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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable Roger E. Henderson, Circuit Court Judge

JOHN HENRY SMITH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001550

APPENDIX

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
Rembert Dennis Building
1000 Assembly Street
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA

COURT OF GENERAL SESSIONS
2013-GS-26-000876

COUNTY OF HORRY

THE STATE,

-vs-

JOHN HENRY SMITH,

Defendant.

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April 17-18, 2013

B E F O R E:

HONORABLE LARRY B. HYMAN, JR.

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

GEORGE H. DeBUSK, JR., Esquire
HEATHER T. von HERRMANN, Esquire
Attorneys for the State

JONATHAN ERIC FOX, Esquire
Attorney for the Defendant

Henry P. Young
Court Reporter

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1 P-R-O-C-E-E-D-I-N-G-S

2 (Convened 9:44 a.m., April 17, 2013).

3 THE COURT: Okay, are we ready?

4 MR. DeBUSK: Ready, Your Honor.

5 MR. FOX: We're ready.

6 THE COURT: Let's make sure we have the
7 number of strikes right. It's five and ten?

8 MR. FOX: That's my understanding, Your
9 Honor.

10 THE COURT: Is that your understanding?

11 MR. DeBUSK: Yes, sir.

12 THE COURT: All right, sir.

13 Okay, when we get the jury in we'll select
14 it. Do we have all the jurors?

15 BAILIFF: We have 44.

16 THE COURT: We have 44?

17 BAILIFF: Yes, sir.

18 (Jury panel now present in the courtroom).

19 THE COURT: Ladies and gentlemen, since we
20 met on Monday I'm sure you have been wondering why
21 don't I write or something to let you know what we
22 are doing. Let me assure you that we were working.
23 On Monday we had actually two murder trials that
24 were scheduled for this week, both of those were
25 resolved without trials and the same thing occurred

1 with similar trials on yesterday, so I can tell you
2 that your presence had a lot to do with us being
3 able to move those cases, so don't feel that you
4 were wasting your time because we do have matters
5 for you to try, for us to try, we're all part of
6 this, this morning and that is why I had you
7 brought up.

8 As I told you on Monday I would just qualify
9 you generally, that is, I was determining whether
10 or not you were qualified under the statutes of
11 this state to serve as jurors in any case and I
12 found all of you were of course qualified. This
13 morning I am going to determine whether or not
14 there is any reason why you should not serve on the
15 particular case that we are trying today. We are
16 about to begin the trial of the case of State of
17 South Carolina versus John Henry Smith. Mr. Smith
18 is seated here at the defense table with his
19 attorney Mr. Fox.

20 Mr. Smith, turn around so the jury can get to
21 know you, okay? Stand up, if you would, Mr. Smith.
22 Just turn around.

23 This is Mr. Smith, as I said.

24 Thank you, Mr. Smith.

25 He is represented by Mr. Fox.

1 Mr. Smith is charged by indictment with the
2 offense of armed robbery, and let me tell you what
3 that means. It simply means that the grand jury
4 has issued a document that is not evidence in this
5 case. I have the indictment here, I will not give
6 you the indictment to take into your jury room but
7 this indictment is a document that simply puts Mr.
8 Smith on notice. It explains to him why he is
9 being charged.

10 This documents alleges that on or about
11 December the 12th of 2011 while armed with a deadly
12 weapon, in this case it is alleged to have been a
13 gun, that he did enter the Walgreen store here in
14 Conway, South Carolina and did take and carry away
15 from the employees there certain property with the
16 intent to deprive Walgreen's of its ownership.

17 Now, as I said, this is nothing more than a
18 document which presents a charge. You will place
19 no significance whatsoever on the fact that Mr.
20 Smith has been charged with an event. That is not
21 evidence.

22 Now, the questions that I'm going to ask you
23 today are for the most part geared toward
24 determining whether or not first of all you know
25 anything at all about this particular offense.

1 Before we get into that, I want to talk with you a
2 minute about what we will be doing later in this
3 trial.

4 The process that we follow for selecting
5 juries in the General Sessions Court or the
6 criminal court is different from the process that
7 we would follow if this were a civil case. That
8 is, where individuals are suing each other. If we
9 had a civil case what would happen is there would
10 be a list made up something like this and each one
11 of you would be given a new number, a number that
12 you didn't know anything about and the attorneys
13 would be given that list in advance and they would
14 have an opportunity to look it over. Of course we
15 try to give them the list or similar list in
16 General Sessions Court. But they get that list and
17 they would strike prospective jurors from that list
18 using the new numbers, so you would not know
19 whether you were even among those first jurors on
20 the list that would have been considered as jurors.

21 Isn't that a very nice polite way to do it?
22 We don't hurt anybody's feelings when we do it that
23 way but in the General Sessions Court we do it
24 differently. We call your name from the list, we
25 have another list that is made up, it is a random

1 list done by computer. We used to use a child or a
2 person who had lost his sight, a blind person, to
3 draw the list and now we use computers but we have
4 you come forward and you have to stand right up
5 here in front of me and turn around and face
6 everybody and then the State will say something
7 like this, "Your Honor, present this juror," or,
8 "Your Honor, excuse this juror."

9 And if the State says to excuse you, you
10 would return to your seat. If the State said
11 present the juror that means that the defense then
12 would consider the juror and the defendant's
13 attorney would either say swear or seat the juror.
14 In that case you would come around and have a seat
15 in the jury box, or the defendant's attorney could
16 say, "Please excuse the juror on this case," and in
17 that case you would return to your seat.

18 Many people find that to be an intimidating
19 process and they get embarrassed by it if they
20 happen to get struck but let me tell you something
21 about selecting a jury and that process that these
22 lawyers go through when they are selecting a jury.
23 You will see they are very serious, they will have
24 scowls on their faces and they will wrinkle their
25 brow and nose as they look at the different jurors.

1 and they will peek over their glasses at you and
2 you will wonder what they are thinking.

3 Let me tell you this. They don't know what
4 they're doing, not one bit in the world. I
5 practiced law for about thirty some years and I can
6 tell you that is the most difficult thing that we
7 do in this courtroom as lawyers, that is
8 determining who should sit on a jury, so don't you
9 take it personal if you were struck. You were
10 probably struck simply because they felt that there
11 was somebody else on that jury that might be more
12 sympathetic to their position in the trial and that
13 was the only reason you were struck and that same
14 lawyer, whether it be an attorney for the State or
15 attorney for the defendant, would have been more
16 than happy to have you on the next jury.

17 Now, you see, I'm taking all this time to
18 make sure your feelings aren't hurt if for some
19 reason you were struck and in reality you all are
20 probably sitting out there thinking, "I hope I
21 don't get on that jury so I can go home."

22 Let me say this. If you do end up on a jury
23 you're probably going to find that it is am
24 educational and enlightening, even rewarding
25 process. Many people who sit on juries approach me

1 when they see me out and around the county and say,
2 "I was on your jury and it was really an experience
3 that I appreciated," because you're going to be
4 fulfilling a extremely high civic duty. This is
5 important, what you do here. There is nothing more
6 important than your job of protecting the rights
7 not only of the State and the citizens of this
8 state but the defendant as well. You are the
9 cornerstone, a jury is the cornerstone of our
10 judicial system.

11 Now, before I begin asking you these
12 questions that relate to this particular case what
13 I'm going to do, I'm going to ask the clerk of
14 court to put you under oath. As I said, there is a
15 bunch of swearing that goes on before you even make
16 it to a jury. You're going to have to be sworn to
17 answer these questions truthfully, then we're going
18 to put you in the jury box and we're going to have
19 to make you take another oath but I'm going to ask
20 you all to stand right now, raise your right hand
21 and listen to the clerk placing you under oath
22 because it is very important the answers you give
23 me are truthful.

24 (Jury panel sworn).

25 THE COURT: All right. Was there anyone who

1 refused to take that oath? If you did, raise your
2 hand.

3 Thank you. All right, for the record, there
4 was no response to that inquiry by the Court.

5 Now, let me begin by asking you has anyone
6 ever been related by blood or marriage to the
7 defendant Mr. John Henry Smith who I introduced to
8 you a moment ago?

9 All right, there is no response to that
10 inquiry.

11 Is has any one of you ever had any financial
12 or other relationship with the Walgreen Company?
13 By that, I mean have you ever been employed by
14 Walgreen or are you employed by Walgreen now, is
15 anyone living in your household or close family
16 member or even a close friend presently working for
17 Walgreen, do you own stock in Walgreen, anything of
18 that nature?

19 And there was no response to that inquiry
20 either.

21 I have to put on the record what you are
22 doing. If you don't respond I have to make sure
23 that the record here that is kept by my court
24 reporter is complete, so that is why I have to say
25 that. I know you're wondering, "Why are you

1 telling yourself what we're doing?" That's the
2 reason.

3 Okay, has any one of you ever had any close
4 social or personal relationship with Mr. Smith, the
5 defendant in this case?

6 And there is no response.

7 I'm going to give you the names of some
8 people who might possibly be called as witnesses in
9 this case. There might be others but these are the
10 ones that we think are most likely to be called and
11 if you hear a name and you notice during the trial
12 that person is not called don't place any
13 significance on that at all. I asked the lawyers
14 to tell me to the best of their knowledge who is
15 possibly going to testify in the case because we
16 want to make sure we don't put you on a jury and
17 have your cousin and your nextdoor neighbor
18 testifying. That would be improper, or you might
19 be influenced to believe that witness over others
20 when you should not.

21 Sergeant Michelle Johnson with the Conway
22 Police Department.

23 Detective Josh Scott, again with the Conway
24 Police Department.

25 Corporal Chris Johnson, Conway Police

1 Department.

2 Patrol Officer Josh Hardee, Conway Police

3 Department.

4 Patrol Officer Jeff Jordan, Conway Police

5 Department.

6 Sergeant Dale Long, Conway Police Department.

7 Captain Susan Safford. Is she with Conway

8 Police Department or J. Ruben Long?

9 MR. DeBUSK: J. Ruben Long.

10 THE COURT: She is actually at J. Ruben Long
11 Detention Center.

12 Hilton L. Fryar.

13 And Sharon Payne.

14 Have any of you ever been related by blood or
15 marriage or are you chose friends of or do you have
16 a social relationship with any of those witnesses,
17 with emphasis on understanding whether or not you
18 might be compelled or you might feel that you
19 should place more emphasis on those witnesses'
20 testimony than others?

21 And there is no response.

22 Attorneys in this case are Mr. George DeBusk
23 and Miss Heather vonn Herrmann. They are seated
24 here at the State's table.

25 Some of our Solicitors go down to Georgetown

1 County, some of the ones that we will see here also
2 practice down there but these Solicitors try cases
3 in Horry County.

4 Now, the other attorney in this case is Mr.
5 Eric Fox. Mr. Fox is here with Mr. Smith. Mr. Fox
6 has been practicing lay for some time here in Horry
7 County as a private and as a public defender both.
8 I think Mr. Fox will go anywhere and try anything.

9 Is that a pretty fair statement, Mr. Fox?

10 MR. FOX: Absolutely, Your Honor.

11 THE COURT: We see him all over the Circuit.

12 All right. Has anyone ever been related by
13 blood or marriage to any of these attorneys or do
14 you have a social relationship or personal
15 relationship with them or have they ever
16 represented you or do they represent you now? In
17 that regard I would ask whether or not any of you
18 or immediate members of your family are close or
19 close friends would presently be represented in
20 matters by the Solicitor's office or the Public
21 Defender's office for the 15th Judicial Circuit?

22 And there is no response.

23 Has any member of the jury panel formed or
24 expressed an opinion about any issue or matter
25 involved in this case or are you aware of any bias

1 or prejudice either toward the State or the
2 defendant in this case?

3 What I am trying to determine there is
4 whether or not you know anything about this case,
5 whether you would be affected by anything else that
6 you may have heard, do you recall reading about it
7 in the newspaper or were you there on the day it
8 happened, have you discussed it with your neighbors
9 or friends? Essentially do you know anything at
10 all about this case at this point in time other
11 than what I have told you?

12 And there is no response.

13 Is there any member of the jury panel that
14 could have been on the grand jury that issued the
15 indictment in this matter, and that grand jury was
16 convened back in 2012, February, 2012?

17 And there is no response.

18 Is there any member of the jury panel who is
19 a member or contributor to any group which has as
20 its primary concern the promotion of law
21 enforcement or victims' rights? Some of those
22 groups would be things like SADD, Students Against
23 Dunk Drivers, MADD, Mothers Against Drunk Driving,
24 CAVE, which is Citizens Against Violent Crimes,
25 things of that nature. Are you a contributor or

1 member of any such organization?

2 And there is no response.

3 Is there any member of the jury panel that
4 knows any reason whatsoever why he or she should
5 not serve as a juror in this case, again with
6 particular emphasis being placed on your ability to
7 be fair and impartial to both the State and the
8 defendant? That is what we're looking for, jurors
9 who can be fair and impartial.

10 And there is no response.

11 Any additional questions from the State?

12 MR. DeBUSK: No, Your Honor.

13 THE COURT: Any from the defense?

14 MR. FOX: Just one, Your Honor. I would ask
15 the Court to inquire whether any member of the jury
16 panel or an immediate family have ever been the
17 victim of a crime.

18 THE COURT: Okay. You heard Mr. Fox's
19 question. Let me phrase it in this fashion. He
20 has asked that I inquire as to whether or not you
21 or a member of your family has been the victim of a
22 crime.

23 Okay, I see several. All right, let's start
24 with the lady on the front row, okay, please stand
25 up and let me ask you this. Don't tell me about

1 what it is but just let me simply ask you this.

2 Would the fact -- was it you or a family member?

3 JUROR HOFFMAN: It was me.

4 THE COURT: The fact you were a victim of a
5 crime, would that affect your ability to be fair
6 and impartial in this case? Could you give both
7 the defense and the State a fair trial?

8 JUROR: I would try. It is possible, it is
9 possible that it could affect me.

10 THE COURT: Your name?

11 JUROR HOFFMAN: Mary Hoffman.

12 THE COURT: Mary Hoffman? Miss Hoffman, I'm
13 going to excuse you from this particular matter.

14 And the next lady, yes, ma'am?

15 JUROR JENNIFER JONES: It was my sister.

16 THE COURT: Would the fact you had a sister
17 who had been the victim of a crime prevent you from
18 giving fair and effective jury service?

19 JUROR JENNIFER JONES: No.

20 THE COURT: Could you be fair to both the
21 State and the defense?

22 JUROR JENNIFER JONES: Yes.

23 THE COURT: You can set that aside?

24 JUROR JENNIFER JONES: Yes.

25 THE COURT: Your name?

1 JUROR JENNIFER JONES: Jennifer Jones.
2 THE COURT: Miss Jones, okay. Your number,
3 Miss Jones?
4 JUROR JONES: 144.
5 THE COURT: Thank you, Miss Jones.
6 And the lady by her, yes, ma'am?
7 JUROR GONZALEZ: My sister.
8 THE COURT: Your sister?
9 JUROR GONZALEZ: Yes.
10 THE COURT: Would the fact your sister was a
11 victim of a crime prevent you from being a fair and
12 impartial juror.
13 JUROR GONZALEZ: No, I would be fair.
14 THE COURT: You could give both the State and
15 the defense a fair trial, you could set that aside,
16 put it out of your mind?
17 JUROR GONZALEZ: Yes.
18 THE COURT: All right, very well.
19 Who else?
20 MR. DeBUSK: Your Honor, could we get her
21 name and number?
22 THE COURT: Yes. Your name?
23 JUROR GONZALEZ: Jacqueline Gonzalez, 102.
24 JUROR CITRONE: I'm juror 44, myself twice,
25 it was armed robbery, I think I would be biased, it

1 was against myself.

2 THE COURT: All right. What I'm going to do,
3 if you don't think you can set that aside I'm going
4 to excuse you. And your name was?

5 JUROR CITRONE: Francis Citrone, juror number
6 44.

7 THE COURT: Number 44, okay, thank you,
8 ma'am.

9 Anyone else on this side?

10 Please stay with us until we're finished.

11 JUROR CITRONE: Yes.

12 THE COURT: We're about to finish up, just
13 sit with us a moment.

14 Who else on that side raised their hand?

15 Okay, let move to the other side.

16 Yes, right on the front row, the gentleman,
17 let's start at the end, yes, sir?

18 JUROR LANE: I have a stepson.

19 THE COURT: Would that in any way affect your
20 ability to be fair and impartial?

21 JUROR LANE: No.

22 THE COURT: Could you give both the State and
23 the defense a fair trial?

24 JUROR LANE: Yes, sir.

25 THE COURT: And your name is?

1 JUROR LANE: Van Lane.
2 THE COURT: Mr. Lane?
3 JUROR LANE: Yes, sir.
4 THE COURT: What is your number, Mr. Lane?
5 JUROR LANE: 156.
6 THE COURT: Thank you, Mr. Lane.
7 And the lady in the pink, right by Mr. Lane.
8 JUROR CHESTNUT: My brother.
9 THE COURT: Okay. Would that affect your
10 ability to be fair and impartial?
11 JUROR CHESTNUT: No, sir.
12 THE COURT: Could you give both the State and
13 the defense a fair trial?
14 JUROR CHESTNUT: Yes, sir.
15 THE COURT: And your name?
16 JUROR CHESTNUT: Wanda Chestnut.
17 THE COURT: Miss Chestnut, your number?
18 JUROR CHESTNUT: 22.
19 THE COURT: Thank you, ma'am.
20 The gentleman by her?
21 JUROR GIBBS: My wife.
22 THE COURT: Would that affect your ability to
23 be fair and impartial?
24 JUROR GIBBS: No, it wouldn't.
25 THE COURT: Could you give both the State and

1 the defense a fair trial?

2 JUROR GIBBS: Yes.

3 THE COURT: All right. And your number?

4 JUROR GIBBS: 98.

5 THE COURT: And your name.

6 JUROR GIBBS: Nathan Gibbs.

7 THE COURT: Thank you, Mr. Gibbs.

8 Anyone else? I see the lady behind Mr.

9 Gibbs. Yes, ma'am, your name.

10 JUROR FIORENTINO: Isabella Fiornetino.

11 THE COURT: And your number?

12 JUROR FIORENTINO: 83.

13 THE COURT: And could you set the fact that

14 you had -- was it you or a family member?

15 JUROR FIORENTINO: It was me.

16 THE COURT: That you were the victim of a

17 crime, could you sit that aside and be fair and

18 impartial?

19 JUROR FIORENTINO: I could.

20 THE COURT: Do you believe you could give the

21 State and the defense a fair trial in this case?

22 JUROR FIORENTINO: Yes.

23 THE COURT: All right.

24 Anyone else?

25 Yes, on the back row?

1 JUROR CRAIG: My name is Irving Craig, I was
2 a victim of a home robbery.

3 THE COURT: All right, Mr. Craig, could you
4 set that aside and be a fair and impartial juror?

5 JUROR CRAIG: Yes, sir, I could.

6 THE COURT: Could you give both the State and
7 the defense a fair trial?

8 JUROR CRAIG: Excuse me?

9 THE COURT: Could you give both the State and
10 the defense a fair trial?

11 JUROR CRAIG: Yes, I would.

12 THE COURT: And your number was?

13 JUROR: 60.

14 THE COURT: Number 60. Thank you, Mr. Craig.

15 All right, anything further, Mr. Fox?

16 MR. FOX: No, Your Honor.

17 THE COURT: All right. Very well, what we're
18 going to do is we're going to start with the
19 process of selecting a jury. I think what we will
20 do is twelve jurors, two alternates, okay?

21 Madam Clerk.

22 THE CLERK: When I call your name please come
23 forward and stand by the podium, bring all your
24 personal belongings with you and face the back of
25 the courtroom.

1 Juror number 26, Connie Brooks.
2 What say the State?
3 MR. DeBUSK: Please present the juror.
4 THE CLERK: What say the defense?
5 MR. FOX: Please seat the juror.
6 THE COURT: See what a good job Miss Brooks
7 did, she got on the jury for that. That is exactly
8 what we want you to do.
9 Come around, Miss Brooks.
10 THE CLERK: Number 177, Patsy Martin.
11 What say the State?
12 MR. DeBUSK: Please present the juror.
13 THE CLERK: What say the defense?
14 MR. FOX: Please seat this juror.
15 THE CLERK: Juror 50, Samuel Colgate.
16 What say the State?
17 MR. DeBUSK: Please present the juror.
18 THE CLERK: What say the defense?
19 MR. FOX: Please excuse this juror.
20 THE COURT: You may return to your seat.
21 THE CLERK: Juror 51, Andra Collins.
22 What say the State?
23 MR. DeBUSK: Please present the juror.
24 THE CLERK: What say the defense?
25 MR. FOX: Please seat this juror.

1 THE CLERK: Juror 17, Michael Bellamy.
2 What say the State?
3 MR. DeBUSK: Please seat the jury.
4 THE CLERK: What say the defense?
5 MR. FOX: Please seat this juror.
6 THE CLERK: Juror 98, Nathan Gibbs.
7 What say the State?
8 MR. DeBUSK: Please present the juror.
9 THE CLERK: What say the defense?
10 MR. FOX: Please excuse this juror.
11 THE CLERK: Juror number 10, Margaret Bannan.
12 What say the State?
13 MR. DeBUSK: Please seat the juror.
14 THE CLERK: What say the defense?
15 MR. FOX: Please seat this juror.
16 THE CLERK: Juror 137, Noel Jarvis.
17 What say the State?
18 MR. DeBUSK: Please present the juror.
19 THE CLERK: What say the defense?
20 MR. FOX: Please seat this juror.
21 THE CLERK: Jury 221, Jillian Poe.
22 What say the State?
23 MR. DeBUSK: Please present the juror.
24 THE CLERK: What say the defense?
25 MR. FOX: Please seat this juror.

1 THE CLERK: You may have a seat.
2 Juror 193, David Moore.
3 What say the State?
4 MR. DeBUSK: Please present the juror.
5 THE CLERK: What say the defense?
6 MR. FOX: Please seat this juror.
7 THE CLERK: Juror 76, Iphigenia
8 Eleftheriou-Akerlund.
9 What say the State?
10 MR. DeBUSK: Please present the juror.
11 THE CLERK: What say the defense?
12 MR. FOX: Please excuse this juror.
13 THE CLERK: Juror 83, Isabella Fiornetino.
14 What say the State?
15 MR. DeBUSK: Please present the juror.
16 THE CLERK: What say the defense?
17 MR. FOX: Please excuse this juror.
18 THE CLERK: Juror 124, Cheryl Hollaway.
19 What say the State?
20 MR. DeBUSK: Please present the juror.
21 THE CLERK: Would say the defense?
22 MR. FOX: Please seat this juror.
23 THE CLERK: Juror 60, Irving Craig.
24 What say the State?
25 MR. DeBUSK: Please present the juror.

1 THE CLERK: What say the defense?
2 MR. FOX: Please excuse this juror.
3 THE CLERK: You may return to your seat, Mr.
4 Craig.
5 THE CLERK: Juror 33, Lula Butler.
6 What say the State?
7 MR. DeBUSK: Please present the juror.
8 THE CLERK: What say the defense?
9 MR. FOX: Please seat this juror.
10 THE CLERK: Juror 25, Amanda Brockney.
11 What say the State?
12 MR. DeBUSK: Please present this juror.
13 THE CLERK: What say the defense?
14 MR. FOX: Please excuse this juror.
15 THE CLERK: 189, Victoria Miller.
16 What say the State?
17 MR. DeBUSK: Please present the juror.
18 THE CLERK: What say the defense?
19 MR. FOX: Please seat this juror.
20 THE CLERK: 132, Jennie Hughes.
21 What say the State?
22 MR. DeBUSK: Please present the juror.
23 THE CLERK: What say the defense?
24 MR. FOX: Please seat this juror.
25 THE CLERK: 163, Dan Lewis.

1 THE COURT: All right, this is an alternate.
2 THE CLERK: What say the State?
3 MR. DeBUSK: Please present the juror.
4 THE CLERK: What say the defense?
5 MR. FOX: Please seat this juror.
6 THE CLERK: 102, Jacqueline Gonzalez.
7 What say the State?
8 MR. DeBUSK: Please present the juror.
9 THE CLERK: What say the defense?
10 MR. FOX: Please excuse this juror.
11 THE CLERK: 31, David Bullock.
12 What say the State?
13 MR. DeBUSK: Please present the juror.
14 THE CLERK: What say the defense?
15 MR. FOX: Please excuse Mr. Bullock.
16 THE CLERK: 119, Brittany Hemmingway.
17 What say the State?
18 MR. DeBUSK: Please present the juror.
19 THE CLERK: What say the defense?
20 MR. FOX: Please seat this juror.
21 THE COURT: All right. This will be my jury
22 and let me advise the rest of you that we have
23 selected a jury and this will be the only jury we
24 will need for the balance of the week, so the rest
25 of you are excused. You are welcome to stay and

1 watch us try this case but otherwise you are free
2 to leave and your requirement of jury service is
3 satisfied. Thank you very much.

4 (Jury panel excused from the courtroom).

5 THE COURT: All right. Miss Miller, if you
6 would, please always occupy that seat when you
7 return to the courtroom because you will be our
8 foreperson. Mr. Lewis, Miss Hemmingway, I will ask
9 you to always occupy those two seats because you
10 are our alternatures. The rest of you may sit
11 wherever you like whenever we return to the
12 courtroom. At this time I'm going to let Mr. Ropp
13 take you into your jury room for just a moment.
14 You can refresh yourselves and he will show you
15 where your refreshments and things of that nature
16 are and I will be bringing you back in directly,
17 all right?

18 (Jury excused from the courtroom).

19 THE COURT: Mr. DeBusk, is there a challenge
20 to the panel?

21 MR. DeBUSK: No, Your Honor.

22 THE COURT: Mr. Fox?

23 MR. FOX: No, Your Honor.

24 THE COURT: Do you challenge the panel?

25 MR. FOX: No, sir.

1 THE COURT: All right. Gentlemen, if you
2 would like, we will take about a ten minute break,
3 let you get organized and then we'll be ready to go
4 forward, all right?

5 MR. DeBUSK: I have a Biggers hearing, Your
6 Honor.

7 THE COURT: All right.

8 MR. DeBUSK: Could I have just a moment, Your
9 Honor?

10 THE COURT: All right.

11 MR. DeBUSK: Your Honor, may we approach just
12 a moment?

13 (Unrecorded bench conference).

14 MR. DeBUSK: The State is ready, Your Honor.

15 THE COURT: All right.

16 MR. DeBUSK: Your Honor, the first item we
17 have is a Biggers hearing on the identification of
18 the defendant by the victim. The State would call
19 Hilton Fryar.

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1 HILTON FRYAR, after being first duly sworn,
2 testified as follows:

3 THE CLERK: Have a seat, speak your first and
4 last name, spell your last.

5 THE WITNESS: My name is Hilton Fryar,
6 F-r-y-a-r.

7 DIRECT EXAMINATION BY MR. DeBUSK:

8 Q Mr. Fryar, I'm sorry, spell your last name
9 for the record.

10 A F-r-y-a-r.

11 Q Thank you. In December of 2011 did you work
12 at Walgreen's in Conway?

13 A Yes, I did.

14 Q Were you on duty in the early morning hours
15 of that day?

16 A Yes, sir.

17 Q Did you encounter the defendant that day?

18 A Uh-huh.

19 Q Where did you encounter him?

20 A In the store when he first came to the
21 register.

22 Q You were working at the register?

23 A Uh-huh.

24 Q Is that a well lit area?

25 A It is.

1 Q Did you get a good look at the defendant?
2 A Yes, I did.
3 Q Did an incident occur at that time?
4 A Uh-huh.
5 Q After the defendant left did you see him
6 again that evening?
7 A Yes, I did.
8 Q When was that?
9 A When officers brought him back for me to
10 identify him.
11 Q About how much time passed between when you
12 saw him at your counter and you saw him again?
13 A Probably at least an hour.
14 Q Okay. Where did you see him the second time?
15 A Outside the store.
16 Q Where outside the store?
17 A After the officer brought him back he pulled
18 him out of the car, we identified him.
19 Q Okay. Was it a well lit area where you could
20 see his face and features?
21 A Uh-huh.
22 Q Was it the same person?
23 A Yes, it was.
24 Q Are you sure?
25 A Uh-huh.

1 MR. DeBUSK: Thank you. Answer any questions
2 the defense may have.
3 CROSS EXAMINATION BY MR. FOX:
4 Q Mr. Frayar, when the person was brought back
5 was there a police car?
6 A Yes, sir.
7 Q Was that a marked patrol car?
8 A Yes, sir.
9 Q It had decals and lights and everything?
10 A Yes.
11 Q Conway Police Department?
12 A Yes.
13 Q Okay. An where was Mr. Smith?
14 A He was in the back seat and then he was
15 pulled out by the officer.
16 Q He was in police custody?
17 A Uh-huh.
18 Q Was he handcuffed?
19 A Yes, sir.
20 Q Was he the only one in the car other than the
21 officer?
22 A Yes, sir.
23 Q Okay. So, everyone else on the scene, there
24 was you, the police officers and Mr. Smith in
25 handcuffs in the back of the police car, correct?

1 A Uh-huh.

2 Q Okay. How did you know, what was it made you
3 sure of the fact this was the man had been in the
4 store previously?

5 A Because I say his face.

6 Q Anything else?

7 A And his clothes.

8 Q What specifically about his clothes?

9 A He still had on the burgandy sweatshirt that
10 was up under his jacket.

11 Q Anything else?

12 A I don't remember.

13 Q Anything else?

14 A That was pretty much it.

15 MR. FOX: Thank you, Your Honor.

16 THE COURT: All right, you may step down
17 down.

18 (Witness excused).

19 MR. DeBUSK: The State would call Sergeant
20 Michelle Johnson of the Conway Police Department.

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1 MICHELLE JOHNSON, after being first duly sworn,
2 testified as follows:

3 THE CLERK: Have a seat, state your name,
4 spell your last name.

5 THE WITNESS: Sergeant Michelle Johnson.

6 DIRECT EXAMINATION BY MR. DeBUSK:

7 Q Sergeant Johnson, were you on duty on
8 December 12, 2011?

9 A Yes, I was.

10 Q In the early morning hours?

11 A Yes.

12 Q What were your duties at that time?

13 A Patrol sergeant.

14 Q Did you respond to the Walgreen's pharmacy
15 that night?

16 A Yes, I did.

17 Q What was the nature of the call?

18 A It was an armed robbery had taken place.

19 Q Did you meet Mr. Hilton Fryar there?

20 A Yes, sir.

21 Q Did there come a time you showed him a
22 suspect?

23 A Yes, sir.

24 Q Tell me the circumstances of that?

25 A A BOLO was given out, description, one of my

1 units located the subject, there was a foot chase,
2 he was arrested, they brought him back to
3 Walgreen's, the victim was walked outside the store
4 and the suspect was taken out of the back of the
5 patrol unit for the suspect to look and see if that
6 was the guy had just robbed him.

7 Q Did he identify him at that point?

8 A Yes, sir.

9 Q Who was the person he identified?

10 A Mr. Smith.

11 Q Okay. Was it the same individual who is the
12 defendant in this trial today?

13 A Yes, sir.

14 MR. DeBUSK: Thank you. Please answer any
15 questions the defense may have.

16 THE COURT: Mr. Fox.

17 MR. FOX: Thank you, Your Honor.

18 CROSS EXAMINATION BY MR. FOX:

19 Q Sergeant, what was the description that went
20 out on the BOLO?

21 A A black male -- I would have to read my
22 notes, I'm not sure what all the description was at
23 the time.

24 Q You didn't have any part in apprehending Mr.
25 Smith?

1 A No, sir. I stayed in the store.

2 MR. FOX: Thank you. No further questions.

3 THE COURT: All right, you may step down.

4 (Witness excused).

5 MR. DeBUSK: Your Honor, there is one other

6 individual who transported the defendant to the

7 scene, he is on his way but is not here. Would you

8 like to hear from him or decide it on the record as

9 it stands?

10 THE COURT: Well, how far out is he?

11 SERGEANT JOHNSON: Corporal Chris Johnson.

12 Sir, he was on the way before we started.

13 THE COURT: He'll probably be here in the

14 next five or ten minutes?

15 MR. DeBUSK: Yes, Your Honor.

16 THE COURT: We'll be at ease until then.

17 MR. DeBUSK: Thank you, Your Honor.

18 MR. FOX: Thanks, Your Honor.

19 (Brief recess).

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1 CHRIS JOHNSON, after being first duly sworn,
2 testified as follows:

3 THE CLERK: State your name and spell your
4 last name.

5 THE WITNESS: Chris Johnson, last name
6 J-o-h-n-s-o-n.

7 DIRECT EXAMINATION BY MR. DeBUSK:

8 Q Corporal Johnson, were you on duty on
9 December 12 of 2011?

10 A Yes.

11 Q In the early morning hours? Did you
12 encounter the defendant that night?

13 A Yes, sir.

14 Q What were the circumstances?

15 A If I could read from my report?

16 Q Yes.

17 A It says on Monday, December 12th, 2011 --

18 MR. FOX: Excuse me. I would object to him
19 reading from the report. If he needs to refresh
20 his memory --

21 THE COURT: You can take the report and
22 refresh your recollection but don't read directly
23 from it.

24 A Okay.

25 Q Thank you. What were the circumstances under

1 which you encountered the defendant?

2 A We had received a call in reference to an
3 armed robbery that occurred at Walgreen's. While
4 we were in the area looking Sergeant Johnson
5 actually went and spoke to the victim at the
6 Walgreen store, BOLO'd out, or gave out a
7 description of what the suspect was wearing,
8 height, weight approximate, and we were in the area
9 looking, did encounter one suspect that fit the
10 description, got out, a foot chase ensued, we got
11 him, questioned him about the incident, he said he
12 had not been at Walgreen's, detained him, put him
13 in the patrol car, carried him back to the incident
14 location where he was positively identified by the
15 victim.

16 Q Okay. You were the officer that carried him
17 there?

18 A That's correct.

19 Q Was it this defendant Mr. John Henry Smith?

20 A Yes, sir.

21 MR. DeBUSK: Thank you.

22 THE COURT: All right, Mr. Fox.

23 CROSS EXAMINATION BY MR. FOX:

24 Q Corporal, do you recall specifically what the
25 height, weight and clothing description was in the

1 BOLO?

2 A No, sir, I do not.

3 Q And you were in your regular patrol car,
4 marked patrol car?

5 A That's correct, yes, sir.

6 Q You transported Mr. Smith back to Walgreen's?

7 A Yes, sir.

8 Q He was in custody at that time?

9 A He was being detained, yes, sir.

10 Q He was in handcuffs?

11 A Yes, sir.

12 Q He was still in handcuffs when he was shown
13 to Mr. Frayar at Walgreen's?

14 A Yes, sir.

15 Q And you were the only one in your patrol car,
16 correct?

17 A That's correct.

18 MR. FOX: Thank you.

19 THE COURT: Mr. Johnson, you tell me that you
20 received a BOLO that gave a description of the
21 defendant, height, weight, clothing, things of that
22 nature, and later you encountered the defendant and
23 after a foot chase you took him into custody, is
24 that correct?

25 THE WITNESS: Actually Officer Scott was the

1 one actually detained him, took him into custody.

2 THE COURT: Okay. Were you there?

3 THE WITNESS: Yes, sir.

4 THE COURT: Did the description you received
5 match the appearance of the defendant in this case?

6 THE WITNESS: To the best of my recollection,
7 yes, sir.

8 THE COURT: Okay. And he was taken back to
9 the actual scene of the alleged robbery?

10 THE WITNESS: Yes, sir.

11 THE COURT: Okay. That would be at
12 Walgreen's?

13 THE WITNESS: Yes, sir.

14 THE COURT: And were you there when Mr. Fryar
15 identified the defendant?

16 THE WITNESS: Yes, sir.

17 THE COURT: Did he have any hesitancy or
18 appear to have any hesitancy --

19 THE WITNESS: No, sir.

20 THE COURT: -- that you could observe? Did
21 he immediately identify him?

22 THE WITNESS: Yes, sir.

23 THE COURT: Okay. Do you know if he may have
24 known him or anything of that nature?

25 THE WITNESS: Not to my knowledge.

1 THE COURT: Okay. And how long would this
2 have been after the actual incident occurred?

3 THE WITNESS: I say within 20 minutes.

4 THE COURT: So, within 20 minutes he was, you
5 had him in custody and he was back in front of the
6 witness?

7 THE WITNESS: Yes, sir.

8 THE COURT: Okay.

9 All right, anything further, Mr. DeBusk?

10 MR. DeBUSK: No.

11 THE COURT: Mr. Fox?

12 MR. FOX: No, Your Honor.

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

14 (Witness excused).

15 THE COURT: All right, Mr. DeBusk.

16 MR. DeBUSK: That is our showing, Your Honor.
17 We would argue that identification is reliable, it
18 was a show-up close in time that the incident
19 occurred, the victim had a good look at the
20 defendant when the incident occurred and then again
21 in a well lit area when he came back, he identified
22 both his face and his clothing, the defendant was
23 captured nearby within a short time, I would argue
24 that it is a reliable identification.

25 THE COURT: Mr. Fox?

1 MR. FOX: I just argue that it has been
2 conceded to be a show-up which is disfavored in the
3 law as being unduly suggestive. At the time Mr.
4 Smith is brought back to the location he is in
5 custody, he is the only one in handcuffs, he is in
6 the back of a police car. I say the circumstances
7 are unduly suggestive.

8 Regarding the description in the BOLO, all
9 the officer can testify to was a black male, he
10 doesn't really remember the specific height,
11 weight, clothing, et cetera. We would argue it was
12 unduly suggestive and improper, Your Honor.

13 THE COURT: After considering the totality of
14 the circumstances I find that the State has met its
15 burden of showing reliability by at least applying
16 a preponderance of the evidence standard which I
17 believe to be the standard should be appropriate in
18 this matter. I do acknowledge that under the law a
19 show-up is disfavored, however I am, I am
20 considering the fact this show-up was almost
21 immediately after the commission of the offense.
22 The defendant was picked up wearing clothes and
23 meeting the general description of the perpetrator.
24 The victim in this matter, Mr. Fryar, exhibited no
25 hesitancy in identifying the defendant and I

1 believe that the circumstances were such that his
2 memory would certainly be fresh some 20 minutes
3 after the actual robbery, so I'm going to make a
4 finding that it was reliable under the case law of
5 this state.

6 All right, thank you, gentlemen. What else
7 do we need?

8 MR. DeBUSK: No further motions from the
9 State, Your Honor.

10 MR. FOX: No further motions.

11 THE COURT: No Jackson-Deno hearing, so we're
12 ready to go?

13 MR. DeBUSK: Might I have just a few minutes
14 to check with my witnesses to make sure I'm ready
15 to roll, take five?

16 THE COURT: All right, go ahead.

17 (Recessed at 10:49 a.m.).

18 (Resumed at 10:56 a.m.).

19 MR. DeBUSK: Your Honor, the State is ready.

20 THE COURT: All right.

21 Mr. Fox?

22 MR. FOX: Ready, Your Honor.

23 THE COURT: Okay. Bring in the jury, if you
24 would.

25 (The jury returned to the courtroom).

1 THE COURT: All right, ladies and gentlemen,
2 we're about to start this trial that is the State
3 versus Mr. John Henry Smith but before we do I
4 would like to make a few remarks to you. This is
5 certainly not a charge on the law. At the end of
6 the trial I will give you a complete charge as to
7 the law that you should apply in your deliberations
8 but I want to tell you some things that might help
9 you understand what we're doing as we progress
10 through this trial and help you understand the
11 procedure we're following.

12 First of all let me remind you of something I
13 told you all on Monday. If at anytime you become
14 uncomfortable, you need a break, you need to return
15 to your jury room, all you have to do is raise your
16 hand and that is my signal or your signal to me
17 that you need to take a break and I promise you we
18 will. Also if at anytime you cannot hear or see
19 what's going on in the courtroom you let me know
20 because everything we do here is for you, none of
21 this evidence is presented for me, I am not the
22 judge of the facts in this case. It is all for you
23 and if we get into a situation we start presenting
24 it in a way you can't see and hear what is going on
25 we're just wasting our time and we're not being

1 fair to the parties to this proceeding.

2 Let me remind you that this trial is probably
3 not going to be like what you may have seen on TV
4 or in the movies. It seems that every time I turn
5 on the television there is some sort of trial going
6 on or there is a police show or they are about to
7 have a trial, something of that nature, and those
8 are the most exciting and thrill packed things I
9 have ever seen. You are probably going to see
10 today and maybe tomorrow that that is not exactly
11 how a real trial progresses. Sometimes it is,
12 sometimes there are exciting moments in a trial but
13 for the most part trials, let me say it this way,
14 let me say that the search for the truth is very
15 deliberate and there are rules on the way evidence
16 is presented that are sometimes redundant and what
17 you might consider to be wasting time but I assure
18 you that there is a purpose for all that and let me
19 remind you also that these attorneys who are
20 appearing before you have taken an oath to present
21 this case not only zealously protecting their
22 positions but also honorably and professionally and
23 ethically and I will require that and you all can
24 expect that of me, too. I likewise am required to
25 conduct myself professionally and ethically and I

1 hope I will throughout this trial.

2 But you as jurors also have that duty to
3 conduct yourselves professionally and honorably and
4 ethically in your determination of the case and in
5 that context it is your duty to look at the
6 evidence which is presented in this case and
7 without any interest, prejudice or bias on your
8 parts to fairly judge that evidence because you as
9 jurors are the sole and exclusive judges of the
10 facts in the case and I will tell you more about
11 that when I charge you fully on the law.

12 Now, the deliberation process, that is what
13 you will be asked to do in this trial, is sort of a
14 three part process that takes place. First of all
15 the jurors must determine what the facts are in the
16 case and then they have to determine what the law
17 is in the case and thirdly they have to put the law
18 and the facts together and see how they fit and
19 that is when you determine whether or not there is
20 reasonable doubt in this case.

21 The State has the burden and the exclusive
22 burden in this case of convincing you beyond a
23 reasonable doubt that the defendant has committed
24 the offense that he is charged with. The defendant
25 has been charged under an indictment. As I told

1 you earlier, that indictment is not evidence. He
2 has pled not guilty, therefore the State has the
3 burden of proving to you that he committed this
4 offense beyond a reasonable doubt and I'm going to
5 tell you a little bit more at the end of the trial
6 what reasonable doubt means but for our purposes
7 you should keep that in your mind. The State has
8 the burden in this particular case.

9 Now let's go back to the determination of
10 what occurred here. As I said, you as jurors are
11 the sole judges of the evidence. You are to
12 determine what occurred, you are the sole judge of
13 the facts in this case. If I say or intimate
14 anything during the trial of this case that I have
15 an opinion about a piece of evidence or opinion
16 about what occurred you should just set that aside
17 and put it out of your mind because it is improper
18 for me to suggest that I have any opinion about the
19 evidence. I'm not allowed to have an opinion about
20 the evidence. It is entirely up to you and you can
21 consider just about anything you have determined in
22 your daily lives to lead you to the truth as a
23 method of determining what the truth is. You can
24 consider things like a witness' opportunity to see
25 or hear what he is testifying about, any interest

1 or prejudice or bias that particular witness might
2 have, any interest the witness might have in the
3 outcome of the case, the intelligence of the
4 witness, you can consider how that witness appears
5 or acts on the witness stand. You can apply all
6 the tests that you normally apply in determining
7 what the truth is in this case.

8 At the end of the trial, as I said, I am
9 going to instruct you on the law, and just like you
10 are the sole judges of the facts, I am the sole
11 judge of the law and you must be guided by the law
12 as I give it to you. That is the easiest part of
13 your deliberation process. I'm going to give you
14 the law that you will apply to the facts to
15 determine whether or not the State has met its
16 burden of proof in this particular case.

17 Now, one of the most dangerous things that a
18 juror can do or a jury can do is to pre-deliberate
19 a case. I ask you not to discuss this case even
20 among yourselves and certainly if we go into
21 tomorrow, when you go home tonight I know it is
22 hard to sit there with your spouse or your
23 significant other and they say, "What kind of case
24 are you on," and for you to have to say, "We'll
25 talk about that after this case is over, the judge

1 has told me not to discuss it." Well, I know that
2 is hard to do but that is what I'm going to ask you
3 to do. I don't know how many times I have been
4 sitting here listening to cases, of course every
5 case I ever tried there was only one way to
6 interpret the evidence and that would be my way,
7 but since I have become a judge I have come to
8 realize that there is two sides to every coin and I
9 don't know how many times I sat here and listened
10 to one side and think well, my goodness, there is
11 no question about how this case could go, and when
12 I hear the other side I'm convinced just as
13 strongly the other way. I have been surprised by
14 it.

15 You may find that to be the case in this
16 case. That is why I ask you not to pre-deliberate,
17 because if you do that you're going to start
18 forming an opinion about whether to believe a
19 witness or not believe a witness. Wait until you
20 have heard everything before you begin to
21 deliberate the case, and that includes talking.

22 Of late we have had to concern ourselves also
23 with this matter of the social media or Facebook
24 and things like that. It would appear to me you
25 can put anything you want on a smart phone and get

1 an answer and we have had some jurors that have
2 gone on Mapquest and gotten maps of the area and
3 they have looked up old newspaper articles and all
4 manner of things. That is highly improper. Please
5 don't do that. You must determine this case solely
6 from the evidence that you hear from this witness
7 stand and what you hear from this witness stand
8 alone in your deliberations.

9 Also I would point out to you that from time
10 to time during this trial you might hear one of
11 these lawyers say something like, "Your Honor,
12 we're got a matter we need to take up outside the
13 presence of the jury," or they may just simply say,
14 "Your Honor, I object to this," or, "I object to
15 that," and I send you out. Let me tell you we're
16 not trying to keep anything from you. Usually that
17 is a result of one lawyer having an objection as to
18 the way a particular piece of evidence is presented
19 to the jury or whether or not a piece of evidence
20 should be presented to the jury.

21 The reason we send you out is this. In
22 ruling on those evidentiary matters, and that is
23 what I have to do, many times I have to express an
24 opinion about the value, the weight of that
25 particular piece of evidence and if I do that in

1 front of you I might sway you, I might influence
2 the way you look at that piece of evidence, so that
3 is why we send you out. It is not because we're
4 trying to keep anything at all from you.

5 Now, we are about to begin the trial, as I
6 said, and the way we will proceed is this. Mr.
7 DeBusk who is representing the State, I think Miss
8 vonn Herrmann has abandoned me. She was just here
9 to help you with the jury?

10 MR. DeBUSK: Yes, sir.

11 THE COURT: Mr. DeBusk is going to give you
12 what is called an opening statement in which he
13 will talk with you about the case. He will tell
14 you what he thinks he can prove or what he thinks
15 occurred with this particular incident or alleged
16 criminal offense. What he says is not evidence.
17 It is not evidence until it's proven from this
18 witness stand.

19 Once Mr. DeBusk has done that Mr. Fox will
20 have an opportunity, if he chooses, to make an
21 opening statement and he will give you the
22 defense's position and he will tell you what the
23 defense believes that it can show or that the State
24 cannot show in this case but there again that is
25 optional, he may or may not do that. Again, what

1 Mr. Fox says is not evidence until you have heard
2 it from the witness stand. He is simply giving the
3 defense's position in the case.

4 Once the two opening statements have been
5 made Mr. DeBusk will put up evidence to prove the
6 State's case. Once he has completed that Mr. Fox
7 will have an opportunity, he doesn't have to do
8 anything but if he chooses he has the opportunity
9 to call witnesses and put up witnesses for the
10 defense. Once the defense rests we will have
11 closing arguments where the two sides again have an
12 opportunity to sum up what has been presented in
13 the courtroom or has not been presented in the
14 courtroom, depending on how you want to look at it,
15 and following that I will charge you on the law and
16 give you the case and you can begin your
17 deliberations in this matter and we'll conclude.

18 Again let me thank you for being here and let
19 me say that if you need anything or if there is any
20 problems that arise during your deliberation
21 process Miss Miller will bring that to my
22 attention. You tell her and she will bring it to
23 my attention. Also if you become uncomfortable
24 raise your hand.

25 And what I'm going to do is ask you to take

1 that last oath that we talked about. The clerk is
2 going to give you that oath as jurors.

3 If you would, ma'am, swear the juror.

4 MR. DeBUSK: Your Honor, may Mr. Fox and I
5 approach, please?

6 (Unrecorded bench conference).

7 THE COURT: Mr. Ropp, if you would take them
8 in the jury room for just a moment, okay, before we
9 get to opening statements.

10 (The jury was excused from the courtroom).

11 THE COURT: All right.

12 MR. DeBUSK: For the record, Sergeant
13 Johnson, Michelle Johnson, she was not here during
14 jury selection, she's informed me since she came
15 in, Mr. Bellamy sitting in the center back row, she
16 knows him from high school and he has done AC work
17 at the police department.

18 I think you are acquaintances, not close
19 friends?

20 MICHELLE JOHNSON: Yes.

21 THE COURT: He does what kind of work at the
22 police department?

23 MR. DeBUSK: Air-conditioning.

24 THE COURT: Worked on the air-conditioning?

25 MR. DeBUSK: Yes.

1 THE COURT: She knows him. And again, Miss
2 Johnson, you were just an acquaintance of Mr.
3 Bellamy?

4 MR. DeBUSK: Just classmates.

5 MICHELLE JOHNSON: Just classmates, we were
6 friends but we didn't pal around together.

7 THE COURT: So you didn't pal around or
8 anything, you just were acquaintances?

9 MICHELLE JOHNSON: Yes.

10 THE COURT: Mr. Fox, do you want to ask her
11 anything?

12 MR. FOX: I don't, Your Honor, I'm satisfied.

13 THE COURT: You're satisfied with that?

14 MR. FOX: I don't request any further
15 questioning of the juror.

16 THE COURT: Okay, all right, thank you.

17 MR. DeBUSK: Thank you, Your Honor.

18 THE COURT: All right, do you gentlemen need
19 a moment?

20 MR. FOX: I would like to step to the
21 restroom.

22 THE COURT: Okay, very well.

23 MR. FOX: Thank you.

24 THE COURT: We'll take just a quick break.
25 (Recessed at 11:08 a.m.).

1 (Resumed at 11:15 a.m.).

2 THE COURT: All right, Mr. DeBusk, ready?

3 MR. DeBUSK: Yes, Your Honor.

4 THE COURT: Okay, Mr. Ragsdale, let's get
5 them in here.

6 MR. FOX: Your Honor, very briefly, I forgot
7 to do this, I would ask the witnesses other than
8 the victim and the investigating officer be
9 sequestered.

10 THE COURT: All right.

11 (Witnesses excused from the courtroom).

12 THE COURT: Now we're ready.

13 (The jury returned to the courtroom).

14 MR. DeBUSK: For the record, our chief
15 investigator is Sergeant Johnson.

16 THE COURT: All right. Did we actually get
17 them sworn in or not?

18 THE CLERK: No.

19 THE COURT: Let's swear them.

20 (Jury sworn).

21 THE COURT: Thank you, you may be seated.

22 Mr. DeBusk.

23 MR. DeBUSK: Thank you, Your Honor.

24 Ladies and gentlemen, this case is about
25 armed robbery. The defendant is accused of going

1 into the Walgreen's in Conway, Walgreen's Pharmacy,
2 going up to the clerk, saying he had a gun, making
3 a motion he had a gun, demanded money, stealing
4 that money and takes it away. He was caught nearby
5 with the money on his person and he was identified
6 by the victim. That is what is before you today,
7 armed robbery.

8 Now, armed robbery isn't just if somebody
9 comes up to you with a gun and demands your money.
10 Under the law of South Carolina it's more more than
11 that. Even if you don't see the weapon it can
12 still be armed robbery. If the defendant indicates
13 he has a gun, makes some representation of a gun,
14 even sticking his finger or a pen out, if the
15 person fears it is actually a gun, based on that
16 that is still armed robbery. The law doesn't
17 require a weapon. That is important.

18 Today you are going to hear the evidence from
19 the stand here, it will be a fairly short trial,
20 you will hear from the witnesses, and as the judge
21 said, the State has the burden of proof. My name
22 is George DeBusk and I'm a Senior Assistant
23 Solicitor here in Horry County. Senior means I
24 have been here a while.

25 The Solicitor represents the State, that is

1 my job. It is very important according to the
2 constitutional rights people have, they have a
3 right to be assumed innocent until proven guilty.
4 I ask you to listen carefully to the testimony,
5 then you will get a chance to decide if the
6 defendant is guilty.

7 The proof is proof beyond a reasonable doubt.
8 The judge will instruct you at the end of the trial
9 on the law as to reasonable doubt and what
10 reasonable doubt is. I would argue to you that are
11 here, you are the jury, to decide whether the
12 defendant has been proven guilty, not to punish him
13 for this crime. Again, I ask you to pay attention
14 for the next day or so, listen to the evidence and
15 at the end the law the judge gives you.

16 Thank you.

17 THE COURT: Mr. Fox?

18 MR. FOX: If it please the Court.

19 THE COURT: Mr. Fox.

20 MR. FOX: Good morning, ladies and gentlemen.

21 My name is Eric Fox, I'm here today to represent
22 John Henry Smith who is seated at the table across
23 the courtroom with me. I thank you for your time.
24 As the judge indicated, this really is one of the
25 highest civic duties you have, along with serving

1 in the military, this and voting, this is one of
2 the three that really our system of government
3 requires.

4 The judge will define what reasonable doubt
5 is. You probably can give a pretty good definition
6 yourself off the top of your head right now if I
7 ask you what a reasonable doubt is. It doesn't
8 mean just any old doubt. Mr. Floyd was a lawyer
9 here a long, long time in Conway. He said you can
10 doubt there is salt down in the ocean in Myrtle
11 Beach but that is not a reasonable doubt. It is,
12 however, the highest burden of proof in our court
13 system. However the judge defines it for you, it
14 doesn't mean maybe that happened, I think it
15 happened, it could have happened. It means I'm as
16 sure as I can be without having been present
17 because one thing I know 100 percent, none of you
18 were present at Walgreen's on September 12th, 2011,
19 you can't know 100 percent and the State is not
20 required to convince you 100 percent. That is
21 impossible. But they are required to do more than
22 make you think it could have happened so you need
23 to be as sure as you can be, not having been there
24 yourself.

25 The judge mentioned the different ways we

1 qualify jurors or select juries in a civil case.
2 If we were here about an auto accident or suing
3 over money that standard of proof is a
4 preponderance of the evidence, that simply means
5 you think of the scales of justice, if you can tilt
6 those scales in your favor even slightly you win.

7 Reasonable doubt, in criminal court, General
8 Sessions Court where we are today you've got to
9 tilt those scales significantly, okay?

10 Now, the Solicitor also mentioned presumption
11 of innocence. Another lawyer I know described it
12 this way. Imagine that rather than Mr. Smith
13 sitting there right now its one of your loved ones,
14 it's your spouse, it's your child, it's your
15 grandmother and you think what in the world, no way
16 would my grandmother be sitting in a courtroom
17 accused of a crime. That is the attitude you
18 should have right now toward Mr. Smith. You have
19 heard nothing about this case other than what the
20 charge is, you should not have any opinion.

21 It is human nature during the course of this
22 trial you probably go back and forth, that is human
23 nature. The State goes first, they have to go
24 first, they have the burden of proof. They will go
25 first and present evidence, but that presumption of

1 innocence is a constitutional right just like Mr.
2 Smith's right to a jury trial, right to testify if
3 he wishes, his right to confront the witnesses, and
4 myself as a lawyer, so I urge you to think during
5 the course of this trial Mr. Smith is entitled to
6 the same attitude of innocence, presumption of
7 innocence you would have or a loved one.

8 I agree with Mr. DeBusk that this is about an
9 armed robbery, at least that is the allegation. It
10 is not an armed robbery. There is not a question,
11 you well not hear a fight in this courtroom either
12 now or during the testimony, at the end about
13 whether a crime occurred and it is not a question
14 of identity, no question Mr. Smith was at
15 Walgreen's on that night and that he committed a
16 crime. The question is what crime did he commit.
17 At the end of the case I will come back and explain
18 to you why it is not armed robbery. It might be
19 one of a couple different what we call lesser
20 included crimes. I believe the evidence will
21 support that.

22 In the meantime I thank you for your
23 attention. We're ready to start.

24 THE COURT: All right, Mr. DeBusk.

25 MR. DeBUSK: Thank you. The State calls

1 Hilton LeShawn Fryar.
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1 HILTON LeSHAWN FRYAR, after being first duly sworn,
2 testified as follows:

3 THE CLERK: State your name and spell your
4 last name.

5 THE WITNESS: My name is Hilton Fryar,
6 F-r-y-a-r.

7 DIRECT EXAMINATION BY MR. DeBUSK:

8 Q Mr. Fryar, what is your occupation?

9 A I'm sorry?

10 Q What's your occupation at this time?

11 A I'm currently unemployed.

12 Q Are you also in school or anything?

13 A Yes.

14 Q What are you studying?

15 A Networking.

16 Q Okay. Computer networking?

17 A Uh-huh.

18 Q Thank you. Now, in December, 2011, where
19 were you working?

20 A Walgreen's.

21 Q On December 12, 2011, were you on duty?

22 A Uh-huh.

23 Q In the early morning, early hours of the
24 morning?

25 A Yes, I was.

1 Q During that early morning hours did anything
2 unusual happen?

3 A Yes.

4 Q What happened?

5 A A little after 2:00 o'clock in the morning we
6 had Mr. Smith over there come in.

7 Q Would you please pull the microphone up close
8 to your mouth? You are kind of soft spoken like
9 me, you're hard to hear.

10 A Sorry.

11 Q Thank you.

12 A I had Mr. Smith over there come in. When he
13 came in he went straight to the ziplock bags were
14 on the aisle, he brought back a box to the
15 register, he asked me what the price was of it, I
16 told him what it was and then after that he
17 proceeded to tell me to give him the money out of
18 the register and to be quiet and not to make any
19 noise because he said he had a gun.

20 Q Where were his hand?

21 A One of his hands was in his pocket.

22 Q Okay.

23 MR. DeBUSK: Let me stop you just a minute
24 and ask to mark State's Exhibit 1.

25 Q I ask if you recognize these two photographs?

1 A Yes, I do.

2 Q What are they?

3 A That is the register I was using and that is
4 the box of ziplocks he bought.

5 MR. DeBUSK: At this time the State offers
6 State's Exhibit 1 in evidence.

7 THE COURT: Any objection, Mr. Fox?

8 MR. FOX: No, Your Honor.

9 THE COURT: All right. A document marked as
10 State's Exhibit 1 is now admitted.

11 (Copy of two photographs marked and received
12 in evidence as State's Exhibit Number 1).

13 BY MR. DeBUSK:

14 Q Let me step back a moment, Mr. Fryar. You
15 say he stated he had a gun?

16 A Yes, sir.

17 Q And what did he ask you?

18 A He told me to give him the money out of the
19 register.

20 Q And again where was his hand?

21 A His pocket.

22 Q What did you do?

23 A I did what I was told, I just proceeded to do
24 what he said and I opened the register and started
25 getting money out of it and before I could get a

1 certain amount or in the middle of what I was doing
2 he just snatched what I had and went out the door.

3 Q Do you know how much he got?

4 A \$60.00.

5 Q Do you know what the denominations were?

6 A Uh-huh. Three twenties.

7 Q Three twenties?

8 A Uh-huh.

9 Q At that time did you fear he had a gun like
10 he said?

11 A Uh-huh.

12 Q What did you do next?

13 A I called my manager as soon as he walked out
14 the door, told her everything that happened.

15 Q Tell me this. How many other employees at
16 Walgreen's were in the store with you?

17 A Besides myself, there is a pharmacist and
18 assistant manager.

19 Q Were either of them in position to see what
20 happened?

21 A No.

22 Q Where were they?

23 A In the back of the store.

24 Q Okay. And this occurred where?

25 A In the front.

- 1 Q Near the front doors?
- 2 A Uh-huh.
- 3 Q Okay. What happened next?
- 4 A After I told the manager what happened she
- 5 called the police, Officer Johnson showed up and
- 6 came to the door and I gave her a description the
- 7 best of my knowledge and I wrote my statement and
- 8 then we waited to see if the officer that was in
- 9 pursuit was going to catch him.
- 10 Q Did you see the person who threatened you
- 11 again that day?
- 12 A Yes.
- 13 Q How long was it after that?
- 14 A Not long. I don't exactly remember how long
- 15 but it wasn't too long after Officer Johnson showed
- 16 up that another officer brought him back in a cop
- 17 car and pulled him out of the back and asked me if
- 18 that was him.
- 19 Q Was it the same person?
- 20 A It was.
- 21 Q How were you able to recognize him?
- 22 A Still wearing some of his under clothes and I
- 23 saw his face.
- 24 Q What kind of clothing was he wearing?
- 25 A Burgundy sweatshirt on, that is all I could

1 see, he was outside the car, I recognized the
2 shirt.

3 Q Okay. Did you get a good look at his face
4 when he was at the register with you?

5 A Uh-huh.

6 Q Did you get a good look at his face when he
7 was brought back?

8 A Yes, I did.

9 Q Was there enough light to see both times?

10 A Uh-huh.

11 Q To your knowledge was any of this captured on
12 video surveillance?

13 A Yes, it was.

14 Q Did you review the tapes with me of this?

15 A Uh-huh.

16 Q Were those tapes a fair and accurate
17 representation of what happened that night?

18 A Yes, it was.

19 Q Where the video cameras were placed in your
20 store?

21 A Yes.

22 MR. DeBUSK: Can I get this marked State's
23 Exhibit 2?

24 THE COURT: Have they been provided to Mr.
25 Fox?

1 MR. DeBUSK: They are exactly as provided to
2 Mr. Fox.

3 THE COURT: All right. I assume you are
4 going to offer some of these?

5 MR. DeBUSK: Yes.

6 THE COURT: Do you have any objection?

7 MR. FOX: I do unless he is the custodian or,
8 not records keeper but in charge of the system that
9 does the recording, verifies it, basically a
10 foundation for the system and those particular
11 videos.

12 THE COURT: Did you ask a moment ago, I think
13 you did, did he review them?

14 MR. DeBUSK: Yes. I can go into more depth
15 if you want me to.

16 THE COURT: Okay. All right.

17 BY MR. DeBUSK:

18 Q Referring to the tapes that you reviewed,
19 were you aware there were video cameras,
20 surveillance cameras in the store where you worked?

21 A Yes, sir.

22 Q Do you know where they were placed?

23 A Uh-huh.

24 Q Were the tapes reviewed taken from those
25 cameras?

1 A Yes, sir.

2 Q Was it from the same time frame that this
3 incident occurred?

4 A Yes, sir.

5 Q Did you appear on those tapes?

6 A Uh-huh.

7 Q Did the person that came up and threatened
8 you appear on those tapes?

9 A Uh-huh.

10 Q And are they a fair and accurate
11 representation of the whole thing?

12 A Yes, sir.

13 MR. DeBUSK: Your Honor, the State would
14 offer them at this time.

15 THE COURT: Mr. Fox, do you want to examine
16 this witness as to that issue?

17 MR. FOX: Yes.

18 BY MR. FOX:

19 Q Mr. Fryar, what is your responsibility day to
20 day? How long have you worked at Walgreen's?

21 A I'm sorry?

22 Q How long did you work at Walgreen's?

23 A About two years.

24 Q Okay. Was it ever your responsibility during
25 that time to be in charge of the taping system?

1 A No, sir.

2 Q Who had responsibility for maintenance or
3 reviewing or anything like that?

4 A The managers.

5 Q So, you had nothing to do with making sure
6 there was tape in there, whether the machine was
7 working or anything like that?

8 A No, sir.

9 MR. FOX: That's all I have.

10 THE COURT: All right.

11 MR. DeBUSK: Your Honor, I think we
12 established sufficient foundation because the
13 defendant actually appears in this tape and he
14 testified as to the night of the incident.

15 THE COURT: I think that is sufficient. I'm
16 going to allow it.

17 MR. DeBUSK: Your Honor, at this time we
18 would move State's Exhibit 2 in evidence.

19 THE COURT: Admitted over objection.

20 (Video recordings marked and received in
21 evidence as State's Exhibit Number 2).

22 MR. DeBUSK: Your Honor, may we publish a
23 portion of this to the jury?

24 THE COURT: Yes.

25 MR. DeBUSK: This is a one hour tape, I'm

1 going to start the tape 19 minutes into the tape,
2 the tape is available if Mr. Fox would like to see
3 it.

4 THE COURT: Okay. Is this different from the
5 one --

6 MR. DeBUSK: I'm sorry, Your Honor, they are
7 identical. I can put the tape I'm actually
8 publishing in as the exhibit at the time.

9 THE COURT: Okay.

10 MR. DeBUSK: They are duplicates.

11 THE COURT: Okay.

12 MR. DeBUSK: For the record, Your Honor,
13 there is no audio on the tape. Your Honor, I'm
14 going to fast forward to 19 minutes.

15 THE COURT: All right.

16 (State's Exhibit Number 2 was played to
17 the jury).

18 MR. DeBUSK: Thank you, Your Honor.

19 BY MR. DeBUSK:

20 Q Mr. Fryar, I ask you, that person in the red
21 plaid sweater, is that you?

22 A Yes, sir.

23 Q After the individual left you went over and
24 picked up something white at the end of the aisle.
25 What was that?

1 A Telephone.

2 Q What were you doing?

3 A I was calling the manager.

4 Q Mr. Fryar, an individual appeared on the

5 video in a blue shirt, who was that?

6 A That was the manager on duty.

7 Q Where was she when this occurred?

8 A In the back of the store.

9 Q Thank you.

10 MR. DeBUSK: Thank you. You can put the

11 screen up.

12 Q Mr. Fryar, that incident on the video you

13 just testified about --

14 A Yes, sir.

15 Q -- had you ever met that individual before?

16 A No, sir.

17 Q Other than when you had the encounter at the

18 counter and saw him later, had you seen him anytime

19 before or since?

20 A No, sir.

21 Mr. Fryar, I'm going to show you State's

22 Exhibits 3 and 4 and ask you if you recognize

23 those?

24 A Yes, I do.

25 Q What are they?

1 A They are pictures of Mr. Smith walking out of
2 the store.

3 Q Are they still frames from that video we just
4 viewed?

5 A Yes, sir.

6 Q Are they fair and accurate representations of
7 the frames from those videos?

8 A Yes, sir.

9 Q Do they fairly and accurately represent the
10 clothing and appearance he had that night?

11 A Yes, sir.

12 MR. DeBUSK: Thank you.

13 Your Honor, we would offer these in evidence
14 at this time.

15 MR. FOX: Without objection, Your Honor.

16 THE COURT: Admitted without objection as
17 State's Exhibits 3 and 4.

18 (Photographs marked and received in evidence
19 as State's Exhibits 3 and 4).

20 BY MR. DeBUSK:

21 Q Mr. Fryar, did the police respond that night?

22 A Yes, sir.

23 Q How long did it take them to get there?

24 A Not long at all.

25 Q And you gave a statement to them?

1 A Yes, sir.

2 Q Did you give a description?

3 A Uh-huh.

4 Q And then you viewed the defendant when they

5 brought him back?

6 A Yes.

7 Q After that have you had any contact with the

8 police about this case until today?

9 A Huh-uh.

10 Q And are you still employed with Walgreen's?

11 A No, sir.

12 Q Okay. Just to review briefly, did the

13 defendant say he had a gun?

14 A Yes, sir.

15 Q Did he have his hand in his pocket as if he

16 may have had a gun?

17 A Yes, sir.

18 Q And how much money did he take?

19 A \$60.00.

20 Q And the denominations were?

21 A Three twenties.

22 MR. DeBUSK: Your Honor, may I publish

23 State's 1, 3 and 4 to the jury?

24 THE COURT: Yes.

25 MR. DeBUSK: Please answer any questions the

1 defendant may have.

2 THE COURT: Mr. Fox.

3 CROSS EXAMINATION BY MR. FOX:

4 Q Mr. Fryar, what was the description that you
5 provided the police of the person that took this
6 money from you?

7 A I gave them approximate height, weight and
8 color, age and color of his clothing.

9 Q That was done how, verbally, written?

10 A Verbally.

11 Q Did you also later have the opportunity to do
12 a written statement for the police?

13 A Yes, sir.

14 Q Okay. Do you recall what you put in that
15 statement?

16 A Yes, sir.

17 Q Okay. Could you tell us what you put in that
18 statement in terms of the description of the
19 robber?

20 A There was no description of the robber in my
21 statement. I just wrote what happened.

22 Q Now, at the time when you say you called your
23 manager and called the police, the police responded
24 at some point, at some point officers brought
25 someone back to you to identify, correct?

- 1 A Uh-huh.
- 2 Q And give us the circumstances, where were you
3 when they came back?
- 4 A I was still in the front of the store with
5 Officer Johnson.
- 6 Q Did you identify him from inside the store or
7 did you step outside?
- 8 A I stepped outside.
- 9 Q Okay. And where was Mr. Smith at that time?
- 10 A He was in the police car and after I got out
11 there they pulled him out for me to identify him.
- 12 Q Was he in handcuffs at that time?
- 13 A Yes, sir.
- 14 Q Okay. Was there anybody other than the
15 police officers and Mr. Smith in that patrol car?
- 16 A No, sir.
- 17 Q Okay. Mr. Smith in the video, the pictures
18 we have seen, the person appears to be wearing a
19 jacket?
- 20 A Uh-huh.
- 21 Q And that is what you testified about, the
22 person having a burgundy shirt, sweatshirt or
23 something, correct?
- 24 A Uh-huh.
- 25 Q You are talking about his outer coat,

1 correct?

2 A Yes, sir.

3 Q When Mr. Smith came back handcuffed in the
4 back of the patrol car was he still wearing that
5 coat?

6 A No, sir.

7 Q Anything else that was missing from the
8 person inside the store?

9 A I'm sorry?

10 Q Mr. Smith was in the back of the patrol car,
11 he didn't have the same jacket as the person that
12 robbed you had. Anything else that he either had
13 or didn't have that was different from the person
14 that --

15 A He wasn't wearing his hat either.

16 Q Now, you never actually saw a weapon,
17 correct?

18 A I'm sorry?

19 Q Did you see a weapon?

20 A No, sir.

21 Q Okay. And did the police, they never brought
22 back a weapon to you to identify or anything, you
23 hadn't seen one, no weapon was ever brought back to
24 you as possibly being in the person's pockets, was
25 there?

1 A No, sir.

2 Q Now, Mr. Smith stayed on one side of the
3 counter, you stayed on the other, correct?

4 A Uh-huh.

5 Q He never lunged at you, never grabbed you,
6 did he?

7 A No, sir.

8 Q Okay. What were his exact words when he
9 walked in? He was already at the register,
10 correct?

11 A Uh-huh.

12 Q He had the ziplock baggies box and then you
13 came from wherever you were up to the register,
14 correct?

15 A Right.

16 Q Okay. What were his exact words?

17 A He came up to the register, he said, "What's
18 the price of this item," and I gave him the price
19 and then he proceeded to say, "Give me the money
20 out of the register." He said it more than one
21 time and --

22 Q Let me ask, I don't mean to interrupt. Did
23 you immediately comply with that?

24 A No, sir, because I didn't, the first couple
25 times he said it I didn't understand what he was

1 saying and then after that, after he kept saying it
2 I understood what he said and he told me not to
3 make any noise and that he had a gun.

4 Q And you had a chance to watch the video when
5 it was played this morning, correct?

6 A Uh-huh.

7 Q You could see the times displayed on there.
8 How long would you say, based on your own
9 recollection and the times were on that video,
10 about how long was your encounter with Mr. Smith?

11 A Maybe five to ten minutes.

12 Q Okay. Now, in fact Mr. Smith had to
13 repeatedly make the demand for money, didn't he,
14 "Come on, come on"?

15 A Uh-huh.

16 Q You didn't see a weapon, you weren't sure
17 what was going on exactly, you didn't immediately
18 comply, correct?

19 A Right.

20 Q Is there an alarm there at the register?

21 A No, sir.

22 Q Okay. You didn't duck down or turn to run or
23 anything, holler out?

24 A No, sir.

25 Q Now, how many times previous to today have

1 you met with the Solicitor about this case?

2 A Just once.

3 Q Where was that?

4 A Here.

5 Q When you say here, where do you mean here?

6 A The Solicitor's office.

7 Q Okay, here in the courthouse?

8 A Uh-huh.

9 Q What was the purpose of that meeting?

10 A To discuss the case.

11 Q Okay. Did that include reviewing the

12 videotape from Walgreen's?

13 A Yes, sir.

14 Q So you had the opportunity to review it once,

15 a couple times, how many?

16 A Just once.

17 Q That was Mr. DeBusk?

18 A Yes, sir.

19 Q Was there any discussion about, about a

20 robbery?

21 A I'm sorry?

22 Q Was there any discussion about what

23 constituted a robbery under South Carolina law?

24 A Yes, sir.

25 Q Okay. So in other words did Mr. DeBusk let

1 you know what the elements --

2 MR. DeBUSK: Your Honor, I object as to
3 hearsay.

4 THE COURT: I'll let him answer.

5 MR. FOX: Okay.

6 BY MR. FOX:

7 Q I will ask again. Was there any discussion
8 about what constitutes armed robbery in the state
9 of South Carolina?

10 A Constitutes?

11 Q Yes, what actions would make an armed
12 robbery?

13 A No, sir.

14 Q Okay. Any discussion about weapon or looks
15 of a weapon in this incident?

16 A Yes, sir.

17 Q Okay. Any discussion about it being
18 important, if someone doesn't have a weapon, that
19 there at least be a representation of having a
20 weapon?

21 MR. DeBUSK: Your Honor, I object, hearsay.

22 THE COURT: I don't think he is offering it
23 for the proof of the matter asserted rather than
24 showing this witness' state of mind during his
25 testimony or what preparation may have been made

1 for his testimony, which is different.

2 MR. FOX: Thank you.

3 The Court's indulgence.

4 Thank you, Your Honor. No further questions.

5 THE COURT: All right, Mr. DeBusk.

6 MR. DeBUSK: Briefly.

7 REDIRECT EXAMINATION BY MR. DeBUSK:

8 Q Mr. Fryar, you said that he asked several
9 times for the money, is that correct?

10 A Yes, sir.

11 Q After he said he had a gun is that when you
12 complied?

13 A Yes, sir.

14 Q Did he have to ask again after he said he had
15 a gun?

16 A No, sir.

17 Q On the video we can't hear what you're saying
18 but you said at one point you backed away from the
19 register and stood back against the wall. Why did
20 you do that?

21 A I wasn't sure what was, exactly what was
22 going on.

23 Q At that point were you in some fear for your
24 safety?

25 A Yes, sir.

1 MR. DeBUSK: Thank you. Nothing further.

2 MR. FOX: Nothing further.

3 THE COURT: All right, you may step down.

4 Thank you, sir.

5 MR. DeBUSK: Your Honor, we ask can Mr. Fryar
6 be allowed to be excused from his subpoena?

7 THE COURT: Any objection?

8 MR. FOX: No, Your Honor.

9 THE COURT: All right. Without objection
10 he's released from his subpoena.

11 MR. DeBUSK: Thank you, Your Honor.

12 (Witness excused).

13 MR. DeBUSK: The State would call Officer
14 Josh Hardee.

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1 JOSH HARDEE, after being first duly sworn,
2 testified as follows:

3 THE CLERK: Please have a seat, state your
4 name and spell your last name.

5 THE WITNESS: Josh Hardee, last name is
6 H-a-r-d-e-e.

7 DIRECT EXAMINATION BY MR. DeBUSK:

8 Q I will ask you a couple obvious questions,
9 Mr. Hardee. Who is your employer?

10 A Conway Police Department.

11 Q How long have you been with them?

12 A About three years now.

13 Q Are you familiar with the Walgreen's in the
14 city of Conway?

15 A Yes, sir.

16 Q Where is that located?

17 A 16th Avenue and 501.

18 Q What county is that?

19 A Horry County.

20 Q Thank you. I will show you what will be
21 marked as State's Exhibit 5. I ask you if you
22 recognize what is on State's Exhibit 5?

23 A Yes, sir. It looks like an aerial view of
24 Highway 501 from Highland Avenue up to around 16th
25 Avenue.

1 Q Does the Walgreen's at 16th and Church
2 Streets appear on that?

3 A Yes, sir.

4 Q I will give you a little sticky and ask you
5 to put it where the arrow points to the Walgreen's.

6 Okay. Were you on duty December 12 of 2011?

7 A Yes, sir, I was.

8 Q What were your duties that night?

9 A Patrol officer.

10 Q Did you respond to a call from Walgreen's?

11 A Yes, sir, I did.

12 Q What happened?

13 A We actually got a call-out for armed robbery
14 at the Walgreen's, I believe Sergeant Johnson was
15 the first officer on scene. We were given a
16 general description of a possible suspect. I saw
17 the subject on Hickory Circle that matched that
18 description and I actually passed the subject the
19 first time, I stopped the car, got out, and when I
20 got out the subject took off fleeing from the scene
21 on foot.

22 Q Did you pursue or inform other officers?

23 A Yes, sir. I notified dispatch I needed other
24 officers in the area, it led to a short foot chase
25 where Officer Scott and Officer Johnson came in.

1 Q What kind of information was in the
2 description?

3 A There was a clothing description, the height,
4 weight approximation.

5 Q Race and sex, et cetera?

6 A Yes, sir.

7 Q Where did you say you saw him first?

8 A Hickory Circle, just before Tinker Town, I
9 think it was.

10 Q In general terms where is Hickory Circle?

11 A Behind the Bi-Lo, between 9th Avenue and 16th
12 Avenue.

13 Q I have another sticky here. I will ask if
14 you can put an arrow that indicates approximately
15 where you first saw that individual.

16 To your knowledge was that individual
17 apprehended?

18 A Say again.

19 Q To your knowledge was that individual you saw
20 on Hickory Circle apprehended?

21 A Yes, sir.

22 Q Did you see him after he was apprehended?

23 A Afterwards he was placed in the rear of a
24 patrol car.

25 Q Did you see him at that point?

1 A Not once he left.

2 Q You just saw him when you approached him and
3 he ran?

4 A Yes, sir.

5 Q And you said he met the general description?

6 A Yes, sir.

7 MR. DeBUSK: Your Honor, at this time we're
8 going to offer State's 5 into evidence.

9 MR. FOX: Without objection.

10 THE COURT: All right.

11 (Aerial photograph marked and received in
12 evidence as State's Exhibit Number 5).

13 BY MR. DeBUSK:

14 Q Just to be clear, where this says, the arrow
15 that is close to what says 16th Avenue and 501, is
16 that the Walgreen's?

17 A Yes, sir, it is.

18 Q The other arrow is where you first saw the
19 defendant?

20 A Yes, sir.

21 MR. DeBUSK: Your Honor, may I publish?

22 THE COURT: Yes.

23 MR. DeBUSK: Please answer any questions the
24 defense has.

25 THE WITNESS: Yes, sir.

1 CROSS EXAMINATION BY MR. FOX:

2 Q Officer, how far were you when you saw Mr.
3 Smith, how far away were you?

4 A He was actually walking down the side of the
5 road as I was fairly close, I would say within ten
6 feet or so.

7 Q Were you on foot or --

8 A I was in my patrol vehicle, sir.

9 Q Okay. Did you make any call to him to stop
10 or anything?

11 A Not until I got out of the vehicle. I
12 actually drove past him at first.

13 Q He started running at that point, correct --

14 A Yes, once I exited the vehicle he was --

15 Q -- before you can do anything? Now, you had
16 a call for an armed robbery at Walgreen's, correct?

17 A Yes, sir.

18 Q What did that put into your mind as a police
19 officers, armed robbery? Did it make you think
20 there might be a weapon, be on the lookout for the
21 defendant with a weapon?

22 A Absolutely.

23 Q Did you see Mr. Smith with a weapon?

24 A At the time, no, sir.

25 Q How far -- you got out, exited your patrol

1 vehicle and he took off running, did you pursue?

2 A I did at first. He took off running toward
3 9th Avenue.

4 Q Okay.

5 A I actually lost him in some brushy area maybe
6 where some houses were and all.

7 Q How far would you estimate it was that you
8 chased him before you had to stop?

9 A Maybe two or three blocks. It wasn't that
10 far.

11 Q Okay. This is the area between -- where is
12 Hickory Circle, between 9th and 16th Avenue in
13 Conway?

14 A Yes, sir.

15 Q Okay. Is it -- in relation to 501 where
16 would it be?

17 A It's between 501 and 378, the first side
18 street after 501 if you come off 9th.

19 Q Okay. So, residential back in there?

20 A Yes, sir.

21 Q Okay. Did you see during the time, a couple
22 blocks you chased Mr. Smith, did you see him throw
23 anything down?

24 A No, sir. It was dark.

25 Q Did you, after you lost him did you make any

1 effort to retrace that area of pursuit to see if
2 you could find a weapon, knife, gun, big club or
3 anything?

4 A After we lost him Officer Scott, after I
5 first lost him Officer Scott had arrived on scene
6 and we were kind of searching through the
7 neighborhood, three or four houses on the street
8 there, some grassy area, trying to locate the
9 subject again and he was observed again closer
10 towards 9th Avenue.

11 Q But it would have been fair to say that,
12 number one, you don't know exactly what has
13 happened, you got a call about an armed robbery,
14 you're unsure whether there is a weapon or not,
15 would it be fair to say you would have been on the
16 lookout for, if you had seen a gun lying on the
17 ground you certainly would have collected it,
18 correct, or at least marked its location for an
19 evidence custodian to come and collect it?

20 A If I had come across any evidence pertinent
21 to the case I would have stood by with it.

22 Q Did you come across any evidence pertinent to
23 the case?

24 A At the time, no, sir.

25 Q How about at anytime?

1 A No, sir.

2 Q Was that the end of your involvement with
3 this incident?

4 A Yes, sir.

5 MR. FOX: All right, thank you. No further
6 questions.

7 THE COURT: Any redirect?

8 MR. DeBUSK: No, Your Honor. We ask Officer
9 Hardee be excused from his subpoena so he can
10 return to his duties.

11 MR. FOX: Without objection.

12 THE COURT: All right, Officer Hardee, you're
13 excused and released from your subpoena.

14 THE WITNESS: Thank you.

15 (Witness excused.)

16 MR. DeBUSK: Your Honor, the State calls
17 Detective Josh Scott.

18 Your Honor, may we approach?

19 THE COURT: Yes.

20 (Unrecorded bench conference).

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1 JOSH SCOTT, after being first duly sworn, testified
2 as follows:

3 THE CLERK: State your name and spell your
4 last name.

5 THE WITNESS: I'm Detective Josh Scott,
6 S-c-o-t-t.

7 DIRECT EXAMINATION BY MR. DeBUSK:

8 Q Officer Scott, I guess Detective Scott now?

9 A Yes, sir.

10 Q Are you still employed with the -- where are
11 you employed?

12 A Conway Police Department.

13 Q And in 2011, December, were you still
14 employed with Conway Police Department?

15 A Yes, sir. I was a patrol officer.

16 Q A patrol officer? Were you on duty the early
17 morning hours of December 12?

18 A Yes, sir.

19 Q Did you encounter the defendant Mr. Smith
20 that night?

21 A Yes, sir, I did.

22 Q Would you explain to the jury what the
23 circumstances were?

24 A We get a call about an armed robbery at
25 Walgreen's, the subject then fled on foot, I think

1 Sergeant Johnson was the first on the scene, gave a
2 BOLO out to be on the lookout for this subject.
3 Officer Hardee was driving down Hickory Circle
4 which is around the Bi-Lo area, right behind Bi-Lo,
5 he says he sees a black male --

6 MR. FOX: Objection to hearsay, Your Honor.

7 Q Please don't tell us what other officers said
8 to you.

9 A Okay. I pulled my car into a dead-end road,
10 a cul-de-sac. I got out of my vehicle, I met with
11 Officer Hardee trying to find the subject involved.
12 While we were just standing there we seen him down
13 a couple houses, we take off after him, the subject
14 fled again. We kind of lost him again. Then we
15 sped around, we then find the subject again, take
16 off running after the subject, he crossed over 9th
17 Avenue, he goes behind a house, in the back yard.
18 When I saw the subject he was actually hanging on
19 the chain link fence. I drew my firearm and told
20 him to stop, get off the fence. He complied, I
21 then demanded he lay down on the ground with his
22 hands spread out, he complied as well. I covered
23 him until Officer Hardee got up to where I was,
24 then Officer Hardee actually cuffed him.
25 Q Who was that subject you stopped?

- 1 A Right there.
- 2 Q The defendant John Henry Smith?
- 3 A Yes, sir.
- 4 Q Okay. Were there any other officers that
5 came to the scene where you were?
- 6 A Yes, sir. After Officer Hardee handcuffed
7 the subject Officer Johnson arrived on scene with
8 his car because me and Officer Hardee didn't have a
9 vehicle and Officer Johnson actually transported
10 him back to the scene.
- 11 Q Do you recall how he was dressed then?
- 12 A All I can remember is he had dark clothing
13 on, like a dark shirt, maybe khaki pants.
- 14 Q I show you State's 5 in evidence and ask if
15 you recognize this?
- 16 A Yes, sir. This is --
- 17 Q Can you identify the approximate location
18 where you placed the defendant under arrest?
- 19 A Yes, sir.
- 20 Q If I gave you a marker could you put the
21 arrow indicating that proximate location?
- 22 THE COURT: Counsel.
- 23 MR. DeBUSK: Oh, thank you, Your Honor.
- 24 Q After Corporal Johnson took the defendant did
25 you have any further contact with him?

1 A With the subject?

2 Q Yes, sir.

3 A No, sir.

4 MR. DeBUSK: Thank you. Please answer any
5 questions the defense may have.

6 THE COURT: Mr. Fox

7 CROSS EXAMINATION BY MR. FOX:

8 Q Detective, during the time you were trying to
9 apprehend Mr. Smith did you ever see him with any
10 weapon?

11 A No, sir.

12 Q Okay. You are actually the one that made
13 contact with him when he was on the fence,
14 commanded him, you said, "Get down off the fence,
15 get on the ground," correct?

16 A Yes, sir.

17 Q Once he was down on the ground did you
18 handcuff him?

19 A I did not.

20 Q Were you present when he was handcuffed?

21 A Yes, sir.

22 Q Who was it that handcuffed him?

23 A Officer Hardee.

24 Q At that time did anyone pat him down, search
25 for weapons?

1 A Yes, sir.

2 Q Okay. And any found?

3 A No, sir.

4 Q Anything that could have been used --

5 obviously by weapon we mean knives or guns,

6 anything else, a big stick, anything that could

7 have been used as a weapon?

8 A I think you can use anything as a weapon.

9 Q Did you find -- I didn't mean to cut you off.

10 A I would think anything in your pocket could

11 be used as a weapon.

12 Q Did you find any objects in his pocket?

13 A Any unusual objects, no.

14 MR. FOX: Thank you -- I'm sorry.

15 Q This was what time of year?

16 A December.

17 Q Okay. And what time of day?

18 A It was late morning, say like --

19 Q After midnight?

20 A Yes, 2:00 o'clock in the morning.

21 Q Do you recall whether it was chilly out that

22 night?

23 A I believe it was kind of chilly out.

24 Q Cold enough to wear more than shirt sleeves?

25 A Yes, sir.

1 MR. FOX: Thank you. No further questions.

2 MR. DeBUSK: The State has no further
3 questions. We would ask Detective Scott be excused
4 from his subpoena and return to duty.

5 THE COURT: Mr. Fox?

6 MR. FOX: Without objection.

7 THE COURT: All right, sir, thank you for
8 coming. You're released from your subpoena.

9 (Witness excused).

10 MR. DeBUSK: The State calls Corporal Chris
11 Johnson.

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1 CHRIS JOHNSON, after being first duly sworn,
2 testified as follows:

3 THE CLERK: State your name and spell your
4 last name.

5 THE WITNESS: Corporal Chris Johnson,
6 J-o-h-n-s-o-n.

7 DIRECT EXAMINATION BY MR. DeBUSK:

8 Q Corporal Johnson, who is your employer?

9 A I'm sorry?

10 Q Who is your employer?

11 A Conway Police Department.

12 Q How long have you been there?

13 A Five and a half years.

14 Q Okay. How about in December of 2012, what
15 were your duties that day?

16 A I was a road patrol officer.

17 Q Okay. In the early morning hours of December
18 12, about 2:00 in the morning did you have contact
19 with the defendant?

20 A Yes, sir.

21 Q Tell us about the circumstances.

22 A We had been dispatched to an armed robbery
23 call at the Walgreen's in Conway, on 16th Avenue,
24 description was given out black male, supposedly
25 come in and had robbed the Walgreen's. Sergeant

1 Johnson, my supervisor at the time, actually went
2 and spoke to the victim.

3 Q Please don't tell us anything someone else
4 said. Just what you observed.

5 A We searched the area. Officer Hardee and
6 Officer Scott had located a suspect, he had started
7 running when they went to get out with him, fitting
8 the description that was given, they did finally
9 make contact with him, detained him. At that point
10 he was placed in the back of my car and I carried
11 him back to the Walgreen's where he was identified
12 by the victim.

13 Q You were actually present when he was
14 presented to the victim?

15 A Yes, sir.

16 Q That was this defendant Mr. Smith?

17 A That's correct.

18 Q Do you remember how he was dressed?

19 A He had on I think khaki pants, some sort of
20 sweatshirt and tennis shoes.

21 Q Okay. Were you involved in the actual chase
22 when he was apprehended?

23 A No, sir.

24 Q You transported him from the scene where he
25 was apprehended to the Walgreen's?

1 A That's correct.

2 Q Okay. From the Walgreen's where did you take
3 him?

4 A He was taken to J. Ruben Long Detention
5 Center.

6 Q Did he have the same clothes on when you
7 turned him over to J. Ruben Long, that he had when
8 he was apprehended?

9 A Yes, sir.

10 Q Were you present when they searched him at J.
11 Reuben Long?

12 A Yes, sir.

13 Q What did they find on him?

14 A In his left shoe was found three \$20 bills.

15 Q \$60.00 in \$20 bills? Did they find anything
16 else of note, weapons?

17 A No, sir.

18 Q Okay. When he was arrested and taken to J.
19 Ruben Long did he have a hat or jacket?

20 A He did not, no, sir.

21 MR. DeBUSK: Please answer any questions the
22 defense has.

23 MR. FOX: No questions, Your Honor.

24 THE COURT: You may step down.

25 (Witness excused).

1 MR. DeBUSK: We ask Corporal Johnson be
2 released from his subpoena so he can return to
3 duty.

4 THE COURT: Any objection?

5 MR. FOX: No objection.

6 THE COURT: All right, Corporal Johnson,
7 you're released from your subpoena.

8 MR. DeBUSK: Officer Jordan, please.

9 (Unrecorded beach conference).

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1 JEFFREY WAYNE JORDAN, after being first duly sworn,
2 testified as follows:

3 THE CLERK: State your name and spell your
4 last name.

5 THE WITNESS: Jeffrey Wayne Jordan, last name
6 is J-o-r-d-a-n.

7 DIRECT EXAMINATION BY MR. DeBUSK:

8 Q Officer Jordan, who is your employer?

9 A Conway City Police Department.

10 Q How long have you been with them?

11 A Four years.

12 Q December of 2012 what were your duties?

13 A Sir?

14 Q December, 2012, what were your duties?

15 A I worked on Delta squad as a patrol officer.

16 Q Patrol officer? Were you on duty at 2:00 in
17 the morning when there was an armed robbery call at
18 Walgreen's December 12?

19 A No, sir.

20 Q Were you on duty later that day?

21 A Yes, sir. I come in in the morning shift.

22 Q Did you aid in the investigation that day?

23 A Yes.

24 Q What did you do?

25 A When we come in we got a report that they had

1 an armed robbery take place during the night at
2 Walgreen's. They informed us that the subject had
3 been, or a subject had been detained or
4 apprehended. The subject was, during the armed
5 robbery had a coat on and they were missing the
6 coat, so I went to the area and did a foot patrol
7 and tried to locate the coat.

8 Q Were you able to locate a coat?

9 A Yes, sir.

10 Q Where did you locate that coat?

11 A Just off 16th Avenue, on Cherokee Street.

12 Q I want to show you what has been marked
13 State's Exhibit 5 and ask if you recognize this?

14 A Yes, sir.

15 Q Can you locate the proximate spot where you
16 found that coat?

17 A Yes.

18 THE COURT: And he is referring to State's
19 Exhibit --

20 MR. DeBUSK: Exhibit 5, Your Honor.

21 THE COURT: Exhibit 5, okay.

22 BY MR. DeBUSK:

23 Q I'm going to give you a small sticky with an
24 arrow on it and ask if you could put it so the
25 arrow indicates the approximate spot where you

1 found the coat.

2 Okay. Where was the coat when you found it?

3 A Coming off 16th Avenue, I was walking down
4 Cherokee, it was on the left side of the road, just
5 off the roadway, in the grass.

6 Q Okay. Was it hidden?

7 A It was kind of balled up, if I remember
8 correctly, it was kind of near a pole or kind of
9 secluded.

10 Q Did you find anything else besides the coat?

11 A I found a hat and it also was, I think, a key
12 chain inside the coat.

13 MR. DeBUSK: Your Honor, these are three
14 items in the bags, could we mark it a composite
15 exhibit?

16 THE COURT: Any objection to that, Mr. Fox?

17 MR. FOX: No, Your Honor.

18 THE COURT: All right, you may.

19 MR. DeBUSK: State's Exhibit 6.

20 (Coat and hat marked and received in evidence
21 as State's Exhibit Number 6).

22 THE COURT: That would be the coat and the
23 hat?

24 MR. DeBUSK: Yes, Your Honor. I will have
25 him identify them.

1 THE COURT: All right.

2 BY MR. DeBUSK:

3 Q Officer Jordan, would you open that bag and

4 tell me if you can identify what is in it?

5 A The coat and hat I collected.

6 Q You collected those items?

7 A Yes.

8 Q And put them in evidence?

9 A Yes.

10 MR. DeBUSK: At this time we move to admit

11 composit Exhibit 6 in evidence.

12 MR. FOX: No objection.

13 THE COURT: It's already in without.

14 BY MR. DeBUSK:

15 Q This hat --

16 A Yes, sir.

17 Q -- and this jacket were what you found near

18 Cherokee?

19 A Yes, sir.

20 Q Did you have any further involvement in the

21 investigation of this case?

22 A No, sir.

23 Q Thank you. And the arrow you placed here

24 near 16th avenue and Cherokee is approximately

25 where you found the hat?

1 A Yes, sir.

2 MR. DeBUSK: Thank you. Please answer any

3 question the defense may have.

4 CROSS EXAMINATION BY MR. FOX:

5 Q Officer, you are specifically looking for a

6 coat but you would have collected anything you

7 thought was of evidentiary value?

8 A Yes, sir.

9 Q In other words, a gun?

10 A Yes, sir.

11 Q A knife?

12 A Yes, sir.

13 Q Some kind of weapon?

14 A Yes.

15 Q Did you find anything other than the coat and

16 hat?

17 A No, sir.

18 Q The coat I'm guessing had pockets?

19 A Yes, sir.

20 Q You searched through those pockets?

21 A Yes, sir.

22 Q To make sure there wasn't anything of

23 evidentiary value?

24 A Yes.

25 Q Did you find anything of value?

1 A No, sir. Just the key chain inside the
2 pocket.

3 MR. FOX: Thank you. No further questions.

4 THE COURT: Any redirect?

5 MR. DeBUSK: No, Your Honor. We would ask
6 Officer Jordan be released from the subpoena so he
7 can return to his duties.

8 THE COURT: All right, you may step down.
9 Any objection to his release?

10 MR. FOX: Of course not, Your Honor.

11 THE COURT: Officer Jordan, you're released
12 from your subpoena, thank you.

13 (Witness excused).

14 MR. DeBUSK: Your Honor, at this time our
15 next witness will require some travel time.

16 THE COURT: All right. I tell you what we're
17 going to do, it is almost 12:30, we're going to
18 break for lunch, I will ask the jury to be back at
19 2:00 o'clock.

20 (The jury was excused from the courtroom).

21 THE COURT: We'll be at ease until 2:00
22 o'clock this afternoon.

23 MR. DeBUSK: Your Honor, may I approach?

24 THE COURT: Yes.

25 MR. DeBUSK: It has nothing to do with this

1 case. The second case.

2 (Unrecorded bench conference).

3 (Resumed at 1:57 p.m.).

4 THE COURT: All right, are we ready?

5 MR. DeBUSK: Your Honor, Mr. Fox went to talk
6 to his client.

7 (Mr. Fox and the defendant are now present).

8 THE COURT: All right. Bring in the jury.

9 (The jury returned to the courtroom).

10 THE COURT: All right, Mr. DeBusk.

11 MR. DeBUSK: Thank you, Your Honor. The
12 State calls Susan Susan Safford of the Horry County
13 Sheriff's office.

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1 SUSAN SAFFORD, after being first duly sworn,
2 testified as follows:

3 THE CLERK: Have a seat, state your name and
4 spell your last name.

5 THE WITNESS: My name is Susan Safford,
6 S-a-f-f-o-r-d.

7 DIRECT EXAMINATION BY MR. DeBUSK:

8 Q Captain Safford, who is your employer?

9 A Horry County Sheriff's Office, J. Ruben Long
10 Detention Center.

11 Q What are your duties there?

12 A Part of my duties is I supervise the booking
13 department which also includes our property room
14 for inmates, storage of their property while
15 they're in our facility.

16 Q For those who may not know, J. Ruben Long is
17 our county jail?

18 A Yes, it is.

19 Q When someone is booked into the county jail
20 they come in in civilian clothes?

21 A Correct.

22 Q Do they keep those civilian clothes
23 sometimes?

24 A After a certain period of time if the inmate
25 is not able to bond out the clothes are removed,

1 they are put in our inmate uniform and the clothes
2 are stored in our property room.

3 Q Okay. When the defendant John Henry Smith
4 was booked in what was done with his clothing?

5 A They were put in a property bag and stored in
6 our property room.

7 Q Securely stored?

8 A Yes.

9 Q Was all his possessions inside that one bag?

10 A Correct.

11 Q Did there come a time you pulled Mr. Smith's
12 property from storage?

13 A Yes.

14 Q What did you do with it?

15 A Dale Long had a search warrant and he came
16 out to collect some items out of the bag.

17 Q Is that Sergeant Dale Long of the Conway
18 Police Department?

19 A Yes.

20 Q And those are the same items taken from the
21 defendant when he was put in jail uniform?

22 A Correct.

23 Q And stored under his name securely?

24 A Correct.

25 MR. DeBUSK: Thank you. Please answer any

1 questions the defendant may have.

2 THE COURT: Mr. Fox?

3 CROSS EXAMINATION BY MR. FOX:

4 Q Ma'am, would you keep a record of what was
5 taken from each person that was booked?

6 A Yes, we do.

7 Q Okay. But in this case your testimony is
8 only that you are in charge of that and at some
9 point you received a request from Dale Long to
10 retrieve Mr. Smith's belongings, is that correct?

11 A Correct.

12 MR. FOX: Thank you. I have no further
13 questions.

14 MR. DeBUSK: Your Honor, I have no further
15 questions either. I ask Captain Safford be excused
16 from her subpoena and return to her duties.

17 THE COURT: Any objection?

18 MR. FOX: No, sir.

19 THE COURT: Captain Safford, you are excused
20 and released from your subpoena.

21 (Witness excused).

22 MR. DeBUSK: Call Sergeant Dale Long.

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1 DALE LONG, after being first duly sworn, testified
2 as follows:

3 THE CLERK: State your name and spell your
4 last name.

5 THE WITNESS: My name is Dale Long, L-o-n-g.

6 DIRECT EXAMINATION BY MR. DeBUSK:

7 Q Sergeant Long, who is your employer?

8 A Conway Police Department.

9 Q What are your duties at this time?

10 A I am the sergeant over the criminal
11 investigations unit.

12 Q Were you involved in the investigation of
13 this case in December of 2011?

14 A I was not.

15 Q Did there come a later time when you received
16 a search warrant at the Horry County Detention
17 Center, J. Ruben Long Detention Center?

18 A Yes.

19 Q Who did you correspond with there?

20 A I obtained the search warrant from the Horry
21 County Magistrate at the jail and then I delivered
22 a copy of that to Captain Safford and she brought
23 out the property that I was requesting.

24 Q Okay. From that -- how was that property
25 stored at the jail, what was it contained in?

1 A It came to me in a bag they opened up and
2 gave me the items.

3 Q Okay. What items did you collect?

4 A It was several items of clothing listed on
5 the search warrant return, shoes, pants, a
6 sweatshirt type, shirt and a pair of sweat pants,
7 regular pants and sweat pants.

8 Q I notice you have a bag there. What is in
9 that bag?

10 A That is the contents that were delivered to
11 me.

12 Q Okay. Please take that bag out, if you
13 could.

14 After you collected them what did you do with
15 them?

16 A I collected them, then I maintained them in
17 my care, custody and control until today.

18 Q All right. Are those the same items you
19 collected in substantially the same condition?

20 A They are.

21 MR. DeBUSK: Your Honor, I don't intend to
22 take the items out of the bags. Should I do it
23 separately or as a composite exhibit?

24 THE COURT: A composite.

25 MR. DeBUSK: Mark it as State's 7.

1 BY MR. DeBUSK:

2 Q This one looks like a burgundy tee-shirt.

3 A Sweat shirt.

4 Q A pair of sweat pants?

5 A Yes.

6 Q A pair of khaki pants?

7 A Yes.

8 Q And a pair of shoes with dark soles?

9 A Yes.

10 Q And these are in the same condition, again,

11 as you collected them?

12 A Yes, transferred from their container to my

13 container.

14 MR. DeBUSK: I don't know if Mr. Fox has had

15 a chance to see them. We move them in evidence at

16 this time.

17 MR. FOX: Without objection, Your Honor.

18 MR. DeBUSK: Your Honor, we move these into

19 evidence as State's 7.

20 THE COURT: All right.

21 (Tee-shirt, sweat shirt, sweat pants, khaki

22 pants and shoes marked and received in

23 evidence as State's Exhibit Number 7).

24 BY MR. DeBUSK:

25 Q Other than that did you do any other

1 investigation in the case?

2 A No.

3 MR. DeBUSK: Thank you. Please answer any
4 questions Mr. Fox has.

5 CROSS EXAMINATION BY MR. FOX:

6 Q Sergeant, you basically retrieved the items
7 from J. Ruben Long, took them out of their
8 container and put it in your own, kept control of
9 it until court today, correct?

10 A Yes.

11 Q Okay. You didn't have any reason to go
12 through any of the clothing?

13 A No.

14 Q Okay. If that had been done before it would
15 be normal procedure if they had found any item in
16 the clothing, whether it be a key chain or money or
17 knife, anything else, that would have been
18 separated from the clothing?

19 A I don't know how they store it but that was
20 not there.

21 Q Those four items is everything you received?

22 A Correct.

23 MR. FOX: Thank you. That's all.

24 MR. DeBUSK: Your Honor, no further
25 questions. We ask that Sergeant Long be excused

1 from his subpoena.

2 THE COURT: All right, you may step down.

3 Any objection to his being excused?

4 MR. FOX: No, sir.

5 THE COURT: Mr. Long, you are excused from
6 your subpoena.

7 THE WITNESS: Thank you, sir.

8 (Witness excused).

9 MR. DeBUSK: At this time the State rests.

10 THE COURT: All right. Take the jury to the
11 jury room, please.

12 (Jury excused from the courtroom).

13 THE COURT: Mr. Fox, the State has rested.

14 MR. FOX: Yes, sir. At this time I would
15 make a motion for a directed verdict on the charge
16 of armed robbery. Your Honor, the ground, the
17 State has not proven all the elements of armed
18 robbery. Unquestionably the testimony is there was
19 no weapon, which is one way it makes it an armed
20 robbery, which if you have a gun that is armed
21 robbery. There is no evidence of any actual weapon
22 either by Mr. Fryar who was the clerk at the
23 Walgreen's or by any officer that found anything
24 subsequently, so that element of armed robbery,
25 that prong is not even at issue today.

1 So then the issue is were his words. The
2 testimony being Mr. Smith came in and said,
3 indicated, "I have a gun verbally." Was that
4 sufficient? Your Honor, I would argue under South
5 Carolina, State of South Carolina versus Muldrow, a
6 2002 Supreme Court case very much on point. I will
7 hand up a copy.

8 THE COURT: Words alone.

9 MR. FOX: Yes, sir.

10 THE COURT: A words alone case.

11 MR. FOX: That's exactly right, Your Honor.

12 So, I would argue that is what we have here, words
13 alone, Muldrow was actually a note rather than
14 verbal, otherwise exactly on point, so we would ask
15 on that basis that Your Honor direct a verdict.

16 THE COURT: All right. Mr. DeBusk, Muldrow
17 seems to say that if he just comes in and says
18 something like, "I will shoot," I think that is
19 exactly what the words were in Muldrow, as I
20 recall, and they said that is not enough but what
21 is different about this case?

22 MR. DeBUSK: Your Honor, there is more than
~~23 words here. There was an actual representation of~~
24 a weapon, he had his hand in his pocket indicating
25 that he had a weapon in his pocket, "I have a gun."

1 The hand is enough of an object to be a
2 representation of a deadly weapon. And it is more
3 than just words, Your Honor, there is words with a
4 representation and it would be sufficient to
5 fulfill the requirement.

6 THE COURT: What testimony said he actually
7 said --

8 MR. DeBUSK: He said, "I have a gun, give me
9 the money," and that he had his hand in his pocket.

10 THE COURT: All right. What do you say about
11 that, Mr. Fox? Doesn't that go beyond Muldrow?

12 MR. FOX: I think Your Honor of course can
13 consider what you heard and saw in terms of
14 testimony. You have the video, there is a hand in
15 the pocket but no motion whatsoever, certainly no
16 pointed finger. I watched very carefully to see
17 whether there was any kind of, at any point whether
18 the jacket came up at all as if someone was pulling
19 a gun and pointing it at somebody even if it were a
20 fake, even if that were pretend, and there was
21 literally no movement whatsoever I would argue that
22 there was in fact no representation of a weapon and
23 the only indication was the words.

24 THE COURT: What about it, Mr. DeBusk?

25 MR. DeBUSK: Again, the statute reads any

1 object which a person present during commission of
2 an armed robbery reasonably believed to be a deadly
3 weapon. A hand in a pocket, coupled with the
4 statement, "I have a gun," is sufficient.

5 THE COURT: The statute says while having
6 possession of an object which the defendant alleges
7 by words or actions to be a deadly weapon and which
8 the victim reasonably believes to be a weapon. I
9 mean, that is sort of what the statute says, isn't
10 it?

11 MR. DeBUSK: That says while using a
12 representation of a deadly weapon, I think is the
13 only difference.

14 THE COURT: I think it goes beyond Muldrow,
15 Mr. Fox, and I would respectfully deny your motion.

16 MR. FOX: Yes, sir, Your Honor.

17 THE COURT: Okay. All right.

18 MR. FOX: At this time, other than the
19 Court's inquiring of Mr. Smith, we do not intend to
20 call any other witnesses or present any other
21 evidence, so it would be appropriate for Your Honor
22 to question Mr. Smith about his desire to testify.

23 THE COURT: All right. Mr. Smith, at this
24 time I'm going to explain to you certain of your
25 rights. If you don't understand anything I say I

1 want you to let me know and if you want me to
2 explain it in more detailed fashion I want you to
3 let me know that. Do you understand?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Place Mr. Smith under oath.

6 JOHN HENRY SMITH, after being first duly sworn,
7 stated as follows:

8 THE COURT: Now we have reached the stage of
9 the trial where you may present your defense and
10 you have the right to claim protection given you by
11 the Fifth Amendment to the Constitution of the
12 United States. That Amendment says at least in
13 part that no person shall be compelled in any
14 criminal case to be a witness against himself.
15 This means that you cannot be required to testify
16 in this case. You have a right to testify on your
17 own behalf, however no one can make you testify and
18 this is a personal right you have and no one can
19 waive this right except you.

20 If you decide to testify you will be subject
21 to the same rules that govern other witnesses, you
22 may be examined and cross-examined on any relevant

23 ~~issue in the case. In addition, if you have any~~

24 convictions involving dishonesty or false

25 statements or crimes punishable by imprisonment for

1 more than one year and this Court determines that
2 the probative value of admitting the evidence
3 outweighs its prejudicial affect to you the
4 Solicitor will be able to introduce your record to
5 attack your credibility.

6 If you decide to testify this decision on
7 your part must be freely, voluntarily and
8 intelligently made with the knowledge of the
9 protections given you by the Fifth Amendment and
10 the consequences of your decision to testify. If
11 you decide not to testify, this is very important,
12 Mr. Smith, if you decide you do not want to testify
13 I will instruct the jurors they cannot give the
14 fact that you did not testify any consideration
15 whatsoever and that there is to be absolutely no
16 prejudice to you because you did not testify.

17 It is left entirely up to you whether or not
18 to testify. Now, you can talk further with your
19 attorney, I know you have been discussing this with
20 your attorney, you can discuss it with your family,
21 your friends, anyone else that you think might be
22 able to help you but the decision will ultimately
23 be left entirely up to you.

24 Do you understand what I have explained to
25 you?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: All right. Now, do you have any
3 questions about what I have explained to you?

4 THE DEFENDANT: No, sir.

5 THE COURT: Now, have you, again, discussed
6 this matter fully with your attorney?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: And have you made a decision
9 whether or not you will or will not testimony?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Do you wish to testify?

12 THE DEFENDANT: No, sir.

13 THE COURT: Okay. Do you wish to talk to
14 your attorney about that any further?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Okay, go ahead.

17 (Brief Conference between Mr. Smith and Mr.
18 Fox).

19 THE COURT: Mr. Smith, have you had adequate
20 time to discuss this with your attorney?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Do you wish to testify or remain
23 silent?

24 THE DEFENDANT: No, sir.

25 THE COURT: You don't want to testify?

1 THE DEFENDANT: No, sir.

2 THE COURT: Very well. Thank you very much.

3 All right, Mr. Fox, will the State put up a
4 defense, I mean, will the defense put up witnesses?

5 MR. FOX: No, Your Honor, the defense would
6 rest.

7 THE COURT: All right. So, the defense has
8 rested?

9 MR. FOX: Yes, sir.

10 THE COURT: All right. Gentlemen, I intend
11 to release the jury until tomorrow morning. I do
12 not have a charge, I thought I did but I didn't.
13 Just a moment ago I looked and I could not find it
14 so I will have to prepare a charge on the law.

15 So, reluctantly I'm going to let them go.

16 MR. DeBUSK: Your Honor, I thought Taylor had
17 prepared one.

18 THE COURT: I'm sorry, he didn't. I thought
19 he did, too.

20 MR. FOX: Could we discuss the charge?

21 THE COURT: I would like to do that while
22 we're still here. Does the State request a lesser
23 included?

24 MR. DeBUSK: No, Your Honor.

25 THE COURT: Does the defense?

1 MR. FOX: Yes, Your Honor. I think there is
2 testimony of the fact, undisputed there is no
3 weapon, there is testimony that the clerk, the
4 victim, did fear for his safety and so I think that
5 would meet the elements. The jury may well find
6 that there was not a representation as a factual
7 issue and they may well find there was a robbery
8 and fear which makes it strong arm robbery, so we
9 would request strong arm robbery.

10 Your Honor, in fact we would request petty
11 larceny because they may well just say from their
12 determination, they can believe everything the
13 clerk said or nothing, they may say he didn't act
14 like he was in fear of his life. We watched the
15 video, we believe no question there was a robbery
16 but there actually was no fear for his wellbeing,
17 that is a determination they could make based on
18 the evidence they have, that would be petty
19 larceny, which is also a lesser included of strong
20 armed robbery, so we request both those charges,
21 Your Honor.

22 THE COURT: Isn't the only testimony that he
23 was in fear? Is there any evidence that suggests
24 he wasn't?

25 MR. FOX: I would argue the video, Your

1 Honor, that he is calm and collected, that is a
2 jury issue and again they can believe everything a
3 witness says --

4 THE COURT: All right, let me hear from you
5 on that, Mr. DeBusk.

6 MR. DeBUSK: Your Honor, I don't know. The
7 video seems to have much the opposite effect to me.
8 You see the clerk backing away against the wall in
9 fear and it is only upon further threatening and
10 prodding he went up to the register and took the
11 money out. I say there is no evidence on the
12 record of a lack of fear and petty larceny doesn't
13 apply and I also argue that strong arm doesn't
14 apply because the only threats on the records were
15 use of a deadly weapon, "I have a gun, don't make
16 me hurt you."

17 MR. FOX: That is Muldrow, Your Honor.

18 THE COURT: I think under Muldrow --

19 MR. DeBUSK: Plus the representation.

20 THE COURT: If they believe there was a
21 representation it's obviously armed robbery. If
22 they don't believe there is a representation it's
23 strong arm robbery, it is one of the two, as I see
24 it. I don't think there is any evidence it should
25 be a petty larceny. The only evidence I have heard

1 in this case is there was a threat to shoot or harm
2 but by implication he said he had a gun, the clerk
3 has testified he was in fear, I don't think there
4 is any testimony to suggest otherwise, I believe it
5 is either an armed robbery or strong arm robbery.
6 I'm going to charge strong armed robbery.

7 MR. FOX: Your Honor, I request the specific
8 language in Muldrow that words alone are not
9 sufficient. Of course that discusses
10 representation.

11 THE COURT: Okay, all right.

12 MR. DeBUSK: I think that that is covered in
13 the standard charge.

14 THE COURT: Is that everything we need to do?

15 MR. FOX: I believe so, Your Honor.

16 THE COURT: Okay. All right, bring the jury
17 in.

18 (The jury returned to the courtroom).

19 THE COURT: Ladies and gentlemen of the jury,
20 as you heard just before you went into your jury
21 room, the State rested. Following that the Court
22 took up several matters that were required
23 concerning this case. We are at a stopping point,
24 all the evidence that you will hear in this case
25 has been submitted to you. In the morning I'm

1 going to bring you back, we will hear closing
2 argument, I will charge you on the law and you will
3 deliberate.

4 Mr. Ropp, take the jury back to their jury
5 room and help them get to their vehicles.

6 BAILIFF: Yes, sir.

7 THE COURT: All right, we're at ease, then,
8 until tomorrow morning.

9 (Recessed at 2:25 p.m.).

10 (Reconvened at 9:52 a.m., April 18, 2013).

11 THE COURT: Mr. Fox, Mr. DeBusk, I have
12 re-examined your motion to include a charge on
13 petty larceny over the evening. I found, I'm
14 sorry, I found a case of State versus Watson, a
15 1875 case, which is pretty much on point. Watson
16 says to snatch monies from the hands of another is
17 not strong arm robbery, rather it is petty larceny.
18 I am aware of State versus Parker. In Parker the
19 Court essentially said that a grand larceny charge
20 was not appropriate as a lesser included offense
21 because it involved the necessity of the State
22 proving an additional element, that being the
23 amount taken. But in this case we do have that
24 proof, \$60, we know exactly what it was, three \$20
25 bills, so I am going to out of an abundance of

1 precaution give that charge.

2 MR. DeBUSK: Your Honor, what year did you
3 say that case was?

4 THE COURT: 1875.

5 MR. DeBUSK: 1875 it was not the statutory
6 crime of purse snatching, there is now a statutory
7 crime --

8 THE COURT: It didn't involve the snatching
9 of a purse or anything of that nature, it was just
10 a taking of money.

11 MR. DeBUSK: The fact that snatching was
12 anything of value, it does not say purse.

13 THE COURT: All right. I'm still going to
14 give him a charge on that.

15 All right, are we ready to argue?

16 MR. FOX: Yes, Your Honor.

17 MR. DeBUSK: Yes, Your Honor.

18 THE COURT: Mr. Ropp, if you would bring in
19 the jury.

20 (The jury returned to the courtroom).

21 THE COURT: Ladies and gentlemen of the jury,
22 it's good to have you back. I trust you had a good
23 evening.

24 Who is the Krisphy Kreme representative?

25 We're at the point in this case where both

1 the defense and the State have rested and we are
2 now going to hear arguments from counsel.

3 Mr. DeBusk, will you argue first?

4 MR. DeBUSK: Yes, Your Honor.

5 THE COURT: All right.

6 MR. DeBUSK: May it please the Court.

7 Ladies and gentlemen, if you look at me you
8 are going to see the Solicitor with his hand in the
9 pocket, I brought a toy gun, I thought I had me a
10 toy gun there, I don't have it. Hold that moment,
11 I'm going to really pull out a deck of cards.

12 There is a game called, you can't turn on the
13 TV without seeing somebody playing a game called
14 Texas Hold'em poker, a very simple game, they put
15 down three cards everybody gets to use in their
16 hand. Then each player gets two cards face down
17 and they know what their hole cards are, they can
18 look at them and the rest of the table doesn't
19 know. And then they make bets based on what they
20 think the other person has in the hole.

21 They make a round of bets and there is some
22 money on the tale. They get another card, another
23 round of bets, they look at their card, do I have
24 enough to beat somebody? I might make a couple
25 pairs or get a straight, all the cards in the same

1 suit. They put down another card and you have to
2 decide do I have enough to increase and bet more
3 and the other guy beat me? You have to decide, you
4 have to look at things, you have to look at what
5 you think the others might have, and the stakes is
6 how much money you have on the table, how much more
7 to bet.

8 Now, if you have a whole lot of nothing, no
9 pairs, no full house, no straight, no nothing,
10 you're not going to want to put much into that. It
11 wouldn't be reasonable to bet a lot more money.
12 The main thing, they are going to beat you. So,
13 you will probably fold. You don't know what the
14 other guy has, he might have nothing, if you fold
15 you might have lost your money for nothing, he
16 might have less than you have or he might take
17 these cards and have a royal flush. It is easy
18 when you're this guy over here, you have nothing,
19 you know the odds are not very good.

20 What about this guy, he has two kings, if
21 there is a king on the table, then he's got a
22 pretty good hand. He has to decide what the other
23 person has. The fun of that game is trying to
24 figure out what the other person has, what they
25 have in the hole, can they hurt you with what they

1 have in the hole.

2 That is just a game. In this case we're
3 talked about armed robbery but there is a
4 similarity. When John Henry Smith went into the
5 Walgreen's on December 12, 2012, he was holding the
6 cards, he went up to Hilton Fryar with a hand in
7 the pocket, he said, "I have a gun." Hilton Fryar
8 had to decide whether to fold or call the bluff.

9 And was it reasonable for Hilton Fryar to
10 think he had a gun? Yes. You can't tell what is
11 in there. The guy says he has a gun, pretty good
12 odds he has a gun. Think of the stakes. If he's
13 got a gun and you call the bluff Hilton Fryar gets
14 shot, he gets killed, the stakes are his life, so
15 it is reasonable for him to believe there is a gun
16 in his pocket.

17 Now, armed robbery, most people think they
18 have to point a gun in your face but there is more
19 than that. The State of South Carolina says if you
20 use a representation of a gun, if it is just a hand
21 in a pocket and you allege you're armed, you say,
22 "I have a gun," that is enough for armed robbery.
23 That it is what we have here.

24 Could I have the screen, please?

25 Now, you recall in evidence we have a

1 surveillance tape of the robbery. The whole thing
2 was caught on tape. I want you to take a look for
3 a minute, as soon as the projector comes down, at
4 what happened. When you think about it, Mr. Hilton
5 Fryar, a stranger comes in there and says he has a
6 gun, he has his hand in his pocket. Think of the
7 odds, think of the stakes, his life. In 14 seconds
8 we'll watch that video again. While we're talking
9 about that, let's talk about a few other things.

10 If you will recall, Mr. Smith walked into the
11 store to pick up a box of ziplock bags, walked up
12 to the counter, sort of pretense, asked how much
13 those bags cost. Here is the counter. Behind it
14 is a rack of cigarettes.

15 Let's take a look at what happened when
16 without expecting it Hilton Fryar responded to a
17 very high stakes game. What is the time? He walks
18 up to the counter with the box of ziplock bags.
19 Here comes Hilton Fryar with the red jersey, checks
20 the price of the bags and tells him -- excuse me.
21 The software wants to be updated.

22 Let's back up just a bit, start again. The
23 box of ziplock bags, here comes Hilton Fryar,
24 checks the price of the bags, he tells him. All
25 this time you notice Mr. Smith had his hand in his

1 pocket. Now he starts pointing over at the
2 register and Hilton Fryar sees he is wanting money.
3 Watch what he does here. Now, look at him pointing
4 at his pocket, he points back at Hilton Fryar,
5 watch what Mr. Fryar does, he backs up about as far
6 as he can get, in that rack of cigarettes. If it
7 hadn't been there he would have gone farther back
8 against the wall. There in his face the man is
9 saying he has a gun, he is telling him, "Give me
10 that money." He's pointing over to his pocket
11 again, pointing at the register, "Give me that
12 money."

13 Mr. Fryar goes over to the register, he puts
14 in his code so he can open the drawer. There comes
15 the cash drawer open, looks at him, he should be
16 looking at the cash drawer. Instead, he is looking
17 over there at the man that says he has a gun in his
18 face. Slowly and nervously he starts pulling the
19 cash out of the drawer as he is commanded to do.
20 Not fast enough for Mr. Smith, though. Watch what
21 he does here in just a moment.

22 But for that threat, but for that threat, "I
23 have a gun," that drawer never would have been
24 opened, he wouldn't have had a chance to grab that
25 money and run. That is robbery, ladies and

1 gentlemen, that threat of force, taking something
2 of value away from the possession of another,
3 that's robbery. In this instance it's armed
4 robbery.

5 Now, before I go on to talk to you in more
6 detail about the law I will talk to you just a
7 minute about establishing the identify of Mr. Smith
8 as the robber, the person in this picture.

9 Could I have the light up just a little bit?
10 Thank you.

11 Look at this map. Remember this map? The
12 officers put the arrows, Walgreen's, where they
13 found the jacket, where Officer Hardee first saw
14 the defendant, Cherokee Street and Hickory Drive,
15 down here on 9th where they ultimately captured
16 him. When they captured him he was wearing the
17 same clothes he had on in this picture, the same
18 burgundy tee-shirt with the design on the front,
19 the same khaki pants, the same tennis shoes.

20 If you look closely you see they have a dark
21 colored sole, dark colored sole, black marks on the
22 side. Same clothing. Right along his route, that
23 jacket and the hat he had backwards on his head.
24 And most incriminating at all was when Corporal
25 Johnson took him out to the jail what did he have

1 in his shoe? Three \$20 bills, the same three \$20
2 bills Hilton Fryar testified he took from him. It
3 was the defendant who went in Walgreen's and robbed
4 Hilton Fryar and Walgreen's of their money.

5 Now I want to talk to you a little bit about
6 the law of armed robbery. Armed robbery has
7 elements just like any crime, things we have to
8 prove. The first element is the taking. You
9 clearly saw in that video him taking \$60.00.

10 And carrying it away. He carried it away and
11 headed south before he is caught by the police.

12 Property of another. That \$60.00 belonged to
13 Walgreen's, it didn't belong to Mr. Smith.

14 With intent to deprive the owner of
15 possession. He wasn't giving that \$60.00 back, he
16 had it in his shoe already. As far as he was
17 concerned once he got out of that store that was
18 his \$60.00. That makes it robbery, taking,
19 carrying away the property of another with intent
20 to deprive the owner of possession.

21 There is two kinds of robbery, strong armed
22 robbery where you threaten somebody with force if
23 they don't give you something, and that is clearly
24 a threat here, it could be strong armed robbery.
25 But there is another kind, that is what we're here

1 today about, armed robbery.

2 To be an armed robbery they have to either be
3 armed or allege to be armed with some indication.
4 If they are armed with a deadly weapon, deadly
5 weapon, that is defined in the statute. Pistol,
6 slingshot, metal knuckles, razor, any other deadly
7 weapon. In this case he alleged he had a gun.
8 There are plenty of guns small enough to fit in
9 somebody's hand and in their pocket. I bear the
10 scar of shooting one of those guns one time, I
11 didn't quite know how small it was and when the
12 slide went back it cut my hand because it was so
13 small. If I put it in my pocket you couldn't tell.

14 The other way, this is a mouth full, I will
15 break it down for you. While alleging either by
16 action or words he was armed while using a
17 representation of a deadly weapon or any object
18 which a person present during the commission of the
19 robbery reasonably believed to be a deadly weapon.
20 That is a mouth full, I will break it down a little
21 bit. Alleging either by action or words he was
22 armed.

23 I would argue to you that this is alleging by
24 actions you're armed. But we had more than that.
25 We had the actual words, "I have a gun." And more

1 than that, the, "I have a gun," he pointed, on the
2 video he was pointing to his pocket.

3 While using a representation of a deadly
4 weapon. That is a toy gun that looks realistic, a
5 plastic knife that really looks real, or any object
6 which a person present during the commission of the
7 armed robbery reasonably believed to be a deadly
8 weapon. A hand is an object. If all he had was
9 his hand in that pocket that's enough, that is a
10 representation of a deadly weapon and he has
11 alleged himself to be armed, "I have a gun." That
12 is enough for armed robbery, any object.

13 Was there more than his hand in there, yes,
14 maybe, could have been a gun. You see how far he
15 ran, a pretty long way through neighborhoods, he
16 made effort to hide things, he threw that jacket
17 and hat off, they are big and bulky and hard to
18 hide. He took that \$60.00 and put it in his shoe
19 where the corporal found it. He could have easily
20 taken the gun out of his pocket and hid it
21 somewhere. And the jacket, he might throw away,
22 the gun is an expensive thing, you hide it
23 somewhere where you can get it later. He might
24 have stuck it in a knot hole in a tree.

25 But I don't have to prove he had a gun to

1 prove him guilty of armed robbery. I have to prove
2 he alleged he was armed and he used some
3 representation of a gun to make the victim think he
4 was armed. That gets back to poker. Why is that,
5 why is that enough for armed robbery? Because the
6 State of South Carolina doesn't make you call his
7 bluff at the risk of your life to find out if he's
8 armed. They say it's armed robbery just when he
9 alleges and makes a representation of a weapon,
10 that's enough and that is what you have here.

11 The law in the State of South Carolina, he
12 alleged he had a gun, he used a representation,
13 "I've got a gun," that's armed robbery. It is not
14 strong arm robbery because he didn't threaten just
15 force, he threatened he was armed and used a
16 representation. It is not just feeling, because
17 that money never would have been out there if he
18 hadn't threatened he had a gun. This was armed
19 robbery and the State is required to prove that, I
20 argue we proved each one of those elements, taking,
21 carrying away the property of another with the
22 intent to deprive them of possession while alleging
23 he was armed. The proof is beyond a reasonable
24 doubt.

25 The judge is going to instruct you on the law

1 at the end of this case. He will tell you what the
2 law is and his words trump everything you hear in
3 argument. He instructs you on the law, the law you
4 take and apply to these facts. And to give you an
5 idea what reasonable doubt is, we say things like
6 proof that leaves you firmly convinced of the guilt
7 of the defendant.

8 Once again, you are the conscience of the
9 community that ultimately decides this case. You
10 look at the facts of this case and you decide did
11 John Henry Smith go in that Walgreen's and
12 threaten, "I have a gun," and indicate his pocket
13 and get that money, and if he did that's armed
14 robbery and the proper verdict would be guilty of
15 armed robbery.

16 I thank you for your attention.

17 MR. FOX: May it please the Court, Your
18 Honor.

19 THE COURT: Yes, sir.

20 MR. FOX: Ladies and gentlemen, I told you at
21 the beginning of this case certain things aren't in
22 dispute. First of all there is not any question or
23 any dispute about whether a crime occurred. The
24 question is what is the proper crime, what crime
25 occurred. There is also not any dispute, the

1 Solicitor has to establish, prove to you the
2 identity of the robber in this case but I told you
3 at the beginning and I think the evidence has shown
4 there is not a question about the identity, the
5 person that went in Walgreen's on December 12,
6 2011, was Mr. John Henry Smith. Those things
7 aren't in dispute. You don't really need to take a
8 whole lot of time on those issues.

9 Now, the question is what exactly is the
10 right crime. A nice illustration, I'm always
11 impressed with lawyers, I'm always thinking about a
12 way I can demonstrate my point to juries, it's not
13 an easy thing to do, but one thing this case is
14 absolutely not is the game of poker. This man is
15 on trial exercising his constitutional rights. You
16 are here, your duty as jurors, you are not to play
17 the odds, you shouldn't hedge your bet, this isn't
18 a game of chance, not a game of poker. You
19 shouldn't base your verdict, you cannot, your oath
20 says you cannot base your decision on hedging your
21 bets. If you're not firmly convinced that he
22 committed, that Mr. Smith committed the crime of
23 armed robbery your oath says you cannot return a
24 verdict of armed robbery, guilty to armed robbery.
25 If you have a reasonable doubt, and that can

1 be any doubt, the judge again will define it, a
2 doubt for which you can give a reason, a doubt that
3 leaves you less than firmly convinced of Mr.
4 Smith's guilt of armed robbery, then you must
5 return a verdict of not guilty on that charge.

6 Close only counts in horseshoes and hand
7 grenades. He might have done it, he could have
8 done it, it could have happened that way, that is
9 not enough, that is not what the law says. So, has
10 the State left you firmly convinced that Mr. Smith
11 is guilty of armed robbery? No question that he
12 went in there and took money that was not his.
13 Also no question there is no weapon, no one ever
14 testified to you they saw a weapon, no one ever
15 testified to you they found a weapon.

16 The police were on Mr. Smith very quickly,
17 they found other things he left, they found him in
18 a short period of time, they never found a gun, a
19 knife, a dirk, a slingshot, any of those things
20 that could be used as a deadly weapon. No evidence
21 about that. You would be guessing as to what may
22 have happened. He could have thrown the gun away,
23 you're guessing, you don't have any evidence or any
24 testimony about that, that is out of your mind, you
25 have been presented with no evidence about a

1 weapon. That part of the statute of armed robbery
2 has no application in this case.

3 You are limited in your deliberations to what
4 has been presented to you in court, not what might
5 have happened, not what could happen, not what you
6 have seen on TV or the movies, but what has been
7 presented to you here.

8 Now, we're talking about whether there were
9 any words. The judge will tell you, you heard Mr.
10 Fryar say, "He told me he had a gun," the judge
11 will instruct you that words alone are
12 insufficient. If I walk up to you and say I've got
13 a gun, give me your money, it's not armed robbery
14 without more.

15 Now, you heard the testimony of Mr. Fryar.
16 The judge will tell you you can believe everything
17 a witness tells you, none of what a witness tells
18 you, some of it. You have a video. What you don't
19 have is audio, you cannot hear what is being said
20 to verify that but words alone are not sufficient,
21 so do you have, this whole things comes down to do
22 you have a representation of a gun.

23 I would disagree with the Solicitor you can
24 really tell where people are looking and doing, you
25 can see two individuals, you can clearly tell the

1 man in the red shirt, the man on the other side of
2 the counter, in a jacket. As far as what their
3 facial expressions are and where they are looking
4 and things, it is very blurry. You watched it
5 again a minute ago. I do not think you can really
6 tell with much clarity where people are looking.

7 He has got his hand in his pocket, Mr. Smith,
8 he has his hand in his pocket when he walked in the
9 door. If you go back a minute or two when he
10 walked in, he walked in with both his hands like
11 this, it is December, he has a jacket on, the
12 officer testified it was cold enough not to be in
13 shirt sleeves, he is keeping his hands warm.

14 Maybe you can characterize at some point that
15 he's pointing to his pocket, I don't know how.
16 There was lot of hand movement. I don't know how
17 you characterize this particular one as pointing to
18 his pocket, it is unclear. His hand does move, one
19 time it is over here and then over here. I think
20 you have to guess, I think you have to conjecture
21 as far as what that is.

22 If there is no representation of a gun, we
23 know there is not a gun or any other kind of
24 weapon, if there is no representation of a weapon,
25 a hand in a pocket by itself is not enough and that

1 is not armed robbery. At the very most that is
2 strong arm robbery because that is by force or
3 intimidation taking money that is not yours. I
4 think that is supported by the evidence.

5 You are also going to have the option, of
6 course one option is not guilty. I told you from
7 the beginning a crime occurred, there is no
8 question about that. You the jury, if you decide
9 Mr. Smith didn't do it, no one can trump that
10 verdict but I don't think that is frankly supported
11 by what you heard.

12 Petty larceny is your other option. Petty
13 larceny is simply taking something without
14 permission with intent to deprive the owner
15 permanently of that object, in this case money.
16 You don't have the force or intimidation. Snatch
17 and grab, you clearly see a snatch and grab, the
18 register was open, Mr. Smith grabs it and out he
19 goes. There has been no force or intimidation
20 either, he comes in, makes a request, this is a
21 robbery, taking the money and going, not purse
22 snatching but that kind of thing, petty larceny in
23 this case is very similar, snatch and grab.

24 Ladies and gentlemen, I think this is a multi
25 option case. You have three options, petty larceny

1 is probably too cold, armed robbery is too hot,
2 strong armed robbery is just right, that fits the
3 evidence that you have heard and that is what I
4 request your verdict be.

5 THE COURT: Thank you.

6 Ladies and gentlemen of the jury, I am now
7 going to instruct you as to the law that you will
8 apply during your deliberation process. I do
9 something I don't think any other judge does, I
10 don't know of any other circuit judges who do it,
11 and that is this. I understand that sometimes the
12 law can be complex and we have brought you here
13 from your daily routines and placed you in an arena
14 that we are familiar with, we deal with it every
15 day and we expect you to understand and be familiar
16 with everything that we tell you, and that would be
17 no fairer than if I were to go to work with you and
18 you expected me to understand what you did at your
19 work, because I certainly wouldn't.

20 So what I do, I prepare a transcript of my
21 charge and I provide the jury with a transcript of
22 that charge. That is, you will have my charge in
23 writing with you during your deliberations and in
24 your jury room. I caution you not to zero in on
25 any single part or one part of that charge. The

1 charge should being taken as a whole document, it
2 should be considered as a whole and not just one or
3 two portions as guiding you during your
4 deliberations. I ask you to please follow that
5 recommendation and instruction while you are
6 deliberating.

7 The law requires me to read directly from
8 this transcript because this transcript that I
9 provide for you must be verbatim what I charged you
10 in the courtroom, so you will notice that I am
11 reading my charge from a transcript that we
12 prepared last evening. Okay?

13 I remind you that during the trial of this
14 case you and I have certain responsibilities to
15 perform and as the trial judge I have the duty and
16 responsibility to preside over the trial of the
17 case and I also have the duty to rule on the
18 admissibility of the evidence offered during the
19 trial.

20 You are to consider only the competent
21 evidence before you. If there was any testimony
22 ordered stricken from the record in this case
23 during the trial you must disregard that testimony.
24 You are to consider only the testimony which has
25 been presented from this witness stand, any

1 exhibits which have been made a part of the record
2 in this case and any stipulations or agreements of
3 counsel.

4 I have the additional duty to charge you the
5 law applicable to this case. As the presiding
6 judge I am the sole judge of the law in this case
7 and it is your duty as jurors to accept and apply
8 the law as I now state it to you. If you already
9 have an idea as to what the law is or what the law
10 ought to be and it does not agree with what I now
11 tell you the law is you must abandon this idea
12 because you are sworn to accept the law and apply
13 the law exactly as I state it to you.

14 In every case tried in this court before a
15 jury the jury becomes the sole and exclusive judge
16 of the facts in the case. A trial judge cannot
17 intimate, state, comment on or make any statement
18 to a trial jury about the facts in a case. Since
19 you the jury are the sole judges of the facts in
20 the case you are not to infer from what I have said
21 during the progress of this trial, in ruling on the
22 admissibility of evidence or otherwise or anything
23 I say now during the course of this instruction to
24 you that I have any opinion about the facts in this
25 case. The law does not allow me to have an opinion

1 about the facts in this case. This is a matter
2 solely for you the jury to determine. As jurors it
3 is your duty to determine the effect, value, weight
4 and truth of the evidence presented during the
5 trial of this case.

6 Now, the indictment charges the defendant
7 with armed robbery. I remind you that the fact
8 that the defendant was arrested, charged and
9 indicted in this case is not evidence in this case
10 and cannot be considered by you as evidence of
11 guilt in this case nor does it create any
12 presumption or inference of guilt. This document
13 is simply the formal written instrument which
14 contains the charges made against the defendant.
15 It is the formal document by which the case is
16 brought into the court.

17 Now, the defendant has pled not guilty to the
18 indictment and that plea puts the burden on the
19 State to prove the defendant guilty. A person
20 charged with committing a criminal offense in South
21 Carolina is never required to prove himself
22 innocent. I charge you that it is an important
23 rule of law that the defendant in a criminal
24 matter, no matter what the seriousness of the
25 charge may be, will always be presumed to be

1 innocent of the crime for which the indictment was
2 issued unless guilt has been proved by evidence
3 satisfying you of that guilt beyond a reasonable
4 doubt.

5 This presumption of innocence does not end
6 when you begin your deliberation but it accompanies
7 the defendant throughout the trial until you reach
8 a verdict of guilt based on evidence satisfying you
9 of that guilt beyond a reasonable doubt. The
10 presumption of innocence is like a robe of
11 righteousness placed about the shoulders of the
12 defendant which remains with the defendant until it
13 has been stripped from the defendant by evidence
14 satisfying you of the defendant's guilt, again
15 beyond a reasonable doubt. Presumption of
16 innocence is not a mere legal theory, it is not
17 just a legal phrase. It is a substantial right to
18 which every defendant is entitled unless you the
19 jury are satisfied from the evidence of the
20 defendant's guilt beyond a reasonable doubt.

21 The State, as I said, has the burden of
22 proving the defendant guilty beyond a reasonable
23 doubt. Some of you may have served as jurors in a
24 civil case where you were told that it is only
25 necessary to prove that a fact is more likely true

1 than not true, such as by the greater weight or
2 preponderance of the evidence.

3 In criminal cases the State's proof must be
4 more powerful than that. It must be proof beyond a
5 reasonable doubt, and proof beyond a reasonable
6 doubt is proof that leaves you firmly convinced of
7 the defendant's guilt. There are very few things
8 in the world that we know with absolute certainty
9 and in criminal cases the law does not require
10 proof that overcomes every possible doubt. If you,
11 based on your consideration of the evidence, are
12 firmly convinced that the defendant is guilty of
13 the crime charged you must find the defendant
14 guilty. If on the other hand you think there is a
15 real possibility that the defendant is not guilty
16 you must give the defendant the benefit of the
17 doubt and find him not guilty.

18 What is a reasonable doubt? In the law a
19 reasonable doubt is the kind of doubt that would
20 cause a reasonable person to hesitate to act.

21 Now, there are two types of evidence which
22 are generally presented during a trial, direct
23 evidence and circumstantial evidence. Direct
24 evidence is evidence or testimony of a person who
25 claims to have actual knowledge of a fact, such as

1 an eyewitness. It is evidence which immediately
2 establishes the main fact to be proved.

3 Circumstantial evidence is proof of a chain
4 of facts and circumstances indicating the existence
5 of a fact. It is evidence which immediately
6 establishes collateral facts from which the main
7 fact may be inferred. Circumstantial evidence is
8 based on inference and not on personal knowledge or
9 observation.

10 The law makes absolutely no distinction
11 between the weight or value to be given to either
12 direct or circumstantial evidence nor is a greater
13 degree of proof or certainty required of
14 circumstantial evidence than of direct evidence.
15 You should weigh all the evidence in the case.
16 After weighing all the evidence, if you are not
17 convinced of the guilt of the defendant beyond a
18 reasonable doubt you must find the defendant not
19 guilty.

20 Necessarily, you must determine credibility
21 of witnesses who have testified in this case, and
22 credibility simply means believability. It becomes
23 your duty as jurors to analyze and evaluate the
24 evidence and determine which evidence convinces you
25 of its truth. In determining the believability of

1 witnesses who have testified in this case you may
2 believe one witness over several witnesses or
3 several witnesses over one witness, you may believe
4 a part of the testimony of a witness and reject the
5 remaining part of the testimony of that same
6 witness. You may believe the testimony of a
7 witness in its entirety or reject the testimony of
8 a witness in its entirety. You may consider
9 whether any witness has exhibited to you any
10 interest, prejudice, bias or other motive in this
11 case. You may also consider the appearance and
12 manner of a witness while on the witness stand.

13 As you have been informed, the defendant is
14 charged with armed robbery. In order to prove this
15 offense the State must first prove beyond a
16 reasonable doubt that the defendant took personal
17 property from the person or presence of another.
18 Property is in the presence of a person if it is
19 within the person's reach, inspection, observation
20 or control so that the person could, if not
21 overcome with violence or prevented by fear, keep
22 possession of the property.

23 The State must also prove beyond a reasonable
24 doubt that the defendant carried the property away
25 intending to permanently deprive the owner of the

1 property and to keep the property for the
2 defendant's own use. The slightest removal of the
3 property or complete, or the complete possession of
4 the property even for an instant by the defendant
5 is sufficient to show a taking and carrying away of
6 the property. Taking and carrying away of the
7 property must have been done with violence or by
8 putting the owner of the property in fear of
9 violence.

10 Finally, the State must prove beyond a
11 reasonable doubt that the defendant was armed with
12 a deadly weapon during the robbery or while
13 alleging either by action or words that he was
14 armed while using a representation of a deadly
15 weapon or any object which a person present during
16 the commission of the robbery reasonably believed
17 to be a deadly weapon. Put another way, the State
18 must prove beyond a reasonable doubt that during
19 the robbery the defendant was either armed with a
20 deadly weapon or was in possession of an object
21 which he alleged by words or action to be a deadly
22 weapon and which the victim reasonably believed to
23 have been a deadly weapon. However, words alone
24 are not sufficient to establish the defendant was
25 armed with a deadly weapon. The State must show

1 evidence corroborating the allegation of being
2 armed, for example, the use of a physical
3 representation of a deadly weapon, to establish an
4 armed robbery.

5 A deadly weapon is any article, instrument or
6 substance which is likely to cause death or great
7 bodily harm. Whether an instrument has been used
8 as a deadly weapon depends on the facts and
9 circumstances of each case. The following are
10 examples of instruments which may be deadly
11 weapons. A pistol, a shotgun, a rifle, a dirk, a
12 dagger, a knife, a slingshot, metal knuckles, a
13 razor, gasoline, a firebomb or Molotov cocktail and
14 lighter fluid. A gun may be a deadly weapon even
15 if it is not operable.

16 If you find the defendant not guilty of armed
17 robbery you may consider the offense of strong arm
18 robbery. Strong arm robbery is the taking of
19 something of value from a person or in the
20 immediate presence of a person by violence or
21 intimidation. When determining whether the robbery
22 was committed with intimidation the trial court
23 should determine whether an ordinary reasonable
24 person in the victim's position would feel a threat
25 of bodily harm from the perpetrator's act.

1 If you find the defendant not guilty of
2 strong armed robbery you may consider the offense
3 of petty larceny. If the defendant is charged with
4 petty larceny the State must prove beyond a
5 reasonable doubt that the defendant took and
6 carried away the property of another against the
7 will or without the consent of another person. The
8 slightest removal of property or the complete
9 possession of the property even for an instant by
10 the defendant is enough to show a taking and
11 carrying away of property. The State must prove
12 beyond a reasonable doubt that the defendant
13 intended to permanently deprive the owner of the
14 property.

15 And finally, the State must prove that the
16 value of the property or thing taken was \$2,000 or
17 less.

18 Now, I instruct you and emphasize the fact
19 that the defendant did not testify in this case is
20 a factor, is not a factor to be considered by you
21 in any way in your deliberations and in your
22 consideration of the question of guilt or innocence
23 of the defendant. It must not be considered by you
24 in any manner whatsoever. A defendant has the
25 constitutional right to remain silent and the

1 assertion of this right must not be considered by
2 you in your deliberations. I repeat, under your
3 oath you are to draw no conclusions whatsoever from
4 the fact that the defendant in this case did not
5 testify. The fact that this defendant did not
6 testify should not even be discussed in the jury
7 room. The burden of proof, as I have said to you,
8 is on the State. The defendant is not required to
9 prove his innocence, the burden of proof remains on
10 the State to prove guilt beyond a reasonable doubt.

11 Now, there are two possible verdicts which
12 you may find on the indictment in this case, guilty
13 or not guilty, and there is no significance
14 whatsoever in the order in which I state these
15 possible verdicts, simply one must be stated first.

16 Now, ladies and gentlemen of the jury, your
17 verdict, I tell you, must be a unanimous one.
18 Madam Foreperson, when the jury agrees on a verdict
19 you will write the verdict on the verdict form
20 which I'm going to provide for you and sign your
21 name as the foreperson and then I will have you
22 knock on the jury room door, signal the fact you
23 have reached a verdict to Mr. Ropp and at that time
24 we'll receive you back into the courtroom.

25 Now I'm going to ask you to return to your

1 jury room but I will ask you not to begin your
2 deliberations until I do one of two things. I may
3 have to bring you back out and give you more
4 instructions, I'm going to discuss that with the
5 attorneys now. If I bring you back out I will
6 re-instruct you and send you back and tell you at
7 that time you can begin your deliberations.
8 However, if I don't bring you back into the
9 courtroom for more instructions but instead I send
10 the evidence that has been admitted in this case
11 and I send the charge which I have just read to you
12 in with that evidence that will be your signal,
13 without me bringing you back, to begin your
14 deliberations. Is that clear?

15 Okay. Now I want to briefly review the
16 verdict form with you. This verdict form should be
17 fairly simple. It begins by saying as to the
18 charge of armed robbery we the jury unanimously
19 find the defendant, and you circle the verdict that
20 you reach on that charge. We have guilty and not
21 guilty listed, and again there is no reason for one
22 being in front of the other, it is just simply that
23 we have to put them down in some order.

24 Under that you will see that I write if you
25 find the defendant guilty of armed robbery stop

1 your deliberating at this point. If you find the
2 defendant not guilty of armed robbery please answer
3 question two. Question two is, as to the charge of
4 strong armed robbery we the jury unanimously find
5 the defendant, and you can do the same thing.

6 Following that verdict I again say if you
7 found him guilty of strong arm stop. If you found
8 him not guilty go on and consider petty larceny,
9 and so forth and so on.

10 Please remember, if anything, the defendant
11 may only be convicted of one of these charges. I
12 want to make that clear. Again let me emphasize,
13 I'm not telling you he must be convicted of
14 anything, I'm not telling you he should not be
15 convicted of anything. I'm simply saying that in
16 the end you will, if you ever get to the point
17 where you indicate that he is guilty of an offense,
18 I think my verdict form is clear and it tells you
19 that is where you stop, you don't go on to a lesser
20 charge. All right?

21 Now, if you would, Mr. Ropp, take your jury
22 into the jury room.

23 (The jury was excused from the courtroom).

24 THE COURT: Anything further from the State?

25 MR. DeBUSK: No, Your Honor.

1 THE COURT: Anything further from the
2 defense?

3 MR. FOX: Just one additional request, Your
4 Honor, which is that you instruct the jury that any
5 doubts they may have as between any two of the two
6 charges, that they should resolve those doubts in
7 favor of the defendant and find the lesser included
8 offense.

9 THE COURT: What does the State say about
10 that?

11 MR. DeBUSK: I think that is covered by the
12 charge you have given.

13 THE COURT: I think it is, I think it is very
14 clear, I have told them to consider only one
15 offense at a time and to not consider a subsequent
16 offense. I just think it is covered in my charge
17 adequately.

18 MR. FOX: Thank you. Nothing other than
19 that.

20 THE COURT: They take the charge as a whole.
21 Okay.

22 All right, gentlemen, come up and make sure
23 that you have got all your exhibits together.

24 Henry, if you would, mark the charge as
25 Court's Exhibit Number 1.

1 (Printed jury instructions were marked as
2 Court Exhibit Number 1).

3 THE COURT: Here is the verdict form. Do you
4 all want to look at that?

5 MR. DeBUSK: Looks good to me.

6 MR. FOX: That's fine.

7 THE COURT: Okay. All right, let's have the
8 bailiff take that back so the jury can begin their
9 deliberations, and you might tell them that that is
10 my signal to begin their deliberations.

11 BAILIFF: Yes, sir.

12 MR. DeBUSK: Dismiss the alternates?

13 THE COURT: Yes, let's bring the alternates
14 back out.

15 Mr. Lewis, Miss Hemmingway, the case has been
16 submitted to the jury, so you're excused. I want
17 to thank you for being here this week. You were
18 very attentive during the trial, I noticed, and you
19 are welcome to stay and see how it comes out if you
20 want to but you are excused and this completes your
21 jury service this week. Thank you very much.

22 JUROR: Thank you.

23 (Alternate jurors excused from the
24 courtroom).

25 THE COURT: All right, we are at ease.

1 (Recessed at 10:42 a.m.).

2 (Resumed at 11:30 a.m.).

3 THE COURT: All right, let's bring in the
4 jury.

5 (The jury returned to the courtroom).

6 THE COURT: Madam Forelady, have you reached
7 a verdict?

8 JUROR: Yes, Your Honor.

9 THE COURT: All right, hand your verdict to
10 the clerk, please. Is that a unanimous verdict?

11 JUROR: Yes, sir.

12 THE COURT: Thank you.

13 Very well, you may publish it.

14 THE CLERK: In the case of State of South
15 Carolina versus John Henry Smith, as to the charge
16 of armed robbery we the jury unanimously find the
17 defendant guilty.

18 Ladies and gentlemen of the jury, if this is
19 your verdict so signify by raising your right hand.

20 THE COURT: Mr. Fox, will you request
21 individual polling?

22 MR. FOX: No, Your Honor.

23 THE COURT: Very well. All right, Mr. Fox,
24 is there any reason that sentencing should not
25 proceed?

1 MR. FOX: No, Your Honor.

2 THE COURT: All right. I will hear from you.

3 MR. FOX: Your Honor, there would be post
4 trial matters that would be addressed.

5 THE COURT: Let's take the jury out for a
6 moment.

7 (The jury was excused from the courtroom).

8 THE COURT: All right, Mr. Fox.

9 MR. FOX: Thanks, Your Honor. At this time
10 we renew our motion for new trial and a directed
11 verdict based on the same grounds we did
12 previously, the State having not met its burden of
13 proof regarding all elements of armed robbery.
14 Specifically in reference to a weapon, there was
15 certainly no evidence there was a weapon, that
16 element was not present. We argue they have not
17 met their elements and in addition it would be our
18 position it was error for the Court not to grant
19 our request to charge that any doubt the jury might
20 have as between the different charges, armed
21 robbery, strong armed robbery, petty larceny, those
22 should be resolved in the defendant's favor. For
23 those reasons we request a new trial.

24 THE COURT: All right. And I respectfully
25 deny your motion. Reviewing the evidence, I

1 believe there was overwhelming evidence upon which
2 the jury could have based its verdict in this
3 particular case and that the evidence does support
4 the verdict.

5 All right, anything further?

6 MR. FOX: No, Your Honor.

7 THE COURT: All right, you may bring the jury
8 back in at this point.

9 (The jury returned to the courtroom).

10 THE COURT: All right, Mr. DeBusk, let me
11 hear from you as to the defendant's prior record.

12 MR. DeBUSK: Your Honor, from 1993 he has
13 four counts of armed robbery, three counts from
14 Myrtle Beach and one from North Myrtle Beach. 2006
15 fraudulent checks, four counts of criminal
16 conspiracy, four counts of forgery. In 2008 he had
17 a fraudulent check from Horry County.

18 Your Honor, as you know, armed robbery is a
19 most serious offense. Having the prior four counts
20 of armed robbery, this being the second most
21 serious offense, the defendant is under the two
22 strikes law eligible for sentence of life without
23 parole. He was notified of this by documents dated
24 May 8, 2012.

25 THE COURT: He was placed on notice the State

1 would seek life without parole based on his prior
2 record?

3 MR. DeBUSK: Yes, Your Honor.

4 THE COURT: Okay. Let me hear from you, Mr.
5 Fox.

6 MR. FOX: Thank you, Your Honor.

7 Your Honor, Mr. Smith, John Henry is 45 years
8 old, lives here in town. Your Honor has heard his
9 prior record. I would point out that the things
10 that make him eligible for a life sentence happened
11 twenty years ago, he was much younger, a much
12 different man. He did about seven years on that
13 charge, released around 2002. For the last ten
14 years the only General Sessions charge was a breach
15 of trust, nothing violent, nothing remotely like
16 this, but that does make him eligible under the
17 statute for a life sentence.

18 I think Mr. Smith, and one of the court
19 officers relayed to me that they know Mr. Smith, he
20 is a very good and gentle man, drugs being the
21 problem. It is not an excuse for what he has done
22 but what he has always told me about this situation
23 was there was no form of plan in his mind, he
24 certainly did not wish to harm anybody. He is
25 adamant he did not have a weapon and as I argued to

1 the jury that it was a robbery, not an armed
2 robbery but we're not taking issue with that
3 because certainly the elements, there was evidence
4 to support the jurors' verdict in terms of
5 representation of a weapon, but we ask Your Honor
6 to keep all those things in mind in your sentence,
7 Your Honor.

8 THE COURT: All right. Mr. Smith, I hear
9 that you have four prior armed robberies, is that
10 correct?

11 THE DEFENDANT: Yes, sir. That was --

12 THE COURT: And Mr. Fox tells me up until
13 2002 you were in prison for that, is that correct?

14 THE DEFENDANT: No, sir. I got out in '97
15 but I completed everything I had with five years
16 probation and everything, I got out and completed
17 everything in 2002.

18 THE COURT: All right, sir. Anything you
19 want to tell me, Mr. Smith?

20 THE DEFENDANT: Yes, sir. Your Honor, like I
21 said, I didn't testify or anything like that, sir,
22 but I just want everybody to know I'm not that type
23 person to want to try to hurt anybody or anything
24 like that. Everything that happened that
25 particular night was not done intending to hurt

1 anyone. I would hope that my past record doesn't
2 reflect on what I have been doing since then. Like
3 I said, I got out in '97 and I completed my
4 probation, I worked a job 14 years, it got closed
5 down --

6 THE COURT: Where did you work?

7 THE DEFENDANT: AVX. I worked at AVX 17
8 years and they closed down in 2008 and I was
9 unemployed and everything, I was kind of devastated
10 because I went back to the plant after I completed
11 my prison sentence and worked there for twelve
12 years, well, 11, from '98, I got out in '97, I went
13 back in '98 and worked until 2008. As a matter of
14 fact I worked two jobs, I worked at a gas station
15 for that period of time also part-time as assistant
16 manager, I was a supervisor at AVX for 16 and a
17 half years.

18 I had a pretty good career, Your Honor, I
19 just got side tracked after I got laid off, I was
20 devastated because I lost my job not for no reason
21 but just that they closed it down and, you know,
22 things started spiraling out of control, I had time
23 on my hands that I couldn't manage and that was my
24 problem. When I have a lot of time on my hands I
25 tend to not manage it like I supposed to.

1 And saying that, sir, and like I say, I'm 54
2 years old, sir, and I never was the type guy to
3 not, if I do the crime I do the time, so I'm not
4 the type of guy that don't want to stand up to what
5 I did, made a mistake, God knows I did, I asked the
6 Lord to forgive me for that and based on that I
7 apologize to all you all for your time, I
8 appreciate everything you have done for me. But
9 that's the type person I am, sir, I did make a
10 mistake, I was unemployed at the time, I just ask
11 you, sir, to have mercy on me, Your Honor.

12 THE COURT: Mr. DeBusk, is it my
13 understanding that the decision to, whether or not
14 to impose life sentence is no longer mandatory, I
15 have discretion whether to impose that sentence or
16 not?

17 MR. DeBUSK: May we approach, Your Honor?

18 THE COURT: Yes.

19 (Unrecorded bench conference).

20 MR. DeBUSK: Your Honor, at this time the
21 State would like to withdraw that notice of intent
22 to seek life without parole and ask you to sentence
23 under the sentencing range of 10 to 30 years.

24 THE COURT: All right.

25 MR. DeBUSK: Thank you.

1 THE COURT: Mr. Fox, any objection from you
2 or your client?

3 MR. FOX: No, Your Honor.

4 THE COURT: All right. The sentence of the
5 Court is that he be confined to the State
6 Department of Corrections for a period of 25 years.
7 Thank you.

8 MR. DeBUSK: Thank you, Your Honor.

9 THE COURT: Ladies and gentlemen of the jury,
10 I want to thank you for your service this week. I
11 think I have told you that your service is so
12 important to the administration of the justice
13 system. It would not work without you and your
14 willingness to be here.

15 I know that it would seem to you that we only
16 disposed of one case this week. Well, you tried
17 only one case. On Monday we had two murder cases
18 that were scheduled, one of those pled out, another
19 one we had a problem with scheduling. But
20 following that all the cases that were scheduled
21 for Tuesday were pled out and as were some other
22 things we were able to handle this week.

23 These cases do not move unless we have a jury
24 sitting in the courtroom ready to go. That is when
25 these cases move, so you have accomplished a

1 tremendous amount of work as far as this week and
2 we thank you for being here.

3 I hope that I get to see you, I love to talk
4 to jurors about what we do. If you see me out and
5 around the county, I'm from here, I have always
6 lived here, and you recognize me please don't
7 hesitate to tell me you were on my jury. I have a
8 lot of folks, it is hard for me to remember
9 everybody but I always appreciate it when someone
10 tells me they were on my jury, that they remember
11 me and I get an opportunity to chat with them about
12 what they thought about the system, what they may
13 even think may be done to improve it.

14 Of course I will see you at the Krispy Kreme
15 doughnut shop.

16 Thank you again so much for being here.
17 You're excused.

18 (Jury excused from the courtroom).

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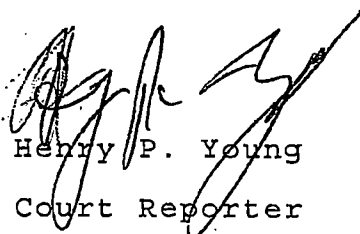
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I, the undersigned Henry P. Young, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case in the Circuit Court for Horry County, South Carolina, on the 17th and 18th day of April, 2013.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

June 24, 2013



Henry P. Young
Court Reporter

WITNESSES

Christopher Wayne Johnson Conway Police
Department

ARREST WARRANT NUMBER

I219109
CDR: 0139 16-11-0330(A)
DOA: 12/12/2011

ACTION OF GRAND JURY

TRUE BILL

Brandon Connor
Foreperson of Grand Jury
Date: FEB 23 2012

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2012-GS-26-00469

FILED
HORRY COUNTY
The State of South Carolina
2013 APR 22 PM 3:56

County of Horry
MELANIE HUGGINS-WARD
George H. Debusk CLERK OF COURT 11H05265

COURT OF GENERAL SESSIONS

February, 2012 TERM

THE STATE

VS.

John Henry Smith
/ M

Pawleys Island SC 29585-6021
DOB: —
SSN: —

ATTORNEY: Hazzard, Ronald W.

Indictment for

Armed Robbery

J. Gregory Hembree, Solicitor

ORIGINAL

CERTIFIED COPY

2013 APR 22 PM 3:56

Melanie Huggins-Ward
CLERK OF COURT
HORRY COUNTY

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on February 23, 2012, the Grand Jurors of Horry County present upon their oath:

ARMED ROBBERY

CDR: 0139 16-11-0330(A)

That John Henry Smith did in Horry County on or about December 12, 2011, while armed with a deadly weapon or while alleging by action or words he was armed, to wit: defendant advised the clerk that he had a gun, take and carry away personal property of Walgreens from or in the immediate presence of Walgreens with intent to deprive Walgreens of possession by use of force, threats or intimidation, in violation of Section 16-11-0330(A), S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

J. Gregory Hembree
J. GREGORY HEMBREE
FIFTEENTH CIRCUIT SOLICITOR

FILED
Horry County
2013 APR 22 PM 3:56
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Melanie Hargrave-White
CLERK OF COURT
HORRY COUNTY

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Horry
 STATE VS.
John Henry Smith

INDICTMENT/CASE#: 2012GS2600469A/W#: 1219109Date of Offense: 12/12/2011S.C. Code § 16-11-0330(A)CDR Code #: 0139

AKA:

Race: Sex: M Age: 54DOB: SS#: Address: Julian Rutledge DrCity, State, Zip: Pawleys Island, SC 29585-6021DL#: SID#: *CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

☒ CONVICTED OF or ☐ PLEADSTO: Robbery / Armed Robbery, robbery while armed or allegedly armed with a deadly weapon (10-30 years)

SENTENCE SHEET

in violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45
The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST:

SCB16182

Debusk, George H.

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed years
 and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
 of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 19-25-135

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP

Total: \$ plus 20% fee: \$ Payment Terms: ☐ Set by SCDPPPS Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)

\$

§ 14-1-211(A)(1) (Conv. Surcharge)

\$100

\$

§ 14-1-211(A)(2) (DUI Surcharge)

\$100

\$

§ 56-5-2995 (DUI Assessment)

\$12

\$

§ 56-1-286 (DUI Breath Test)

\$25

\$

Proviso 47.9 (Public Def/Prob)

\$500

\$

§ 14-1-212 (Law Enforce. Funding)

\$25

\$

§ 14-1-213 (Drug Court Surcharge)

\$150

\$

§ 50-21-114 (BUI Breath Test Fee)

\$50

\$

§ 56-5-2942(J) (Vehicle Assessment)

\$40/en

\$

Proviso 90.5 (SCCJA Surcharge)

\$5

\$

3% to County (if paid in installments)

\$

TOTAL

\$ 133.90

 days/hours Public Service EmploymentObtain GED ☐Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling Random Drug/Alcohol testing Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ 25.00 beginning 4/18/2013\$ paid to Public Defender FundOther:
☐ Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2152Sentence Date: 4-18-13

FILE FORM 5
 Horry Co
 STATE OF SOUTH CAROLINA
 2015 JUN -2 AM 8:30 IN THE COURT OF COMMON PLEAS
 COUNTY OF Horry
 MELANIE HUGHES
 CLERK OF COURT
JOHN HENRY SMITH
 Full name and prison number (if any) of Applicant.
 #211679
 v.
 State of South Carolina
 2015 CP264022
 APPLICATION FOR
 POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention LIEGER CORRECTIONAL INSTITUTE
2. Name and location of Court which imposed sentence Horry County General Session
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 8012GS2600469 Robbery / ARMED Robbery
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 4-18-13 25 years
 - (b) _____

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. In the Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. FEB. 25. 2015
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Unpublished Opinion No. 2015-UP-095
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) See Attachment:

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) See Attachment:

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

- iv. _____
- (d) the date of each such disposition:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:
 - i. _____
 - ii. _____
 - iii. _____
- (b) the proceedings in which each ground was raised:
 - i. _____
 - ii. _____
 - iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) _____
- (b) _____
- (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Jonathan Eric Fox, Esquire
- ii. Kathrine H. Hudgins
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Trial
- ii. Appeal
- iii. _____
19. State clearly the relief you seek in filing this application:
Re-sentencing
20. Are you now under sentence from any other court that you have not challenged?
No

20 15 CP26 4022

STATE OF SOUTH CAROLINA)

County of)

VERIFICATION

I, , being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

John Henry Smith

SWORN to and subscribed before me this 28th
day of May, 2015.

William L. Blount (L.S.)
Notary Public

My Commission Expires: March 4, 2025

FILED
CLERK OF COURT
2015 JUN -2 AM 8:30
CLERK OF COURT

20 15 CP26 4022

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, , hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

John Henry Smith
Applicant

SWORN or affirmed to and subscribed before me this
28th day of May, 2015.

William S. Glone
Notary Public

My Commission Expires: March 4, 2025

FILED
CLERK OF COURT
2015 JUN -2 AM 8:30
CLERK OF COURT

10.(a) Applicant was denied the right to effective assistance of counsel-guaranteed by the Sixth and Fourteenth Amendment to the United States Constitution and by Article 1, §§ 3 and 14 of the South Carolina Constitution - during the guilt-or-innocence phase of his jury trial.

11.(a) Supporting facts: Trial counsels performance during the guilt-or-innocence phase was both unreasonable and prejudicial. See *Strickland v. Washington*, 466 U.S. 668 (1984). Counsels acts or omissions included, but are not limited to, the following:

① Counsel failed to adequately investigate the facts and circumstances surrounding the credibility of States witnesses. Counsels failure to conduct such an investigation deprived the jury of critical information relevant to an accurate assessment of witnesses credibility.

② Counsel failed to seek an instruction stating that a burglary charge must set
①

forth one, specific crime intended upon entry and stating what the specific crime was in this case.

10.(b) Applicant was denied the right to effective assistance of counsel - guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article 1, §§ 3 and 14 of the South Carolina Constitution - during the sentencing phase of his jury trial.

11.(b) Supporting facts: Trial counsels performance during the sentencing phase was both unreasonable and prejudicial. See *Strickland v. Washington*, 466 U.S. 668 (1984).

Counsels acts or omissions included, but are not limited to, the following:

① Counsel failed to investigate, develop and present all available, relevant, and admissible mitigating evidence. As a result of counsels failure to uncover and present this evidence, applicants sentence is unreliable

② Counsel failed to emphasize applicant was previously on probation and successfully completed without incident.

③ Counsel failed to illuminate that applicants prior probation did not include a drug treatment program which could in fact been a preventive measure to insure that a case such as this never evolved.

Applicant respectfully requests this court to grant leave to amend P.C.R. application according to additional information which is revealed through discovery.

I, JOHN HENRY SMITH state pursuant to 28 U.S.C 1746 under the penalty of perjury that the foregoing is true and correct.

x. John Henry Smith
DATE: 5-28-15

RE: PCR Application

TO: Clerk of Court,

Please find a PCR application along with a 3 page attachment. I request a clock stamped copy to be sent to:

JOHN HENRY SMITH #211679
LIEBER CORRECTIONAL INSTITUTE CA-51
P.O. Box #205
RIDGEVILLE S.C 29472

Respectfully Submitted,
x John Henry Smith
DATE: 5-28-15

Ridgeville S.C
5. .15

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

John Smith, #211679,

Applicant,

V.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2015-CP-26-4022

RETURN

Respondent, making its Return to the Application for Post-Conviction Relief filed June 2, 2015, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In February 2012, the Horry County Grand Jury indicted Applicant for armed robbery (2012-GS-26-0469). Jonathan Eric Fox, Esquire, represented Applicant. On April 17, 2013, Applicant proceeded to trial before the Honorable Larry B. Hyman Jr. and a jury. The jury found Applicant guilty as indicted. Judge Hyman sentenced Applicant to twenty-five (25) years' imprisonment.

Applicant filed a timely notice of appeal. Kathrine Haggard Hudgins, Esquire, represented applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on February 25, 2015. State v. Smith, Op. No. 2015-UP-095 (S.C. Ct. App. filed February 25, 2015). The remittitur was returned to the circuit court on March 13, 2015.

II.

In his Application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
 - a. "Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendment ... and by Article 1, sections 3 and 14 of the South Carolina Constitution"
 - b. "Trial counsels performance during the guilt-or-innocence phase was both unreasonable and prejudicial"
 - c. "Counsel failed to adequately investigate the facts and circumstances surrounding the credibility of states witnesses."
 - d. "Counsel failed to seek an instruction stating that a burglary charge must set forth one, specific crime intended upon entry"
 - e. "Counsel failed to investigate, develop [sic] and present all available, relevant, and admissible mitigating evidence."
 - f. "Counsel failed to emphasize applicant ... successfully completed [probation] without incident."
 - g. "Counsel failed to illuminate that applicants prior probation did not include a drug treatment program which could in fact been a preventive measure to insure that a case such as this never evolved."

Respondent denies Applicant is entitled to relief on any of these claims, and demands strict proof thereof. Any claims not specifically enumerated in the Application or amendments thereto will be opposed by Respondent at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRPC.

Attached to this Return and incorporated herein are the records of the Horry County Clerk of Court regarding the subject conviction(s), Applicant's records from the South Carolina Department of Corrections, the trial transcript, and Applicant's appellate records. Any records not attached will be forwarded upon receipt. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent submits Applicant's allegation of ineffective assistance of counsel is without merit. 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, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove trial counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Respondent submits 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, 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.

Respondent denies each and every allegation not hereinbefore expressly admitted, qualified, or explained.

[SIGNATURE BLOCK ON NEXT PAGE]

VII.

WHEREFORE, having made its return, Respondent requests an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

JESSICA E. KINARD
Assistant Attorney General

By: *Julia E. Kemp*
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

Feb. 1, 2015

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

JOHN HENRY SMITH, #211679

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2015-CP-26-4022

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

James K. Falk, Esquire
38 Broad St., Suite 350
Charleston, SC 29401

DATED this 1ST day of February, 2016.


Norma Bigbee, Legal Assistant
For Respondent

1
2 State of South Carolina) Court of Common Pleas
3 County of Horry) 2015-CP-26-04022

4
5 John Henry Smith)
6 vs.) Transcript of Record
7 State of South Carolina)
8

9
10 May 24th, 2017
11 Conway, South Carolina

12 BEFORE:

13 Honorable Roger E. Henderson, Judge.

14 APPEARANCES:

15 James K. Falk, Esq.
16 Attorney for the Applicant

17 Megan Jameson, Esq.
18 Attorney for the State
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23 Teresa J. F. Bautz, RPR
24 Official Court Reporter
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I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
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John Henry Smith				
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Mr. Falk	14	--	--	--
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Ms. Jameson	--	16	--	--
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J. Eric Fox				
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Mr. Falk	25	--	40	--
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Ms. Jameson	--	29	--	--
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E X H I B I T S

NO.	DESCRIPTION	ID	EV
State's-1	LWOP Notice	3	33
State's-2	Arraignment findings	3	35

Exhibits retained by Clerk of Court.

1 (The hearing commenced at approximately
2 11:08 a.m.)

3 (WHEREUPON, State's Exhibit Nos. 1 and 2 were
4 marked for identification only.)

5 MS. JAMESON: May it please the Court.

6 THE COURT: Yes.

7 MS. JAMESON: Your Honor, the next matter is John
8 Henry Smith versus the State of South Carolina, Docket
9 No. 2015-CP-26-4022. Mr. Smith was indicted during
10 February 2012 term of the Horry County Grand Jury for
11 armed robbery. He was represented by J. Eric Fox.

12 On April 17, 2013, Mr. Smith proceeded to a jury
13 trial before the Honorable Larry B. Hyman, Jr., where
14 he was convicted as indicted. Judge Hyman sentenced
15 Mr. Smith to 25 years imprisonment. A notice of appeal
16 was filed, and an appeal was perfected on Mr. Smith's
17 behalf. Following briefing, the Court of Appeals
18 affirmed Mr. Smith's conviction and sentence, and the
19 remittitur was sent on March 13th, 2015.

20 On June 2nd, 2015, Mr. Smith filed an application
21 for post conviction relief alleging he was being held
22 in custody unlawfully based on allegations of
23 ineffective assistance of counsel for failing to
24 adequately investigate the facts and circumstances
25 surrounding the credibility of the State's witnesses,

1 failing to seek an instruction that a burglary charge
2 must set forth the specific crime intended upon entry
3 and stating what the specific crime was in this case,
4 failing to investigate and present mitigating evidence
5 during sentencing, failing to emphasize Applicant had
6 previously completed a probationary sentence
7 successfully, and failing to emphasize Applicant's
8 prior probation did not include drug treatment program
9 which could have acted as a preventative measure in
10 this case.

11 The State made its return on June 2nd, 2015
12 requesting an evidentiary hearing be held. He's
13 represented in this matter by James Falk. And Mr. Falk
14 indicated to the State on Monday that Mr. Smith will be
15 going forward on two additional allegations,
16 ineffective assistance of counsel for failing to advise
17 Applicant to turn down a 15-year plea offer from the
18 State and failing to object to leading questions of the
19 victim. And I'll turn it over to Mr. Falk at this
20 time.

21 THE COURT: Mr. Falk.

22 MR. FALK: Your Honor, I was just handed today
23 this LWOP notice, and I was unaware that he was
24 actually ever served with the LWOP. Obviously with his
25 prior criminal record that was always a possibility,

1 but I don't know it was actually ever served.

2 And so I just -- I would feel more comfortable if
3 maybe the Court would just make sure that Mr. Smith
4 understands that if we go forward today and we get a
5 new trial, he most assuredly will be on trial with an
6 LWOP as opposed to the rather severe sentence that he
7 got. And then we're ready to go forward.

8 I just -- I was unaware that they had actually
9 served it, and I think that sort of might have changed
10 some of my discussions I had with him week before last.

11 MS. JAMESON: Your Honor, if the State could be
12 briefly heard in response to that, there is a
13 discussion during sentencing where the State clearly
14 indicates to Judge Hyman that an LWOP notice had been
15 served. And there's a discussion between defense
16 counsel, Mr. Fox, and the Court.

17 And Judge Hyman actually requested that all
18 parties approach the bench, and the State withdrew the
19 LWOP notice. So it's the State's position that
20 Mr. Falk did have prior notice that he received LWOP
21 notice.

22 MR. FALK: And that fact may be. I'm just -- I'm
23 not sure that my conversations with him might have been
24 different.

25 THE COURT: Okay.

1 MR. FALK: I just want to make sure that -- or I
2 could ask him.

3 THE COURT: I mean, has that been re-served now?

4 MR. FALK: Oh, no, no, I'm sorry. I was just
5 unaware that he was served.

6 THE COURT: Okay.

7 MR. FALK: And maybe if I could just ask him some
8 questions as we go forward, however you want to do it.
9 I just want to make sure he understands.

10 THE COURT: Okay, all right. Well, let me ask a
11 couple, and I'll certainly let you add any questions
12 that you wish to ask him, okay.

13 Okay, Mr. Smith, stand up, please.

14 THE APPLICANT: Yes, sir.

15 THE COURT: All right. You understand when we're
16 talking about LWOP, life without parole?

17 THE APPLICANT: Yeah. Yes, sir, I think I
18 understand it.

19 THE COURT: Okay. You were provided with that
20 notice earlier, it's been indicated to me by the
21 Attorney General, you understand that. If you are
22 granted the relief that you seek here today, do you
23 understand that this matter will go back for a new
24 trial, that's what you -- that's the relief you could
25 gain from today's hearing; do you understand that?

1 THE APPLICANT: Yes, sir.

2 THE COURT: And if you were to do so, then you
3 would be confronted with the possible sentence if you
4 were to be convicted -- you may be acquitted -- but if
5 you were to be convicted, you may be sentenced to life
6 without parole, you understand that, because of your
7 prior record; do you understand that? And your prior
8 criminal history; do you understand that?

9 THE APPLICANT: Yes, sir.

10 THE COURT: Okay. Knowing that and understanding
11 that, do you still want to go forward with this
12 proceeding today, knowing what the potential result
13 could be for you if you win?

14 THE APPLICANT: Yes, sir.

15 THE COURT: Okay. Mr. Falk, you want to ask him
16 some questions?

17 MR. FALK: One moment, Your Honor.

18 THE COURT: Go ahead and have a seat.

19 MR. FALK: Mr. Smith, I just wanted to make sure
20 that you understand that if we went back and you got a
21 new trial and if you were convicted of strong arm --

22 THE APPLICANT: Yes, sir.

23 MR. FALK: -- not armed robbery but strong arm, it
24 would still set you up for LWOP, life without parole,
25 if you were convicted of strong arm robbery, you would

1 still get life without parole.

2 THE APPLICANT: No, sir, I wasn't aware of that.

3 MR. FALK: Could we just have a few more minutes.

4 THE COURT: Sure, yes, sir, go ahead, Mr. Falk.

5 Make sure he understands, is clear.

6 (Discussion off the record.)

7 MR. FALK: Your Honor, really the crux of our
8 whole defense in this -- or application, PCR
9 application, is that possibly my client might have had
10 some liability on a conviction for strong arm but
11 possibly not on armed robbery just based on some of
12 what I believe were leading questions that were allowed
13 in by the solicitor in this case. They weren't
14 objected to or got any type of corrective order to the
15 Court.

16 Realizing that if we went back, his possibility of
17 getting convicted at least of strong arm is significant
18 because of a video, that I advised him that if we went
19 back to trial he most assuredly would get LWOP'ed. And
20 so I believe he is prepared to withdraw this
21 application.

22 THE COURT: Okay. Mr. Smith, would you stand,
23 please, sir. Raise your right hand as best you can.

24 JOHN HENRY SMITH, after being duly sworn,
25 testified as follows:

1 THE COURT: Okay. All right, Mr. Smith, and I
2 realize that a lot's taken place since we just came in
3 the courtroom.

4 THE APPLICANT: Yes, sir.

5 THE COURT: With regards to explanations to you,
6 Mr. Falk did an even better job than I did of
7 explaining the problem that if you were to be
8 successful with the post conviction relief application,
9 he's explained to you that even strong arm robbery
10 could result -- a conviction for strong arm robbery
11 could result in an LWOP sentence, a life without parole
12 sentence; you understand that?

13 THE APPLICANT: Yes, sir.

14 THE COURT: Okay. After talking with Mr. Falk, is
15 it your desire to withdraw this application in light of
16 the relief that you might receive as a result of this
17 hearing?

18 THE APPLICANT: Yes, sir.

19 THE COURT: Okay. Do you understand that if you
20 withdraw this application and I grant your request,
21 that you can't come back later and file another post
22 conviction relief application?

23 THE APPLICANT: Yes, sir.

24 THE COURT: This will end this, it will be final
25 after today; you understand that?

1 THE APPLICANT: Yes, sir.

2 THE COURT: All right, sir. Has anybody
3 threatened you in any way to get you to do this?

4 THE APPLICANT: No, sir.

5 THE COURT: Has anybody promised you anything,
6 threatened you in any way, done anything inappropriate
7 to make you feel like you had to plead guilty?

8 THE APPLICANT: No, sir.

9 THE COURT: Are you under the influence of any
10 alcohol or drugs today?

11 THE APPLICANT: No, sir.

12 THE COURT: Do you suffer from any kind of
13 physical, mental or emotional problems that keep you
14 from being able to understand things clearly?

15 THE APPLICANT: No, sir.

16 THE COURT: In other words, you got a clear head
17 today?

18 THE APPLICANT: Yes, sir.

19 THE COURT: You understand everything I've asked
20 you, and everything that's been talked about so far
21 today?

22 THE APPLICANT: Yes, sir.

23 THE COURT: Okay. How old are you, sir?

24 THE APPLICANT: 58.

25 THE COURT: 58. How far did you go in school?

1 THE APPLICANT: I finished high school and two
2 years of technical college.

3 THE COURT: Two years technical. What kind of
4 work did you do after you got out of tech school?

5 THE APPLICANT: I did ceramic capacitor work at a
6 place in Myrtle Beach called AVX, stayed there 27
7 years.

8 THE COURT: 27 years, okay. So you got a
9 substantial work history, then. Okay. Mr. Falk has
10 been representing you in this matter; correct?

11 THE APPLICANT: Yes, sir.

12 THE COURT: And I realize a lot's taken place, as
13 I pointed out earlier on the record. Have you had
14 enough time to talk to him about this withdraw?

15 THE APPLICANT: Sir?

16 THE COURT: Have you had enough time to talk to
17 Mr. Falk about this withdraw of your application?

18 THE APPLICANT: Yes, sir. I figured that's enough
19 time.

20 THE COURT: Okay, all right. And you need to ask
21 him anything else at this point in time?

22 THE APPLICANT: No, sir.

23 THE COURT: Do you need any other explanations
24 from the Court or anybody?

25 THE APPLICANT: No, sir, I'm good.

1 THE COURT: Okay, all right. Are you satisfied
2 with the services that Mr. Falk has rendered to you?

3 THE APPLICANT: Yes, sir. Like I said, with this
4 LWOP thing, you know, that I know I committed a crime,
5 you know. I just didn't think it was to that extent,
6 you know, being that I didn't have a weapon or anything
7 like that. So I was thinking it could have been a
8 lesser charge. But, like you said, with strong arm,
9 the LWOP's going to be there anyway. So I'm just
10 between a rock and a hard spot, so I think I'll just
11 take it like it is.

12 THE COURT: Okay. So are you satisfied with the
13 services that Mr. Falk has provided?

14 THE APPLICANT: Oh. Yes, yes, sir.

15 MS. JAMESON: Your Honor, if we may have one brief
16 moment to -- it's my understanding, I was under the
17 impression strong armed was, and I want to confer we're
18 looking in Westlaw to make sure, that strong arm would
19 make him eligible for another LWOP. I know attempted
20 armed robbery is, but if we could have one brief
21 moment.

22 (Discussion off the record.)

23 MS. JAMESON: Your Honor, we are back on the
24 record. After counsel has spoken with Mr. Smith, it's
25 our understanding we are going forward at this time.

1 Now, I apologize for the confusion.

2 THE COURT: No, that's fine. I'm glad we got it
3 straight.

4 MR. FALK: Again, Your Honor, obviously this was
5 somewhat on the fly, and I was -- my advice, as the
6 record will show, was incorrect and that strong arm was
7 not a serious offense, which I thought it was. I knew
8 it wasn't two, I thought it was a one. So really going
9 forward would be consistent with our prior
10 conversations, and that's our wish.

11 THE COURT: Okay. Mr. Smith, you understand that
12 now and are aware of that?

13 THE APPLICANT: Oh, yes, sir.

14 THE COURT: Okay. We all were in error, but you
15 understand now what the situation is?

16 THE APPLICANT: Totally, sir.

17 THE COURT: Okay, good. All right, we'll go
18 forward then. Okay.

19 MR. FALK: My first witness would be Mr. Smith.

20 THE COURT: Mr. Smith, come around, sir, and be
21 sworn.

22 JOHN HENRY SMITH, after being duly sworn,
23 testified as follows:

24 THE CLERK: Please be seated. Please state your
25 full name.

1 THE APPLICANT: John Henry Smith.

2 DIRECT EXAMINATION

3 BY MR. FALK:

4 Q Mr. Smith?

5 A Yes, sir.

6 Q Who represented you in this action?

7 A Mr. Eric Fox.

8 Q Okay. And can you tell me something about your
9 understanding what the plea negotiations were.

10 A Well, just like we speaked earlier, the plea
11 was -- thing was about -- they gave me a 15-year plea,
12 that was on the table at first. And after a meeting
13 they said that they wasn't going to drop it or
14 something like that. It was going to stay the same.

15 And like I said, Your Honor and y'all, the only
16 reason I went to take it to trial is simply because I
17 didn't, you know, have a weapon or anything like that,
18 so I didn't feel like it warranted armed robbery. I
19 was thinking on the basics of maybe if I was convicted
20 under strong arm or something like that, a snatch and
21 grab or something like that. So that's why I didn't
22 accept the plea at that time.

23 Q Okay.

24 A And I took the trial, yes, sir.

25 Q All right. What did your lawyer tell you about

JOHN HENRY SMITH-DIRECT BY MR. FALK

15

1 the likelihood that you would get convicted of strong
2 arm robbery? I mean, the likelihood you'd be convicted
3 of armed robbery?

4 A Well, you know, he say I have a chance, you know.
5 In fact, he even said that -- I think he went as far as
6 from armed robbery or grand larceny, petty larceny,
7 something like that. Because it was like a snatch and
8 grab when the guy went to -- I just grabbed the money
9 and shot out the door. And that what was presented.

10 Q Okay.

11 A Yes, sir.

12 Q And what was the sentence that you got in this
13 case?

14 A 25 years.

15 Q Okay. And you were convicted of?

16 A Armed robbery. I don't know if I can speak on the
17 case or anything like that.

18 Q No, no, no.

19 A But --

20 Q You know, if we are successful today, this is your
21 testimony.

22 A Yes, sir. All right, sir.

23 MR. FALK: I have no further questions.

24 THE COURT: Ms. Jameson?

25 MR. FALK: I have no further -- yeah, of this

1 witness, yeah.

2 MS. JAMESON: Yes, I would like to cross-examine.

3 THE APPLICANT: Yes, ma'am.

4 CROSS-EXAMINATION

5 BY MS. JAMESON:

6 Q Mr. Smith, how many times did you meet with
7 Mr. Fox before going to trial?

8 A Twice.

9 Q Was he your first attorney?

10 A No, ma'am.

11 Q Who did you have prior to him?

12 A Ronald Hazzard was appointed to me at first. And
13 it was some transition where he was transferred in
14 Georgetown, and they gave me Mr. Fox. I saw Mr. Fox at
15 one time and, you know, we talked and everything like
16 that. I was kind of like waiting to see if I was going
17 to get another plea or something like that.

18 You know, a lot of times they gave you another one
19 and it comes down a little bit, and it probably would
20 have been acceptable to me. But I never got one. And
21 when I saw him again, it was either we going to take
22 the plea or we're taking it to trial. So I said, well,
23 let's -- you know, let's crank it up.

24 Q When you said you wanted another plea, what type
25 of offer were you looking for?

JOHN HENRY SMITH-CROSS BY MS. JAMESON

17

1 A Ma'am, I'm going to tell you the truth, I was
2 looking for ten years or less, ma'am. I mean, I
3 acknowledged that I did a crime and I was remorseful
4 for doing a stupid thing like that. But I just didn't
5 think it warranted no 25 years for just snatching and
6 grabbing \$60, ma'am.

7 Q How many times did you meet with Mr. Hazzard when
8 you had him representing you?

9 A One time. Out of 16 months, you know, I was with
10 him one time and met Mr. Fox one time, and then one
11 time before we went to trial.

12 Q Do you recall reviewing any of the discovery with
13 either Mr. Fox or Mr. Hazzard?

14 A Well, me and Mr. Fox went over some things, I
15 mean, I can't say we didn't. We went over some things.

16 Q Did you watch the surveillance video with Mr. Fox?

17 A I think he did bring a tape in or something like
18 that before we went to trial, if I'm not mistaken.
19 It's been a little while now.

20 Q Did you look at any of the photographs taken from
21 the surveillance videos of Mr. Fox?

22 A Yes, ma'am.

23 Q Where was your hands during this robbery?

24 A In my pocket.

25 Q Did he explain to you that that could look like a

1 weapon, and under South Carolina case law --

2 A Well, he explained to me that if I made a gesture.
3 But, you know, just having my hands in my pocket,
4 that's why I didn't understand. I came in the store
5 December the 11th and, you know, 1:30 in the morning,
6 it was wintertime. I came in the store with my hands
7 in my pocket, so I didn't think that warranted anything
8 by my hands just being in my pocket. I didn't make any
9 gestures like I had anything, I just had my hands in my
10 pockets.

11 Q But you told the store clerk you had a gun; right?

12 A No, ma'am, I didn't tell him that. But I have no
13 way of proving I didn't because I wasn't on audio. I
14 just told him that this was a robbery and, you know,
15 give me the money. And like me and Mr. Fox had
16 discussed, I didn't have any proof to say I didn't say
17 I had a weapon. But, ma'am, I didn't have a fingernail
18 clipper in my pocket.

19 Q Do you recall your trial, Mr. Smith?

20 A Yes, ma'am.

21 Q Do you remember the store clerk testifying, Hilton
22 Frier?

23 A Yes, I remember Mr. Frier.

24 Q Do you remember Mr. Frier testifying that you
25 brought a bag of Ziploc bags up to him, asked for the

JOHN HENRY SMITH-CROSS BY MS. JAMESON

19

1 price --

2 A Right.

3 Q -- and then told him to give you all of his money
4 because you had a gun?

5 A Yes, ma'am. But I didn't tell him because I had a
6 gun. I just told him to give me the money, this was a
7 robbery.

8 Q So you're denying you ever told him you had a gun?

9 A Oh, yeah. No, I never told anybody I had a gun
10 because I never had no weapon, period.

11 Q And you had your hand in your pocket during the
12 entire encounter?

13 A I won't say the entire encounter, but when the
14 surveillance camera showed the still pictures, it
15 wasn't like a video, it was just like still pictures of
16 me having my hand in my pocket at the register. You
17 know, everything happened so fast, I just had my hand
18 in my pocket at the time, yes, ma'am.

19 Q And Mr. Fox explained to you that based on that,
20 it's a -- it could be seen as a representation of a
21 gun?

22 A If -- you know, if I made some type of gesture,
23 but I only -- like I say, I didn't make any kind of
24 gesture. So, I mean, it's a difference between having
25 your hand in your pocket and having your hand in your

1 pocket, if I could just stand up and say, like this
2 (indicating), you know, making a gesture like I had
3 something. But if I stand up there and I'm just
4 talking to you and say, man, look here, it's a robbery,
5 give me the money, my hand's in my pocket, but I didn't
6 do any kind of gesture to make him think I had any kind
7 of weapon, ma'am.

8 Q And you appealed your conviction; correct?

9 A Yes, ma'am.

10 Q And that very issue was raised on appeal; correct?

11 A Yes, ma'am.

12 Q And the Court of Appeals agreed with the verdict
13 and affirmed your conviction; right?

14 A Yeah. They said some case about if you had the --
15 I mean, had your hand in your pocket. But it's still
16 based on if I told him I had a weapon, and I never told
17 him I had a weapon, ma'am, because I didn't have one.
18 It was like I said, it was a snatch and grab. That was
19 the only purpose I was in that store.

20 Q When you say it was a quick snatch and grab, this
21 encounter lasted five to ten minutes; didn't it, your
22 entire time in the store?

23 A Yes, ma'am.

24 Q So it wasn't a quick you grabbed the money and you
25 ran right out; right?

JOHN HENRY SMITH-CROSS BY MS. JAMESON

21

1 A No. The whole encounter lasted like that. I'm
2 talking about from the time I came in the store, and I
3 walked about two aisles, picked up the trash bags,
4 asked him for the price. See, ma'am, I'm old school, I
5 thought when he do the price check, the register was
6 going to open. I was going to reach over and grab what
7 I could and dash out the door. That was the whole
8 intent.

9 Q When you say you're old school, is that because
10 you have four prior armed robbery convictions?

11 A No. Old school because I was an older guy, that's
12 what we call old school.

13 Q But you do have four prior armed robbery
14 convictions; correct?

15 A Well, that's something I did back in the '90s,
16 yes, ma'am.

17 Q Okay. But you don't dispute you have four priors;
18 correct?

19 A No, ma'am, I don't dispute that. 20 years ago.

20 Q Okay. The State had served you with notice of
21 life without parole, intent to seek life without
22 parole; correct?

23 A Yes, ma'am.

24 Q Do you recall getting a copy of that notice?

25 A No, ma'am, I never get a copy. I don't think I

1 got a copy, I didn't see a copy.

2 MS. JAMESON: Your Honor, may I approach?

3 THE COURT: Yes, ma'am.

4 Q Mr. Smith, I'm handing you what's been premarked
5 as State's Exhibit 1.

6 A Yes.

7 Q Do you recognize that document?

8 A No, ma'am. This is the first time I saw that,
9 that I can remember.

10 Q You were never served with this?

11 A No, ma'am.

12 Q Okay.

13 A I don't have anything in my files on that.

14 Q Did Mr. Fox explain to you that the mandatory
15 sentence for armed robbery is 10 to 30 years?

16 A Yes, ma'am.

17 Q And did he explain to you that a probationary
18 sentence was not possible?

19 A I don't recall, ma'am.

20 Q One of your allegations is that he should have
21 presented more evidence to the Court in mitigation that
22 you had successfully completed probation before;
23 correct?

24 A Yes, ma'am.

25 Q But you understand for armed robbery you were

JOHN HENRY SMITH-CROSS BY MS. JAMESON

23

1 looking at a minimum of ten years in prison; correct?

2 A Oh, yes, ma'am.

3 Q So probation wasn't an option if you were
4 convicted of armed robbery; right?

5 A Right.

6 Q And you understood that?

7 A Yes, ma'am.

8 Q The life without parole notice was withdrawn after
9 your attorney presented some mitigation on your behalf;
10 correct?

11 A Yes, ma'am, as far as I know.

12 Q And you informed the trial Court, you informed
13 judge Hyman that you had successfully completed
14 probation before; correct?

15 A Yes, ma'am.

16 MS. JAMESON: And for the record, Your Honor,
17 that's on page 165 of the trial transcript.

18 Q And your attorney informed the Court that you had
19 a prior drug addiction; correct?

20 A Yes, ma'am.

21 Q And you had a 15-year offer in this case; correct?

22 A Correct.

23 Q Do you recall being arraigned by Judge Hyman?

24 A Arraigned, ma'am?

25 Q Where you had a hearing in front of Judge Hyman,

1 and he discussed the charges with you and the possible
2 plea offers from the State?

3 A I think when we came to court, he explained all
4 that stuff for me, but I didn't have anything prior to
5 that. I mean, everything I heard from him was the day
6 I came to court, I mean, you know, if that's what
7 you're talking about.

8 Q One of your other allegations is that your
9 attorney, Mr. Fox, failed to investigate the
10 credibility of the State's witnesses; correct?

11 A Right.

12 Q What other investigation did you want him to do?

13 A Well, like I said, the credibility of the victim,
14 and I just felt like, you know, they led him into what
15 he was saying about I said I had a gun. I mean, I
16 didn't never say that because I never had no weapon,
17 ma'am.

18 Q So it wasn't any investigation into his past, it
19 was just that leading question?

20 A Yes, ma'am.

21 Q Is what you mean by that. And you haven't done
22 any more investigation in anticipation of this hearing
23 today; have you?

24 A No, ma'am.

25 MS. JAMESON: One moment, Your Honor. No further

J. ERIC FOX-DIRECT BY MR. FALK

1 questions.

2 THE COURT: Mr. Falk?

3 MR. FALK: No redirect.

4 THE COURT: Okay. You can step down, sir.

5 THE APPLICANT: Thank you, sir.

6 (Witness excused.)

7 MR. FALK: We would call Mr. Fox.

8 THE COURT: Mr. Fox.

9 J. ERIC FOX, after being duly sworn, testified as
10 follows:

11 THE CLERK: Please be seated.

12 DIRECT EXAMINATION

13 BY MR. FALK:

14 Q Hello, Mr. Fox.

15 A Good morning.

16 Q On the date of this trial which was April 2013,
17 how long had you been with the public defender's
18 office?

19 A I had been with -- full-time with Horry County
20 public defender's office since June of 2012. But I had
21 been a public defender in Georgetown for 18 years
22 before that.

23 Q Okay. You obviously were there at the trial.
24 There was a video; is that correct?

25 A There was.

1 Q There was no audio; is that correct?

2 A You could not hear anything. I mean, there may
3 have been some sound, but no, you couldn't hear
4 anything being spoken between the clerk and Mr. Smith.

5 Q So the jury never heard out of my client's mouth
6 any threat about a gun; is that correct?

7 A That's correct. And you couldn't -- there
8 couldn't have been any lip reading either because one
9 view was from behind or the side. You couldn't see
10 Mr. Smith's face directly, so there wouldn't have been
11 any lip reading going on either.

12 Q So there was no evidence to corroborate the
13 victim's statement regarding the gun; is that correct?

14 A That's correct.

15 Q Okay. And in preparing for this trial, did you
16 think it was going to be important for the State to
17 show that the victim actually feared that there was a
18 gun?

19 A That was going to be everything. Mr. Smith is
20 correct, it was to me inconclusive as to what -- his
21 hands were clearly in his pockets. He's right, it was
22 December, you know, he had a jacket on. To me it was
23 not conclusive one way or the other what he was doing.
24 There's some movement, you know, as he moves around and
25 talks. You know, it's not just perfectly still. But

J. ERIC FOX-DIRECT BY MR. FALK

27

1 he never raises it up, you know, like the fingers in
2 the pocket kind of gesture either. So, yeah, that was
3 going to be everything, I think.

4 Q Do you have a copy of the transcript?

5 A I do.

6 Q Could you look at page 65.

7 A Yes, sir.

8 Q To kind of get yourself oriented to where that is
9 in the sort of scheme of the direct.

10 A Yeah, I see it.

11 Q I'm looking at line nine.

12 A Yes, sir.

13 Q The solicitor asked, at that time did you fear he
14 had a gun like he said?

15 A Yes.

16 Q Would you agree that that is possibly a leading
17 question?

18 A I would.

19 Q Was there a trial strategy not to object to that
20 question?

21 A Not specifically. Sometimes -- Mr. DeBusk, the
22 solicitor, is a very experienced solicitor. I believe
23 if there had been an objection, he would have easily
24 rephrased the question and gotten the same information.
25 I don't recall having that exact thought at the moment,

1 but the transcript is clear, I did not object.

2 Q And he did pretty much put those words into his
3 victim's mouth?

4 A I would agree, that's a leading question.

5 Q And would you agree that it's a leading question
6 on a substantial issue in the case?

7 A Yes.

8 Q One moment, please. If you could look, then, to
9 page 82.

10 A Yes, sir.

11 Q If you could look at lines 23, 24 and his answer
12 on 25.

13 A Yes.

14 Q The question was, and this is where Mr. DeBusk is
15 on redirect, he says, at that point you're in some fear
16 for your safety. Would you agree that that's a leading
17 question?

18 A Yes.

19 Q And, again, the subjective fear that the victim
20 had is an important element in the State's case; is
21 that not correct? He had to believe he had a gun;
22 right?

23 A To me the more -- the focus more during trial was
24 on the representation. I mean, that is tied in,
25 however --

J. ERIC FOX-CROSS BY MS. JAMESON

29

1 Q It's a representation?

2 A They join together, yes. I don't think the fear
3 is required as an element of armed robbery.

4 Q And so there is no other -- I'm not sure if I've
5 asked you this question specifically, but there was no
6 other corroborating evidence that there was a gun or
7 that the victim believed there was a gun; is that
8 correct? There was no evidence to corroborate that?

9 A No, no, it was the victim's testimony, that's
10 correct.

11 MR. FALK: Your Honor, I have no further
12 questions.

13 THE COURT: Counsel, I need to take a very quick
14 five minutes.

15 MS. JAMESON: Certainly. Thank you, Your Honor.

16 (WHEREUPON, a brief recess was taken at
17 11:41 a.m.)

18 CROSS-EXAMINATION

19 BY MS. JAMESON:

20 Q Mr. Fox, when were you appointed to represent
21 Mr. Smith?

22 A I took over for Mr. Hazzard -- hold on. Looks
23 like in late April of 2012.

24 Q How many times did you meet with him?

25 A I met with him -- from my notes, I met with him

1 four different times, once at the courthouse and three
2 different times at the detention center.

3 Q He was incarcerated pretrial?

4 A He was.

5 Q Did you file any Brady or Rule 5 motions in this
6 case?

7 A They had already been done when Mr. Hazzard
8 represented him. We did do a supplemental motion
9 discovery. I don't recall exactly what that was for,
10 but we also filed in July of 2000 -- oh, for the video,
11 we hadn't received the video initially. We failed a
12 supplemental motion for that in July 2012, and we did
13 receive that.

14 Q In the surveillance video, did you watch that with
15 Mr. Smith?

16 A I did.

17 Q Did it show one angle or multiple angles?

18 A I believe there were two. There was one that was
19 better that was a little bit behind. You could see the
20 clerk. So it was looking towards the counter, and you
21 could see the clerk and you could see the person come
22 in. You could see who we knew was Mr. Smith. My
23 recollection was it was slightly behind and to one side
24 just a little bit.

25 Q Where were his hands in the video?

J. ERIC FOX-CROSS BY MS. JAMESON

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1 A They were in his pockets.

2 Q Both hands in the pockets or just one?

3 A At least one -- I don't recall, I believe his
4 right hand was. The left hand, I honestly don't recall
5 if it was as well.

6 Q Do you recall the testimony of the clerk,
7 Mr. Frier?

8 A Yes.

9 Q And he testified that your client told him he had
10 a gun at least once if not more than once; correct?

11 A He did.

12 Q And Mr. Smith didn't testify at trial; correct?

13 A No. We discussed that because of his priors and
14 the fact the jury would then hear about his prior armed
15 robbery convictions, we felt that -- I advised him that
16 would not be maybe the wisest move. And we still had
17 the same arguments whether he testified or not, so he
18 chose not to.

19 Q So the uncontroverted testimony before the jury
20 was that he did tell Mr. Frier that he had a gun;
21 correct?

22 A That is correct.

23 Q Did you advise Mr. Smith of the elements of armed
24 robbery?

25 A Yes.

1 Q Is fear an element of armed robbery?

2 A Without looking back, I don't recall. I don't
3 believe it is. You have the, obviously, actually armed
4 with a weapon or representation of an object or
5 representation that a person reasonably believes is. I
6 don't believe that the person on the other end's fear
7 is an element of the crime.

8 Q Did you discuss potential sentences with Mr. Smith
9 for armed robbery?

10 A We did. We discussed the mandatory minimum on
11 armed robbery itself of ten years. The State -- the
12 solicitor indicated right along that because of his
13 priors that they intended to serve him notice with life
14 without parole if convicted of the armed robbery at
15 trial. That was done on June the 8th of 2012.

16 MS. JAMESON: Your Honor, may I approach briefly?

17 THE COURT: Yes, ma'am.

18 Q I'm going to hand you what's been premarked as
19 State's Exhibit 1; do you recognize that document?

20 A That is the notice of intent to seek a sentence of
21 life without parole.

22 Q And have you seen that before?

23 A I have.

24 Q Is that in your file?

25 A It probably is. I've not gone back to the file,

J. ERIC FOX-CROSS BY MS. JAMESON

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1 but I'm sure it is. I received a copy of that at the
2 hearing.

3 MS. JAMESON: The State would seek to introduce
4 State's Exhibit No. 1.

5 THE COURT: Any objection, Mr. Falk?

6 MR. FALK: Oh, I'm sorry, no objection.

7 THE COURT: Admitted without objection.

8 (WHEREUPON, State's Exhibit No. 1 was admitted in
9 evidence.)

10 MS. JAMESON: And I have a courtesy copy for Your
11 Honor.

12 Q Did you discuss this document with your client?

13 A Absolutely.

14 Q And he understood the State was seeking life
15 without parole based on his four prior armed robberies;
16 correct?

17 A He did. I believe he did.

18 Q Okay. Did you explain the ramifications of that
19 to him?

20 A I did. I indicated that if he were found guilty
21 of armed robbery, the only sentence a judge would be
22 able to give him would be life and that life meant day
23 for day until he died in prison.

24 Q Were there any plea offers in this case?

25 A They did. The State had offered around the time I

1 got the case -- to back up, Mr. Hazzard had discussed
2 with the solicitor trying to get some kind of treatment
3 program, the Life Recovery Program we have here which
4 is done through the jail. Something other than prison
5 was turned down.

6 When I got the case, the plea offer was 15 years
7 on armed robbery. Explained that to Mr. Smith as well
8 as the fact that he would have to do 85 percent of that
9 at least because it was a no-parole offense, the fact
10 that if found guilty at trial the only sentence he
11 could receive would be life.

12 Q Was your client arraigned in this case?

13 A He was on June the 8th, which is the same day that
14 the LWOP notice was served.

15 Q And he was advised that there was a 15-year plea
16 offer from the State; correct?

17 A He was -- even another attorney in our office, Kia
18 Wilson, had relayed that. We have in this circuit we
19 have what's called jail sign-up days where plea offers
20 are sent by the solicitor's office prior to court. And
21 if the specific attorney isn't available, another
22 attorney may just explain, not necessarily advise but
23 explain what the offer is. Ms. Wilson of our office
24 did that on May the 1st, according to the notes in the
25 file.

J. ERIC FOX-CROSS BY MS. JAMESON

35

1 And then on June the 8th, I met and discussed that
2 with Mr. Smith prior to the arraignment. And then of
3 course Judge Hyman, I believe, went over that on the
4 record with him.

5 Q Did you explain to your client that the State --
6 that the offer would expire?

7 A Yes.

8 Q And if the offer expired, the State would not be
9 making any other offers and it could go to trial?

10 A I did.

11 Q I'm going to hand you what's been premarked as
12 States Exhibit No. 2. Do you recognize that document?

13 A I do. This is the arraignment findings that Judge
14 Hyman signed on June the 8th, 2012.

15 Q Have you seen that document before?

16 A I have. It would have been -- a copy would have
17 been provided to me sometime after.

18 MS. JAMESON: The State would seek to move Exhibit
19 No. 2, the arraignment findings of Judge Hyman, into
20 the record.

21 MR. FALK: No objection.

22 THE COURT: Without objection.

23 (WHEREUPON, State's Exhibit No. 2 was admitted in
24 evidence.)

25 MS. JAMESON: Your Honor, if I may approach with a

1 courtesy copy.

2 Q And this document states what we just discussed,
3 that there was a 15-year plea offer, it was going to
4 expire and it wouldn't be remade; correct?

5 A It does. It does.

6 Q And during -- your client was convicted of armed
7 robbery after trial; correct?

8 A He was.

9 Q And did you present any mitigation evidence after
10 he was convicted?

11 A I would have to look at the transcript. I don't
12 recall specifically what we discussed.

13 Q Specifically, if you want to start on 164.

14 A Thank you. Well, I think, you know, it's there in
15 the transcript. I described his prior record, how long
16 ago that had been, that he really had no trouble other
17 than a breach of trust in ten years. He had a good job
18 with AVX; in fact, this, I believe, came up when he
19 lost what would have been a very good paying job.

20 Pointed out that other people, including people at
21 the jail, had told me that he was -- or the court
22 officers said he was a good fellow. So, yeah, there
23 was some mitigation that was presented.

24 Q And did the State at some point during your
25 mitigation withdraw its LWOP notice?

J. ERIC FOX-CROSS BY MS. JAMESON

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1 A They did. My recollection is that after some of
2 the mitigation, some of the presentation, Judge Hyman
3 called us to the bench, the solicitor and myself,
4 informed the solicitor that he would likely give a
5 substantial -- a 25-year sentence if the State would be
6 willing to withdraw life without parole notice. And
7 the solicitor, my recollection was, pretty much
8 instantly agreed.

9 Q Was there an indication of Judge Hyman of what
10 potential sentence he was thinking of giving your
11 client if the LWOP notice had been withdrawn?

12 A My recollection is he said it would be 25. It was
13 going to be a big number, but certainly much --
14 probably much less than life that he was facing.

15 Q Regarding the allegation of the leading questions,
16 we start it off on page 65 with, did you fear for your
17 life when he had a gun, I think your testimony was the
18 solicitor easily could have rephrased that question
19 based on your experiences with him?

20 A Yes.

21 Q And, again, the clear unrefuted testimony is that
22 Defendant said he had a gun to the clerk?

23 A From the clerk, yeah.

24 Q Do you think it's pretty common sense to the jury
25 that a gun during an armed robbery would cause someone

1 to be in fear for their life?

2 A Many would have that reaction, so yes. Our whole
3 argument was there was no gun, there was no
4 corroboration for that. There certainly was no gun
5 found, you certainly couldn't see a gun in the video.
6 My argument was it was very unclear what Mr. Smith was
7 doing with his -- he had a hand in the pocket, but that
8 was all very clear.

9 So there was still, we felt, a very good argument
10 to be had for, as Mr. Smith said, something other than
11 armed robbery.

12 Q And you made all of those arguments on the record
13 during the trial before Judge Hyman; correct?

14 A I did.

15 Q And those were preserved for appellate review?

16 A They were. And we actually even got a jury charge
17 from the judge on petty larceny, and I think I used --
18 Mr. Smith used the term snatch and grab, and I didn't
19 disagree, I think I used that phrase in closing
20 argument. And Judge Hyman did actually charge petty
21 larceny, or in fact, just stealing something, you know,
22 a small amount. And that was an option the jury had.

23 Q Had you had an opportunity to look at any of the
24 appellate records in this case?

25 A I have not.

J. ERIC FOX-CROSS BY MS. JAMESON

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1 MS. JAMESON: Moment's indulgence, Your Honor.

2 THE COURT: Yes.

3 Q Regarding the allegation of credibility against
4 the store clerk, did you notice any credibility issues
5 with Mr. Hilton Frier?

6 A He didn't have anything in terms of impeachable
7 convictions. And then there would just be the normal
8 issue you have with any witness is the opportunity to
9 observe, you know, consistency and statements, the
10 things you would explore with any witness.

11 Q And there was a show up line-up here; correct?

12 A There was.

13 Q Do you recall how long after the robbery he was
14 brought back to Mr. Frier for an identification?

15 A It was not very long. They were able to find him
16 fairly -- I don't recall exactly how long, but it
17 wasn't hours by any means. I think it was minutes.

18 Q And he was wearing the same clothing he was
19 wearing during the robbery, according to the testimony
20 of Mr. Frier; correct?

21 A There was some discussion about the sweatshirt, I
22 think. It was at least consistent, I think, was the
23 testimony. I'm not sure he still had on the jacket
24 that you could see in the video.

25 Q And Mr. Smith never denied being there and taking

1 the money, he only denied having the gun?

2 A That's exactly right. He was very specific with
3 me, and I was in my negotiation with the solicitor.
4 Yes, I did this. He was in a tight spot, kind of
5 desperate. He specifically and intentionally did not
6 take a weapon thinking that it could not be -- you
7 know, not being a lawyer and not understanding the law,
8 he specifically avoided taking a weapon that would
9 scare anybody, that would threaten anybody, that could
10 escalate the situation that could harm anybody thinking
11 that he was committing, as he puts it, a snatch and
12 grab rather than armed robbery.

13 Q Did he ever deny to you telling the clerk he had a
14 gun?

15 A Always.

16 Q And he has four prior armed robbery convictions?

17 A He does.

18 MS. JAMESON: No further questions, Your Honor.

19 THE COURT: Follow up?

20 MR. FALK: Just on redirect.

21 REDIRECT EXAMINATION

22 BY MR. FALK:

23 Q You had testified that you got a petty larceny
24 instruction, and you also got an instruction on strong
25 arm; is that correct?

1 A That's correct.

2 Q So the jury had the opportunity?

3 A Yes. They absolutely could have gone with either
4 the two lesser includeds or just not guilty.

5 Q So they weren't presented with an all-or-nothing
6 type of verdict?

7 A They were not. And, in fact, I think I argued
8 kind of for the snatch and grab that -- and, I think, I
9 believe I said to the jury, look, we don't dispute that
10 something happened, that there was a crime. It was a
11 matter of what the crime should be.

12 Q Was there any testimony of how much money was in
13 the till?

14 A I don't know how much was in, I think \$60 was
15 taken.

16 Q Yeah. But not the entire -- the entire drawer
17 wasn't taken; was it?

18 A Oh, no. No, no. I think the clerk just kind of
19 reached in and handed -- and I don't know whether that
20 was everything, it was later at night, but it was \$60
21 taken.

22 MR. FALK: I have no further questions.

23 MS. JAMESON: No additional from the State, Your
24 Honor.

25 THE COURT: All right, you can step down, Mr. Fox.

1 Thank you, sir.

2 (Witness excused.)

3 THE COURT: Anything else?

4 MR. FALK: Your Honor, we have no further
5 witnesses.

6 THE COURT: Anything else from the State?

7 MS. JAMESON: No, no further witnesses. If we
8 could just briefly make a few comments in regards to
9 this case in closing.

10 THE COURT: Certainly.

11 MS. JAMESON: The State's position is that --

12 THE COURT: Does he go first?

13 MS. JAMESON: You go first?

14 THE COURT: Mr. Falk.

15 MR. FALK: I don't mind if she goes first. But, I
16 mean, really, I don't believe his testimony on the plea
17 agreement. I think that that, my client himself -- I
18 don't think we have an issue there. I think our really
19 only issue that we're going forward with is whether or
20 not Mr. Fox, for whatever reason, allowed through
21 leading questions leading the victim -- I mean, the
22 solicitor putting leading questions into the victim's
23 mouth and then getting the testimony out of the victim
24 that, yeah, I was in fear, yeah, I thought he had a
25 gun.

1 Certainly I think the testimony was there was
2 never any representation. It was one of these things,
3 you know, I got my hand in my pocket but not, you know,
4 pointing it at anybody, just his hand was in his
5 pocket. And there was a dispute as to -- well, my
6 client disputes whether or not he had a gun.

7 I think the leading testimony that, yeah, I was in
8 fear for my life, yeah, I feared he had a gun, yeah, I
9 only did that after he told me, I believe that that was
10 the testimony that certainly could easily have swayed
11 the jury to going from some of the more -- the lesser
12 included offenses, the strong arm robbery or possibly
13 even the petty larceny to sort of the snatch and grab.

14 I think that generally it's -- although allowing a
15 leading question here or there might not be the type of
16 error that would justify somebody getting new relief.
17 However, we believe that there was extreme prejudice to
18 my client from that error. I mean, a leading question
19 here or there, but we believe that it was a leading
20 question that was of a substantial element that the
21 State needed to convince the jury that this guy, yeah,
22 really did think there was a gun, and that's why he
23 acted. Thank you.

24 THE COURT: Thank you, Mr. Falk. Ms. Jameson.

25 MS. JAMESON: In response, Your Honor, I believe

1 Mr. Falk just said the only real meaty issue here for
2 the Court's consideration is the leading questions by
3 the solicitor. And I know there's been testimony in
4 regards to page 65 where the leading questions started
5 about the fear for life.

6 I would like to direct Your Honor's attention to
7 page 63 of the trial transcript, particularly lines 12
8 through 21. And this testimony, of course, comes
9 before that testimony that Applicant is objecting to.
10 And in this testimony, the clerk, Mr. Hilton Frier,
11 says that Mr. Smith approached him and clearly told him
12 to take the money out of the register and not to be
13 quiet or make any noise because he said he had a gun,
14 and one of his hands was in his pocket.

15 So the State's position is that that would be
16 irrelevant testimony because we already have the
17 testimony that came in that he had a gun. And any
18 reasonable person, if they're approached with a gun
19 pointed at them and told to get money that they would
20 be in fear for their life. So the State's position is
21 that Mr. Fox wasn't deficient for failing to object to
22 that testimony.

23 But even if Your Honor were to find him deficient,
24 there certainly would not be any prejudice flowing from
25 that allegation because the jury already had the proper

1 testimony that Mr. Smith had approached him with a gun,
2 and that would cause some fear.

3 So the State would submit that Applicant hasn't
4 set forth evidence to establish either deficiency or
5 prejudice under Strickland and would ask that Your
6 Honor deny this application.

7 THE COURT: Okay. All right. Ms. Jameson, what
8 you have pointed out that's on page 63 of the
9 transcript makes it clear that the response of the
10 clerk is certainly not any type of leading question.
11 The question was, what happened. And he goes through
12 and explains about the statement about a gun and also
13 that the hands were in the pocket.

14 So even if two pages later on cross-examination or
15 whatever, Mr. Fox did allow a leading question, which
16 would have been corrected, I'm sure, as he pointed out
17 by the solicitor, I just don't find that there's any
18 real deficiency here in his representation.

19 And I don't think it, you know, what he did or
20 didn't do would lead to any type of -- or justify any
21 type of relief under the post conviction relief
22 application, so I respectfully deny Mr. Smith's
23 request.

24 MS. JAMESON: Thank you, Your Honor. The State
25 will prepare a proposed order for your consideration

1 and send it to Mr. Falk.

2 THE COURT: Good luck, Mr. Smith.

3 (The hearing concluded at approximately

4 12:05 p.m.)

5 (End of Transcript of Record)

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2
3 CERTIFICATE OF REPORTER
45 STATE OF SOUTH CAROLINA)
6)
7 COUNTY OF HORRY)8 I, TERESA J.F. BAUTZ, Official Court
9 Reporter for the Fifteenth Judicial Circuit of the
10 State of South Carolina, do hereby certify that the
11 foregoing is a true, accurate and complete Transcript
12 of Record of the proceedings had and evidence
13 introduced in the trial of the captioned case, relative
14 to appeal, in the Court of Common Pleas for Horry
15 County, South Carolina, on the 10th day of October,
16 2017.17 I FURTHER CERTIFY that I am neither of
18 kin, counsel nor interest to any party hereto.
1920
21 *S/Teresa J. F. Bautz*22 TERESA J.F. BAUTZ, RPR
23 Official Court Reporter
24
25

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF HORRY	)	INDICTMENT: 2012GS2600469
	)	
STATE OF SOUTH CAROLINA	)	
	)	
VS.	)	NOTICE OF INTENTION TO SEEK A
	)	SENTENCE OF LIFE WITHOUT PAROLE
JOHN HENRY SMITH	)	
	)	
DEFENDANT	)	
	)	

TO: JOHN HENRY SMITH, DEFENDANT, AND FOX, J. ERIC, HIS/HER ATTORNEY

PLEASE TAKEN NOTICE that at the trial of the above-entitled action to be scheduled on a date at least ten (10) days hence, of which you will be timely notified, the State will seek the Defendant to be sentenced to a term of imprisonment for life without the possibility of parole, pursuant to South Carolina Code of Laws, § 17-25-45 (1995), as amended. The State intends to rely upon the Defendant's prior convictions of:

- 1993 Armed Robbery Horry County (MB) D847405
- 1993 Armed Robbery Horry County (MB) D923823
- 1993 Armed Robbery Horry County (MB) D847404
- 1993 Armed Robbery Horry County (NMB) D406416

to statutorily enhance his/her punishment.

SCANNED

Conway, South Carolina

Dated: 5-8-12

5-8-12 4:00

George H. Debusk
 GEORGE H. DEBUSK, SENIOR
 ASSISTANT SOLICITOR
 FIFTEENTH JUDICIAL CIRCUIT

FILED
 HORRY COUNTY
 2012 JUN -6 PM 12:03
 MELANIE HOSKINS WARD
 CLERK OF COURT

CERTIFIED COPY
 2012 JUN -6 PM 12:07
 Myrlene Maynard
 CLERK OF COURT
 HORRY COUNTY



STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF HORRY) INDICTMENT: 2012GS2600469
STATE OF SOUTH CAROLINA)
VS.) ARRAIGNMENT FINDINGS
JOHN HENRY SMITH)
DEFENDANT)

MELANIE T. JONES, JR.
CLERK OF COURT

2012 JUN 25 AM 11:38

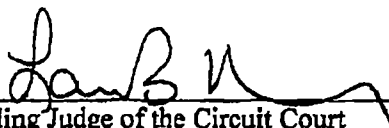
FILED

THIS MATTER comes before the Court on motion of George H. Debusk, on behalf of the Solicitor for the Fifteenth Judicial Circuit, to determine if the defendant intends to plead guilty or not guilty to the charges above-referenced, and to assist in scheduling a proposed trial date should the defendant wish to exercise his or her right to a trial. The defendant and his or her attorney, J. Eric Fox, are present before the Court.

Based upon the inquiry of the Court and the representations of the defendant, defense counsel, and counsel for the state, the Court makes the following findings and conclusions:

1. That the defendant has been fully informed of the State's plea offer.
2. That the defendant has had adequate time to discuss the State's plea offer with defense counsel and that after careful consideration, the defendant has rejected the plea offer of the state.
3. That the defendant understands and acknowledges that the State has withdrawn its plea offer, and that the State will not re-offer the plea on some future date.
4. That the defendant and defense counsel have considered possible conflicts of interest and have determined that none are known at this time.
5. That there are no unusual or exceptional circumstances known to the defense or the State at this time that would cause unreasonable delay in the trial of this case.
6. That the State and the defense have indicated both parties intend to be ready for trial during the August 2012, terms of Court.

THE ABOVE FINDINGS AND CONCLUSIONS are made this 8 day of JUNE, 2012.


Presiding Judge of the Circuit Court
Fifteenth Judicial Circuit

Conway, South Carolina



STATE OF SOUTH CAROLINA
COUNTY OF HORRY

John Henry Smith, SCDC No. 211679,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2015-CP-26-4022

ORDER OF DISMISSAL

FILED
HORRY COUNTY
2017 JUN 10 PM 4:38
RENEE N. ELMS
CLERK OF COURT
HORRY COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief filed by John Henry Smith (Applicant) on June 2, 2015, alleging various claims of ineffective assistance of counsel. Respondent made its Return on February 1, 2016, requesting an evidentiary hearing be held. An evidentiary hearing was convened in the Horry County Court of Common Pleas on March 24, 2017, at the Horry County Courthouse. Applicant was present at the hearing and was represented by James Falk, Esquire. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. At the conclusion of the hearing, this Court denied the application from the bench. This order follows.

PROCEDURAL HISTORY

The records before this Court indicate the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. During its February 2012 term of court, the Horry County Grand Jury indicted Applicant for armed robbery (2012-GS-26-0469). Jonathan Eric Fox, Esquire, of the Horry County Public Defender Office represented Applicant. On April 17, 2013, Applicant proceeded to jury trial in the Horry County Court of General Sessions before the Honorable Larry B.

Hyman Jr., circuit court judge. On April 18, 2013, the jury convicted Applicant as indicted. Judge Hyman sentenced Applicant to twenty-five years' imprisonment.

Applicant filed a timely notice of appeal and an appeal was perfected on Applicant's behalf by Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense—Division of Appellate Defense. Following briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence in an unpublished summary opinion. State v. John Henry Smith, Op. No. 2015-UP-095 (Ct. App. filed Feb. 25, 2015). The Remittitur was returned to the circuit court on March 13, 2015.

ALLEGATIONS RAISED

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following allegations of ineffective assistance of counsel:

1. Failure to adequately investigate the facts and circumstances surrounding the credibility of the State's witness Hilton Fryar;
2. Failure to seek an instruction stating that a burglary charge must set forth one specific crime intended upon entry and stating what the specific crime was in Applicant's case;
3. Failure to investigate and present mitigation evidence during sentencing;
4. Failure to emphasize Applicant had previously completed probation successfully; and
5. Failure to emphasize Applicant's prior probation did not include drug treatment program which would have acted as preventative measure.

At the evidentiary hearing, Applicant proceeded forward on the two additional allegations of ineffective assistance of counsel: failure to properly advise Applicant regarding a fifteen year plea offer from the State and failure to object to leading questions to the victim. In support of his application, Applicant testified on his own behalf and presented testimony from trial counsel Jonathan Eric Fox (trial counsel).

SUMMARY OF EVIDENCE ADDUCED AT TRIAL

A little after two o'clock in the morning on December 12, 2011, Hilton Fryar was working the cash register at Walgreen's when a man entered the store, got a box of Ziploc bags from a shelf, brought it to the counter, and asked Fryar for the price.¹ Fryar was able to identify Applicant as the man who entered the store. Applicant then ordered Fryar to give him the money from the cash register and told Fryar not to make any noise because he had a gun. One of Applicant's hands was in his pocket. Fryar opened the register and started removing money when Applicant suddenly snatched approximately sixty-dollars from Fryar's hand and ran out the door. The incident was captured by the store's video surveillance camera and that video recording was introduced into evidence over Applicant's objection. After it was published, two still shots from that video were also introduced. Fryar repeated his testimony that during the robbery Applicant claimed to have a gun and had his hand in his pocket as if he may have had a gun. (Tr.p.62, line 1-p.74, line 24). On cross-examination Fryar acknowledged he never actually saw a weapon. (Tr.p.77, lines 16-20). On re-direct examination, Fryar testified he was in fear for his safety and backed away from the register after Applicant claimed to have a gun. (Tr.p.82, lines 7-25).

Police officers responded to the Walgreen's shortly after the robbery. Based on Fryar's description of the perpetrator and a subsequent search of the surrounding area, Applicant was located on foot, chased, and ultimately apprehended. The police officers who chased and caught Applicant after the incident, placed him under arrest, and booked him into the detention center did not see Applicant with a weapon, did not see him throw anything to the ground during the

¹ Applicant's theory of the case was an acknowledgment he committed the robbery, but a claim that he was not armed. (Tr.p.57, line 20-p.60, line 23).

pursuit, and did not discover a weapon in his possession. (Tr.p.88, lines 18-24; p.89, lines 21-24; p.95, line 7-p.96, line 13; p.100, lines 2-17; p.106, line 4-p.107, line 2; p.115, lines 11-22).

At the close of the State's case, Applicant moved for a directed verdict. He argued the State failed to produce evidence of any actual weapon and, relying on our supreme court's opinion in State v. Muldrow,² argued his words alone were insufficient to allow the case to go forward. The solicitor argued evidence of more than mere words existed to support the armed robbery charge and that Applicant made an actual representation of a weapon by having his hand in his pocket and claiming he had a gun. The trial court agreed, found the evidence against Applicant went beyond the evidence in Muldrow, and denied the motion. (Tr.p.116, line 9-p.119, line 15).

The trial court subsequently granted Applicant's request for jury charges on the lesser-included offenses of strong-arm robbery and larceny. (Tr.p.123, line 20-p.126, line 15). During closing arguments, the solicitor argued Applicant's claim he had a gun combined with having his hand in his pocket constituted a representation of a deadly weapon and argued it was reasonable for Fryar to think Applicant had a gun. (Tr.p.131, lines 2-23). Applicant argued these actions were insufficient to carry the State's burden of proof. (Tr.p.142, line 8-p.144, line 4). The trial court gave standard jury charges on the respective roles of the judge and jury, the State's burden of proof, the presumption of innocence, reasonable doubt, direct and circumstantial evidence, credibility of witnesses, and the elements of armed robbery. (Tr.p.145, line 5-p.158, line 22). In regard to the State's burden of proving Applicant was either armed with a deadly weapon or alleged he was armed while using a representation of a deadly weapon, the court charged in part:

However, words alone are not sufficient to establish the defendant was armed with a deadly weapon. The State must show evidence corroborating the allegation of being armed, for example, the use

² 348 S.C. 264, 559 S.E.2d 847 (2002).

of a physical representation of a deadly weapon, to establish an armed robbery. (Tr.p.153, line 23-p.154, line 4). The jury deliberated for approximately forty-five minutes and returned a verdict of guilty of armed robbery. (Tr.p.161, lines 1-19).

Following the jury's conviction of Applicant, the solicitor presented Applicant's lengthy prior record to the trial court, including convictions for four prior armed robberies and numerous fraudulent check, forgery, and criminal conspiracy charges. (Tr. 163-64). The solicitor also informed the trial court it had previously served Applicant with notice of its intention to seek life without parole pursuant to S.C. Code Ann. § 17-25-45 based on Applicant's four prior burglary convictions. (Tr. 163-64). In mitigation, trial counsel noted Applicant was forty-five years old, had not been in any serious trouble in the past decade, and was a peaceful man other than his drug addiction. (Tr. 164-65). Trial counsel also stressed Applicant denied ever having a weapon and that Applicant had previously completed probation successfully. (Tr. 164-65). Applicant then addressed the court, noting he had effectively finished probation previously, had been employed for more than fourteen years, and only relapsed with addiction after losing his job. (Tr. 165-66). The trial court asked both parties to approach the bench, and thereafter, the State withdrew its notice of intention to seek life without parole. (Tr.167). The trial court then sentenced Applicant to twenty-five years imprisonment. (Tr. 168).

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from trial counsel. Applicant testified first and stated he met with trial counsel twice prior to his trial. He testified trial counsel was the second attorney who represented him on this charge. He recalled reviewing the discovery with trial counsel, including surveillance footage from the Walgreen's that showed the robbery from several different angles. Applicant acknowledged he

robbed the Walgreen's, but asserted he did not have a weapon and therefore should have been convicted of strong arm robbery. He admitted to having his hand in his pocket, but stressed he made no gesture or movement to indicate he had a gun. He agreed the video surveillance shows him with his hand in his pocket. Applicant denied telling the store clerk he had a gun and claimed he only stated, "Give me the money, this is a robbery." He testified he wanted trial counsel to attack the credibility of the victim because he did not tell the clerk he had a weapon. He testified trial counsel explained to him that under South Carolina case law, the physical representation element of armed robbery could be met based on his hand in his pocket.

Applicant testified he wanted a plea offer of ten to fifteen years imprisonment and is displeased with his twenty-five year sentence. He acknowledged he had four prior armed robbery convictions and knew the State was seeking a life without parole sentence, although he denied being served with written notice from the State. He testified he recalled the State withdrawing its life without parole notice after trial counsel's mitigation. Applicant admitted he was aware of a fifteen year plea offer from the State and he rejected the offer because he wanted a better offer of a ten year sentence. He acknowledges trial counsel advised him he would not be eligible for a probationary sentence and that the mandatory minimum sentence for armed robbery was ten years of imprisonment.

Trial counsel took the stand next and testified he had been practicing criminal defense for more than twenty years. He testified he took this case over from a fellow public defender a year prior to trial. He testified he met with Applicant four times prior to his trial. Trial counsel testified he reviewed all discovery materials with him, including the surveillance footage from the store. He testified the videos clearly showed Applicant had his hand in his pocket during the robbery. He testified the video did not have clear sound and therefore was unable to corroborate

the store clerk's assertion Applicant said he had a gun. However, he acknowledged the uncontroverted testimony presented at trial was that Applicant told the clerk he had a gun and was in fear for his life. Trial counsel testified Applicant did not take the stand at trial to refute the clerk's claims because of his four prior armed robbery convictions. However, he testified the store clerk did not have any credibility issues or any impeachable offenses that could be used to attack his veracity.

Trial counsel testified the State served Applicant with notice of intention to seek a sentence of life without parole, which was introduced by Respondent as Respondent's Ex. No. 1. He testified the State had previously made an offer of fifteen years imprisonment and Applicant rejected this plea offer because he wanted a better plea offer to the lesser included offense of strong armed robbery. He testified Applicant was arraigned before Judge Hyman and during the arraignment, he was questioned regarding the State's fifteen year plea offer. He testified these arraignment findings were memorialized in a written order signed June 8, 2012 and filed June 25, 2012, which was introduced as Respondent's Ex. No. 2. Trial counsel testified the State ultimately withdrew its notice of intent to seek life without parole after his mitigation and testified the trial court indicated it would sentenced Applicant to twenty-five years of imprisonment if the State rescinded its notice.

He testified his trial strategy was to attack the State's case, including the credibility of the store clerk victim, who was the State's chief witness. He again acknowledged the clear and uncontroverted testimony presented at trial was that Applicant had a gun and was in fear for his life. When questioned about his failure to object to the State's allegedly leading questioning of the clerk regarding whether he was in fear, trial counsel testified he believes it is common sense that someone being threatened with a gun would be in fear for his or her life and that the State

could have, and likely would have, rephrased its question if he had objected to such questioning. (Tr. P. 63, 65, 82).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearings. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was

unreasonable. Strickland, 466 U.S. at 689. “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668

After careful review of the entire record, including the testimony and exhibits presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action. Below are this Court's rulings in regards to each of Applicant's specific allegations of ineffective assistance of counsel:

Allegation No. 1: Trial counsel was ineffective for failing to adequately investigate the credibility of the victim

Applicant alleges trial counsel was ineffective for failing adequately investigate the credibility of State's witness Hilton Fryar, the Walgreen's store clerk who Applicant robbed. Specifically, Applicant alleges trial counsel was ineffective for failing to attack the credibility of Fryar regarding Fryar's assertions Applicant stated he had a gun. Applicant presented no evidence to impugn Fryar's credibility and or otherwise support this allegation. Additionally, trial counsel testified Fryar did not have any credibility issues or any impeachable offenses that could be used to attack his veracity.

A review of the record reveals trial counsel vigorously cross-examined Fryar and was able to elicit from Fryar that he never saw Applicant with a weapon. (Tr. 77). Additionally, during his closing argument, trial counsel highlighted to the jury, "no question there is no weapon, no one ever testified to you they saw a weapon, no one ever testified to you they found a weapon." (Tr. 141). Moreover, trial counsel argued to the jury, "[n]ow, you heard the testimony of Mr. Fryar. The judge will tell you you can believe everything a witness tells you, none of what a witness tells you, some of it. You have a video. What you don't have is audio, you cannot hear what is being said to verify that but words alone are not sufficient, so do you have, this whole things comes down to do you have a representation of a gun." (Tr. 142).

This Court finds Applicant has failed to carry his burden as to this allegation, which must be denied and dismissed with prejudice. This Court finds trial counsel's performance was not deficient and was well within the professional standards required for a criminal defense attorney. Specifically, trial counsel elicited from Fryar that he never saw a weapon, and then highlighted this to the jury on cross-examination, as well as emphasizing the video recording did not have

audio and there was nothing to corroborate Fryar's testimony that Applicant said he had a gun. Furthermore, Applicant cannot show any prejudice, as he failed to present any evidence as to any additional information trial counsel could have used to impeach or otherwise attack Fryar's credibility. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

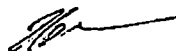
Allegation No. 2: Trial counsel was ineffective for failing to seek an instruction stating that a burglary charge must set forth one specific crime intended upon entry and stating what the specific crime was in Applicant's case

Applicant alleges trial counsel was ineffective for failing to seek an instruction stating that a burglary charge must set forth one specific crime intended upon entry and stating what the specific crime was in Applicant's case. However, Applicant was not indicted or convicted of burglary. This allegation is wholly without merit and must be denied and dismissed with prejudice.

Allegation No. 3: Trial counsel was ineffective for failing to investigate and present mitigation evidence during sentencing

Applicant alleges trial counsel was ineffective for failing to investigate and present mitigation evidence during sentencing. At the post-conviction relief hearing, Applicant could not articulate and failed to present evidence of any specific information he wanted trial counsel to present in mitigation. Additionally, the record refutes this allegation. Prior to trial, the State had served Applicant with its notice of intention to seek life without parole. During sentencing, trial counsel argued the following in mitigation on Applicant's behalf:

Your Honor, Mr. Smith, John Henry is 45 years old, lives here in town. Your Honor has heard his prior record. I would point out that the things that make him eligible for a life sentence happened twenty years ago, he was much younger, a much different man. He did about seven years on that charge, released around 2002. For the last ten years the only General Sessions charge was a breach of



trust, nothing violent, nothing remotely like this, but that does make him eligible under the statute for a life sentence.

I think Mr. Smith, and one of the court officers relayed to me that they know Mr. Smith, he is a very good and gentle man, drugs being the problem. It is not an excuse for what he has done but what he has always told me about this situation was there was no form of plan in his mind, he certainly did not wish to harm anybody. He is adamant he did not have a weapon and as I argued to the jury that it was a robbery, not an armed robbery but we're not taking issue with that because certainly the elements, there was evidence to support the jurors' verdict in terms of representation of a weapon, but we ask Your Honor to keep all those things in mind in your sentence, Your Honor.

(Tr. 164-65). Shortly thereafter, the trial court asked the State and trial counsel to approach the bench, and as a result, the State withdrew its notice of intention to seek life without parole and the trial court sentenced Applicant to twenty-five years' imprisonment.

This Court finds Applicant has failed to carry his burden as to this allegation, which must be denied and dismissed with prejudice. This Court finds trial counsel's performance was not deficient and was well within the professional standards required for a criminal defense attorney. Specifically, trial counsel successfully presented mitigation on Applicant's behalf during the sentencing proceeding which resulted in the State withdrawing its notice of intention to seek life without parole. Furthermore, Applicant cannot show any prejudice, as he failed to present any evidence as to any additional information trial counsel could have used during mitigation. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

Allegation No. 4: Trial counsel was ineffective for failing to emphasize Applicant had previously completed probation successfully

Applicant alleges trial counsel was ineffective for failing to emphasize Applicant had previously completed probation successfully. However, Applicant was convicted of armed robbery, an offense which requires a mandatory minimum sentence of ten years of

imprisonment. See S.C. Code Ann. §16-11-330(A) ("Robbery and attempted robbery while armed with deadly weapon. A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony and, upon conviction, **must be imprisoned for a mandatory minimum term of not less than ten years or more than thirty years, no part of which may be suspended or probation granted.** A person convicted under this subsection is not eligible for parole until the person has served at least seven years of the sentence.") (emphasis added). Therefore, this allegation is wholly without merit and must be denied and dismissed with prejudice.

Allegation No. 5: Trial counsel was ineffective for failing to emphasize Applicant's prior probation did not include drug treatment program which would have acted as preventative measure

Applicant alleges trial counsel was ineffective for failing to emphasize Applicant's prior probation did not include a drug treatment program which would have acted as a preventative measure. However, as discussed above, Applicant was not eligible for probation, drug treatment programs, or any other alternative form of incarceration. This allegation is without merit and must be denied and dismissed with prejudice.

Allegation No. 6: Trial counsel was ineffective for failing to properly advise Applicant regarding a fifteen year plea offer

Applicant alleges trial counsel was ineffective for failing to properly advise him regarding a plea offer from the State that would have allowed him to plead guilty to armed robbery in exchange for a negotiated sentence of fifteen years imprisonment. The uncontroverted

evidence before this Court clearly demonstrates Applicant was aware of the State's fifteen year plea offer and rejected this offer. Applicant admitted he was aware of a fifteen year plea offer from the State and he rejected the offer because he wanted a better offer of a ten year sentence. He acknowledges trial counsel advised him he would not be eligible for a probationary sentence and that the mandatory minimum sentence for armed robbery was ten years of imprisonment. He also acknowledged he had four prior armed robbery convictions and knew the State was seeking a life without parole sentence. Trial counsel testified the State made an offer of fifteen years' imprisonment prior to Applicant's trial and Applicant rejected this plea offer because he wanted a better plea offer to the lesser included offense of strong armed robbery. He testified Applicant was arraigned before Judge Hyman and during the arraignment, he was questioned regarding the State's fifteen year plea offer. He testified these arraignment findings were memorialized in a written order signed June 8, 2012 and filed June 25, 2012, which was introduced as Respondent's Ex. No. 2.

This Court finds Applicant has failed to carry his burden as to this allegation, which must be denied and dismissed with prejudice. This Court finds trial counsel's performance was not deficient and was well within the professional standards required for a criminal defense attorney. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

Allegation No. 7: Trial counsel was ineffective for failing to object to leading questions to the victim

Applicant alleges trial counsel was ineffective for failing to object to the leading questions of State's witness Fryar. Specifically, Applicant complains the following lines of questioning were improper:

Q. At that time did you fear he had a gun like he said?

A. Uh-huh.

...

Q. At that point[,] were you in some fear for your safety?

A. Yes, sir.

(Tr. 65 lines 9-11; 82 lines 23-25). Applicant contends these questions were leading and improperly allowed the State to elicit Fryar as being in fear for his life. In response to this allegation, trial counsel testified he believes it is common sense that someone being threatened with a gun would be in fear for his or her life and that the State could have, and likely would have, rephrased its question if he had objected to such questioning.

This Court finds this allegation is without merit and must be denied and dismissed. As trial counsel testified, Fryar testified earlier that Applicant told him he had a gun and his hands were in his pocket. See Tr. 63. Therefore, Applicant is unable to glean any possible prejudice from these allegedly improper questions. This Court also finds trial counsel responded in accordance with professional standards required of a criminal defense attorney when he elected not to object, as such an objection would not likely have been sustained or the State would have rephrased its question to Fryar. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

CONCLUSION

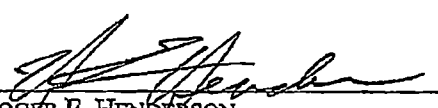
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

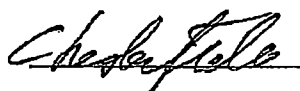
This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 26th day of June, 2017.


ROGER E. HENDERSON
Presiding Judge
Fifteenth Judicial Circuit

, South Carolina