to see
17 pictures of a dead man, of a man who has been shot with a
18 shotgun, but ladies and gentlemen, I didn't paint that
19 picture. He painted that picture when he pulled that trigger.
20 We don't have to prove that, but I submit to you it's true.
21 He caused that to become a reality. We didn't do that. If
22 that's offended you in some way, I apologize, but remember who
23 did the crime. Remember who drew that blood, who took that
24 life. Please don't hold that against us. Shot that shotgun
25 again, taking that man's life. What gauge? Where is that

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1 wad? Twenty gauge wadding found at the murder scene, twenty
2 gauge wad, consistent with the shotgun.

3 Amazingly it doesn't stop there. Go on down to the
4 Conoco, down to that Conoco station. They are trying to put
5 these three witnesses -- just -- okay, these three witnesses.
6 If you don't believe everything these three witnesses are
7 saying, he's not guilty. Does that appeal to your common
8 sense. His Honor is going to tell you, you can believe some
9 of what a witness says, all of what a witness says, or none of
10 what a witness says. He's looking at us like we picked the
11 witnesses. No sir, no Ma'am, we didn't pick these witnesses.
12 They picked them when they decided to start this crime spree
13 that night. They picked the witnesses to their crimes. They
14 picked the victims. We didn't pick those witnesses. They
15 picked them, and picked on them, and that's why they are here.
16 They chose them; we did not choose them. We are stuck with
17 what they chose. Don't mind being stuck with those people,
18 but that's what we are stuck with.

19 Peggy Williams. Let's talk about Peggy Williams. I did
20 ask you to focus on those three, but if you will remember --
21 and they are not going to tell you -- if you will remember
22 what I said about it, they are all important, but these three
23 are more important. Peggy Williams. Okay, you can't believe
24 her because she was out that night, that she went out with
25 some friends, that she had two glasses of wine, and that she

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1 had an argument or disagreement with some of those friends, so
2 you can't believe Peggy Williams. Does that appeal to your
3 good common sense. Ten years as an insurance agent, doing
4 business, working hard in this community, but you can't
5 believe Peggy Williams. And they want to pick on her about
6 her glasses. She's near-sighted. How close was she to Marcus
7 Timmons, for five whole minutes, five minutes, good lighting,
8 I submit to you, better than this courtroom. Ladies and
9 gentlemen, I haven't been talking to you five minutes right
10 now, and she was face to face with him, nose to nose the
11 entire time, but she's not credible.

12 All right. Let's judge her credibility based on a
13 little bit of math. Some of you have science backgrounds,
14 math backgrounds. I don't. It's not my thing. But let's
15 judge her based on that. Less than three months later, ladies
16 and gentlemen, out of eighteen possible choices -- and you
17 will take this back in your jury room with you. You can take
18 a look at it. You can judge her on this. Out of eighteen
19 possible choices -- think of the odds -- she picks Marcus
20 Timmons, and only Marcus Timmons, only Marcus Timmons, and
21 says, hundred percent, absolutely positively certain. That's
22 back in 1993, not the year 2000. That's when she picks him
23 out. And you know what's even more important about it, what's
24 the big coincidence about that, it's later on the next month
25 when the fingerprint comes back of Quincy Timmons. So what

1 are the odds of her picking out the first cousin of the man we
2 know was there, by his fingerprint. Is that coincidence? No
3 sir, no Ma'am. That's her focusing on that face for more
4 than five minutes. They say you can't believe that. Well,
5 she signed it back there under oath, May the 28th, 1993, I
6 swear it's true. You got to judge her credibility, you got to
7 judge her believability, but they want to pick on her because
8 she had a few glasses of wine and she was out that night. If
9 she did not have a few glasses of wine, and wasn't out that
10 night, she wouldn't have been a victim. Their fault. They
11 chose the time of the crime spree, not her.

12 What else about Peggy Williams that we know is true?
13 They tried to trip her up on that same line of questioning
14 they used with Ms. Rogers. You didn't say that in '94 in that
15 hearing, did you? She wasn't asked it either. That's not
16 fair to her. That's not fair to her. Judge that. Judge what
17 they tried to do to her. Did she pick him out of this
18 courtroom here? Did you get to see her pick him out? What do
19 you think about that? Don't you think that takes courage,
20 from a man that held a shotgun on you? And she didn't know
21 that that shotgun had taken a life that night, and that it was
22 fully loaded with buckshot, again.

23 And Mr. Paavel told you about that gun. You have to
24 open it up to take the shell out. Killed Thomas Wise, took
25 the shell out, put a new shell in. Captain McNair smelled

1 that gun behind the Pantry, freshly fired. If this isn't the
2 homicide weapon, I don't need to be standing here right now.
3 If that's not good common sense, there is no reason for me to
4 stand before you. How many freshly fired twenty gauge
5 shotguns do you think were in the Cayce area at three o'clock
6 in the morning that night? That's the murder weapon right
7 there. Your good common sense tells you that.

8 Quincy Timmons. Ladies and gentlemen, Quincy Timmons
9 came in here, year 2000. He's been in prison for
10 approximately six years. He is the first cousin, blood cousin
11 of Marcus Timmons. They have the same grandmother. Quincy's
12 mother, Marcus's father, brother and sister. He's got nothing
13 to lose by coming in here and saying whatever in the world he
14 wants to say, but now he wants to say Marcus wasn't there.
15 Let's think about this thing, because he told you from the
16 witness stand yesterday that he wasn't involved in this
17 murder, but he pled guilty to it. What was his reward for
18 pleading guilty to it? A life sentence. Does that make sense
19 to you, that he's going to plead guilty to something he didn't
20 do, and take a life sentence for it, and then testify that he
21 and Marcus were the ones involved, he and his first blood
22 cousin.

23 You heard what Willie Williams said about it. I want
24 you to think about that, what Willie Williams said about
25 Quincy Timmons. He would go to my Bible study; he would sit

1 there and do Bible study with us back then; he was respectful
2 to me; he was that way to me. I submit to you, back then
3 Quincy Timmons had something that he doesn't have now. He had
4 a conscious. He had a conscious. He took responsibility for
5 his role in this crime, and he told the truth about his own
6 flesh and blood, first cousin. He had something he doesn't
7 have now. He swore to it, under oath, with his attorney
8 present, on two separate occasions. December the 12th, 1994,
9 he pled guilty to the -- told the whole story, in front of the
10 Judge, Judge Mark Westbrook, on the penalty of getting a life
11 sentence. He did get that life sentence. On December 14th of
12 1994 he told it, and told it in more detail. What did he tell
13 you? Me and Marcus. What happened? Stopped a man on the
14 side of the road, went up to him, going to rob him; Marcus had
15 that twenty gauge shotgun, had it across my chest, pointed at
16 the man; the man and I got in an argument, got in a physical
17 fight. Does that sound consistent with anybody? Is that
18 corroborated by the physical evidence? Chased him across the
19 road into a ditch; we were still fighting; Marcus said, get
20 the hell out of the way. Do you remember words like that from
21 another witness? What did you do? I got out of the way.
22 What did Marcus do? He shot him with that shotgun. Was there
23 something interesting the man had on him? Marijuana. So you
24 can't believe Deputy Snead who told you about the marijuana?
25 You can't believe Chief James, who told you about the

1 marijuana? What does Quincy know that only the killers could
2 know? He knows about that marijuana? What does Willie
3 Williams know that only the killers could know? He knows
4 about that marijuana. Small little fact in there, but it's
5 glaring, because only the killers could know that information.

6 Quincy Timmons told the whole story back then and he
7 took his punishment. He had a conscious. Don't give him
8 credit, and don't give Marcus Timmons the benefit of the fact
9 he doesn't have one any more.

10 Willie Williams, not a perfect human being, that drug
11 charge, violation on that shotgun, okay. That's fine. He is
12 not a murderer; he is not an armed robber. He's a fifty year
13 old man with six children and four grands, and they want to
14 pick on him about the fact that he went to jail, and during
15 the time he was in jail nobody was taking care of those
16 children. Who is going to take care of Thomas Wise's
17 children? That's what we are here about. We are not here
18 about Willie Williams's children. We are here about Thomas
19 Wise's children. And what did he tell you? What do you know
20 about his life? Hardworking all his life. Was a paratrooper,
21 served in Vietnam. Not perfect, no. He wouldn't have been in
22 the jail cell with him if he were perfect. Fortunately for
23 justice he wasn't perfect, because he was in a place where he
24 could get to meet and know Marcus Timmons, and what did he
25 say? Got in an argument with a white man about that

1 telephone. I'm not afraid of him, not afraid of a white guy;
2 I've already killed one before. Sound reasonable to you?
3 Talking a little too much. I submit to you, that's Marcus
4 Timmons. Where did he tell you about it? Shot him on Highway
5 321. He was coming from a club. Quincy walked up to him and
6 asked him for a light. They got in an argument. Called
7 Quincy a name. They got in a physical fight. Sound
8 consistent with Quincy Timmons? Got in a physical fight. The
9 man was beating up on Quincy. Marcus told him to get out of
10 the way and he shot him, left him in a ditch.

11 Ladies and gentlemen, look at State's Exhibit Number 14.
12 Where do those drag marks come from? Let's call that a ditch.
13 Is that reasonable? Is that good common sense? That man drug
14 himself up to the roadway out of that ditch, after Marcus
15 Timmons put a hole in him, sixteen of them. Facts only the
16 killer could know.

17 Now, what's taken out of that van six weeks later, and
18 who was Marcus Timmons found with? His running buddy, his co-
19 conspirator, his co-robber, co-killer, six weeks later,
20 stopped in that van, Marcus Timmons and a man named Stacey
21 Wright, who has nothing to do with this case whatsoever. What
22 does Quincy do? Quincy ran. What does Marcus does, or what
23 doesn't he do? The police talk to him and he won't even give
24 his name. Said he was grunting at them. Wouldn't even tell
25 the officer who he was. They got the car keys out of his

1 pocket. They found his car, found his driver's license, the
2 only way they could identify him. Evidence of flight, guilty
3 knowledge, guilty knowledge. Why do that unless you've got
4 something to hide. What's found in that van? This red
5 bandanna, the bandanna George Cullifer identified as being on
6 the man at the Pantry, this half face ski mask. Peggy
7 Williams testified his voice was muffled. Quincy Timmons
8 prior testimony, that was Marcus', and he had it on that
9 night, February 27th, 1993, and that hat. This was taken out
10 of that van that night, six weeks later. Quincy Timmons said
11 he had it on. Consistent with the shorter man with the
12 shorter gun. Ladies and gentlemen, we all know in the middle
13 of April, in Columbia, you need a ski mask. Does that appeal
14 to your common sense. You need a neoprene face mask for the
15 wind chill factor in Columbia, South Carolina. What do you
16 think these items are for, and where do you think they are
17 from? Witnesses in this case have identified these items as
18 the items on the robbers that night. Good evidence. We don't
19 have any evidence? Reasonable doubt? How about no doubt?

20 Ladies and gentlemen, I told you my voice was the last
21 that you would hear on behalf of the Wise family. That's
22 true. But your twelve voices will be the last words and voice
23 they hear on behalf of this case, all the victims in this
24 case, including their loved one, and the ones that have taken
25 the stand. Please, use that good common sense, evaluate this

1 evidence, and render that verdict that speaks the truth. Let
2 that last voice be for justice.

3 Thank you.

4 THE COURT: Mr. Foreman, ladies and gentlemen of the
5 jury, we will take a break at this time. When we come back
6 I'll instruct you on the law that applies in this case. When
7 You receive my instructions you will be asked to retire to
8 begin your deliberation. Once again, while you are in the
9 jury room, do not discuss this case.

10 Please follow the bailiff to the jury room.

11 THE FOLLOWING TAKES PLACE AFTER A BREAK, AND OUTSIDE THE
12 PRESENCE OF THE JURY.)

13 THE COURT: Okay. Is the State ready?

14 MR. RIDDLE: State is ready, Your Honor.

15 THE COURT: Defendant ready?

16 MR. AYER: Yes sir, I am, Your Honor.

17 For the record, I would like to make, Your Honor, a
18 motion, based on Solicitor Swarat's closing argument, just for
19 the record. He mentioned, when the van was stopped, the
20 charge of flight, and I'm not sure whether he meant charge of
21 flight from the April crime or the February crime, but nobody
22 was really fleeing -- they were fleeing from another crime, if
23 anybody was fleeing, is at least my understanding of what he -
24 - he talked about that being evidence of guilt. That would
25 have been evidence of guilt of an April crime, not of this

1 crime.

2 THE COURT: It could be guilt of any crime, because
3 that's the ---

4 MR. AYER: Well, possibly,.

5 THE COURT: The law is real clear that, if you run,
6 that that could be evidence of guilt of a -- of a crime.

7 MR. AYER: And I think he misstated the testimony of
8 Susan Rogers or Doris Kirby. He indicated that their
9 testimony was consistent as to the eyewitness identification,
10 and I don't think that was true at all. I think there
11 testimony was very inconsistent from -- for the shorter man,
12 short gun, full ski mask. I don't think they necessarily said
13 what he said they said.

14 THE COURT: All right. Well, I'll note your
15 objections ---

16 MR. AYER: Thank you, sir.

17 THE COURT: ---For the record, and I deny your motions,
18 but you are protected on the record.

19 MR. AYER: Thank you, sir.

20 THE COURT: All right. You may bring in the jury.

21 (THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE
22 JURY.)

23 THE COURT: Mr. Foreman, members of the jury, you have
24 heard the charges -- I will not repeat those at this time --
25 against the Defendant in this case. There are some fifteen

1 different charges, fifteen verdicts that you will be asked to
2 render, and I will go into that in my instructions to you.

3 To each one of these crimes that is alleged against this
4 Defendant, this Defendant, Marcus D. Timmons, has entered a
5 plea of not guilty, which places upon the State of South
6 Carolina the burden of proving the Defendant guilty. A person
7 charged with committing a criminal offense in South Carolina
8 is never required to prove himself innocent. I charge you
9 that it is vital, important rule of the law of evidence that
10 the defendant in a criminal trial, no matter how great or
11 serious may be the offenses with which he is charged, must
12 always be presumed innocent, until his guilt has been proven
13 beyond a reasonable doubt. This presumption of innocence
14 remains with the Defendant at all times, from the moment of
15 his arraignment, throughout the trial, and until the jury has,
16 upon the testimony and evidence presented, reached a verdict
17 of guilty beyond a reasonable doubt. It is the solemn duty of
18 the jury, if not clearly convinced of his guilt, beyond a
19 reasonable doubt to the contrary, to acquit the defendant.
20 The burden of proof is upon the State to establish, by
21 evidence to your satisfaction, the guilt, beyond a reasonable
22 doubt, of this Defendant.

23 What is reasonable doubt? A reasonable doubt is the
24 kind of doubt that would cause a reasonable person to hesitate
25 to act. The State of South Carolina has the burden of proving

1 the Defendant guilty, beyond a reasonable doubt. Some of you
2 may have served as jurors in civil cases, where you were told
3 that it is only necessary to prove that a fact is more likely
4 true than not true. In criminal cases the State's proof must
5 be more powerful than that. It must be beyond a reasonable
6 doubt. Proof beyond a reasonable doubt is proof that leaves
7 you firmly convinced of the defendant's guilt. There are very
8 few things in this world that we know with absolute certainty,
9 and in criminal cases the law does not require proof that
10 overcomes every possible doubt. If, based on your
11 consideration of the evidence, you are firmly convinced that
12 the Defendant is guilty of the crimes charges, you must find
13 him guilty. If, on the other hand, you think there is a real
14 possibility that the Defendant is not guilty, you must give
15 him the benefit of the doubt, and find him not guilty.

16 Under the Constitution and laws of South Carolina, you
17 are the finders of the facts in this case. I do not have the
18 right to pass upon the facts, or express any opinion that I
19 might have as to the facts of this case, nor may I intimate,
20 in any way, what I may think about the guilt or innocence of
21 the Defendant. You are the judges, and the sole judges of the
22 credibility, the believability of the witnesses who have
23 testified in this case. In passing upon their credibility you
24 may take into consideration many things, such as the
25 following: The appearance and manner of the witness on the

1 stand, sometimes referred to as the demeanor of the witness.
2 Was the witness forthright or hesitant; was the witness's
3 testimony consistent, or did it contain discrepancies; what
4 was the ability of the witness to know the facts about which
5 he or she testified; did the witness have a cause or a reason
6 to be biased and prejudiced in favor of the testimony he or
7 she gave; and was the testimony of the witness corroborated,
8 or made stronger by other testimony and evidence, or was it
9 made weaker, or impeached by such other testimony and
10 evidence.

11 As jurors you have a right to believe a small portion of
12 a witness's testimony, and discard the larger portion, or
13 vice-versa. You may believe all of a witness's testimony or
14 none. You may believe the testimony of a single witness
15 against that of many witnesses, or the other way around. Most
16 certainly you do not determine the matter of credibility or
17 believability by counting up the number of witnesses who may
18 have testified on behalf of the parties. Throughout this
19 entire process you have but one objective, and that is to seek
20 the truth, regardless of from which witness the testimony may
21 have come. All these things you will consider, bearing in
22 mind that you should give the Defendant the benefit of every
23 reasonable doubt.

24 The same Constitution and laws which make you the
25 finders of the facts and the evidence, provide that the Judge

1 is the sole and only instructor in the law. You must accept
2 as correct the law which I charge, and apply it to the
3 evidence as you find it, and reach your verdict. If I should
4 make an error in the law as I instruct it to you, there is
5 another time and place that error can be considered, and if
6 necessary, corrected, but for purposes of this case today, you
7 must accept the law as I charge it to you to be the correct
8 law.

9 I further charge you in this regard that you should not
10 be concerned with what the law ought to be, but rather, what I
11 charge you the law to be.

12 There's two types of evidence which are generally
13 presented during a trial, direct evidence and circumstantial
14 evidence. Direct evidence is the testimony of a person who
15 asserts, or claims to have actual knowledge of a fact, such as
16 an eyewitness. Circumstantial evidence is proof of a chain of
17 facts and circumstances indicating the existence of a fact.
18 The law makes absolutely no distinction between the weight or
19 value to be given to either direct or circumstantial evidence,
20 nor is a greater degree of certainty required of
21 circumstantial evidence than of direct evidence. You should
22 weigh all the evidence in the case. After weighing all the
23 evidence, if you are not convinced of the guilt of the
24 Defendant, beyond a reasonable doubt, you must find the
25 Defendant not guilty.

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1 In the trial of this case some witnesses were qualified
2 as an expert in a particular field. I charge you that,
3 although lay witnesses are limited to testifying about facts
4 within their knowledge, and are not allowed to give opinions,
5 certain witnesses who, by training, education, or experience,
6 are considered as experts in a particular field, may give
7 opinions in that field, based upon the facts of a matter and
8 their conclusions, and these opinions constitute evidence to
9 be considered by you in connection with all of the other
10 evidence and testimony in the case, that is to say, you may
11 consider the expert's opinion just as you do all the other
12 evidence in the case. It is for you, the jury, to give it
13 such weight as you, in your experience and discretion, may
14 determine. By this I mean that you must weigh such evidence,
15 and accept or reject it in the same manner as you treat all
16 other evidence in the case.

17 Criminal intent is a necessary element of each crime
18 that must be proven by the State beyond a reasonable doubt.
19 Criminal intent is always a matter that must be determined by
20 the jury, from the circumstances surrounding the situation. I
21 charge you that the State does not have to prove a specific
22 intent before a defendant may be found guilty. A general
23 intent is sufficient. Such intent may be shown by acts and
24 conduct of the accused, the character or the means or
25 instrument used, manner in which it was used, purpose to be

1 accomplished, resulting wounds or injuries, and other
2 circumstances.

3 If you should determine that identification of the
4 Defendant is -- in this case is an issue, then I charge you as
5 follows: The State of South Carolina has the burden of
6 proving identity beyond a reasonable doubt. You, the jury,
7 must be satisfied, beyond a reasonable doubt, of the accuracy
8 of the identification of the Defendant before you may convict
9 him. Identification testimony is an expression of belief or
10 impression by a witness. You may consider the opportunity a
11 witness had to observe the alleged offender at the time of the
12 offense, and to thereafter make an identification. It is for
13 you, the jury, to determine the accuracy of the identification
14 of the Defendant. You must consider the credibility of each
15 identification witness in the same way as any other witness.
16 You may consider their truthfulness as well as the capacity,
17 opportunity and circumstances to make a reliable observation
18 of the matters about which he or she testified. Whether the
19 witness had an adequate opportunity to observe the offender at
20 the time of the offense will be affected by such matters as
21 how long or short a time was available, how far or close the
22 witness was, the lighting conditions, whether the witness had
23 occasion to see or know the person in the past. Once again I
24 instruct you, the burden of proof -- once again I instruct
25 you, the burden of proof on the State extends to every element

1 of the crime charged, and this specifically included the
2 burden of proving, beyond a reasonable doubt, the identity of
3 the Defendant as the perpetrator of the crimes with which he
4 now is charged. If, after examining the testimony, you have a
5 reasonable doubt as to the accuracy of the identification, you
6 must find the Defendant not guilty.

7 I further charge you that, if a crime was committed by
8 two or more persons who are acting together in the commission
9 of the crime, or the offense, the act of one is the act of
10 all. This is true if there are two people, or more than two
11 people, involved in the act. For example, two people, or more
12 than two people, can be guilty of killing another, that is,
13 guilty of murder, when only one of the two had a firearm, and
14 only one fired the shot or committed the act that caused the
15 death. If two or more people are together, are acting
16 together, assisting each other in the commission of an
17 offense, the law says that, under these circumstances, the act
18 of one is the act of all, and as it is sometimes said, the
19 hand of one is the hand of all.

20 I instruct you now, and emphasize to you, the fact that
21 the defendant in the trial of a criminal case does not testify
22 in his own behalf is not a factor to be considered by you, in
23 any way, in your deliberations, and in your consideration of
24 the question of guilt or the innocence of the accused. It
25 must not be considered by you in any manner whatsoever against

1 the Defendant, or mitigated against the Defendant in any
2 respect whatsoever. The Defendant has the Constitutional
3 Right to remain silent, and the assertion of this
4 Constitutional Right cannot, and must not be considered by you
5 in your deliberations. Under your oath then, you are to reach
6 no inference, and draw no conclusion whatsoever from the fact
7 that the Defendant, in this case, did not testify. The fact
8 that the Defendant did not testify should not even be
9 discussed in the jury room. The burden of proof, as I have
10 stated to you, is upon the State. It is not incumbent upon
11 the accused to prove his innocence. The burden of proof
12 remains upon the State to prove guilt, beyond a reasonable
13 doubt, and the fact that the Defendant did not testify is not
14 a factor to be considered by you in determining the guilt or
15 the innocence of the Defendant.

16 There are various crimes alleged against the Defendant
17 in this case. I will now instruct you on these crimes. First
18 I will instruct you on the crime of murder. Section 16-3-10
19 of the South Carolina Code of Laws as amended states in part,
20 "Murder is the killing of any person, by another, with malice
21 aforethought, either expressed or implied." I charge you that
22 in order to convict of murder, the State must not only prove
23 that the deceased was killed by the Defendant, but it also
24 must prove, beyond a reasonable doubt, that the killing was
25 done with malice aforethought.

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1 Malice in the law of homicide is a term of art, that is,
2 a technical term, importing wickedness, and excluding just
3 cause or excuse. It is something which springs from
4 depravity, from a heart devoid of social duty, and fatally
5 bent on wrongdoing. Malice has been defined as the wrongful
6 intent to injure another, and indicates a wicked or depraved
7 spirit, intent on doing wrong. The words expressed or implied
8 do not mean different kinds of malice, but merely the manner
9 in which the only kind known to the law may be shown to exist.
10 Malice is expressed when there are prior threats of vengeance,
11 or when other circumstances show directly that a criminal
12 purpose was entertained. The law says, if one intentionally
13 kills another with a deadly weapon, the inference of malice
14 may arise. If facts are proved, beyond a reasonable doubt,
15 sufficient to raise an inference of malice to your
16 satisfaction, this inference would be simply an evidentiary
17 fact to be taken into consideration by you, the jury, along
18 with the other evidence in the case, and you may give it such
19 weight as you determine it should receive. You may accept or
20 reject it's permissive inference, depending upon your view of
21 the evidence.

22 The law says if one intentionally kills another during
23 the commission of a felony, the implication of malice may
24 arise. If facts are proved, beyond a reasonable doubt,
25 sufficient to raise an inference of malice to your

1 satisfaction, this inference would be simply an evidentiary
2 fact to be taken into consideration by you, the jury, along
3 with other evidence in the case, and you may give it such
4 weight as you determine it should receive. You may accept or
5 reject this permissive inference, depending upon your view of
6 the evidence.

7 When we define murder as an unlawful killing, with
8 malice aforethought, what do we mean by aforethought? It
9 means that, while the law does not require that malice shall
10 exist for any particular length of time before the commission
11 of the act in question, it must be aforethought. There must
12 be a combination of the previous evil intent, and the act
13 producing the fatal result. But malice need not be in the
14 mind of the one doing the wrongful act any particular length
15 of time before the act. If it is present in the mind any
16 length of time before the act, and at the time of the act,
17 accompanying and prompting the act, then it's presence would
18 be sufficient.

19 The Defendant is also charged with two counts of armed
20 robbery. I am now going to explain to you the offense known
21 in the law as armed robbery. I'm going to read to you, in
22 part, Section 16-11-330 of the Code of Laws of this State.
23 "Any person convicted for the crime of robbery, while armed
24 with a pistol, dirk, slingshot, metal knuckles, razor, or
25 other deadly weapon, shall suffer punishment for armed

1 robbery."

2 I will now define for you the offense of robbery while
3 armed with a deadly weapon in which, for convenience in this
4 instruction, I will call armed robbery. I'm going to first
5 define for you the crime of larceny, then robbery, and then
6 what constitutes armed robbery, because larceny is embraced
7 within robbery, and then armed robbery is the aggravation of
8 the crime of robbery.

9 What is larceny? Larceny is the felonious taking and
10 carrying away, by any person, of the goods or personal
11 property of another, with the felonious intent to permanently
12 deprive the owner of his property, and convert it to the
13 taker's own use. The essential elements of the crime of
14 larceny, which ordinarily is called stealing, are one, the
15 felonious intent, the intent to steal on the part of the
16 taker, to permanently deprive the owner of the personal
17 property, and to convert the property to the taker's own use.

18 Robbery is the felonious taking and carrying away of the
19 personal property, of any value, of another, from his person,
20 or in his presence, by violence, or putting him or her in fear
21 of violence. Robbery includes larceny, and all of the
22 elements which are necessary to constitute larceny are also
23 necessary to constitute robbery. The elements of robbery are
24 first, the property taken must be the subject of larceny, that
25 is, personal property. I charge you that lawful coin and

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1 currency of the United States of America is personal property.
2 Second, there must be a felonious taking and carrying away of
3 the personal property, that is, there must be a trespass to,
4 and an asportation of the personal property by the taker --
5 even for an instance is sufficient -- and the carrying away,
6 or even the slightest removal of the personal property is
7 sufficient in law. Third, the taking and carrying away of the
8 personal property must be with a felonious intent, that is,
9 with the intent to steal on the part of the taker, to
10 permanently deprive the owner of the personal property, and to
11 convert the personal property to the taker's own use. Fourth,
12 the aggravating circumstances necessary to constitute robbery,
13 as distinguished from larceny, are these. The property must
14 be taken from the person of another, but if it is taken in his
15 or her own presence, it is then taken constructively from his
16 or her person. The taking must not only be without his or her
17 consent, but it must be accomplished with violence, or by
18 putting him or her in fear of violence. In order for one to
19 be guilty of robbery while armed with a deadly weapon, the law
20 requires that one must have used a deadly weapon to accomplish
21 the purpose of robbery, as I have defined that term to you.

22 I charge you that a shotgun or a rifle is a deadly
23 weapon, as defined by the statute which I have read to you.

24 The Defendant is also charged with two counts of
25 attempted armed robbery. I have just instructed you on the

1 crime of armed robbery. I will now define for you attempt.
2 Attempt can be defined as an effort to accomplish a specific
3 purpose, but falling short of success. Attempt in criminal
4 law is an endeavor to accomplish a crime carried beyond mere
5 preparation, but falling short of execution or completion of
6 the ultimate design. In other words, an attempt includes an
7 intent to do a particular criminal thing, combined with an act
8 falling short of the thing intended. An attempt has two
9 elements, one, a specific intent to commit a particular crime,
10 and two, a direct and effectual act toward it's completion.
11 To constitute an attempt to commit a felony, there must be
12 some act done toward the accomplishment of the criminal
13 purpose, beyond mere preparation. In other words, there must
14 be some overt act, not a mere intent, and the overt act must
15 go beyond mere preparation.

16 The Defendant is also charged with the crime of
17 possession of a firearm during the commission of, or attempt
18 to commit a violent crime. Under Section 16-23-490 of the
19 South Carolina Code of Laws a person is guilty of possession
20 of a firearm during the commission of, or attempt to commit a
21 violent crime if the person is in possession of a firearm, or
22 visibly displays what appears to be a firearm during the
23 commission of a violent crime. Our law defines firearm as a
24 machine gun, automatic rifle, revolver, pistol, or any weapon
25 which will, or is designed to, or may readily be converted to

1 expel a projectile. A violent crime includes the offenses of
2 murder and armed robbery. Should you, the jury, find the
3 Defendant not guilty of the crime of murder and armed robbery,
4 then you could not find the Defendant guilty of this crime,
5 possession of a firearm during the commission of, or attempt
6 to commit a violent crime.

7 The Defendant is also charged with assault and battery
8 of a high and aggravated nature. I will now instruct you on
9 the offense of assault and battery of a high and aggravated
10 nature. First I will define the term assault, and then the
11 term battery. An assault is defined as an attempt to do
12 violence to the person of another, in a rude, angry and
13 resentful manner. A battery is defined as carrying into
14 effect an assault, by using or applying force to the person of
15 another, however slight, in a rude, angry and resentful
16 manner. Assault and battery of a high and aggravated nature
17 is an unlawful act of violent injury to the person of another,
18 accompanied by circumstances of aggravation, such as the use
19 of a deadly weapon, the infliction of serious bodily injury,
20 the intent to commit a felony, the great disparity between the
21 ages and physical conditions of the parties, a difference in
22 the sexes, the purposeful infliction of shame and disgrace,
23 resistance of lawful authority, and others. Neither serious
24 bodily harm, nor the use of a deadly weapon is an essential
25 element of the offense of assault and battery of a high and

1 aggravated nature. Actual bodily harm to the alleged victim
2 is not necessary to establish an assault and battery of a high
3 and aggravated nature. In determining whether an assault and
4 battery is of a high and aggravated nature, all of the
5 surrounding circumstances must be considered.

6 The Defendant is also charged with two counts of
7 conspiracy. Section 16-17-410 of the South Carolina Code of
8 Law states in part, conspiracy is hereby defined as a
9 combination between two or more persons, for the purpose of
10 accomplishing a criminal or unlawful object, or an object,
11 neither criminal nor unlawful, by criminal or unlawful means.
12 This statute then makes it unlawful for two or more persons to
13 conspire or combine, either to accomplish a criminal or
14 unlawful purpose, or to accomplish a purpose not, in itself
15 criminal or unlawful, but by criminal or unlawful means. It
16 is the unlawful combination or agreement between two or more
17 people that constitutes the offense, and no overt act is
18 necessary. Stated differently, conspiring is a distinct
19 offense, and nothing else need be done in execution of it,
20 that is, no overt act carrying out or completing the
21 conspiracy is necessary or required. For example, if two
22 people meet and agree to commit a crime, they would be guilty
23 of criminal conspiracy, even though they later changed their
24 minds and determined not to do so. Mere knowledge that
25 another person is engaged, or other persons are engaged in

1 criminal conduct is not sufficient to show an agreement to
2 join in that conduct. Similarly, the mere fact that this
3 Defendant may have associated with another person, or other
4 persons, or may have met with such persons, or assembled
5 together and discussed common aims and interests with such
6 persons, does not necessarily establish proof of the existence
7 of a conspiracy, or of the Defendant joining in a conspiracy.
8 Merely sharing objectives, meeting together, or engaging the
9 similar or parallel conduct is not sufficient. In order to
10 convict the Defendant of conspiracy the State must prove,
11 beyond a reasonable doubt, not only that the Defendant knew of
12 the illegal conduct, but also that the Defendant agreed to
13 combine with other persons for the purpose of accomplishing
14 the unlawful conduct.

15 The Defendant is charged with six counts of pointing and
16 presenting a firearm. South Carolina Code Section 16-23-410
17 provides that it unlawful for a person to present or point at
18 another person a loaded or unloaded firearm, but this section
19 must not be construed to abridge the right of self-defense, or
20 to apply to theatricals or like performances. Before you can
21 find any defendant guilty of this offense you must find all
22 three elements of this crime have been proved, to your
23 satisfaction, beyond a reasonable doubt. The elements are,
24 one, the Defendant committed some action with regard to a
25 firearm that amounts to pointing or presenting, two, the item

1 that the Defendant pointed or presented was, in fact, a
2 firearm. It is not necessary for you to find that the firearm
3 was loaded with ammunition of some kind. The firearm may be
4 loaded or unloaded. Three, the Defendant pointed or presented
5 the firearm at another person other than himself. In order to
6 find a defendant guilty you must find that all three of these
7 essential elements have been proven beyond a reasonable doubt.
8 If you find that any one of these elements has not been proven
9 beyond a reasonable doubt, then you must return a verdict of
10 not guilty on this charge.

11 Mr. Foreman, ladies and gentlemen of the jury, you have
12 been selected as fair and impartial jurors, sworn to
13 impartially try and determine the facts of this case, and when
14 you comply with your oath to do so, no one will have a right
15 to criticize your verdict, and you will have fully discharged
16 your duty as jurors. You should not be influenced by
17 opinions, or expressions of opinions, if any, which you may
18 have heard on the outside, but you are to decide this case
19 according to the testimony that you have heard from the lips
20 of the sworn witnesses, along with other evidence introduced.

21 The indictments in this case allege several different
22 offenses against the Defendant. Each indictment charges a
23 separate and distinct offense. Some of these indictments
24 charge more than one offense, and in those indictments each
25 offense charged is referred to as a count, for example, count

1 one, count two. You must decide each indictment or each
2 count, that is, each charge, separately on the evidence and
3 the law applicable to it, uninfluenced by your decision as to
4 any other charge. The Defendant may be convicted or acquitted
5 on any or all of the offenses charged. You will be asked to
6 write a separate verdict of guilty or not guilty for each
7 crime charged.

8 Now, I instruct you that, for each crime charged there
9 are only two possible verdicts. One is guilty, the other is
10 not guilty. We have prepared verdict forms -- these are the
11 forms that I hold in my hand -- for each charge. They will
12 accompany you to the jury room when you begin your
13 deliberations. On these verdict forms you will notice they
14 all look alike at the top. At the left-hand corner we have
15 the name, or the caption of the case. Toward the right top of
16 the page we have the name of this Court and beneath that a
17 case number. Down beneath the case number we have, for
18 example, on this form printed, count one, murder, and beneath
19 that the name of the victim. And on the -- each form is
20 different in respect to what is printed on the top right-hand
21 portion of the page.

22 Now, there is no significance at all in the order that
23 these forms of verdict appear, simply, we had to print one
24 first, and then the other second.

25 I charge you that whatever your verdict is on each one

1 of these crimes, each one of these charges, it must be
2 unanimous, that is, all twelve of you must agree.

3 Mr. Foreman, when all twelve of you have agreed on a
4 verdict to a charge, you would then come beneath the form of
5 verdict that all twelve of you have agreed on. You would sign
6 your name on the line provided, and you will have completed
7 your verdict on that particular charge. As I said, there are
8 fifteen verdict forms. When you have agreed on verdicts on
9 all of the charges, and you have completed each verdict form,
10 simply let the bailiff know -- there will be a bailiff
11 stationed outside of your door -- and at that time we will
12 assemble to receive your verdict.

13 Once again, I do remind you that whatever your verdict
14 is on each charge, it must be unanimous; all twelve of you
15 must agree.

16 At this time I'm going to ask that you go to the jury
17 room. I'm going to ask that the bailiff put the twelve jurors
18 in a jury room, and keep separate the two alternates. Do not
19 allow them to go into the jury room at this time.

20 Mr. Foreman, ladies and gentlemen of the jury, do not
21 begin your deliberations. In just a few minutes the clerk, or
22 the bailiff, will bring in the exhibits, and also these
23 verdict forms. At that time you will be instructed to begin
24 your deliberations, so at that time do not begin your
25 deliberations.

1 If the twelve jurors would follow the bailiff to the
2 jury room, and then the two alternates follow the other
3 bailiff to a separate room.

4 (THE JURY RETIRED AT 3:55 P.M. THE FOLLOWING TAKES
5 PLACE OUTSIDE THE PRESENCE OF THE JURY.)

6 THE COURT: All right. Is the jury secured?

7 BAILIFF: Yes sir.

8 THE COURT: All right. Any exceptions or requests for
9 additional charges by the State?

10 MR. RIDDLE: No sir.

11 THE COURT: By the Defendant?

12 MR. AYER: Your Honor, I just renew my objection to
13 charge those one, two and three requests for charge that we
14 introduced earlier.

15 THE COURT: All right. Anything else?

16 MR. AYER: I think that's all, Your Honor.

17 THE COURT: All right. Let me ask the attorneys if
18 they would come forward and meet with the Court Reporter, and
19 make sure that all the exhibits are here.

20 (AT THIS TIME ALL EXHIBITS WERE REVIEWED BY ALL COUNSEL
21 AND THE COURT REPORTER.)

22 THE COURT: All right. I've let the attorneys look at
23 these verdict forms we are going to send back to the jury.

24 Does the State have any objection?

25 MR. SWARAT: No objection.

1 MR. RIDDLE: No sir.

2 THE COURT: And the Defendant?

3 MR. AYER: None, Your Honor.

4 THE COURT: All right. Do we have -- do the State and
5 the Defendant agree we have all of the exhibits now?

6 MR. RIDDLE: We have all of the exhibits at this time.

7 THE COURT: Mr. Ayer, you agree?

8 MR. AYER: Yes sir.

9 THE COURT: All right. Let me ask the bailiff if he
10 would take the exhibits and the verdict forms back, and please
11 instruct the jury to begin their deliberations.

12 BAILIFF: Yes sir.

13 THE COURT: And if you want to bring the two alternates
14 out.

15 (AT THIS TIME THE TWO ALTERNATES WERE BROUGHT INTO THE
16 COURTROOM AND EXCUSED BY THE COURT.)

17 (THE EXHIBITS WERE THEN PASSED INTO THE JURY ROOM AND
18 THE JURY WAS INSTRUCTED TO BEGIN DELIBERATION AT 4:00 O'CLOCK
19 P.M.)

20 (DEFENDANT'S REQUESTS TO CHARGE MARKED COURT'S EXHIBIT
21 NUMBER 5, NOT TO GO TO THE JURY.)

22 (THE FOLLOWING TAKES PLACE AT 6:10 O'CLOCK P.M., OUTSIDE
23 THE PRESENCE OF THE JURY.)

24 THE COURT: All right. Let the record reflect that
25 the Defendant is present.

1 The jury has sent out the following message. "We need
2 to hear or read Quincy's testimony from yesterday."

3 This is being marked as Court's Exhibit Number 6.

4 (NOTE FROM THE JURY MARKED COURT'S EXHIBIT NUMBER 6.)

5 THE COURT: What I propose to do is bring them out.
6 I'm going to ask them if they want to hear the entire
7 testimony, or if there is just a part, or parts of it they
8 want to hear. Sometimes we get to playing the testimony and
9 they stop and say, no, we don't want to hear that, we want to
10 hear something else, so I'm just going to ask them, if there
11 is no objection, if they want to hear the entire testimony, or
12 if there is a certain part or parts of the testimony they want
13 to hear.

14 Any objection to me asking that?

15 MR. SWARAT: None from the State, Your Honor.

16 MR. AYER: Your Honor, I guess it's -- it depends on
17 what it is. Provided it doesn't take the entire testimony out
18 of context, I have no objection to it.

19 THE COURT: Well, I -- I just view it as they have a
20 right to ask for what portion they want. If they don't want
21 to hear the entire thing -- they may want to hear the entire
22 testimony. I don't know. But I'll just ask them that, and
23 then ---

24 Dixie, do you have his testimony so you can replay it?

25 COURT REPORTER: Yes sir.

1 THE COURT: Okay. You got enough sound equipment so
2 they can hear it?

3 COURT REPORTER: Yes sir.

4 THE COURT: And if you hear any objections -- I cannot
5 remember. I'm going to look through my notes ---

6 COURT REPORTER: There were none.

7 THE COURT: ---But we will have to slam on brakes and
8 stop it and -- so they don't hear all of that.

9 COURT REPORTER: Well, anything that's outside the
10 presence of the jury I definitely will not play, but any
11 objections that were made in the presence of the jury are not
12 noted.

13 THE COURT: Okay. All right. You can bring in the
14 jury.

15 (THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE
16 JURY.)

17 THE COURT: Mr. Foreman, ladies and gentlemen of the
18 jury, we have received the following message from the jury.
19 "We need to hear or read Quincy's testimony from yesterday."
20 We certainly can play back all of this witness's testimony if
21 that's what the jury wishes to hear; however, if there is a
22 certain portion, or part of that you wish to hear we can do
23 that also, so if you want to hear the entire testimony we are
24 prepared to do that, or if there is a certain part or parts --
25 whatever your pleasure is.

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1 FOREMAN: We would like to hear the whole thing.

2 THE COURT: The whole thing. Okay. The Court Reporter
3 is going to play this from the audio tape. If you cannot hear
4 it at any time, if you will just simply raise your right hand
5 we will stop and make whatever adjustments are necessary. The
6 acoustics in the room are pretty good, so I think you can hear
7 it, but if you, for whatever reason, cannot hear it, just let
8 us know.

9 All right. You may proceed.

10 (AFTER A PORTION OF THE TESTIMONY OF QUINCY TIMMONS WAS
11 PLAYED IN OPEN COURT, THE FOLLOWING TAKES PLACE.)

12 FOREMAN: Your Honor, we have heard enough.

13 THE COURT: But you don't want to hear the cross-
14 examination of the witness?

15 FOREMAN: No sir.

16 THE COURT: It's whatever is your pleasure.

17 FOREMAN: That's enough.

18 (AT THIS TIME THE JURY RETURNED TO THE JURY ROOM TO
19 CONTINUE DELIBERATION. THE FOLLOWING TAKES PLACE OUTSIDE THE
20 PRESENCE OF THE JURY.)

21 THE COURT: All right. Any exceptions or requests, or
22 additional instructions by the State?

23 MR. RIDDLE: No sir.

24 THE COURT: By the Defendant?

25 MR. AYER: Your Honor, the only thing I would say --

1 and I said this earlier about the context of it -- and I heard
2 the jury say they didn't need to hear anymore, but I would
3 submit that, unless they hear the cross-examination, that it
4 is slightly out of context.

5 THE COURT: I can't force them to hear it. I'm sorry.
6 I just can't force the jury to do -- you know, if they want to
7 hear it, parts of it, all of it, that's fine, but I can't
8 force them to sit and listen.

9 MR. AYER: I understand.

10 THE COURT: Okay. Anything else? All right. We will
11 be at ease till we hear from the jury.

12 (THE JURY CONTINUED TO DELIBERATE AT 7:25 P.M.)

13 (THE FOLLOWING TAKES PLACE AT 7:50 P.M., OUTSIDE THE
14 PRESENCE OF THE JURY.)

15 THE COURT: The Court has been advised that the jury
16 has reached a verdict. Is the State ready to receive the
17 verdict?

18 MR. RIDDLE: Yes sir.

19 THE COURT: Defendant ready?

20 MR. AYER: Defendant is ready, Your Honor.

21 THE COURT: All right. You may bring in the jury.

22 (THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE
23 JURY.)

24 THE COURT: All right, Jerri.

25 CLERK OF COURT: Mr. Foreman, have you reached a

1 verdict?

2 FOREMAN: Yes, we have.

3 CLERK OF COURT: Please pass it up.

4 THE COURT: All right. The clerk may publish the
5 verdicts.

6 CLERK OF COURT: Indictment (94-GS-32-0362), count one,
7 murder, the victim, Thomas Wise, the verdict, guilty.

8 Count two, armed robbery, victim, Thomas Wise, the
9 verdict, guilty.

10 Count three, criminal conspiracy, the verdict, guilty.

11 Indictment (94-GS-32-2738), attempted armed robbery, the
12 verdict -- Susan Rogers, the verdict, guilty.

13 Pointing and present -- excuse me -- pointing a firearm,
14 victim, Susan Rogers, the verdict, guilty.

15 (94-GS-32-0367), armed robbery, the verdict -- excuse me
16 -- the victim, Doris Kirby, the verdict, guilty.

17 Pointing a firearm, the victim, Doris Kirby, the
18 verdict, guilty.

19 Pointing a firearm, the victim, Noreen Brazel, the
20 verdict, guilty.

21 Assault and battery of a high and aggravated nature, the
22 victim, Noreen Brazel, the verdict, guilty.

23 Pointing a firearm, the victim, Ricky Traitor, verdict,
24 guilty,

25 Possession of a firearm during the commission of a

1 violent crime, the victim, E-Z Coin Laundry, the verdict,
2 guilty.

3 (00-GS-32-3326), pointing a firearm, the victim, Peggy
4 Williams, the verdict, guilty.

5 (00-GS-32-3327), pointing a firearm, the victim, George
6 Cullifer, the verdict, guilty,

7 (00-GS-32-3328), attempted armed robbery, the victim,
8 George Cullifer, the verdict, guilty.

9 (94-GS-32-0364), criminal conspiracy, the verdict,
10 guilty.

11 Mr. Foreman, and ladies and gentlemen of the jury, if
12 these are your verdicts, so say each of you by raising your
13 right hands.

14 (ALL JURORS RAISED THEIR RIGHT HANDS.)

15 CLERK OF COURT: You may put them down.

16 THE COURT: All right. Any matters concerning the
17 verdicts by the State?

18 MR. RIDDLE: No sir.

19 THE COURT: By the Defendant?

20 MR. AYER: Your Honor, would you poll the jury?

21 THE COURT: All right. If the Clerk would poll the
22 jury as to each verdict, please.

23 (AT THIS TIME THE JURY WAS POLLED AND ALL JURORS
24 AFFIRMED THE VERDICTS AS PUBLISHED.)

25 THE COURT: All right. Any other matters concerning

1 the jury?

2 MR. AYER: None for the defense, Your Honor.

3 THE COURT: All right. You want to bring Mr. Timmons
4 around for sentencing, and if any of the victims are present
5 I'll be glad to hear from them, and also, Solicitor, we will
6 need to know prior record of this Defendant.

7 MR. RIDDLE: Yes sir. Your Honor, in regards to the
8 victims, they have written some things down that they would
9 just like for me to hand to the Court for Your Honor to read,
10 in reference to Mr. Wise.

11 None of the victims from the other armed robberies wish
12 to speak, but the victims from Thomas Wise, in lieu of
13 speaking, just had written down a couple of pages that they
14 would like for me to hand to the Court.

15 THE COURT: All right.

16 MR. AYER: Would you like for Mr. Timmons to come
17 around, Your Honor?

18 THE COURT: Yes. If he would just come stand at the
19 Clerk's bench and ---

20 MR. AYER: Can his family come beside him also?

21 THE COURT: Huh?

22 MR. AYER: Can his family come up beside ---

23 THE COURT: Sure. Uh huh (indicating positive)

24 MR. RIDDLE: Your Honor, I have misstated. That is
25 from two of the members of the family. Ms. Barbara Brown, the

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1 sister of Mr. Wise, would like to speak.

2 THE COURT: Okay.

3 Were all of the victims made aware that they would have
4 a chance to speak?

5 MR. RIDDLE: Yes sir.

6 THE COURT: And these are the ones that have chosen to
7 be heard?

8 MR. RIDDLE: Yes sir. Yes sir.

9 THE COURT: Okay. All I ask that they do is identify
10 their -- themselves by giving their full name, and then I'll
11 be glad to hear from them.

12 MS. BROWN: Barbara L. Brown.

13 THE COURT: All right.

14 MS. BROWN: Tommy, my brother, was the baby of seven
15 children, and a lot has been said in the courtroom in the last
16 four days, but a lot has not been said about him as a person.
17 All he ever wanted in his life was his wife and his two little
18 girls to have a happy home, and when his life was taken, his
19 little girls was only eight and ten years old. He will never
20 see them graduate from high school or college. He will never
21 walk them down the aisle to be married, and he will never see
22 any grandchildren. It has affected them in a way that I -- I
23 can't even describe to this Court.

24 One time my family was very, very close. We were a
25 happy go lucky family. We laughed and cut up, and on Sunday

1 afternoons we picked up and played softball all afternoon. We
2 had gatherings, Christmas and Thanksgiving. Father's Day and
3 Mother's Day was a big deal to us, always has been, but when
4 he killed my brother all that change. My whole family
5 changed. We are not the same. We will never be the same.

6 I got help, to try to cope with what happened to Tommy.
7 Some of my other siblings, they chose other ways to help them,
8 which has pulled families apart, their families.

9 My mother died two years ago. She never got over it.
10 She talked about it constantly, how somebody could shoot
11 somebody in the back and leave them in a ditch to die.

12 My father had a stroke. We've been through so much
13 stress and pain. He was very energetic and happy, and after
14 this he's just -- he can't even open a packet of sugar.

15 My husband tells me all the time, he wants the woman he
16 married back, but she's not there. It's gone from me.
17 Something left me, and I can't get it back. We -- none of us
18 can.

19 I'm -- and his little girls, they can't even deal with
20 it. They can't even deal with it.

21 I'm asking -- I'm asking for the maximum sentence for
22 this man.

23 Thank you.

24 MR. RIDDLE: Your Honor, if it please the Court, in
25 terms of a prior record, what this jury was not allowed to

1 hear about the Supreme Court's decision, April 9th, the name
2 that those masks, bandannas, and the other items were
3 recovered from that van, there was another string of armed
4 robberies in Richland and Lexington County. Those armed
5 robberies were perpetrated by Quincy Timmons, Marcus Timmons
6 and Stacey
7 Wright.

8 The first one, Your Honor -- actually the van they were
9 stopped in was a stolen van. They stole that van, went to the
10 Waffle House located out near I-20, over in Richland County,
11 went into the Waffle House, late at night, crowded with
12 people, all three of them armed with weapons. At that time
13 Marcus Timmons had a nine millimeter handgun, Quincy Timmons
14 had a Tec 9, which is basically a submachine gun, easily
15 modifiable to be fully automatic, Stacey Wright had a .22
16 pistol. They robbed that Waffle House; they robbed all of the
17 customers there in the Waffle House. When they left that
18 Waffle House, either Marcus or Quincy started firing off the
19 nine millimeter weapon which they had, and they shot a good
20 number of rounds outside the Waffle house.

21 From there, Your Honor, Marcus and Quincy Timmons and
22 Stacey Wright went to the Pantry Express Station, which is
23 located at St. Andrews -- or excuse me, at Piney Grove Road
24 and I-26, the Shell Station right there. Your Honor, they
25 parked at the apartment complex directly behind the Shell

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1 Station, toward Harbison Boulevard, walked back up to the
2 Pantry Express. At that time, Your Honor, wearing those
3 masts, the same masks that were involved in this case, they go
4 into the Pantry Express. Again, Quincy is armed with that Tec
5 9, Marcus is armed with the nine millimeter pistol, Stacey
6 Wright is armed with the twenty-two. They robbed the three
7 individuals in the Pantry Express, two people working the
8 store, and an individual, a customer who was in there, stole
9 his wallet.

10 Upon leaving that store, Your Honor, they fired off
11 several more rounds, both inside and outside that store.
12 Several bullets and shell casings were recovered from the
13 scene, as well as from the scene over at the Waffle House in
14 Richland County.

15 A resident of that apartment complex, Your Honor, heard
16 those gunshots at the Pantry Express. He looked out the
17 windows. He saw them run down, jump in the van and take off.
18 What he did, Your Honor, actually broke this case for law
19 enforcement, because he came out of his apartment, jumped in
20 his car and gave chase, chased them up to Harbison Boulevard.
21 They turned left onto Harbison, went down to where Harbison
22 intersects with St. Andrews, right there by the Fire Station
23 in Irmo, and Irmo High School.

24 At that point, Your Honor, he became frightened, but he
25 got the license tag number off of that van. He then turned

1 around, went back to the Pantry Express and provided that
2 license tag number to law enforcement. Law enforcement
3 actually found that van at the Texaco station at 378 and I-26,
4 right there near the hospital, and that is, in fact, where the
5 traffic stop, or the contact that Phil Wright had with them
6 took place.

7 Your Honor, they knew that that van had been involved in
8 this armed robbery spree in Richland and Lexington that night.
9 When the officers approached, Quincy Timmons ran. When they
10 searched that van, Your Honor, they found the three weapons
11 involved, which S.L.E.D. was able to match back to the shell
12 casing and the bullets found at the robberies from that night.
13 They found the masks; they found the ski mask, the half mask,
14 the bandanna, the two hats that are already in evidence, and
15 Mr Timmons was placed under arrest at that time.

16 He was not charged, as Your Honor knows, until a later
17 date. That was based on the information that we discovered
18 from Willie Williams, as well as the fingerprint match which
19 came back from S.L.E.D. at that time.

20 Your Honor, subsequent to the original trial in this
21 case, Mr. Timmons pled guilty to twelve counts of armed
22 robbery, after he had already been sentenced by the Court back
23 in December of 1994.

24 So his record at this time as it stands, Your Honor, is
25 twelve counts of armed robbery. That's eight patrons in the

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1 business from the Waffle House, and two people from the
2 Pantry, as well as the patron from the Pantry Express on St.
3 Andrews Road.

4 Your Honor, it's the State's position that this is an
5 incredibly dangerous individual. I think that is demonstrated
6 both by his actions on April the 9th, as well as by his
7 actions on February the 27th.

8 I think the most telling question, or series of
9 questions in Quincy Timmons' testimony regarding Marcus
10 Timmons' character were the questions that Mr. McMann asked in
11 reference to, after shooting Thomas Wise, it didn't bother him
12 enough that he didn't go commit another armed robbery fifteen
13 minutes later.

14 Based on all of the information, Your Honor, based on
15 Mr. Timmons' prior record, his propensity for violence, we
16 would ask that the Court impose consecutive sentences in this
17 case.

18 THE COURT: Mr. Ayer, I'll be glad to hear from you and
19 your client, and any members of his family.

20 What I would ask that they do, if they wish to speak, is
21 state their full name first, and then we will be glad to hear
22 from them.

23 MR. AYER: All right. Your Honor, this is Marcus's
24 grandfather and his godmother, and I think his aunt. His
25 mother and step-father were here earlier. They went into the

1 side room. I don't know whether they want to speak to you or
2 not.

3 Your Honor, obviously the jury has spoken, and we accept
4 that. Marcus Timmons is twenty-four years old. He was
5 seventeen years old on February 27th, 1993.

6 I understand the tragedy of this situation. I
7 understand the emotion that is prevalent in this courtroom
8 right now, however, Your Honor, Marcus Timmons, again, was a
9 very young man, is still a very young man, and I would urge
10 the Court to make his sentences concurrent. The Court's hands
11 are bound, to a certain extent. It is my understanding that
12 he will be parole eligible in twenty years. He would still be
13 a relatively young man. That would give him some hope for
14 rehabilitation, and I would submit that it would, perhaps, not
15 come -- perhaps not make up for what happened, but it would at
16 least give him some hope for rehabilitation, and would like
17 the Court to take into consideration his youthfulness, and
18 seventeen years old, and not keep him in prison for basically
19 the rest of his life, and give him some chance to get out to
20 redeem himself, and to make amends somehow for what's
21 happened.

22 THE COURT: Anyone else wish to speak?

23 DEFENDANT, MR. TIMMONS: As far as me?

24 THE COURT: Anyone?

25 DEFENDANT, MR. TIMMONS: I'll speak. The incident the

1 Solicitor has spoke about, pled guilty to those previously,
2 admitted my involvement in those, and I'm currently serving
3 time in the Department of Corrections for those, and I still
4 stand, as I stood the last time before the Supreme Court sent
5 this case back to this Court, so apparently guilt was not
6 proven overwhelmingly then, and I still feel it is now, that
7 I'm not guilty, and I would like to ask to be excused from
8 sentencing.

9 THE COURT: You would like to ask what?

10 DEFENDANT, MR. TIMMONS: To be excused from sentencing.

11 THE COURT: I'm not going to let you be excused for
12 sentencing. You will remain in the courtroom till we complete
13 this process.

14 Anyone else wish to speak?

15 DEFENDANT, MR. TIMMONS: No sir, Your Honor.

16 THE COURT: Okay.

17 MR. AYER: Your Honor, can Mr. Timmons' godmother say
18 something?

19 THE COURT: Uh huh (indicating positive)

20 DEFENDANT, MR. TIMMONS: Not going to change nothing.
21 Don't even worry about it.

22 THE COURT: All right. Anything further from the
23 State?

24 MR. RIDDLE: No sir.

25 THE COURT: From the Defendant?

1 MR. AYER: (NODS HEAD NEGATIVE)

2 THE COURT: All right. Indictment (94-GS-32-0362),
3 count one, murder, the sentence is the Defendant be committed
4 to the Department of Corrections for a term of life.

5 County two, armed robbery, sentence is Defendant be
6 committed to the State Department of Corrections for a term of
7 twenty-five years. This is consecutive to the sentence in
8 count one.

9 Count three, criminal conspiracy, the sentence is the
10 Defendant be committed to the Department of Corrections for a
11 term of five years. This is concurrent.

12 Indictment (94-32-0364), criminal conspiracy, sentence
13 is the Defendant be committed to the Department of Corrections
14 for term of five years concurrent.

15 (94-32-0367), count one, armed robbery, sentence is the
16 Defendant be committed to the State Department of Corrections
17 for a term of twenty-five years. This is consecutive to the
18 ~~life sentence in (94-0362).~~

19 (94-0367), count two, pointing and presenting a firearm,
20 sentence is the Defendant be committed to the Department of
21 Corrections for a term of five years. This is concurrent.

22 Count three, pointing and presenting a firearm, sentence
23 is the Defendant be committed to the Department of Corrections
24 for a term of five years. This is concurrent.

25 Count four, assault and battery of a high and aggravated

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1 nature, sentence is the Defendant be committed to the
2 Department of Corrections for a term of ten years. This is
3 concurrent.

4 Count five, pointing and presenting a firearm, committed
5 to the Department of Corrections for a term of five years,
6 concurrent.

7 Count six, possession of a weapon during the commission
8 of, or attempt to commit a violent crime, sentence is the
9 Defendant be committed to the Department of Corrections for a
10 term of five years. This is concurrent.

11 (94-2738), count one, attempted armed robbery, sentence
12 is the Defendant be committed to the Department of Corrections
13 for a term of twenty years. This is concurrent.

14 (94-2738), count two, pointing and presenting a firearm,
15 the Defendant is committed to the Department of Corrections
16 for a term of five years, concurrent.

17 Indictments (00-3326), pointing and presenting a
18 firearm, (3327), pointing and presenting a firearm, and (3328)
19 -- excuse me (3327), those two indictments, pointing and
20 presenting a firearm, on each indictment sentence is he be
21 committed to the Department of Corrections for a term of five
22 years, concurrent.

23 And on -- (00-3328), attempted armed robbery with a
24 deadly weapon, the sentence is he be committed to the
25 Department of Corrections for a term of twenty years

1 concurrent.

2 All right. You may remove the prisoner at this time.

3 Let me ask, Mr. Ayer, do you have any motions you want
4 to make, if so we will have to keep the prisoner present for
5 the motions.

6 MR. AYER: The only motion I have would be a motion for
7 a new trial.

8 THE COURT: All right. You -- why don't y'all just
9 have a seat and let me deal with my jury here.

10 (AT THIS TIME THE JURY WAS EXCUSED FROM FURTHER
11 SERVICE.)

12 THE COURT: All right. Mr. Ayer, I think you have a
13 motion, or some motions. I'll be glad to hear from you.

14 MR. AYER: Yes, Your Honor. On second thought, can I
15 wait to make those motions? Under the Rules I think I have
16 ten days to make them, from the time of the sentencing; is
17 that correct?

18 THE COURT: I can -- I guess I can give you up to ten
19 days. I'm trying to think -- I'm not going to be back in this
20 area, and I think your client would have a right to be
21 present. Do you think you would want to make those motions on
22 Tuesday? I'm going to be in McCormick. We could get -- get
23 your client transported up there.

24 MR. AYER: Will you be here tomorrow?

25 THE COURT: I hadn't planned on it. I was hoping to

1 leave -- to head toward home tonight.

2 MR. AYER: I just -- I'm just concerned. I want to
3 make sure that Mr. Timmons is adequately protected in
4 connection with the motions that I make.

5 THE COURT: The only suggestion I would have within the
6 -- next week would be McCormick, and then to stay within the
7 ten days, the following week I'm going to be in Anderson on --
8 I guess that's going to be like September the 11th.

9 I can't very well change my schedule, because those
10 courts have already lined up cases to be tried, and if I miss
11 a day in one of those places to come down here it's going to
12 throw them in a bit of a quandary, but I will be in McCormick,
13 I know, Tuesday.

14 MR. AYER: This coming Tuesday?

15 THE COURT: This coming Tuesday, and then if you want
16 to come up to Anderson, I'll be glad to hear you up there.

17 If you want to think about it and let me know you can --
18 we will be at the -- Monday is a holiday. We will be at the
19 McCormick courthouse Tuesday, but we'll have to get an order
20 trans -- in advance, transporting your client. One of the
21 resident judges could sign that order transporting him.

22 MR. AYER: Your Honor, can Mr. Timmons waive his right
23 to be present?

24 THE COURT: I would rather, in this situation, that he
25 not do that, that he be present.

1 Do you know if you have a conflict on Tuesday or ---

2 MR. AYER: I don't know right now, without the benefit
3 of -- but I will -- why don't we try to do it in McCormick on
4 Tuesday.

5 THE COURT: Okay. And tomorrow if you would just see
6 Judge Westbrook or Judge Keesley -- I think Judge Westbrook
7 may be here tomorrow, but if you could just see him they can
8 do an order transporting ---

9 MR. RIDDLE: Your Honor, I can arrange for transport.
10 That's not a problem.

11 THE COURT: Okay.

12 MR. RIDDLE: But I would need to know tomorrow a firm
13 time and firm date, since Monday is a holiday.

14 THE COURT: Yes.

15 MR. RIDDLE: I'm going to have to let them know
16 tomorrow for Tuesday.

17 THE COURT: What about twelve noon on Monday -- I mean
18 on Tuesday, and whatever I'm doing I can just stop at twelve
19 noon. We could -- if I have a jury we can send them to lunch
20 early, and we could ---

21 MR. AYER: That's fine with me, Your Honor.

22 THE COURT: What's your travel time from here up there,
23 an hour or so?

24 MR. AYER: Hour and twenty minutes. Isn't that right?

25 MR. RIDDLE: It's about seventy-five miles, Your Honor,

1 so ---

2 THE COURT: Okay. If somebody would just call my
3 office and let me know that you are going to be in McCormick,
4 and whatever we are doing we can stop around twelve noon and
5 hear this.

6 MR. AYER: On Tuesday, right?

7 THE COURT: Huh?

8 MR. AYER: On Tuesday.

9 THE COURT: On Tuesday, Uh huh (indicating positive)

10 MR. AYER: All right, sir.

11 Any other matters?

12 MR. RIDDLE: Nothing from the State, Your Honor.

13 MR. AYER: None from the Defendant, Your Honor.

14 THE COURT: All right. If nothing further, then this
15 term of court is adjourned sine di.

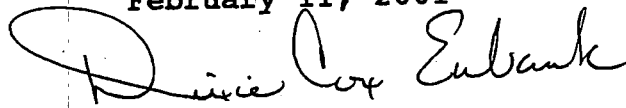
16 -----END OF REQUESTED TRANSCRIPT OF RECORD-----
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C E R T I F I C A T E

I, the undersigned, DIXIE COX EUBANK, Official Court Reporter for the Fifteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the TRIAL of the captioned case, relative to appeal, in the COURT OF GENERAL SESSIONS for LEXINGTON COUNTY, SOUTH CAROLINA, on the 28th, 29th, 30th and 31st days of August, 2000.

I DO FURTHER CERTIFY that I am neither of kin, counsel nor interest to any party hereto.

February 11, 2001



DIXIE COX EUBANK

CIRCUIT COURT REPORTER

FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA.

COURT OF GENERAL SESSIONS

COUNTY OF LEXINGTON

94-GS-32-362

94-GS-32-364

94-GS-32-367

94-GS-32-2738

THE STATE OF SOUTH CAROLINA

-VS-

MARCUS TIMMONS

TRANSCRIPT OF RECORD

SEPTEMBER 5, 2000

MCCORMICK, SOUTH CAROLINA

B E F O R E :

THE HONORABLE H. DEAN HALL, JUDGE.

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

C. DAYTON RIDDLE, III, ESQUIRE
ATTORNEY FOR THE STATE

CAREY M. AYER, ESQUIRE
LISA L. SMITH, ESQUIRE
ATTORNEYS FOR THE DEFENDANT

DAPHNE D. HELMS
CIRCUIT COURT REPORTER

1 THE COURT: ALL RIGHT. THIS MATTER IS BEFORE THE
2 COURT. THESE ARE ALL LEXINGTON COUNTY CASES STARTING WITH
3 INDICTMENT NUMBER 94-362, STATE VERSUS MARCUS B. TIMMONS.
4 WE'RE IN MCCORMICK COUNTY AND LET ME ASK THE ATTORNEYS THAT
5 ARE PRESENT IF THEY WOULD STATE THEIR NAME FOR THE RECORD AND
6 THE NAME OF THEIR CLIENT, PLEASE.

7 MR. RIDDLE: DAYTON RIDDLE, STATE OF SOUTH CAROLINA.

8 MR. AYER: CAREY AYER, MARCUS TIMMONS, THE
9 DEFENDANT.

10 THE COURT: AND LET THE RECORD ALSO SHOW THAT THE
11 DEFENDANT, MARCUS B. TIMMONS, IS PRESENT. MR. AYER, BEFORE
12 WE BEGIN, ANY OBJECTION CONCERNING JURISDICTION OR VENUE?

13 MR. AYER: NO.

14 THE COURT: SINCE WE'RE IN MCCORMICK COUNTY.

15 MR. AYER: NONE, YOUR HONOR, AND I APPRECIATE THE
16 COURT ACCOMMODATING US.

17 THE COURT: OKAY. AND THURSDAY AT THE CONCLUSION OF
18 THE TRIAL OF THESE CASES YOU HAD INDICATED YOU WOULD LIKE
19 SOME TIME CONCERNING POST-TRIAL MOTIONS. SO AT THIS TIME IF
20 YOU'RE READY I'LL BE GLAD TO HEAR FROM YOU.

21 MR. AYER: MAY IT PLEASE THE COURT? YOUR HONOR, I
22 JUST WANT TO MOVE ON BEHALF OF THE DEFENDANT FOR A MOTION FOR
23 A NEW TRIAL ON THE FOLLOWING GROUNDS: NUMBER ONE WOULD BE
24 THAT THE TESTIMONY OF ONE OF THE WITNESSES, WILLIE WILLIAMS,
25 REGARDING A STATEMENT MADE BY MR. TIMMONS TO MR. WILLIAMS IN

1 JAIL PRIOR TO MR. TIMMONS' ARREST FOR THE CHARGES WHICH HE
2 WAS TRIED ON, THAT THAT STATEMENT MADE TO MR. WILLIAMS AND
3 ALLOWED INTO EVIDENCE WAS VERY PREJUDICIAL TO MR. TIMMONS IN
4 THAT PRIMARILY IT MADE THE JURY AWARE THAT MR. TIMMONS HAD AN
5 ARREST RECORD AT THE TIME HE GAVE THE STATEMENT, AND TO ALLOW
6 THAT INTO EVIDENCE THE DEFENDANT WOULD SUBMIT WAS PREJUDICIAL
7 TO HIM AND SHOULD HAVE BEEN EXCLUDED.

8 NUMBER TWO, THE TESTIMONY AND THE EVIDENCE
9 INTRODUCED THROUGH MS. PEGGY WILLIAMS WHERE SHE PICKED MR.
10 TIMMONS OUT OF A PHOTO LINE-UP, WE WOULD TAKE THE POSITION
11 THAT IT SHOULD NOT HAVE BEEN ALLOWED INTO EVIDENCE DUE TO ITS
12 UNRELIABILITY. I THINK WE DISCUSSED THE CASE THAT OUTLINED
13 THE FIVE FACTORS THAT THE COURT LOOKS TO IN DETERMINING
14 RELIABILITY, CHIEF OF WHICH AMONG THOSE FACTORS I THINK THE
15 LENGTH OF TIME THAT MRS. WILLIAMS HAD TO OBSERVE MR. TIMMONS
16 WAS NOT VERY MUCH AND SHOULD HAVE BEEN CONSIDERED, THE
17 INCONSISTENCY IN HER STATEMENTS WHERE SHE DESCRIBED MR.
18 TIMMONS' APPEARANCE, AND ALSO THE TIME DELAY BETWEEN HER
19 OBSERVING MR. TIMMONS AND THE TIME IN WHICH SHE PICKED HIM
20 OUT OF THE PHOTO LINE-UP.

21 NUMBER THREE; FURTHER IN RELATIONS OR AS IT REGARDS
22 MS. WILLIAMS, ALSO JUST THE ADMISSIBILITY OF THE PHOTO
23 LINE-UP ITSELF INFORMED THE JURY THAT MR. TIMMONS HAD AN
24 ARREST RECORD AT THE TIME THAT HE WAS PICKED OUT AND THE DATE
25 IN WHICH HE WAS PICKED OUT WAS PRIOR TO HIS ARREST ON WHICH

1 HE WAS BEING TRIED FOR. SO, AGAIN, I THINK IT PREJUDICED HIM
2 IN THAT IT ALLOWED THE JURY TO KNOW THAT HE HAD AN ARREST
3 RECORD PRIOR TO HIS BEING ARRESTED FOR THIS CHARGE.

4 FOURTH, THE TESTIMONY -- THIS IS OUR POSITION THAT
5 THE LAW PROVIDES THAT IF NO TESTIMONY IS INTRODUCED BY THE
6 DEFENDANT THEN THE DEFENDANT WOULD HAVE THE FINAL CLOSING
7 ARGUMENT, AND WE THINK THAT THE DEFENDANT WAS PREJUDICED BY
8 NOT HAVING THE FINAL CLOSING ARGUMENT. THE DEFENSE WOULD
9 STIPULATE THAT IN THE STATE'S CASE ONE ITEM OF EVIDENCE WAS
10 INTRODUCED. HOWEVER, IN THE DEFENDANT'S CASE NO EVIDENCE WAS
11 INTRODUCED AND NO TESTIMONY WAS TAKEN.

12 LASTLY, YOUR HONOR, I KNOW THE COURT WENT OUT OF ITS
13 WAY, AS DID ALL PARTIES, TO LIMIT, IF NOT ELIMINATE, ANY
14 REFERENCES TO THE PRIOR TRIAL. IT IS OUR POSITION THAT THERE
15 WERE A NUMBER OF REFERENCES TO THE PRIOR TRIAL IN SPITE OF
16 EVERYONE'S WORK IN TRYING TO EXCLUDE THEM. I THINK ONE OF
17 THE WITNESSES, QUINCY TIMMONS, TESTIFIED TO PRIOR STATEMENTS
18 THAT HE HAD GIVEN, PRIOR GUILTY PLEAS THAT HE HAD GIVEN. IT
19 WAS REFERENCED THAT HE PLED GUILTY, THEN TWO DAYS LATER
20 TESTIFIED IN A HEARING. THE NAME OF KNOX MCMAHON WHO WAS A
21 CIRCUIT SOLICITOR AT THAT TIME WAS INVOKED A GREAT DEAL.
22 JUDGE WESTBROOK'S NAME WAS MENTIONED A NUMBER OF TIMES.

23 I THINK EVEN ON ONE OCCASION THE WORD JURY WAS
24 ACTUALLY MENTIONED, AND I DON'T THINK THIS IS NECESSARILY
25 ANYBODY'S FAULT. AS I SAID, I THINK THE COURT WENT OUT OF

1 ITS WAY TO INSTRUCT THE WITNESSES NOT TO REFER TO A PRIOR
2 TRIAL, BUT NEVERTHELESS I THINK A GREAT NUMBER OF REFERENCES
3 MANAGED TO FIND THEIR WAY INTO THE RECORD AND THE CUMULATIVE
4 EFFECT OF THESE REFERENCES PROBABLY GIVE THE JURY AN IDEA
5 THAT THIS WAS NOT THE FIRST TIME THIS CASE HAD BEEN TRIED AND
6 SUCH WOULD HAVE AMOUNTED TO PREJUDICE TO MR. TIMMONS AND I
7 WOULD MOVE FOR A NEW TRIAL ON THOSE GROUNDS.

8 THE COURT: ALL RIGHT. MR. RIDDLE?

9 MR. RIDDLE: YOUR HONOR, JUST HANDLING THOSE IN THE
10 ORDER THAT MR. AYER PRESENTED THEM, HE STARTED OFF WITH
11 WILLIE WILLIAMS' TESTIMONY AND THE FACT THAT THE STATEMENT
12 THAT MR. TIMMONS GAVE TO WILLIE WILLIAMS ACTUALLY OCCURRED
13 PRIOR TO HIS ARREST ON THE HOMICIDE CHARGES AND THE CHARGES
14 FROM FEBRUARY THE 27TH. YOUR HONOR, THAT EXACT TIME FRAME OF
15 THE STATEMENT WAS NEVER BROUGHT OUT IN FRONT OF THE JURY AS I
16 RECALL IT. THE STATE CERTAINLY NEVER BROUGHT OUT WHEN
17 EXACTLY THE STATEMENT WAS MADE TO MR. WILLIAMS. THE ONLY --
18 ONLY THING THAT WAS BROUGHT OUT IS THAT IT WAS MADE AT THE
19 LEXINGTON COUNTY DETENTION CENTER, BUT EVERYBODY IN THAT
20 COURTROOM, INCLUDING THE JURY, WAS AWARE THAT MR. TIMMONS HAD
21 BEEN ARRESTED FOR THESE HOMICIDE CHARGES AND HE WAS ON TRIAL
22 FOR THE HOMICIDE CHARGES.

23 SO I THINK IT'S -- I DON'T THINK YOU CAN PRESUME
24 PREJUDICE BY THE FACT THAT THE STATEMENT WAS MADE IN THE JAIL
25 WHEN THERE WAS NO REFERENCE TO THE TIME IN WHICH THE

1 STATEMENT WAS MADE. THERE WAS NO REFERENCE THAT IT WAS MADE
2 PRIOR TO, I BELIEVE, THE JUNE ARREST DATE ON THE HOMICIDE
3 CHARGES WHEN MR. TIMMONS WAS ARRESTED AND CHARGED WITH THE
4 HOMICIDE.

5 IN REFERENCE TO THE PHOTO LINE-UP OF MS. WILLIAMS,
6 YOUR HONOR, ALL THE CASES INDICATE THAT THE TEST IS A
7 TOTALITY OF THE CIRCUMSTANCES AND THAT NO SINGLE FACTOR IS
8 CONTROLLING. THE FACTOR THAT MR. AYER RELIES ON MOST HEAVILY
9 IS THE TIME FACTOR BETWEEN THE TIME OF THE OFFENSE AND THE
10 TIME OF THE LINE-UP. IF WE WERE TO RELY ON THAT FACTOR
11 SOLELY, YOUR HONOR, WHAT THAT IN-ESSENCE MEANS IS THAT IF THE
12 POLICE DON'T SOLVE THE CRIME RIGHT AWAY THEY OUGHT TO QUIT
13 WORKING ON IT BECAUSE THEY'RE NOT GOING TO EVER BE ABLE TO
14 PRESENT EVIDENCE OF AN ACCURATE AND RELIABLE LINE-UP AT THE
15 TIME OF THE TRIAL IF IT'S NOT SOLVED ESSENTIALLY WITHIN TWO
16 WEEKS IS WHAT WAS ARGUED AT THE TRIAL, AND I DON'T THINK
17 THAT'S THE LAW. THE LAW IN THE CASE AND THE LAW IN THE STATE
18 IS THE TOTALITY OF THE CIRCUMSTANCES AND YOU LOOK AT ALL THE
19 FACTORS OUTLINED IN THE CASES AND NOT MERELY THE LENGTH OF
20 TIME THAT HAS PASSED BETWEEN THE TIME OF THE CRIME AND THE
21 TIME WHEN THE LINE-UP IS DONE.

22 HE ALSO ARGUES THAT THE MERE FACT THAT A PHOTO
23 LINE-UP WAS DONE PUTS MR. TIMMONS' CHARACTER IN ISSUE. I
24 DON'T THINK THAT'S, IN FACT, THE CASE. THERE WAS NO
25 REFERENCE WHATSOEVER TO THE SOURCE OF THAT PHOTOGRAPH, ONLY

1 THAT A SERIES OF PHOTOGRAPHS WERE SHOWN TO THE VICTIM IN THIS
2 CASE. THOSE PHOTOGRAPHS COULD HAVE JUST AS EASILY COME OUT
3 OF A HIGH SCHOOL YEAR BOOK AS FROM ANY POLICE FILE. SO THERE
4 IS NO INDICATION IN THE RECORD WHATSOEVER AND NOTHING WAS
5 PRESENTED TO THE JURY ABOUT THE SOURCE OF THE PHOTOGRAPH, AND
6 THE SOURCE OF THE PHOTOGRAPH IS OBVIOUSLY WHAT IS PREJUDICIAL
7 TO THE JURY AND THE REASON WHY THAT ONE PARTICULAR CASE AND I
8 CAN'T RECALL THE NAME WHERE THEY HAD THE PLACARDS AROUND
9 THEIR NECK IN THE FRONT AND SIDE VIEW SHOTS OF THE TYPICAL
10 MUG SHOT POSES. THAT WAS OVERTURNED ON THOSE GROUNDS BECAUSE
11 THAT -- IN THAT CASE CLEARLY THE SOURCE OF THE PHOTOGRAPH WAS
12 A PRIOR ARREST. IN THIS CASE IT WAS JUST A PICTURE OF
13 ESSENTIALLY A FACIAL SHOT OF 18 INDIVIDUALS WITH NO
14 IDENTIFYING MARKS IN REFERENCE TO THE SOURCE OF THE
15 PHOTOGRAPH. SO THAT WAS NEVER PUT IN FRONT OF THE JURY AND,
16 AND I THINK IT'S SPECULATIVE TO PRESUME PREJUDICE AGAINST MR.
17 TIMMONS BASED ON THAT.

18 YOUR HONOR, IN REFERENCE TO HIS MOTION REGARDING THE
19 PRIOR ARGUMENT, I BELIEVE CROWE, YOUR HONOR, INDICATES THAT
20 IF EVIDENCE IS PUT IN THAT THE DEFENSE LOSES THE PRIOR
21 ARGUMENT AND WE WOULD JUST RELY ON YOUR RULING FROM THE TRIAL
22 IN THAT REGARD. YOUR HONOR, AS FAR AS REFERENCES TO THE
23 PRIOR TRIAL, I THINK THE RECORD IS PRETTY CLEAR AND I THINK
24 THE RECORD SPEAKS FOR ITSELF. THERE WERE REFERENCES TO MR.
25 MCMAHON. THERE WERE REFERENCES TO JUDGE WESTBROOK. THAT, IN

1 FACT, YOUR HONOR, WAS BROUGHT ABOUT BY MR. QUINCY TIMMONS
2 INITIALLY REFUSING TO TESTIFYING, THEN CHANGING HIS STORY AND
3 INDICATING THAT HIS PRIOR TESTIMONY, I BELIEVE AS HE SAID ON
4 THE STAND, WAS ALL LIES. THAT'S WHAT NECESSITATED BRINGING
5 OUT THE PRIOR INCONSISTENT STATEMENTS THAT HE MADE BACK IN
6 1994, AND I DON'T THINK ANYTHING THAT HAPPENED DURING THE
7 TESTIMONY OF MR. QUINCY OR, EXCUSE ME, ANYTHING THAT HAPPENED
8 DURING THE TESTIMONY OF QUINCY TIMMONS INFECTED THE
9 FUNDAMENTAL FAIRNESS OF THIS TRIAL AND WE WOULD URGE YOU TO
10 DENY THE MOTIONS.

11 THE COURT: OKAY. MR. AYER, ANY REPLY?

12 MR. AYER: NOTHING, YOUR HONOR.

13 THE COURT: ALL RIGHT. I HAVE CONSIDERED THE
14 ARGUMENTS OF COUNSEL FOR THE DEFENDANT. THERE WERE FIVE
15 GROUNDS ARGUED AND, MR. AYER, ON EACH OF THOSE GROUNDS I'M
16 GOING TO DENY THE DEFENDANT'S MOTION FOR A NEW TRIAL. ANY
17 OTHER MOTIONS AT THIS TIME?

18 MR. AYER: NONE, YOUR HONOR.

19 THE COURT: OKAY. ALL RIGHT. ANYTHING FROM THE
20 STATE?

21 MR. RIDDLE: NO, SIR.

22 THE COURT: ALL RIGHT. THEN THE HEARING WILL BE
23 CONCLUDED.

24 MR. AYER: THANK YOU, YOUR HONOR.

25 THE COURT: DO Y'ALL WANT TO PREPARE AN ORDER ON

1 THIS?

2 MR. RIDDLE: I---

3 THE COURT: DO YOU SEE ANY NEED FOR AN ORDER OTHER
4 THAN THE TRANSCRIPT?

5 MR. AYER: I DON'T, YOUR HONOR.

6 THE COURT: OKAY.

7 MR. RIDDLE: NO, SIR.

8 THE COURT: I DON'T USUALLY DO AN ORDER, BUT YOU
9 MIGHT -- SINCE WE HAVE A DIFFERENT COURT REPORTER Y'ALL MIGHT
10 WANT TO GET A COPY OF THE TRANSCRIPT OF THIS HEARING FROM...

11 MR. RIDDLE: I'M GOING TO GO AHEAD AND GIVE HER A
12 CARD RIGHT NOW AND ORDER A TRANSCRIPT FROM THIS HEARING.

13 THE COURT: OKAY. ALL RIGHT. IF NOTHING FURTHER,
14 THEN THE HEARING IS ADJOURNED.

15 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED. THERE
16 WERE NO EXHIBITS INTRODUCED DURING THE PROCEEDINGS.)

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I, THE UNDERSIGNED DAPHNE D. HELMS, OFFICIAL COURT REPORTER FOR THE ELEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR LEXINGTON COUNTY, SOUTH CAROLINA, ON THE 5TH DAY OF SEPTEMBER, 2000.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

NOVEMBER 25, 2000

Daphne D. Helms

DAPHNE D. HELMS, COURT REPORTER

FILED SYP

ORIGINAL

2003 FEB 25 P 1:33

STATE OF SOUTH CAROLINA

THOMAS H. COMERFORD
CLERK OF COURT
LEXINGTON SC

In the Court of Common Pleas

County of LEXINGTON

MARCUS TIMMONS, # 217397

Full name and prison number (if any) of Applicant.

vs.

WILLIAM M. WHITE, WARDEN

Name of Respondent.

STATE OF SOUTH CAROLINA

APPLICATION FOR
POST-CONVICTION RELIEF

2003-CP32-0759

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 it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention BROAD RIVER CORRECTIONAL INSTITUTION, 4460 BROAD RIVER ROAD,
COLUMBIA, SOUTH CAROLINA - 29210
2. Name and location of Court which imposed sentence COURT OF GENERAL SESSIONS - FOR THE COUNTY
OF (LEXINGTON), SOUTH CAROLINA - 29072 - 3494
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) (94-GS-32-0362) - (MURDER); (94-GS-32-0364) - (CONSPIRACY); (94-GS-32-0367) - (ARMED
 - (b) ROBBERY); (94-GS-32-2738) - (ATTEMPTED ARMED ROBBERY) - (POINTING AND PRESENTING
 - (c) FIREARM); (00-GS-32-3326) - (POINTING AND PRESENTING FIREARM); (00-GS-32-3327) - (POINTING
AND AND PRESENTING FIREARM); (00-GS-32-3328) - (ATTEMPTED ARMED ROBBERY):
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) (0362-LIFE TERM); 0364 -FIVE YEARS CONCURRENT; 0367-TWENTY-FIVE YEARS CONSECUTIVE;
 - (b) 0367-FIVE YEARS CONCURRENT; 2738-TWENTY YEARS CONCURRENT-FIVE YEARS CONCURRENT;
 - (c) 3326-AND 3327-FIVE YEARS EACH 3328-TWENTY - YEARS CONCURRENT.

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5. Check whether a finding of guilty was made
(a) after a plea of guilty _____
(b) after a plea of not guilty X _____
(c) after a plea of nolo contendere _____
6. Did you appeal from the judgment of conviction or the imposition of sentence?
YES _____
7. If you answered "yes" to (6), list
(a) the name of each Court to which you appealed:
i. SOUTH CAROLINA COURT OF APPEALS
ii. _____
iii. _____
(b) the result in each such Court to which you appealed:
i. APPEAL DISMISSED
ii. _____
iii. _____
(c) the date of each such result:
i. MAY 29, 2002
ii. _____
iii. _____
(d) if known, citations of any written opinion or orders entered pursuant to such results:
i. UNKNOWN
ii. _____
iii. _____
8. If you answered "no" to (6), state your reasons for not so appealing:
N/A
(a) _____
(b) _____
(c) _____
9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
(a) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL
(b) TRIAL COUNSEL'S FAILURE TO MAKE CONTEMPORANEOUS OBJECTION
(c) _____
10. State concisely and in the same order the facts which support each of the grounds set out in (9):
(a) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL
(b) NOT PRESERVING IDENTIFICATION ISSUE FOR APPELLATE REVIEW
(c) _____

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law? N/A

(b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? N/A

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? N/A

(d) any other petitions, motions or applications in this or any other Court? N/A

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. N/A

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. N/A

ii. _____

iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

(a) POST CONVICTION RELIEF PRESENTS THE FIRST OPPORTUNITY FOR THE APPLICANT

(b) TO ALLEGE INEFFECTIVE ASSISTANCE OF COUNSEL

(c) TRIAL COUNSEL - AS DIRECT APPEAL DOESN'T AFFORD SUCH OPPORTUNITY.

16. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____

(b) your trial, if any? YES

(c) your sentencing? YES

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

i. CAREY AYER, ESQ., -

ii. LISA LEE SMITH, ESQ., -

iii. AILEEN P. CLARE - S.C. OFFICE OF APPELLATE DEFENSE - COLUMBIA, S.C.

(b) the proceedings at which each such attorney represented you:

i. TRIAL

ii. TRIAL

iii. (CLARE) - APPEAL

18. State clearly the relief you seek in filing this application.

SENTENCES SET-ASIDE - CONVICTIONS (REVERSED)

19. Are you now under sentence from any other court that you have not challenged?

NO

ORIGINAL

STATE OF SOUTH CAROLINA

County of LEXINGTON

VERIFICATION

I, MARCUS TIMMONS, 217397, 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.

* Marcus Timmons #217397
MARCUS TIMMONS, #217397

SWORN to and subscribed before me this 10th
day of Feb, 19/2003
Elizabeth Wood (S.S.)
Notary Public

My Commission Expires: July 29, 2007

FILED
2003 FEB 25 P 1:33
THOMAS H. CONTEFORD
CLERK OF COURT
LEXINGTON SC

APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, MARCUS TIMMONS, #217397, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security therefor.

* Marcus Timmons #217397
MARCUS TIMMONS, #217397

SWORN or affirmed to and subscribed before me this
10th day of Feb, 19/2003
Elizabeth Wood
Notary Public

My Commission Expires July 29, 2007

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ISSUE #1

APPLICANT'S TRIAL COUNSEL INEFFECTIVE IN
NOT CONTEMPORANEOUSLY OBJECTING TO THE
TAINTED IDENTIFICATION PROCEDURE, AND NOT
PRESERVING SUCH ISSUE FOR APPELLATE REVIEW:

* * * * *

ISSUE # 2

APPLICANT'S TRIAL COUNSEL INEFFECTIVE IN
NOT OBJECTING TO THE TRIAL COURT'S ERROR OF
DENYING APPLICANT'S MOTION TO SUPPRESS THE
UNRELIABLE IDENTIFICATION OF THE APPLICANT:

* * * * *

ISSUE #3

APPLICANT'S TRIAL COUNSEL INEFFECTIVE IN
NOT CONTEMPORANEOUSLY OBJECTING TO THE IN -
COURT - IDENTIFICATION OF THE APPLICANT;
THEREBY NOT PRESERVING THE ISSUE FOR
APPELLATE REVIEW:

ISSUE #1

APPLICANT'S TRIAL COUNSEL INEFFECTIVE IN NOT
CONTEMPORANEOUSLY OBJECTING TO THE TAINTED
IDENTIFICATION PROCEDURE, AND NOT PRESERVING
SUCH ISSUE FOR APPELLATE REVIEW:

THE APPLICANT ALLEGES TRIAL COUNSEL WAS INEFFECTIVE BEFORE AND DURING TRIAL OF THE APPLICANT, AND THE APPLICANT WAS PREJUDICED AS A RESULT OF TRIAL COUNSEL'S FAILURE TO CONTEMPORANEOUSLY OBJECT TO THE TAINTED IDENTIFICATION PROCEDURE USED AT APPLICANT'S TRIAL; TRIAL COUNSEL WAS FURTHER INEFFECTIVE IN NOT PRESERVING SUCH ISSUE FOR APPELLATE REVIEW.

APPLICANT'S TRIAL COUNSEL MADE A PRE-TRIAL MOTION TO SUPPRESS WITNESS (PEGGY WILLIAMS') IDENTIFICATION OF THE APPLICANT, HOWEVER, THE TRIAL COURT DENIED THE MOTION TO SUPPRESS. SEE TRIAL TRANSCRIPT PAGE #261, LINES 14 - THRU - TRIAL PAGE #297, LINES 1-14; TRIAL PAGE #308, LINES 1-20; TRIAL PAGE #346, LINES 1-19. WHILE THE TRIAL COURT'S RULING WAS PLAIN ERROR, TRIAL COUNSEL FAILED TO CONTEMPORANEOUSLY OBJECT, AND DID NOT PRESERVE THE TRIAL COURT'S ERRONEOUS RULING FOR APPELLATE REVIEW. FURTHERMORE, TRIAL COUNSEL'S INEFFECTIVENESS WAS COMPOUNDED AND THE APPLICANT WAS FURTHER PREJUDICED, BECAUSE TRIAL COUNSEL FURTHER FAILED TO CONTEMPORANEOUSLY OBJECT WHEN WITNESS (WILLIAMS) IDENTIFIED APPLICANT IN THE JURY'S PRESENCE. SEE, TRIAL TRANSCRIPT PAGE #324, LINES 14-25: THIS ACTION WAS BLATANT ERROR, AND TRIAL COUNSEL SHOULD HAVE OBJECTED; AGAIN, WHEN TRIAL COUNSEL FAILED TO

CONTEMPORANEOUSLY OBJECT TO SUCH PREJUDICIAL IDENTIFICATION PROCEDURE DURING TRIAL, SUCH NON-ACTION RENDER'S TRIAL COUNSEL INEFFECTIVE, AND IN TRIAL COUNSEL'S FAILURE TO CONTEMPORANEOUSLY OBJECT, THE SAID ISSUE WAS NOT PRESERVED FOR APPELLATE REVIEW. TRIAL COUNSEL WAS INEFFECTIVE. STRICKLAND V. WASHINGTON, 104 S.CT. 2052 (1984).

APPLICANT'S CLAIM OF TRIAL COUNSEL BEING INEFFECTIVE IS BASED, AND RELIED UPON SOLID CASE LAW. A CONTEMPORANEOUSLY OBJECTION IS REQUIRED TO PRESERVE AN ISSUE FOR APPELLATE REVIEW. STATE V. MCHONEY, 544 S.E.2D 30,37 (2001); STATE V. HUGHES, 521 S.E.2D 500,503 (1999); (HOLDING AN IN LIMINE RULING IS NOT FINAL AND DOES NOT PRESERVE AN ISSUE FOR APPEAL OR APPELLATE REVIEW, WITHOUT A CONTEMPORANEOUSLY OBJECTION BEING MADE; COMPARE - STATE V. BURTON, 486 S.E.2D 762,765 (CT. APP. 1997); (ADMISSIBILITY OF TESTIMONY NOT PRESERVED FOR REVIEW WHERE TWO WITNESSES TESTIFIED AFTER THE TRIAL COURT MADE AN IN LIMINE RULING AND BEFORE THE TESTIMONY'S ADMISSION BECAUSE DEFENDANT FAILED TO CONTEMPORANEOUSLY OBJECT. SEE, STATE V. MUELLER, 460 S.E.2D 409,410,411 (CT. APP. 1995), (HOLDING TRIAL COURT'S RULING ON CHALLENGED EVIDENCE IMMEDIATELY BEFORE IT ADMISSION WAS NOT A RULING IN LIMINE AND THUS THE QUESTION OF ITS ADMISSIBILITY WAS PROPERTY PRESERVED).

APPLICANT'S TRIAL COUNSEL WAS INEFFECTIVE IN NOT MAKING A CONTEMPORANEOUSLY OBJECTION TO THE TAINTED IDENTIFICATION PROCEDURES, THE IN COURT IDENTIFICATION OF THE APPLICANT BEFORE

JURORS, AND THE TRIAL COURT'S ERRONEOUS RULING DENYING
APPLICANT'S MOTION TO SUPPRESS. THE APPLICANT WAS PREJUDICED AND
DENIED APPELLATE REVIEW DUE TO TRIAL COUNSEL'S INEFFECTIVENESS.
CURTIS V. STATE, 407 S.E.2D 643 (1991):

ISSUE #2

APPLICANT'S TRIAL COUNSEL INEFFECTIVE IN
NOT OBJECTING TO THE TRIAL COURT'S ERROR OF
DENYING APPLICANT'S MOTION TO SUPPRESS THE
UNRELIABLE IDENTIFICATION OF THE APPLICANT.

THE APPLICANT CONTENDS TRIAL COUNSEL WAS INEFFECTIVE IN NOT OBJECTING TO THE TRIAL COURT'S ERROR, OF DENYING APPLICANT'S "MOTION TO SUPPRESS" THE UNRELIABLE IDENTIFICATION OF THE APPLICANT. TRIAL COUNSEL WAS INEFFECTIVE. DANIEL V. STATE, 317 S.E.2D 746 (1984).

INITIALLY, THE APPLICANT WAS CHARGED WITH PARTICIPATING IN A CRIME, ALONG WITH A CO-DEFENDANT. HOWEVER, (PEGGY WILLIAMS), AN ALLEGED VICTIM OF ONE OF THE ROBBERIES, TESTIFIED AT THE TRIAL OF THE APPLICANT. THE ALLEGED VICTIM (WILLIAMS), TESTIFIED AT APPLICANT'S TRIAL THAT SHE HAS POOR VISION AND MUST WEAR GLASSES OR CONTACT LENS FOR PROPER VISION. THE ALLEGED VICTIM ALSO TESTIFIED AT TRIAL, ON THE NIGHT IN QUESTION, SHE HAD CONSUMED GLASSES OF WINE DURING A THREE HOUR PERIOD. AFTER LEAVING A BAR, THE ALLEGED VICTIM WAS DROPPED OFF AT A CONVENIENCE STORE; WHILE APPROACHING THE CONVENIENCE STORE, THE ALLEGED VICTIM (WILLIAMS), STATED SHE WAS APPROACHED BY TWO ARMED, MASKED MEN. ONE OF THE MASKED MEN GRABED HER, WHILE THE OTHER MASKED MAN DEMANDED MONEY FROM THE CONVENIENCE STORE CLERK. AT TRIAL, THE

ALLEGED VICTIM (MS. WILLIAMS), TESTIFIED THAT HER ASSAILANT'S VOICE WAS MUFFLED BY A SCARF AROUND HIS NECK. THE ALLEGED VICTIM (MS. WILLIAMS), PREVIOUS TESTIMONY WAS THAT HER ASSAILANT WORE A "SKI MASK WITH EYE AND MOUTH HOLES". SEE, TRIAL TRANSCRIPT PAGE #273, LINES 19 -THRU - TRIAL PAGE #276, LINES 1-6. THE ENCOUNTER WITH THE ALLEGED VICTIM (MS. WILLIAMS) AND HER ASSAILANT ONLY LASTED A FEW MOMENTS. APPROXIMATELY THREE MONTHS LATER, THE ALLEGED VICTIM PICKED THE APPLICANT FROM A PHOTOGRAPHIC LINEUP. SHE FURTHER TESTIFIED THAT SHE WAS ABLE TO IDENTIFY APPLICANT BY HIS "DOE-SHAPED EYES". HOWEVER, SHE OFFERED NO DEFINITION OF THAT TERM, ("DOE - SHAPED EYES") AND NONE APPEARS NOWHERE IN THE TRIAL RECORD. APPLICANT'S TRIAL COUNSEL MOVED TO SUPPRESS THE PHOTO IDENTIFICATION AS UNRELIABLE. THE TRIAL COURT DENIED THE MOTION TO SUPPRESS. SEE, TRIAL TRANSCRIPT PAGE #261, LINES 14 - THRU - TRIAL PAGE #297, LINES 1-14; TRIAL PAGE #308, LINE 20 - THRU -TRIAL PAGE #346, LINES 1-19. THE TRIAL COURT'S RULING IN DENIAL OF APPLICANT'S MOTION TO SUPPRESS WAS ERROR. TRIAL COUNSEL FAILED TO MAKE A CONTEMPORANEOUS OBJECTION TO THE TRIAL COURT'S ERRONEOUS RULING; THEREFORE, THE ISSUE WAS NOT PRESERVED FOR APPELLATE REVIEW ON DIRECT APPEAL. IN THE PROCESS OF TRIAL COUNSEL'S INEFFECTIVENESS IN NOT CONTEMPORANEOUSLY OBJECTING TO THE TRIAL COURT'S RULING, THE APPLICANT WAS DENIED DUE PROCESS, AND PROPER ACCESS TO THE APPELLATE COURTS. THE APPLICANT WAS PREJUDICED AS A RESULT OF TRIAL COUNSEL'S FAILURE TO OBJECT. TRIAL COUNSEL INEFFECTIVE. WHETSELL V. STATE, 277 S.E.2D 891 (1981).

THE APPLICANT CONTENDS TRIAL COUNSEL WAS INEFFECTIVE IN NOT MAKING A CONTEMPORANEOUS OBJECTION, BE AN IDENTIFICATION PROCEDURE IS "INADMISSIBLE" IF, TAKING INTO ACCOUNT THE TOTALITY OF CIRCUMSTANCES, THERE EXISTS A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION. STATE V. MOORE, 540 S.E.2D 445 (2000). HOWEVER, IN DETERMINING THE ADMISSIBILITY OF AN IDENTIFICATION, A TRIAL COURT MUST CONSIDER THE FOLLOWING FACTORS; (1) THE OPPORTUNITY OF THE WITNESS TO VIEW THE CRIMINAL AT THE TIME OF THE CRIME; (2) THE WITNESS'S DEGREE OF ATTENTION; (3) THE ACCURACY OF THE WITNESS'S PRIOR DESCRIPTION OF THE CRIMINAL; (4) THE LEVEL OF CERTAINTY DEMONSTRATED BY THE WITNESS AT THE CONFRONTATION; AND, (5) THE LENGTH OF TIME BETWEEN THE CRIME AND THE CONFRONTATION. NEIL V. BIGGERS, 93 S.CT. 375 (1972). THE WITNESS (WILLIAMS) IDENTIFICATION OF THE APPLICANT DOES NOT MEET THE NEIL V. BIGGERS, STANDARD.

THE APPLICANT'S TRIAL COUNSEL WAS INEFFECTIVE IN NOT MAKING AN OBJECTION TO THE TRIAL COURT'S DENIAL OF SUPPRESSION OF THE ALLEGED VICTIM'S (MS. WILLIAMS), INCONSISTENT TESTIMONY; BECAUSE (1) FROM ALLEGED VICTIM'S TESTIMONY, "IT WAS NEARLY THREE IN THE MORNING, AND PARTIALLY DARK, WHEN SHE SAW HER ATTACKER; (2) SHE WAS NOT WEARING HER GLASSES AND HAD BEEN DRINKING; (3) SHE ALSO HAD BEEN CRYING BECAUSE OF AN ARGUMENT WITH FRIENDS; (4) SHE SAW THE PERSON ONLY FOR A SHORT TIME, AND DID NOT SEE HIS LINEUP FOR THREE MONTHS AFTER THE CRIME ITSELF; AND (4) HER MEMORY WAS SO INCONSISTENT THAT SHE COULD NOT REMEMBER WHAT THE PERSON HAD OVER HIS FACE, OR WHETHER HE WORE A HAT. SHE REMEMBERED ONLY RACE, GENDER, AND "DOE - SHAPED" EYES.

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NO DOUBT, TRIAL COUNSEL SHOULD HAVE MADE AN OBJECTION TO SUCH INCONSISTENT TESTIMONY BY THE (WILLIAMS). WHEN TRIAL COUNSEL FAILED TO OBJECT TO SUCH TESTIMONY, THE APPLICANT WAS PREJUDICED BY THE WITNESS'S UNRELIABLE IDENTIFICATION; TRIAL COUNSEL WAS INEFFECTIVE. GALLMAN V. STATE, 414 S.E.2D 780 (S.C.1992). FURTHERMORE, TRIAL COUNSEL WAS INEFFECTIVE IN NOT OBJECTING TO THE TRIAL COURT'S DENIAL OF SUPPRESSION, BECAUSE THE IDENTIFICATION PROCEDURE WAS UNDULY SUGGESTIVE, AND RESULTED IN IRREPARABLE MISIDENTIFICATION; THE TRIAL COURT WAS IN ERROR IN ADMITTING THE VICTIM'S (WILLIAMS), IDENTIFICATION OF THE APPLICANT OVER THE DEFENSE'S MOTION TO SUPPRESS THE IDENTIFICATION AND TESTIMONY. THE APPLICANT FURTHER CONTENDS, DUE TO TRIAL COUNSEL NOT OBJECTING TO THE IDENTIFICATION PROCEDURE, THE APPLICANT'S DUE PROCESS RIGHTS WERE VIOLATED. FOSTER V. CALIFORNIA, 394 U.S. 440,442 (1969); SIMMONS V. UNITED STATES, 390 U.S. 377,390 (1968); ALSO, UNITED STATES CONSTITUTIONAL AMENDMENT (14); SOUTH CAROLINA STATE CONSTITUTION - ARTICLE I, SECTION (3) - AND - (14), RESPECTIVE.

THE MOORE, COURT HAS HELD, AN IN COURT IDENTIFICATION IS INADMISSIBLE, IF A SUGGESTIVE OUT - OF - COURT IDENTIFICATION PROCEDURE CREATED A SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MIS - IDENTIFICATION. MOORE, SUPRA., SEE ALSO, MANSON V. BRATHWAITE, 432 U.S. 98 (1977). IN THE APPLICANT'S CASE, THE PHOTO LINEUP WAS HIGHLY QUESTIONABLE. THE WITNESS STATED HER ASSAILANT HAD "DOE SHAPE EYES," BUT NEVER TESTIFIED WHAT THE FACIAL FEATURE LOOKED

LIKE; AS FROM WITNESS'S OWN TESTIMONY, THE ASSAILANT HAD A COVERING OVER HIS FACE, WHICH THE VICTIM TESTIFIED INCONSISTENTLY WHAT SUCH COVERING WAS. THEREFORE, NO IDENTIFICATION CAN BE CONSIDERED RELIABLE WITH ONLY "EYES" BEING IDENTIFIED, AND NOT THE TOTAL FACE ITSELF. SEE, TRIAL TRANSCRIPT PAGE #261, LINES 11 - THRU- TRIAL PAGE #284 1-18; ALSO SEE, TRIAL TRANSCRIPT PAGE #308, LINES 13 - THRU - TRIAL PAGE #350, LINES 1-19. TRIAL COUNSEL WAS INEFFECTIVE AND SHOULD HAVE OBJECTED TO THE PREJUDICIAL IDENTIFICATION TESTIMONY OF THE WITNESS (MS. WILLIAMS). TRIAL COUNSEL FAILED TO OBJECT TO SUCH PREJUDICIAL TESTIMONY; AS IT IS VIRTUALLY IMPOSSIBLE TO PUT A "FACE WITH ONLY EYES" WITHOUT SOME METHOD OF "SUGGESTIVENESS." TRIAL COUNSEL WAS INEFFECTIVE AND SHOULD HAVE OBJECTED. SEE, WHITLEY V. BAIR, 802 F. 2D 1487 (4TH CIR. 1986). APPLICANT'S TRIAL COUNSEL'S CONDUCT DID NOT FALL WITHIN A REASONABLE RANGE OF COMPETENCE DEMANDED OF CRIMINAL ATTORNEYS DURING CRIMINAL PROCEEDINGS. DARDEN V. WAINWRIGHT, 106 S.CT. 2464 (1986).

APPLICANT'S TRIAL COUNSEL WAS FURTHER INEFFECTIVE IN NOT OBJECTING, NOR CHALLENGING THE TRIAL COURT'S ERRONEOUS RULING CONCERNING THE OUT - OF - COURT IDENTIFICATION PROCEDURE WHICH WAS SUGGESTIVE. SEE, TRIAL TRANSCRIPT PAGE #296, LINES 10 - THRU - TRIAL PAGE #297, LINES 1-14: IN THE TRIAL COURTS RULING, THE TWO PRONG TEST SET FORTH IN NEIL V. BIGGERS, WAS NOT ADHERED TO, FOR WHICH TRIAL COUNSEL DID NOT OBJECT. THE BIGGERS, COURT HAS STAUNCHLY HELD, WHERE THE DEFENSE CHALLENGES AN OUT OF COURT

IDENTIFICATION PROCEDURE AS SUGGESTIVE, THE COURT MUST CONDUCT A TWO - PART INQUIRY. FIRST, THE TRIAL COURT MUST DETERMINE IF THE IDENTIFICATION PROCESS WAS UNDULY SUGGESTIVE. SECOND, THE TRIAL COURT MUST DETERMINE WHETHER, DESPITE THE SUGGESTIVE NATURE OF THE CONFRONTATION PROCEDURE, THE IDENTIFICATION WAS SO RELIABLE THAT NO SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION EXISTED. SEE, BIGGERS, 409 U.S. AT 198: ALSO, MOORE, 540 S.E.2D AT 447. IN DETERMINING WHETHER THE IDENTIFICATION IS ADMISSIBLE, THE COURT MUST EVALUATE A NUMBER OF FACTORS, INCLUDING THE OPPORTUNITY OF THE WITNESS TO VIEW THE PERPETRATOR AT THE TIME OF THE CRIME, THE WITNESS'S DEGREE OF ATTENTION, THE ACCURACY OF THE WITNESS'S PRIOR DESCRIPTION OF THE PERPETRATOR, THE LEVEL OF CERTAINTY DEMONSTRATED BY THE WITNESS AT THE CONFRONTATION, AND THE LENGTH OF TIME BETWEEN THE CRIME AND THE CONFRONTATION. AGAIN SEE, BIGGERS, 409 U.S. AT 199-200; MOORE, 540 S.E.2D AT 448-49. NO DOUBT, IN THE PRESENT CASE OF THE APPLICANT, THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING THE WITNESS (WILLIAMS) IDENTIFICATION OF THE APPLICANT, AND APPLICANT'S TRIAL COUNSEL WAS INEFFECTIVE IN NOT OBJECTING TO THE ERRONEOUS TRIAL COURT'S RULING. THOMPSON V. LEEKE, 590 F. SUPP. 110 (1984).

AS FOR THE FIRST PRONG, THERE IS NO DOUBT THAT THE IDENTIFICATION PROCEDURE USED IN THE APPLICANT'S CASE WAS UNDULY SUGGESTIVE AND OVERWHELMINGLY PREJUDICIAL. NUMEROUS OF PEOPLE IN THE STATE OF SOUTH CAROLINA, AND THE NATION, HAVE THE SO CALLED - "DOE SHAPED-EYES, OR SLANT EYES." THE TRIAL COURT, IN ITS RULING, DID

NOT SATISFY THE FIRST PRONG MANDATED BY THE BIGGERS, COURT. THE ALLEGED VICTIMS IDENTIFICATION OF THE APPLICANT WAS TOTALLY INCONSISTENT, AND VICTIM'S IDENTIFICATION OF THE APPLICANT THROUGH A PHOTO LINEUP WAS NO DOUBT, SUGGESTIVE; AS FROM VICTIM'S VERY OWN TESTIMONY, HER ASSAILANT WORE A SKI MASK OR SOME OTHER TYPE OF COVERING TO CONCEAL HIS FACE, AND SUCH SKI MASK OR COVERING HAD "HOLES" FOR EYES (SEEING); WITHOUT SOME SOME OF SUGGESTIVENESS, IT WOULD HAVE BEEN IMPOSSIBLE TO "MATCH A FACE" ACCORDING TO EYES. IMPOSSIBLE!! SEE, TRIAL TRANSCRIPT PAGE #312, LINES 19 - THRU - TRIAL PAGE #314 LINES 1-25. AS WITH THE PHOTO LINES, IT IS PATENT THAT THE TAINTED PROCEDURE USED BY POLICE WAS UNDULY SUGGESTIVE. STATE V. MOORE, 540 S.E.2D 448 (2000).

MOOREOVER, TRIAL COUNSEL WAS INEFFECTIVE IN NOT OBJECTING TO THE TRIAL COURT'S RULING, BECAUSE THE TRIAL COURT DID NOT SATISFY THE SECOND PRONG SET FORTH BY THE BIGGERS, COURT. THE APPLICANT AVERS THE SECOND PRONG OF BIGGERS, IS NOT SATISFIED BECAUSE BECAUSE, THE EVIDENCE ESTABLISHED A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION BY THE WITNESS. AS IS NOTED WITHIN, BIGGERS, REQUIRES A REVIEW OF A NUMBER OF FACTORS IN DECIDING IF, NOTWITHSTANDING THE SUGGESTIVE PROCEDURE, UNDER THE TOTALITY OF THE CIRCUMSTANCES THE IDENTIFICATION IS SUFFICIENTLY RELIABLE TO BE ADMITTED. HERE, IN THE APPLICANT'S CASE, AS IN MOORE, THE ONLY FACTOR OF THE FIVE ESTABLISHED WITH ANY DEGREE OF RELIABILITY IS THE LENGHT OF TIME BETWEEN THE CRIME AND THE CONFRONTATION - HERE IN THE APPLICANT'S CASE, THE VICTIM TESTIFIED THE CONFRONTATION

LASTED NO LESS THAT "FIVE" MINUTES---NO MORE THAN "TEN" MINUTES. SEE, TRIAL TRANSCRIPT PAGE #314, LINES 16-25; SEE ALSO, MOORE, 540 S.E.2D AT 449. BUT ALSO AS IN MOORE, THIS FACTOR IS OUTWEIGHED BY THE OTHER FACTORS AS WELL.

THE APPLICANT FURTHER CONTENDS TRIAL COUNSEL WAS INEFFECTIVE, AND SHOULD HAVE OBJECTED TO THE TRIAL COURT'S ERRONEOUS RULING, AND INEFFECTIVE IN NOT OBJECTING TO THE TOTAL IDENTIFICATION PROCESS.

THE APPLICANT FURTHER ASSERTS, THE MOORE, COURT HAS HELD; FIRST THE OPPORTUNITY OF THE WITNESS TO VIEW THE PERPETRATOR AT THE TIME OF THE INCIDENT AND HER DEGREE OF ATTENTION WERE NOT AS CLEAR-CUT AS THE STATE CONTENDED. HOWEVER, IN THE APPLICANT'S CASE, ALTHOUGH THE WITNESS TESTIFIED SHE WAS IN THE PRESENCE OF THE INTRUDER FOR A PERIOD OF MINUTES, SHE ALSO REVEALED THAT SHE WAS NOT ACTUALLY CONFRONTING THE INTRUDER FACE TO FACE THROUGHOUT THE INCIDENT. SHE WAS NOT WEARING HER GLASSES, WHICH WITHOUT HER GLASSES SHE STILL TESTIFIED HER ASSAILANT'S FACE WAS COVERED, AND SHE ONLY SAW HER ASSAILANT'S EYES THROUGH A FACIAL COVERING.

THE NEXT FACTOR, THE PRIOR DESCRIPTION GIVEN BY THE WITNESS. WEIGHS HEAVILY AGAINST A FINDING OF RELIABILITY. FURTHER, IN THE APPLICANT'S CASE, THE WITNESS COULD NOT GIVE AN ACCURATE DESCRIPTION OF THE FACIAL COVERING; AT ONE POINT, THE WITNESS STATED HER ASSAILANT WORE A SKI MASK, AT ANOTHER POINT, THE WITNESS TESTIFIED THE ASSAILANT WORE A FACIAL COVERING (NECK

SCARF). SEE, TRIAL TRANSCRIPT PAGE #274, LINES 14-21; ACCORDING, THE ASSAILANT'S FACE WAS NEVER VIEWABLE, PURSUANT TO WITNESS'S TESTIMONY. AS IN MOORE, WHERE THE ONLY DESCRIPTIVE FEATURES WERE THE ROBBER'S CLOTHING AND RACE, SEE, MOORE, 540 S.E.2D AT 449; HOVER, THE WITNESS (MS. WILLIAMS), DID NOT DESCRIBE IDENTIFYING FACIAL FEATURES, SKIN TONE, HAIR, OR APPROXIMATE AGE. WITHOUT MORE, HER INITIAL DESCRIPTION UNDERMINES THE RELIABILITY OF HER TESTIMONY CONCERNING "IDENTIFICATION."

TRIAL COUNSEL SHOULD HAVE OBJECTED TO THE FOLLOWING ERRORS; TRIAL COUNSEL SHOULD HAVE OBJECTED TO THE SUGGESTIVE IDENTIFICATION PROCESS; TRIAL COUNSEL SHOULD HAVE OBJECTED TO THE TRIAL COURT'S DENIAL OF APPLICANT'S MOTION TO SUPPRESS; AND TRIAL COUNSEL SHOULD HAVE OBJECTED TO WITNESS (WILLIAMS) IN COURT IDENTIFICATION. IN TRIAL COUNSEL'S FAILURE TO OBJECT TO THE NUMEROUS ERRORS INVOLVING THE TAINTED IDENTIFICATION PROCESS, THE APPLICANT WAS PREJUDICED AS A RESULT OF TRIAL COUNSEL'S INEFFECTIVENESS. FINALLY, THE LEVEL OF CERTAINTY FACTOR CANNOT BE DEEMED RELIABLE. WHILE THE WITNESS TESTIFIED SHE HAD NO DOUBT AS TO THE IDENTIFICATION OF APPLICANT AS THE ASSAILANT, SHE ADMITTED IN HER TESTIMONY THAT; (1) ON THE PARTICULAR NIGHT IN QUESTION, SHE HAD BEEN DRINKING; (2) THE WITNESS TESTIFIED THAT SHE HAS "POOR" VISION AND MUST WEAR EYE GLASSES OR CONTACTS - ON THE NIGHT IN QUESTION, SHE WORE NO GLASSES NOT CONTACTS; (3) IT WAS PARTIALLY DARK, AND SHE ONLY SAW THE INTRUDER ONLY FOR A SHORT TIME; (4) SHE DID NOT SEE PHOTO LINEUP FOR THREE MONTHS AFTER THE CRIME; AND, (5) HER MEMORY WAS SO INCONSISTENT THAT SHE COULD NOT

REMEMBER WHAT THE INTRUDER HAD OVER HIS FACE, OR WHETHER HE WORE A HAT, SKI MASK, OR SCARF. SHE ONLY REMEMBERED RACE, GENDER, AND SO CALLED "DOE - SHAPE EYES". THE ERRORS TRIAL COUNSEL FAILED TO OBJECT TO WAS EVIDENCE WHICH UNDERMINED HER ASSERTIONS THAT SHE WAS CERTAIN IN HER IDENTIFICATION, AND DEMONSTRATES A LIKELIHOOD OF MISIDENTIFICATION BASED ON THE SUGGESTIVENESS AND NATURE OF THE IDENTIFICATION PROCESS. THE IDENTIFICATION PROCEDURE COULD ONLY HAVE BEEN BASED ON THE SUGGESTIVE NATURE OF THE ENTIRE IDENTIFICATION PROCEDURE. FURTHERMORE, THE IDENTIFICATION COULD ONLY HAVE BEEN BASED ON THE SUGGESTION THAT APPLICANT WAS THE ASSAILANT BECAUSE HE, ONE, AMONG MANY HUMAN BEINGS, HAD A POLICE PHOTO ON FILE WITH SO CALLED "DOE - SHAPE EYES." HERE, AS IN MOORE, UNDER THE TOTALITY OF THE CIRCUMSTANCES, A SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION RENDERS THIS IDENTIFICATION UNRELIABLE AS A MATTER OF LAW AND THEREFORE INADMISSIBLE. FOSTER V. CALIFORNIA, 394 U.S. 440, 442 (1969); TRIAL COUNSEL WAS INEFFECTIVE. BRILEY V. BASS, 750 F.2D 1238 (1984).

ISSUE #3

APPLICANT'S TRIAL COUNSEL INEFFECTIVE IN NOT
CONTEMPORANEOUSLY OBJECTING TO THE IN -
COURT - IDENTIFICATION OF THE APPLICANT;
THEREBY NOT PRESERVING THE ISSUE FOR
APPELLATE REVIEW:

* * * * *

IMPROPER IN - COURT IDENTIFICATION

THE APPLICANT CONTENDS TRIAL COUNSEL WAS INEFFECTIVE IN NOT CONTEMPORANEOUSLY OBJECTING TO THE IN - COURT - IDENTIFICATION OF THE APPLICANT. AT TRIAL OF THE APPLICANT, THE WITNESS (WILLIAMS) WAS ALLOWED WITHOUT OBJECTIONS, TO IDENTIFY THE APPLICANT IN COURT, AND IN THE PRESENCE OF THE JURY. THE APPLICANT CONTENDS SUCH ACTION WAS ERROR, AND THE APPLICANT WAS PREJUDICED AS A RESULT OF TRIAL COUNSEL NOT OBJECTING TO THE IN - COURT - IDENTIFICATION OF THE APPLICANT. TRIAL COUNSEL WAS INEFFECTIVE FURTHER IN NOT MAKING A CONTEMPORANEOUS ~~OBJECTION~~ ON DIRECT APPEAL, THE SAID ISSUE OF IN - COURT - IDENTIFICATION WAS NOT PROPERLY BEFORE THE COURT FOR APPELLATE REVIEW. STATE V. MCHONEY, 544 S.E.2D 30,37, (2001); TRIAL COUNSEL SHOULD HAVE OBJECTED TO THE IN - COURT - IDENTIFICATION OF THE APPLICANT, BY THE WITNESS

(WILLIAMS), BECAUSE THE PHOTO LINEUP PROCEDURE WAS "TAINTED," "INTER - ALIA," SUCH AS, THE VICTIM (WILLIAMS') INCONSISTENT TESTIMONY CONCERNING WHAT THE ASSAILANT WAS WEARING TO CONCEAL FACIAL FEATURES. "SKI - MASK, OR SCARF."

THEREFORE, THE APPLICANT AVERS TRIAL COUNSEL SHOULD HAVE MADE THE REQUIRED CONTEMPORANEOUS OBJECTION BECAUSE THE PHOTO - LINEUP IDENTIFICATION OF THE APPLICANT IS "HIGHLY" QUESTIONABLE. SUCH QUESTION, FOR INSTANCE, IS THE MERE FACT THAT WITNESS (WILLIAMS'), OWN TESTIMONY ATTESTS TO THE FACT THAT HER ASSAILANT WORE A FACIAL COVERING, HOWEVER, IF A FACIAL COVERING WAS WORN, THEN HOW WAS WITNESS ABLE TO PICK APPLICANT'S PHOTO OUT OF A LINEUP, WHEN WITNESS NEVER, AT ANY TIME, DESCRIBED ANY FACIAL FEATURES OF HER ASSAILANT? "EYES ALONE DO NOT CONSTITUTE FACE." THERE IS NO DOUBT, SOME TYPE OF SUGGESTIVENESS OCCURRED IN ORDER FOR WITNESS TO IDENTIFY APPLICANT IN OPEN COURT. THEREFORE, THE PHOTO LINEUP WAS TAINTED, AND THE "POISON" SPILLED OVER TO THE IN COURT IDENTIFICATION OF THE APPLICANT; FOR WHICH TRIAL COUNSEL DID NOT OBJECT. SEE, TRIAL TRANSCRIPT PAGE #324, LINE 14-25; TRIAL PAGE #26, LINE 1. TRIAL COUNSEL SHOULD HAVE MADE A CONTEMPORANEOUS OBJECTION TO THE IN COURT IDENTIFICATION OF THE APPLICANT, BY THE WITNESS. HAD TRIAL COUNSEL MADE A CONTEMPORANEOUS OBJECTION, THEN THE IN COURT IDENTIFICATION OF THE APPLICANT IN THE JURY'S PRESENCE, WOULD HAVE BEEN AUTOMATICALLY PRESERVED FOR APPELLATE REVIEW. APPLICANT'S TRIAL COUNSEL WAS INEFFECTIVE. SIMMONS V. UNITED STATES, 88 S.CT. 967 (1978). ON THE BASIS OF THE ENTIRE RECORD, HERE, IN THE

APPLICANT'S CASE, IT CAN BE CONCLUDED BEYOND A REASONABLE DOUBT, THAT THE IMPROPER IN - COURT IDENTIFICATION BY MS. PEGGY WILLIAMS WAS PREJUDICIAL TO THE APPLICANT, AS THE APPLICANT WAS DENIED DUE PROCESS. CHAPMAN V. CALIFORNIA, 87 S.CT. 824 (1967). THE IMPACT ON THE JURY FROM THE TAINTED PHOTO LINEUP, AS WELL AS THE IN - COURT IDENTIFICATION OF THE APPLICANT WORKED PREJUDICE AGAINST THE APPLICANT, AND THE PREJUDICIAL EFFECT OUTWEIGHED THE PROBATIVE VALUE OF THE IDENTIFICATION PROCEDURE. WILLIAMS V. ZAHRADNICK, 635 F. 2D 353 (1980).

FINALLY, STOVALL V. DENNO, 87 S.CT. 980 (1968); MAKE IT CLEAR, HOWEVER, THAT INDEPENDENT OF ANY RIGHT TO COUNSEL CLAIM. A PROCEDURE OF IDENTIFICATION, AS IN THE APPLICANT'S CASE AT BAR, MAY BE "SO UNNECESSARILY SUGGESTIVE AND CONDUCTIVE TO IRREPARABLE MISTAKEN IDENTIFICATION" THAT DUE PROCESS OF LAW WAS DENIED WHEN EVIDENCE OF THE IDENTIFICATION PROCEDURE WERE USED AT APPLICANT'S TRIAL BEFORE JURORS. SUCH CLAIM THAT MS. WILLIAMS IDENTIFICATION OF THE APPLICANT, IN COURT, AND OUT OF COURT, CERTAINLY FALLS WITHIN THE RULES MANDATED BY BOTH, THE STOVALL, COURT, AND THE SIMMONS, COURT, AND "MUST BE EVALUATED IN LIGHT OF THE TOTALITY OF SURROUNDING CIRCUMSTANCES" WITH THE VIEW OF DETERMINING IF THE PROCEDURE IN THE APPLICANT'S CASE "WAS SO UNDULY PREJUDICIAL AS FATAL, THAT THE APPLICANT'S CONVICTION WAS ALSO TAINTED. APPLICANT'S TRIAL COUNSEL WAS INEFFECTIVE IN NOT MAKING THE CONTEMPORANEOUS OBJECTION AS REQUIRED TO PRESERVE ISSUE OF IDENTIFICATION (IN COURT) FOR APPELLATE REVIEW. TRIAL COUNSEL WAS INEFFECTIVE. UNITED STATES V. WADE, 87 S.CT. 1926 (1967).

FOR THE SOUND REASONS SET FORTH AND WITHIN, THE APPLICANT HAS "BURDEN OF PROOF" IN SHOWING THAT TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT, WHICH RENDERS TRIAL COUNSEL INEFFECTIVE; PURSUANT TO STRICKLAND V. WASHINGTON, 104 S.CT. 2052 (1984); AND, MARTINEZ V. STATE, 403 S.E.2D 113 (1991):

AS A DIRECT RESULT OF TRIAL COUNSEL'S INEFFECTIVENESS, THE APPLICANT WAS DENIED DUE PROCESS OF LAW, DENIED EQUAL PROTECTIONS OF THE LAW, DENIED THE EXCLUSIVE RIGHT TO A FAIR TRIAL, AND DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN A CRIMINAL PROCEEDING.

FOR THE FOREGOING REASONS, THE APPLICANT ASKS THIS HONORABLE COURT TO "REVERSE - BOTH, CONVICTIONS AND SENTENCES" PERTAINING TO APPLICANT'S PRESENT INCARCERATION.

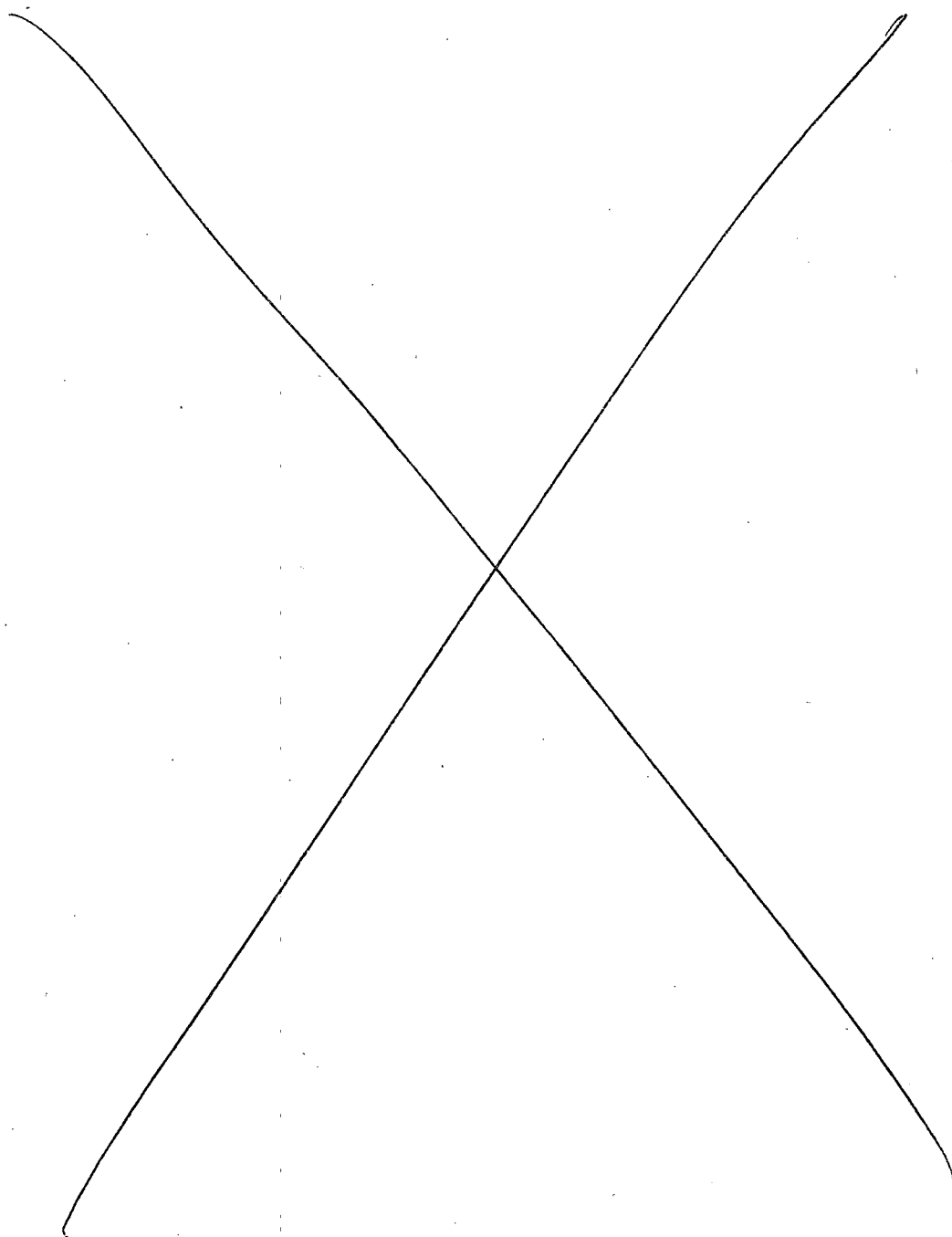
st Marcus Timmons #217397
MARCUS TIMMONS, #217397
BROAD RIVER CORR., INSTI.,
4460 BROAD RIVER ROAD
COLUMBIA, SO., CAR., 29210

SWORN TO AND SUBSCRIBED BEFORE ME

ON THIS 10th DAY OF ^{Feb}~~JANUARY~~ - 2003

Shaketa W. W. W. (L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES *July 29, 2007*.



~~22~~

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	
	)	
Marcus Timmons	)	03-CP-32-0759
	)	
Applicant.	)	AMENDED APPLICATION FOR
	)	POST-CONVICTION RELIEF
vs.	)	
	)	
State of South Carolina,	)	
Respondent.	)	

1. Place of Detention Applicant is currently confined at the Broad River Correctional Institution, 4460 Broad River Rd., Columbia S.C. 29210.
2. Name and Location of Court which imposed sentence Lexington County Court of General Sessions, Lexington, South Carolina, 29072.
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed: murder, armed robbery, attempted armed robbery, pointing and presenting a firearm.
4. The date upon which sentence was imposed and terms of the sentence: August 31, 2000, confinement for life.
5. A finding of guilty was made after a plea of not guilty.
6. The judgment of conviction was appealed.
7. A) Applicant appealed to the South Carolina Court of Appeals.
B) Applicant's conviction and sentence were affirmed.
C) Applicant's convictions and sentence were affirmed on May 29, 2002.
D) Applicant's appeal was dismissed pursuant to S.C. Court of Appeals Unpublished Opinion.

8. N/A/

9. Applicant was denied the effective assistance of trial and appellate counsel in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, South Carolina Constitution and laws. *Strickland v. Washington*, 466 U.S. 668 (1984).

10. The facts in support of Applicant's claim for relief are as follows:

(A) Applicant was denied the effective assistance of trial counsel due to trial counsel's failure to contemporaneously object to identification testimony that was unreliable. *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's failure to contemporaneously object barred this issue for a decision on the merits on direct appeal. Counsel was therefore ineffective in failing to adequately preserve this issue for appeal.

(B) Applicant was denied the effective assistance of appellate counsel in that counsel failed to raise the issue of the erroneous admission of autopsy photographs. The photographs were unnecessary to establish the state's case, and were unduly prejudicial. *State v. Kornahrens*, 290 S.C. 281, 350 S.E.2d 180 (1986). The cause of Thomas Wise's death was uncontested and photographs were unnecessary to prove this fact. As such the photographs should have been excluded. Trial counsel objected to the introduction of the photographs, and this issue was therefore preserved for appellate review. Failure to raise this issue was deficient. *Strickland v. Washington, supra*. Applicant's conviction should be reversed.

(C) Applicant was denied the effective assistance of appellate counsel. Trial counsel objected to the erroneous admission of a photographic lineup under *State v. Tate, infra*. The State failed to meet the three pronged test under *State v. Tate*, 288 S.C. 104,

341 S.E.2d 380 (1986), and State v. Robinson, 274 S.C. 198, 262 S.E.2d 729 (1980) for admission of the lineup and thus the trial court was in error for admitting this evidence. This issue was preserved for appellate review, and should have been raised on direct appeal. Counsel was ineffective for failing to raise this issue. Strickland v. Washington, supra. Applicant's convictions should be reversed.

(D) Applicant was denied the effective assistance of trial counsel when his trial attorney failed to object to the Solicitor's improper closing argument that contained an improper reference to Applicant's silence and refusal to answer questions posed by law enforcement at the time of his arrest. This kind of argument violates the principal set forth in Doyle v. Ohio, 426 U.S. 610 (1976), holding that the right to silence cannot be used against the defendant to draw an inference of guilt as to the crime charged. Trial counsel's failure to object to this argument was deficient, and requires reversal of Applicant's convictions. Strickland v. Washington, supra.

11. Prior to this application, and with respect to this conviction, Applicant has not filed (a) any petition in a State Court under South Carolina Law, nor (b) any petitions in state or Federal Courts for habeas corpus or post-conviction relief, nor (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7), nor any other petitions, motions or applications in this or any other Court.

12. Not applicable.

13. No ground set forth in (9) has been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed.

14. Not applicable.

15. The grounds set forth in (9) were not previously raised because they are

cognizable only in post-conviction relief.

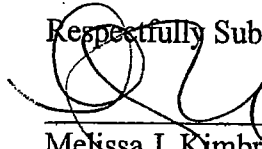
16. Applicant was represented by an attorney during his arraignment, plea, trial, sentencing and appeal.

17. Carry Ayer and Lisa Smith, Esquires, of Lexington, South Carolina, represented the applicant during his trial court proceedings. Aileen Claire, Esquire, of the South Carolina Office of Appellate Defense, located in Columbia, South Carolina represented Applicant on his direct appeal.

18. Applicant seeks a reversal of his conviction, and vacation of his sentence.

19. Applicant is not now under sentence from any other court.

Respectfully Submitted:



Melissa J. Kimbrough, Esquire
1720 Main Street, Ste. 106
Columbia, S.C. 29201
(803) 765-2796.

This 12th day of September, 2005.

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

Marcus Timmons, #217397,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS

2003-CP-32-0759

RETURN

The Respondent, making its Return to the application for post conviction relief (PCR) filed February 25, 2003, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was indicted at the 1994 term of the Lexington County Grand Jury for murder (94-GS-32-0362), conspiracy (94-GS-32-0364), armed robbery (94-GS-32-2738). In 2000, the Applicant was indicted for attempted armed robbery , pointing and presenting a firearm (00-GS-32-3326), pointing and presenting firearm (00-GS-32-3327, 3328). He was represented by Carey Ayer and Lisa Smith, Esquire. On September 5, 2000, following a jury trial, the Honorable H. Dean Hall sentenced the Applicant to confinement for life.

The Applicant did timely appeal his conviction and sentence. State v. Marcus Timmons, 2002-UP-382 (filed May 29, 2002). Pursuant to Anders v. California, the S.C. Court of Appeals dismissed the case and on July 10, 2002 issued the remittitur.

Attached herewith and incorporated herein by reference are the records of the Lexington County Clerk of Court regarding the subject convictions, the Applicant's records from the South

Carolina Department of Corrections, the appellate records, and the application for PCR. Any of the above not so attached will be forwarded upon receipt.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel for failure to make contemporaneous objections.

III.

The Respondent interprets each of the Applicant's allegations to be claims that he received ineffective assistance of counsel. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, Id. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under

professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held.

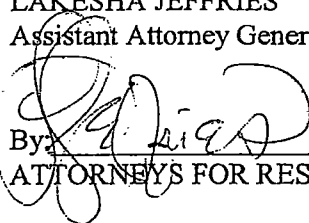
Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

LAKESHA JEFFRIES
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

November 8, 2004

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

)
) IN THE COURT OF COMMON PLEAS

2003-CP-32-0759

Marcus Timmons,

Applicant,

vs

State of South Carolina,

Respondent.

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) AFFIDAVIT OF SERVICE BY MAIL
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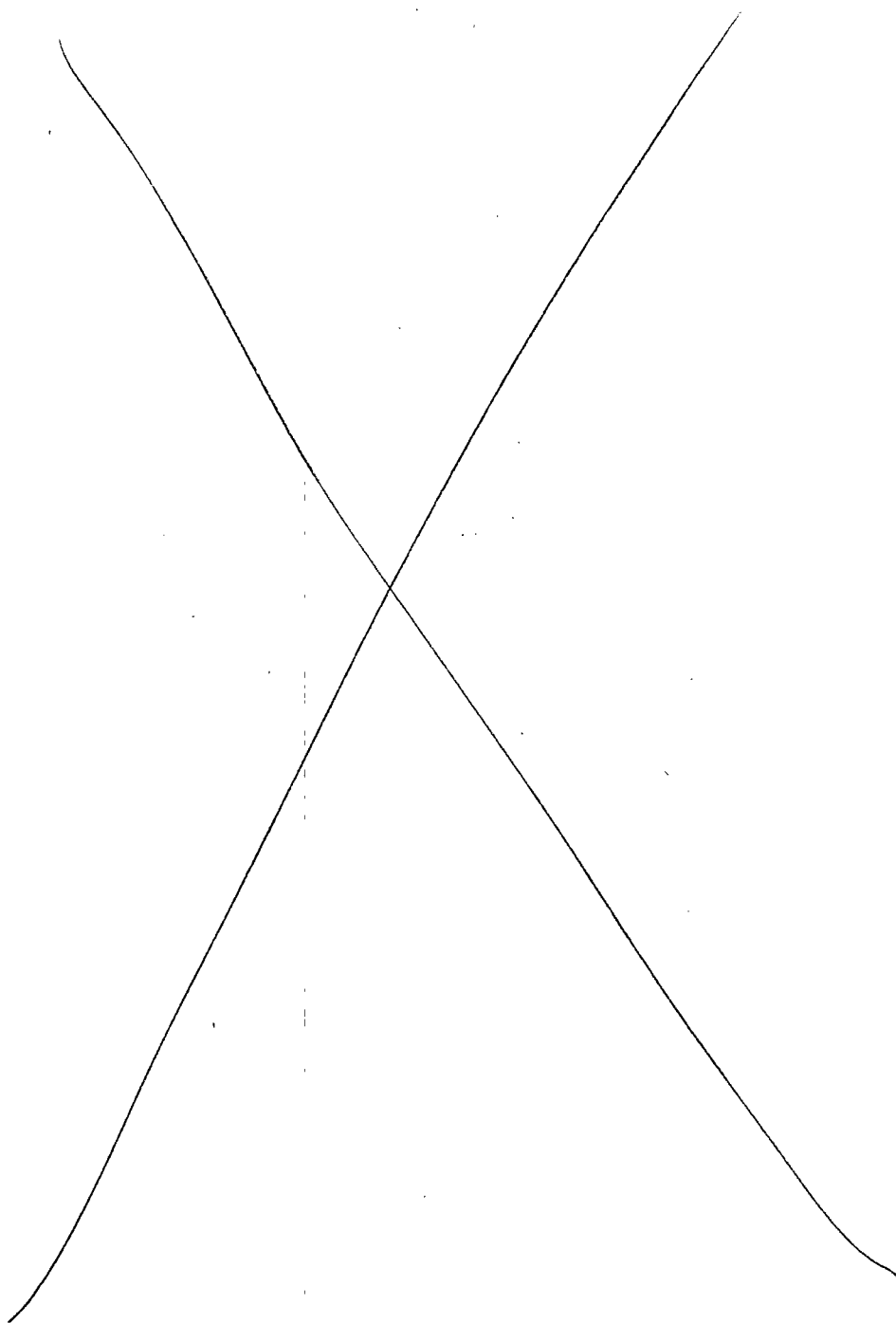
1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Carey R. Ayer, Esquire
Nicholson Davis Frawley Anderson & Ayer
P.O. Box 489
Lexington, SC 29071

DATED this 9th day of November, 2004.



Brooke L. Gambill, Legal Assistant
For Respondent



007

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

COURT OF COMMON PLEAS

2003-CP-32-0795

MARCUS TIMMONS)

APPLICANT)

vs.)

TRANSCRIPT OF RECORD

STATE OF SOUTH CAROLINA)

RESPONDENT)

January 24, 2006

Lexington, South Carolina

B E F O R E:

THE HONORABLE CLYDE N. DAVIS, JUDGE.

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

MELISSA J. KIMBROUGH, ESQ.
Attorney for the Applicant

SABRINA C. TODD, ASSISTANT ATTORNEY GENERAL
Attorney for the Respondent

CAROL M. THUEME, RPR
Official Court Reporter

I N D E X

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EXHIBITS

(THERE WERE NO EXHIBITS MARKED.)

1 MS. TODD: The State would call Marcus Timmons
2 versus State. It's a Lexington County case,
3 2003-CP-32-0795.

4 Mr. Timmons is present in the courtroom and is
5 here with his attorney, Ms. Melissa Kimbrough.

6 The applicant has had two trials on the charges
7 involved in this case. His first trial resulted in
8 convictions which were reversed on appeal. This is a
9 post-conviction relief action from the second trial.

10 He filed his post-conviction relief action
11 February 23rd, 2003, and an amended application in
12 October of 2005.

13 He did have a direct appeal. It was an Anders
14 appeal and an Anders dismissal.

15 The amended application, Your Honor, alleges two
16 grounds of ineffective assistance of trial counsel and two
17 grounds of ineffective assistance of appellate counsel.

18 Appellate counsel initially was subpoenaed by my
19 office for this case, but when I reviewed the record and
20 materials, I realized that she had submitted an Anders
21 brief and because the Court issued an Anders dismissal, I
22 released her from the subpoena under the thought that the
23 Court of Appeals, when it issued the opinion, looked to
24 see if there were any preserved issues of arguable merit
25 and decided that there were not and it dismissed the case

1 pursuant to Anders versus California.

2 There are a number of charges in here and I do
3 not want to get them wrong, but there is a murder charge.
4 This was basically a string of armed robberies and an
5 attempted armed robbery and one person was killed. And
6 like I said before, this was a trial.

7 The applicant has been sentenced to life and
8 then some additional sentences for the other convictions,
9 which I believe are concurrent; is that correct?

10 MS. KIMBROUGH: Yes, they are.

11 MS. TODD: If I may just approach.

12 MS. KIMBROUGH: Your Honor, may it please the
13 Court.

14 Your Honor, the applicant raises four issues for
15 this post-conviction relief. They're numbered or lettered
16 A through D on pages two and three of the amended
17 application.

18 The first involves trial counsel error for
19 failing to contemporaneously object to identifications
20 that were made. There was initially an objection made due
21 to the numerous factors that sort of indicated that the
22 identification was unreliable. I don't know if we can get
23 into those at a later point; however, the initial
24 objection was overruled and the identification was
25 allowed. There was no objection at the time of the

1 in-court testimony concerning the identification, and thus
2 that issue was not preserved for appeal.

3 The issue B involves appellate counsel. And I
4 understand that the Attorney General respondent has taken
5 the position that the Anders brief essentially insulates
6 appellate counsel from any attack on an ineffective
7 assistance ground. Certainly I would take issue with that
8 interpretation.

9 Obviously, this case was heard because it was a
10 non-capital murder. It originated in the South Carolina
11 Court of Appeals and that they did not take issue with
12 Ms. Clare's assessment that there were no issues of merit
13 certainly does not end the matter. I mean, essentially
14 the Court of Appeals agreed with Ms. Clare.

15 However, as a result of filing an Anders brief,
16 this case never went up to the Supreme Court, which on
17 direct appeal they have the final say. Certainly we think
18 there were issues of merit that should have been raised
19 and a full review was never had. Essentially they were
20 told there was no merit.

21 I'm sure they did a thorough job of reviewing
22 the record, but the Supreme Court never got a shot at it
23 and we think that obviously there were issues of merit and
24 that they should have been raised. And those issues
25 consist of failing to object to the admission of autopsy

1 photographs during the guilt phase.

2 There was sufficient testimony as to the cause
3 of death. It was not contested. Mr. Thomas Wise was shot
4 and killed and there's no question that he died as a
5 result of that.

6 The State introduced two sets of essentially
7 autopsy photographs to substantiate its case. One set
8 involved two x-rays. Those were non-bloody, they showed
9 the gunshot on two sides of the victim, and they clearly,
10 for corroboration, would have corroborated what was
11 essentially uncontested testimony to begin with.

12 But the photographs, which I was advised by the
13 Clerk they could not release it to me -- they were
14 available in the Clerk's office as Exhibits 34 and 35 --
15 these were bloody photographs of the entrance and exit
16 wounds. The victim is nude. They are shots showing his
17 lower torso to right below his thigh, and they're just
18 bloody, ugly photographs. They're very -- we believe very
19 prejudicial. There's no question he died from that and no
20 question of who did it.

21 The third issue, which is also an appellate
22 counsel issue, was the failure to raise the issue of the
23 admission of the photographic lineup. Under State versus
24 Tate, there's a three-prong inquiry that must be made to
25 substantiate that the State has the basis for submitting

1 the photo lineup. Obviously, the question is prejudice.
2 It's one of showing the client in a mug shot, and that's
3 obviously something that's not going to help him. And so
4 we believe it was clear error and that it should have been
5 raised by appellate counsel, and again we get into whether
6 an Anders brief takes care of that.

7 Finally, we believe that there was a Doyle
8 violation and that consisted of the Solicitor's comments
9 during closing arguments that the defendant would not
10 speak to law enforcement at the time that he was stopped
11 and we presume under arrest, and obviously he cannot make
12 those sorts of comments about the defendant. The
13 defendant exercised his right to remain silent and didn't
14 testify and the State should not have commented on it and
15 we believe it should have been objected to.

16 And those would be the four grounds, Your Honor.

17 THE COURT: All right. Do you want to call your
18 first witness?

19 MS. KIMBROUGH: Your Honor, I don't believe we
20 have any witnesses. I believe the State is going to call
21 Mr. Ayer.

22 MS. TODD: The State would call Carey Ayer.

23 THE CLERK: Place your left hand on the Bible
24 and raise your right.

25 CAREY AYER, after being duly sworn, testified as

1 follows:

2 THE CLERK: Have a seat and state your name for
3 the record.

4 THE WITNESS: Carey Ayer.

5 DIRECT EXAMINATION

6 BY MS. TODD:

7 Q Mr. Ayer, could you briefly just for the Court's
8 benefit explain a summary of the facts of this case?

9 A Well, I'll explain them as best I can recall.

10 Marcus and it seems to me his cousin, Quincy,
11 and I think there was a third individual, were charged
12 with the murder of Mr. Wise and a string of armed
13 robberies. And as far as the details of the case, I just
14 don't really recall the details. That's just an overview
15 of what I recall him being charged with and the factual
16 background.

17 Q Okay. Now one of the armed robberies was of a
18 Pantry; is that correct? Or the attempted -- it may have
19 been an attempted armed robbery at a Pantry?

20 A That's my recollection, it was a Pantry-type store.
21 Whether or not it was a Pantry or a 7-Eleven I couldn't
22 say, but it was a Pantry-type store.

23 Q And that was the only -- there was a victim in that
24 incident who was able to identify someone; is that
25 correct?

1 A Yes. My recollection is that lady's name was Peggy
2 Williams.

3 Q Okay. And she identified who?

4 A Well, she identified Marcus. I don't recall whether
5 she identified anybody else, but she gave an eye witness
6 identification of Marcus. And I think she also looked at
7 a photo lineup and identified Marcus as being one of the
8 gentlemen involved in the robbery.

9 Q Now, as to her in-court identification of Mr. Marcus
10 Timmons --

11 A Right.

12 Q -- you objected to that, did you not?

13 A I did.

14 Q What was your basis for objecting to her
15 identification?

16 A Well, again, I don't know how detailed I can be. I
17 just remember moving to suppress her testimony because I
18 felt like it was unreliable.

19 I think -- my memory is it was dark. I think
20 she said the men had masks on and it happened real quick.

21 Just for various reasons I felt like her
22 identification of Marcus was very unreliable and met what
23 I considered to be the test at that time for excluding eye
24 witness identification, so I made a motion that it be
25 excluded.

1 And I don't want to get ahead of myself, but my
2 recollection is the judge heard that motion outside the
3 presence of the jury and overruled my motion to suppress
4 her eye witness identification and allowed it in.

5 Q Now, were you making your motion at all based on any
6 allegation that her identification was tainted by some
7 other out-of-court identification process?

8 A Well, it seems like there were maybe two issues or
9 two bases. One was just again the circumstances
10 surrounding the robbery led me to believe she probably
11 couldn't properly identify Marcus. But maybe what you're
12 getting to is the photo lineup. Something led me to
13 believe, at least my recollection is, that she would have
14 had a preconceived idea or preconceived notion or some
15 reason to go ahead and identify Marcus. That's my
16 recollection.

17 Q Okay. Do you have a copy of the transcript with you?

18 A I don't.

19 Q Okay. Would that help you at all?

20 A Am I supposed to know where to look?

21 Q No, I'm going to try and help you out there.

22 A If I could follow up to -- again, on your last
23 question, I can recall something in my mind led me to
24 believe that identifying Marcus was either suggested to
25 Mrs. Williams or, for some reason, she had reason to

1 identify Marcus and then the lineup in my mind didn't
2 appear to be neutral, didn't appear fair, that she had
3 some preconceived idea as to why she should identify
4 Marcus.

5 Q Okay. There was an ID hearing held and it looks like
6 from my notes that it starts around page 240 something.
7 I'm not sure if it's 241. My record is falling apart.
8 Two forty-three, two forty-two?

9 A Two forty-three?

10 Q Two forty-three I believe is where the examination
11 begins, but it looks like the ID hearing starts on 242.

12 And you asked questions of D.I. Blackwell,
13 Detective Blackwell from the Cayce Public Safety
14 Department, about how the photo lineup was handled and
15 that sort of thing, and I believe you also examined
16 Ms. Williams.

17 A All right.

18 Q Does that appear to be correct? I believe the
19 examination of Ms. Williams may have started on page 261.

20 A Two sixty-one?

21 Q Yes.

22 A Okay.

23 Q Okay. Your actual motion, I believe, begins on page
24 285. And --

25 A Okay.

1 Q I believe you actually talk about her not being
2 reliable.

3 A Right.

4 Q Am I looking at -- let's see if I may be looking at
5 where you're talking about the photographic lineup.

6 But I think that your challenge to her
7 testifying was about her not being a reliable witness and
8 not about the taint. Do you know of something different
9 at that point?

10 A Well, I mean, again I said earlier that is my
11 recollection. And I see here on page 286 I say, "Going
12 through those factors, number one, the opportunity of the
13 witness to view the criminal at the time of the crime."

14 And on down it says, "The second factor is the
15 degree of witness's attention to the events."

16 Q Right.

17 A "The third factor being the accuracy of the witness's
18 prior description of the defendant."

19 Q Right. But those would be factors that you would
20 consider once there was a determination of some sort of
21 taint to determine whether it was reliable notwithstanding
22 the fact that there was some alleged taint.

23 And I'm not sure that we're aware of any place
24 in the record -- I'm not aware of any place in the record
25 where there's an alleged taint. I know you've spoken a

1 little bit about maybe someone had suggested something?

2 A No. When I say -- "suggested" might not be the right
3 word. And again, I don't know that there was a taint.

4 It just seems like I recall that, for example,
5 if you have a photo lineup and the defendant is a black
6 male, as Mr. Timmons is, and the lineup consists of eight
7 people and seven of them are white and one of them is
8 Mr. Timmons -- I'm not saying that happened, I'm just
9 saying in reviewing the case law and researching it -- it
10 was my understanding that that would not be a proper photo
11 lineup.

12 And I can't quite recall what the photo lineup
13 in this situation actually was, but something just tells
14 me that it was something about the photo lineup that made
15 me believe it should be objected to, so I made the
16 objection. But I can't again say here under oath exactly
17 what it was.

18 Q Okay. But you objected to her identifying your
19 client?

20 A True.

21 Q And then what happened between that time and when she
22 actually identified -- between the time the judge denied
23 that and the time when she actually identified your client
24 in front of the jury?

25 A You mean how much time elapsed between the two?

1 Q Yes. How much time and what events? Was there any
2 other testimony, any other evidence presented?

3 A I don't recall that there was. But, I mean, I
4 wouldn't swear under oath that there wasn't, but I don't
5 recall there being a gap.

6 In fact, I think I saw in the application that
7 there was a motion in limine before all the testimony.
8 But my recollection is that it was in camera out of the
9 presence of the jury, the judge denied my motion and then
10 we went right into Ms. Williams testifying, which probably
11 contributes to -- assuming I didn't object when she
12 testified in front of the jury, that probably contributed
13 to my not objecting because I think the judge just three
14 minutes or five minutes earlier denied my motion to
15 suppress and allowed the testimony in.

16 So I can't recall exactly what I was or wasn't
17 thinking, but I could see how I would think there was no
18 need to object because he'd just ruled against me.

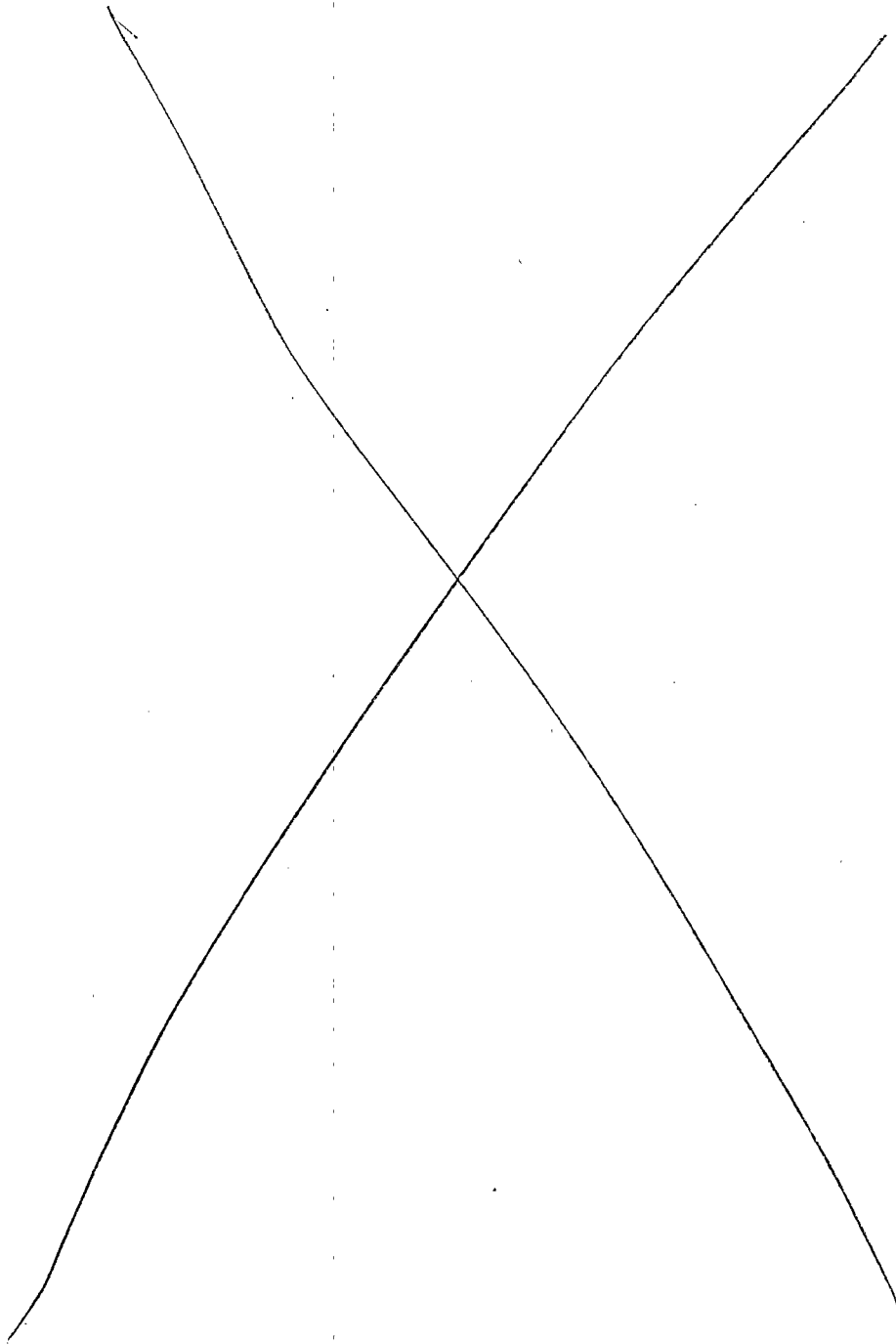
19 Q So there was nothing that would have changed the
20 Court's ruling?

21 A That's my recollection.

22 Q Okay. If you could look on page 324, I believe
23 that's where Ms. Williams actually identifies your client.

24 A Okay. I see that.

25 Q I'm looking at beginning on line 15 and running down



1 to line 25. Is that where she identifies your client?

2 A Yes. It looks like Solicitor Tad Swarat had asked
3 Ms. Williams to identify the man that held her up in the
4 store and she pointed and said, "He's over there," and I
5 guess pointed to Mr. Timmons.

6 Q Now, as you've stated before, you don't have any
7 independent recollection of what you were thinking at that
8 point in time, but your strategy, your thinking would have
9 been what?

10 A Well, "strategy" might not be the right word, but my
11 thinking would have been that it would have been redundant
12 for me to again stand up and object to the evidence coming
13 in when the judge just ruled that it could come in.

14 I know sometimes in civil cases you file a
15 motion in limine and the judge will hear you before the
16 case starts and then he'll say, "Well, when we get to that
17 point, you know, we'll address it again."

18 My recollection is this was not that situation.
19 The judge excused the jury, he put Ms. Williams on the
20 stand, she offered what she would testify to, I objected
21 to it, the judge said, "I deny -- I'm going to allow it
22 in," the jury came back in, she testified. That's my
23 recollection.

24 Q Okay. And would you have any reason for not wanting
25 to object again during her testimony before the jury?

- 227 -

1 A No.

2 Q In addition to no need?

3 A No.

4 Q Now, as to the issue regarding the alleged Doyle
5 violation, do you recall there being some evidence
6 regarding a traffic stop related to some other crime?

7 A Yes.

8 Q And that's how actually law enforcement learned about
9 Marcus and Quincy Timmons; is that correct?

10 A That's my understanding.

11 Q And there was an officer who testified regarding
12 stopping that van; is that correct?

13 A I think that's correct.

14 Q Now, you were concerned about that and made a motion
15 to try and limit what was said there because it was
16 related to other crimes and you didn't want information
17 about other crimes to go before the jury, correct?

18 A I think that's correct.

19 Q And they tried to clean it all up so that it wouldn't
20 indicate that he was being investigated for another crime,
21 correct?

22 A That's my recollection.

23 Q Now, the officer testified, I believe, that -- let's
24 see, it was William Samuel Wright on page 383. He
25 testified, did he not, regarding an attempt to speak with

1 Marcus Timmons? I'm looking at the beginning of line 13?

2 A I see that.

3 Q And if you would, just take a moment to review the
4 rest of that page.

5 A And this is me asking questions or this is
6 Mr. Riddle?

7 Q I believe this is still direct examination by
8 Mr. Riddle.

9 A Okay.

10 Q And your cross-examination starts on page 384.

11 A Okay. I've read 383.

12 Q Okay. And what substantively came out during that
13 portion of testimony?

14 A Well, I think Mr. Wright or Detective Wright asked
15 Marcus Timmons his name. Marcus apparently, according to
16 Mr. Wright, would not tell him. But subsequently later
17 on, I guess, he was able to identify Marcus as being the
18 person. But the substance of it, I guess, is he asked
19 Marcus his name and Marcus wouldn't tell him.

20 Q Okay. Did he comment about anything that Marcus did
21 other than tell him?

22 A Well, he says here at line 15, "I attempted to figure
23 out exactly who he was. He wouldn't respond to my
24 questions any more than an occasional grunt."

25 Q Okay. And there was no objection to that at that

1 time, correct?

2 A By me?

3 Q Right.

4 A No, ma'am, I don't see one.

5 Q Okay. Now, did you see any need to object to that?

6 A I'm sorry, repeat that?

7 Q Did you see any need to object to that?

8 A Again, it's hard to go back. Apparently I didn't see
9 a need because I didn't object, but I can see in hindsight
10 how a criminal defendant would have the right not to
11 incriminate himself and have the right not to -- have the
12 right to remain silent.

13 Now, I'm not saying I'm even right about that,
14 but I can -- because I'm not sure at that point whether he
15 had that right or not, but perhaps he did have the right.

16 Q Well, do you see any information about whether he had
17 been arrested and Mirandized at that time?

18 A I don't know.

19 Q Okay. But you don't see a need surrounding that
20 testimony directly?

21 A No, but all I'm looking at is page 383 and 384.

22 Q Okay. But you have no recollection of that; is that
23 correct?

24 A I don't have a recollection one way or the other.

25 Q One way or the other?

1 A Right.

2 Q Okay. And this information was brought up again in
3 the State's summation, the fact summation by Mr. Swarat.

4 If you could look on page 626, beginning on line
5 17 to the end of the page. I believe this is the portion
6 that the applicant is specifically alleging should have
7 been objected to.

8 A I see that.

9 Q Okay. And what was substantively said at that point?

10 A Well, I think that is in Mr. Swarat's closing
11 statement. He goes back to Detective Wright's testimony
12 wherein Marcus, or at least Detective Wright testified
13 that Marcus wouldn't give his name and said he was
14 grunting at them and wouldn't tell the officer who he was.
15 So I guess he's referencing Marcus's failure to speak.

16 Q Okay. Wouldn't even give his name, correct?

17 A Correct.

18 MS. TODD: Beg the Court's indulgence.

19 (Pause.)

20 BY MS. TODD:

21 Q And your objection to the photo lineup was what? Do
22 you remember?

23 A Well, again, my recollection is that there was
24 just -- it was unreliable. I just felt like that
25 Ms. Williams didn't have sufficient time, sufficient

1 light, sufficient attention span. I didn't feel like,
2 under the case law that I reviewed, that her testimony was
3 reliable.

4 And then, I think, again there was the issue of
5 the photo lineup, which -- and I'm sorry I can't be more
6 detailed in my objection, but I just remember generally
7 thinking that again there was something about it that was
8 not fair to Marcus, but I can't remember exactly what it
9 was.

10 MS. TODD: Okay. I thank you very much for your
11 testimony.

12 THE WITNESS: Okay.

13 MS. KIMBROUGH: Thank you, Your Honor. May it
14 please the Court.

15 CROSS-EXAMINATION

16 BY MS. KIMBROUGH:

17 Q I just have to start with the photo ID.

18 Do you recall looking at the 18 photographs that
19 were sort of laid out and it was your opinion at that time
20 that there was something wrong with this photo lineup, how
21 it was put together, in some ways suggestive; is that your
22 recollection? I want to make sure I'm recapping what you
23 said correctly.

24 A I don't recall the number of pictures. I recall it
25 being a photo lineup. And maybe the word "suggested" is

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1 not the best word.

2 I just, again, remember generally that there
3 seemed to be something about it that was unfair to
4 Mr. Timmons in my mind.

5 Again, an extreme example would be, as I
6 mentioned earlier, you have eight people, seven of them
7 are white, one of them is black, and the person's trying
8 to identify a black individual. That's an extreme example,
9 and that's not the case here, but there was something
10 about it that led me to believe that it wasn't fair to
11 Marcus.

12 MS. TODD: May I make a suggestion? Maybe the
13 Clerk can bring us the exhibits.

14 MS. KIMBROUGH: I was going to suggest that at
15 the end.

16 MS. TODD: Maybe that would just make this a lot
17 easier if the Clerk could bring the exhibits that were
18 used at this trial.

19 THE COURT: Do you want them right now?

20 MS. TODD: Well, I just thought that that might
21 aid us.

22 THE COURT: All right. We'll do that. We'll
23 stand at ease until she gets back.

24 (Pause.)

25 BY MS. KIMBROUGH:

1 Q Going to the Doyle issue, do you recall in reviewing
2 the discovery, that you had any concerns that Mr. Timmons
3 had not been Mirandized after he was stopped?

4 A I don't recall that.

5 Q Okay. Do you recall --

6 A But let me say, I don't recall it, but I don't recall
7 not recalling it, if that makes any sense. I just don't
8 recollect one way or the other.

9 Q Okay. And I think you said that -- and again, just
10 sort of a recap of the testimony -- you didn't have a
11 strategic reason per se for not objecting to the
12 Solicitor's closing argument that Mr. Timmons remained
13 quiet when they questioned him?

14 A I know I didn't have a strategic reason.

15 MS. KIMBROUGH: Beg the Court's indulgence.

16 (Pause.)

17 BY MS. KIMBROUGH:

18 Q And I think it's probably okay to go on to the second
19 prong of the Neil v Biggers issue. We can talk about the
20 first, the suggestability of the lineup, but just to
21 review, the second part where you go into various factors,
22 is it your recollection that the person who actually made
23 this eye witness identification had been consuming alcohol
24 and it was dark, there were masks, and a three-month time
25 period between the incident and the photo lineup? Would

1 those have been the factors that you considered in seeking
2 to suppress?

3 A They could have been. Again, I haven't gone back
4 through my reasons.

5 Now, whether or not she had consumed alcohol I
6 don't know, but I don't know that she didn't. Again, that
7 could have been a factor.

8 I remember the gentlemen were alleged to have
9 had on masks, it was dark, the attention that she paid,
10 and I'm sure there were a couple of other reasons, but
11 they all led me to believe that her eye witness testimony
12 would be unreliable.

13 Q Okay. As far as the other issues which don't concern
14 any allegation of ineffectiveness on your part; however, I
15 would like to explore this a little bit.

16 You objected to the autopsy photographs coming
17 in; do you recall that?

18 A I think that's correct.

19 Q All right. Now, would it be fair to say that your
20 obvious reasons for objecting to the photographs was that,
21 in your view, they were prejudicial against the defendant?

22 A Yeah. I mean, I think I agree with your summary when
23 you started out, that the issue of Mr. Wise's death was
24 not an issue and I didn't see that it served any purpose
25 other than to inflame the jury.

1 Q And while the photographs are downstairs in the
2 Clerk's office and we don't have the benefit of having
3 them in front of us right now, do you recall one of the
4 photographs being particularly bloody and gory, basically
5 exposing his naked torso?

6 A I think so. Again, I wouldn't swear to it, but I
7 think it led me to believe that the only purpose for
8 introducing it was to arouse and inflame the jury.

9 Q Okay. And with the second appellate issue, which
10 again has nothing to do with your actions and I think you
11 preserved this issue, you did object to the lineup coming
12 in under State versus Day. Do you recall that?

13 A Yes.

14 Q And was it your opinion that that lineup gave the
15 jury the impression of a prior arrest or prior -- tell us
16 what your reason was for objecting to it. I mean you
17 obviously thought it was prejudicial. Just I'm curious
18 what insight you thought it had.

19 A Well, it does seem to me, now that you mention it,
20 that one of my reasons other than the ones I've stated may
21 have been, why is a person, you know -- the question that
22 might be planted in a juror's mind, why is a person in a
23 photo lineup to begin with.

24 I think -- my picture is not in a photo lineup
25 anywhere. I mean, at least I hope it's not.

1 And I do think one of my -- part of my thought
2 process was the taint or the prejudice from a person just
3 being in a photo lineup, in addition to the things that
4 I've stated previously.

5 Q And following up on that -- again, I don't think we
6 need the photo lineup here with us --

7 MS. KIMBROUGH: May I approach, Your Honor?

8 THE COURT: Yes.

9 BY MS. KIMBROUGH:

10 Q On page 247, if you could refer to that, this may
11 have been -- I don't know, but let me ask, the photo
12 lineup, which we'll have the benefit of seeing very
13 soon --

14 A I'm sorry, I couldn't hear you.

15 THE COURT: Excuse me just a second. The Clerk
16 has a question about exactly what exhibits we want from
17 the file.

18 THE CLERK: I've got two boxes of exhibits, Your
19 Honor. I've got two Banker boxes, and I need to know the
20 exact numbers needed and I can bring them up from that.

21 (A discussion was held off the record.)

22 THE CLERK: I apologize for interrupting, Your
23 Honor.

24 BY MS. KIMBROUGH:

25 Q I'll start fresh.

1 A Okay.

2 Q Page 247, I don't have my transcript, but I think
3 you're at the right page at this point.

4 In discussing the photo lineup, do you recall
5 that there were numbers underneath each of the
6 photographs?

7 A I don't recall independently, but if you want me to
8 read page 247, I will.

9 Q I'm asking that because insofar as determining
10 whether or not there was a taint in the initial photo
11 lineup, I think one could infer that when you have numbers
12 underneath somebody's picture, that it's not a photograph
13 from a birthday party or some other non-criminal setting.
14 So I was curious as to whether or not that was part of the
15 objection from the taint.

16 A Well, I think you're right about the numbers. In
17 fact, at least the testimony on page 247 indicates that
18 she refers to the picture number when picking out Marcus.

19 Q It's been a long time, but do you think that was
20 possibly part of your belief that there was a tainted
21 lineup to begin with, the fact that there's numbers?

22 A I don't know. I don't know.

23 And let me say, too, when we -- because I don't
24 want to just throw out words loosely because words have a
25 lot of connotation -- if I said the word "taint," I don't

1 mean "taint" in the sense that anybody, that any person
2 did anything to taint anything. It's just that the
3 process of a photo lineup is not -- was to me not one
4 hundred percent fair to Marcus. But I'm not suggesting
5 that anybody did anything to taint it such that she would
6 pick Marcus. I don't know.

7 Q You're not talking about any intentional taint?

8 A No.

9 Q It's just the way it was laid out and the way the
10 photographs where displayed?

11 A Right.

12 Q Okay.

13 A And again as I think you prompted me to think about
14 it, it may have been just the fact that a person's in a
15 photo lineup to begin with.

16 MS. KIMBROUGH: If we can wait for the photo
17 lineup unless Ms. Todd wants to talk to him on those
18 couple things.

19 MS. TODD: Let me look for just a second. I
20 don't believe so.

21 THE COURT: Okay. We'll stand at ease.

22 (Pause.)

23 MS. KIMBROUGH: May we approach, Your Honor?

24 THE COURT: Yes.

25 MS. KIMBROUGH: May I approach the witness, Your

1 Honor?

2 THE COURT: Yes, ma'am.

3 BY MS. KIMBROUGH:

4 Q There's the photographic lineup.

5 A Yes. Okay.

6 Q Have you had a chance to review the photo lineup?

7 A I have.

8 Q Okay. Based on your refreshing your recollection as
9 to what the photographic lineup consisted of, do you now
10 recall why you wouldn't have objected to it, or you still
11 can't recall?

12 A I would have objected again based on the previous
13 reasons, but those previous reasons probably were more of
14 a general nature.

15 Specifically, I think that I recall that it
16 would be very difficult for someone to identify an
17 individual off of these photographs. Because even sitting
18 here today, I wouldn't bet a lot of money on which one of
19 these individuals right here is Marcus on this page. And
20 I think I just remember thinking because of the quality of
21 photograph, because of the nature, it just didn't seem
22 reliable to me.

23 Q So the lineup itself seemed unreliable and the
24 witness based on the various factors also seemed --

25 A -- both.

7 5 7