



EX-A

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Reply to Columbia Office

March 17, 2010

Montavis K. Gaines # 323168
McCormick Correction Institution F-1-127
386 Redemption Way
McCormick, South Carolina 29899

Re: Gains v. State of South Carolina - Post Conviction Relief
Our File Number: 65310-40647

FILED
2010 JUN 22 PM 2:20
CLERK OF COURT
SALUDA CO. SC.

Dear Mr. Gaines:

I am in receipt of your letter dated March 13, 2010. Please find enclosed a copy of the Return we received from the Attorney General's office. Please find enclosed my Amended Application for Post-Conviction Relief on your behalf and a copy of the letter to the attorney general's office.

Please be aware that I do not represent criminals or people that have been charged with a crime. I have no familiarity with this area of the law and have never done a post conviction relief matter. I am a certified specialist in bankruptcy and debtor-creditor law. So, I am uniquely unqualified to "represent you." Unfortunately, there is no remedy for ineffective assistance of the person appointed to represent you in post conviction relief matters. So, I will simply do the best that I can with the extremely limited resources that I have available to me. As for resources, I have no investigator, I have no money to order transcripts, and I have a very limited amount of time to spend on this court appointment.

As for the matters that I have not included in the amended application that you provided in your brief in support of post conviction relief, let me explain the reasons for the excluded items:

1. The video evidence is a matter left within the sound discretion of the trial judge. If the video does not show you in the store, as both you allege and as your counsel argued, then its presentation was not prejudicial to you. Further, your attorney's cross examination of Lt. Holloway made it clear that from the information on the video alone, the witnesses could not identify you as the person in the video. Thus, I do not see the video evidence as being a good argument for relief.
2. The prior inconsistent statement of Ms. Bonham as to when she saw the defendants trying on masks (whether it was Saturday or the day before the robbery) does not directly attack the issue of whether she saw the defendants trying on masks. Strategically, an attorney sometimes lets a small inconsistent statement go.

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STATE OF SOUTH CAROLINA
COUNTY OF SALUDA

MONTAVIS K. GAINES # 323168

APPLICANT

VS

STATE OF SOUTH CAROLINA
RESPONDENT

IN THE COURT OF COMMON PLEAS
C/A NO: 2009-CP-41-176

THE APPLICANTS MOTION FOR
RELIEVE OF COUNSEL

FILED
JUN 22 PM 2:20
CLERK OF COURT
SALUDA CO. S.C.

PLEASE TAKE NOTICE THAT THE APPLICANT MONTAVIS K. GAINES MOVES TO THE COURT WITH THE APPLICANT'S MOTION FOR RELIEVE OF COUNSEL IN THE ABOVE CAPTIONED CASE THEREFORE ON THE GROUNDS THAT COUNSEL MR RICHARD R. GLEISSNER OF THE FINKEL LAW FIRM WAS COURT APPOINTED TO REPRESENT THE APPLICANT IN THE ABOVE POST CONVICTION RELIEF APPLICATION WHICH MR RICHARD R. GLEISSNER STATED BY A LETTER DATED MARCH 17, 2010 THAT IS ATTACH AS EXHIBIT A CLAIMING THAT HE DO NOT REPRESENT CRIMINALS OR PEOPLE THAT HAVE BEEN CHARGED WITH A CRIME THAT HE HAVE NO FAMILIARITY WITH THE CRIMINAL LAW AND HAVE NEVER DONE A POST CONVICTION RELIEF MATTER ALSO CLAIMING TO HAVE NO INVESTIGATOR OR MONEY TO ORDER TRANSCRIPTS AND HAVE VERY LIMITED AMOUNT OF TIME TO SPEND ON THIS COURT APPOINTMENT AND CLAIMING TO BE UNQUALIFIED TO REPRESENT THE APPLICANT BY THE LETTER DATED MARCH 17, 2010 ATTACH AS EXHIBIT A THAT THE APPLICANT MOVES TO HAVE MR RICHARD R. GLEISSNER RELIEVE OF COUNSEL AND THAT THE APPLICANT SHOULD BE COURT APPOINTED ANOTHER COUNSEL THAT IS QUALIFIED TO REPRESENT THE APPLICANT IN THE ABOVE CAPTIONED CASE THEREFORE THE APPLICANT'S MOTION FOR RELIEVE OF COUNSEL SHOULD BE GRANTED IN THE ABOVE CAPTIONED CASE

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Saluda County

Eugene C. Griffith, Jr., Circuit Court Judge

MONTAVIS GAINES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212227

APPENDIX

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1 State of South Carolina

2 In the Court of General Sessions

3 County of Saluda

4
5 The State,

6 v.

7 Montavis Kentrail Gaines,

8 defendant.

9
10 Before: The Honorable William P. Keesley, Judge; and a Jury.

11
12 Appearances:

13 For the state: H. Franklin Young, assistant solicitor and Ervin J. Maye, assistant solicitor

14 For the defendant: Michael Ray Ellisor, Esquire

15
16 Court reporter: Smokey Perry

17
18 week of July 24, 2007

19
20 indictments 2006-GS-41-419, 420 and 421

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1 The Court: Solicitor, call your case.

2 Mr. Young: Thank you, Your Honor. The state now calls for trial indictments numbers 2006-
3 GS-41-419 an indictment against Montavis Kentrail Gaines for armed robbery. State calls 2006-GS-41-
4 420 an indictment for criminal conspiracy against Montavis Kentrail Gaines. 2006-GS-41-421 against
5 Montavis Kentrail Gaines for assault and battery with intent to kill. I hand up the indictments, Your
6 Honor.

7 The Court: Ladies and gentlemen of the jury, please, give me your attention. We're about to
8 qualify a jury that's gonna hear 3 separate and distinct indictments, each of which is captioned THE
9 STATE -VS- MONTAVIS KENTRAIL GAINES. These indictments, as I've said, are separate and
10 distinct. They will be tried together for purposes of convenience because they're all said to have arisen
11 from the same general incident that's said to have occurred on October the 11th 2006.

12 One indictment charges Mr. Gaines with assault and battery with intent to kill. It alleges that in
13 Saluda county on or about October 11, 2006, that Mr. Gaines with malice aforethought committed an
14 assault and battery with intent to kill VICTIM. It's alleged that Mr. Gaines struck Mr. VICTIM in the
15 head with a handgun during an armed robbery with the intent to kill Mr. VICTIM.

16 Another indictment charges criminal conspiracy. It alleges that in Saluda county on or about
17 October the 11th 2006, that Mr. Gaines unlawfully and willfully united, combined, conspired,
18 confederated, agreed or had a tacit understanding with Jerome Rhoades for the purpose of accomplishing
19 the crime of armed robbery.

20 And finally I have an indictment that alleges armed robbery. It states that in Saluda county on or
21 about October the 11th 2006, while armed with a deadly weapon, specifically, a handgun, that Mr. Gaines
22 feloniously took from the person or presence VICTIM by means of force or intimidation goods or
23 monies of the local cash advance. It's alleged that Mr. Gaines threatened Mr. VICTIM with the use of a
24 handgun and that he took goods or monies, he being Mr. Gaines, took goods or monies described as
25 United States currency with the intent to deprive the owner permanently of that property.

1 Now upon his arraignment on these charges, Mr. Gaines has entered pleas of not guilty. He is
2 presumed to be innocent. The state of South Carolina, having brought these charges, has the burden of
3 proof and has to prove each of these offenses beyond a reasonable doubt. I'm going to be asking you a
4 series of questions. If any of them apply to you or if you have doubt about whether they apply to you,
5 you need to stand and follow the same basic procedure that we followed when we drew the first jury. Is
6 Montavis Kentrail Gaines in the courtroom?

7 Mr. Ellisor: That is correct, Your Honor.

8 The Court: Mr. Gaines, I need for you to stand, turn around and face that way so the jury can
9 see you. Thank you very much, sir. You may be seated. Is there any member of the jury panel who is
10 related by blood or marriage or connected by employment with the defendant in these cases: Montavis
11 Kentrail Gaines? If so, please, stand. Your name, please? Yes, ma'am?

12 The juror: [REDACTED].

13 The Court: [REDACTED]

14 The juror: Uh-huh. 118.

15 The Court: All right. [REDACTED] is juror #118. And what's your relationship?

16 The juror: Cousin.

17 The Court: I'm gonna set you aside on this trial. Don't discuss any of this with your fellow
18 jurors, please. 118 is set aside. She's related to the defendant. Yes, sir?

19 The juror: [REDACTED]. 197.

20 The Court: Hold on just a second, please.

21 The clerk: 197.

22 The Court: And what's your connection, sir?

23 The juror: Cousin.

24 The Court: I'll set you aside on this trial, [REDACTED]. Don't discuss it.

25 Mr. Ellisor: He's 197, Your Honor?

1 The Court: Yes, sir. Juror #197 [REDACTED] is set aside on the second trial. Your name, sir?
2 The juror: [REDACTED].
3 The Court: [REDACTED]?
4 The juror: [REDACTED].
5 The Court: [REDACTED]?
6 The Juror: Yes, sir.
7 Mr. Young: He's not on my list, Your Honor.
8 The Clerk: #206. [REDACTED].
9 The Court: Okay. Mr. [REDACTED] is juror #206. And what's your situation, sir?
10 The juror: Classmate.
11 The Court: Classmate?
12 The juror: Yes, sir.
13 The Court: Is there anything at all about your relationship or your experience with Mr. Gaines
14 that would affect your ability to be a fair and impartial juror in the case?
15 The juror: I know him.
16 The Court: That wasn't my question. The question was is there anything about your
17 relationship or experience that would affect your ability to be a fair and impartial juror in this case? Why
18 are you hokin' down at the seat. Stand back up, please. Did you understand my question?
19 The juror: No.
20 The Court: You didn't understand the question?
21 The juror: No.
22 The Court: Then how did you get through Monday when I asked the same question over and
23 over again? Is there anything about your relationship with him, your experiences with him that would
24 affect your ability to be a fair juror, an impartial juror in this case?
25 The juror: Yes, sir.

1 The Court: Okay. Thank you. I'll set you aside on this case. 206 is set aside. Mr. [REDACTED] will
2 be represented by Mr. Michael Ray Ellisor. You have a witness list, solicitor?

3 Mr. Young: I do, sir.

4 The Court: The following persons have been identified as potential witnesses for the state. If
5 any of these people are present at this time, then that person will need to stand as his or her name is called.
6 Jerome Rhoades. VICTIM I need you to stand and face so the jury can see you. Thank you, sir.
7 WITNESS : Thank you, ma'am. Janie Mae Bonham. DWITNESS 1 WITNESS 1 Thank you,
8 sir. Arthur Turner of the Sahda police department. Thank you. Mike Haag of the Sahda police
9 department. Robery Shorter of the Sahda county sheriff's office. Over here to my right. Charles
10 Holloway of the Sahda police department. Thank you. Is there any member of the jury panel who is
11 related by blood or marriage or connected by employment with any of the potential witnesses for the
12 state? If so, please, stand. Your name, sir?

13 The juror: [REDACTED]

14 The clerk: #198.

15 The Court: 198. What's your situation, please?

16 The juror: Mr. Holloway is a cousin.

17 The Court: Okay. You're a cousin to Mr. Holloway. I'm going to set you aside on this case,
18 Mr. [REDACTED]. Don't discuss any of that with your fellow jurors, please. 198 is set aside. The state will be
19 represented by Mr. Frank Young who is an assistant solicitor in the 11th judicial circuit.

20 Mr. Young: Your Honor, I believe Mr. Maye is going to actually come in on the rest of the case
21 at some point.

22 The Court: Okay. And Mr. Ervin Maye who is an assistant solicitor in the 11th judicial circuit.
23 Do any of you know anything at all about this matter? Have you heard, seen or read anything about it?
24 Has anybody talked to you about it? You have any knowledge whatsoever about the underlying factual
25 allegations? Do you know anything at all about the situation? If so, please, stand. Your name, please?

1 The juror: [REDACTED]

2 The Court: Come down front, please, ma'am. The lawyers and Mr. Gaines may join me if you
3 like. (the following occurred on the record but outside the hearing of the jury venire.) Juror #20. Ms.
4 [REDACTED]?

5 The juror: Yes, [REDACTED]

6 The Court: [REDACTED] I mispronounced your name.

7 The juror: Most people do.

8 The Court: What's your situation?

9 The juror: I just heard -- I mean I live in town. I mean I don't know anything about it, but I've
10 heard about it. I know the owner of the business.

11 The Court: You know the owner of the business.

12 The juror: Yes. I don't know anyone else that was involved.

13 The Court: Do you recall any of the specifics about what you might've heard?

14 The juror: No, sir.

15 The Court: You understand that if you're a juror, [REDACTED] you're going to have to decide the
16 case based upon the evidence presented in the courtroom?

17 The juror: Yes, sir.

18 The Court: Is there anything at all about what you may have heard or read that would affect
19 your ability to be a fair--

20 The juror: No, sir.

21 The Court: --and impartial juror in this case?

22 The juror: No, sir.

23 The Court: Is there anything at all about your relationship with the owner of the business that
24 would affect your ability to be fair and impartial?

25 The juror: No, sir.

1 The Court: You're satisfied you put aside all of those things and serve as a fair and impartial
2 juror?

3 The juror: Yes, sir.

4 The Court: Any doubt in your mind?

5 The juror: No doubt whatsoever.

6 The Court: Ms. [REDACTED] is juror #20. She's eligible to serve. Anybody else? (the following
7 occurred within the hearing of the entire courtroom.) Have any of you, any of your immediate family
8 members, any of your close personal friends to the best of your knowledge ever been accused of
9 committing a robbery or been the victim of a robbery or have any of you, any of your immediate family
10 members, any of your close personal friends to the best of your knowledge ever been accused of
11 committing a crime of violence or the victim of a crime of violence? Any of those things apply to you,
12 please, stand. We're gonna talk about it up front. Anybody? Come down front, please. (the following
13 occurred outside the hearing of the jury venire but on the record.) Your name, please, ma'am?

14 The juror: [REDACTED] 201.

15 The Court: 201? Okay, Ms. [REDACTED], what's your situation?

16 The juror: My nephew that lives next door to me, [REDACTED], his home has been robbed
17 several times.

18 The Court: Is there anything at all about your relationship with him or that experience that
19 would affect your ability to be a fair and impartial juror?

20 The juror: I don't think so.

21 The Court: You have any doubt?

22 The juror: No.

23 The Court: Ms. [REDACTED] is 201. She's eligible to serve. Anybody else? Yes, ma'am, what's your
24 name, please?

25 The juror: [REDACTED] 195.

1 The Court: What number?

2 The juror: 195.

3 The Court: Okay, Ms. [REDACTED], what's your situation?

4 The juror: My brother was killed in Pakistan by a terrorist. I think that's pretty close.

5 The Court: Sure. Is there anything about your relationship with him or that experience that
6 affects your ability to be fair and impartial?

7 The juror: No. That was a terrorist. That was a terrorist crime. That was not this.

8 The Court: Any doubt in your mind about your ability to be fair and impartial?

9 The juror: No.

10 The Court: Ms. [REDACTED] juror #195. She's eligible to serve. Anybody else? (the following
11 occurred within the hearing of the entire courtroom.) Do any of you have any connection of any kind
12 with any of the people involved in this case? That would include being neighbors, friends, attend the
13 same church or civic clubs, current or former clients of the attorneys; ever been on the opposite side of a
14 case represented by one of these attorneys or anyone with whom you're affiliated. Do you have any
15 connection with the Saluda police department or Saluda county sheriff's office? If you have any
16 connection of any kind with any of the people in the case or any entity in the case, please, stand and let us
17 know about it. Over here on my left. Your name, sir?

18 The juror: [REDACTED] 32.

19 The Court: All right. Mr. [REDACTED] is 32. And what's your connection?

20 The juror: I go to church with Mike Herlong.

21 The Court: Goes to church with Mike Herlong.

22 Mr. Young: Your Honor, Mr. Herlong is present in the courtroom. He will simply operate the
23 equipment that Mr. Ellisor and I have talked about. He's just gonna operate some equipment for us. He's
24 not gonna testify in any fashion.

25 The Court: Mr. [REDACTED], is there anything at all about your relationship with Mr. Herlong that

1 would affect your ability to be a fair and impartial juror in the case?

2 The juror: No.

3 The Court: You can decide the case without regard to what he may think of your decision?

4 The juror: Yes.

5 The Court: You need to answer me out loud.

6 The juror: Yes.

7 The Court: Any doubt in your mind about your ability to be fair and impartial?

8 The juror: No.

9 The Court: Thank you very much. 32 Mr. [REDACTED] is eligible to serve. Ms. [REDACTED] 196, and
10 what's your situation, ma'am?

11 The juror: 195.

12 The Court: Oh, I'm sorry. I'm looking right at it and read it wrong.

13 The juror: I work for the accounting firm that does the audits for Saluda county.

14 The Court: Cut that air conditioning off for a minute. You work for the accounting firm off that
15 does what?

16 The juror: Audits the county.

17 The Court: Audits. Is there anything at all about that connection that affects your ability to be a
18 fair and impartial juror in this case?

19 The juror: No, sir.

20 The Court: Any doubt in your mind?

21 The juror: No, sir.

22 The Court: Thank you. 195 is able to serve. Ms. [REDACTED] Yes, ma'am? Your name?

23 The juror: 146. [REDACTED].

24 The Court: Ms. [REDACTED] is juror #146. And what's your situation, please?

25 The juror: Friends with the attorney Ellisor.

1 The Court: Okay. Is there anything at all about your connection with him that affects your ability
2 to be fair and impartial in this case?

3 The juror: No, sir.

4 The Court: Can you decide the case without regard to what he may think of your decision?

5 The juror: Yes.

6 The Court: Do you have any doubt about your ability to be fair and impartial?

7 The juror: No.

8 The Court: [REDACTED] is juror #146. She's eligible to serve. Thank you, ma'am. In the pink.

9 The juror: [REDACTED].

10 The Court: 22. Ms [REDACTED] is juror #22. What's your situation, please?

11 The juror: Attorney Ellisor coached my daughter in soccer and our children attended school
12 together.

13 The Court: Okay. Is there anything at all about your relationship or experience with the attorney
14 that affects your ability to be a fair and impartial juror in the case?

15 The juror: No.

16 The Court: Can you decide the case without regard to what he may think of your decision?

17 The juror: Yes, sir.

18 The Court: Any doubt in your mind?

19 The juror: No, sir.

20 The Court: Thank you. Ms [REDACTED] is juror #22. She's eligible to serve. Over here. Your name,
21 please?

22 The juror: [REDACTED]. 184.

23 The Court: Okay, Ms [REDACTED] is juror #184. What's your situation, ma'am?

24 The juror: Me and WITNESS were friends in high school.

25 The Court: You were friends with WITNESS ?

1 The juror: Yes, sir.

2 The Court: You understand she's a potential juror in the case? I mean what'd I say? Juror?

3 Witness: All right. I didn't get much sleep last night. I'm sorry. Witness: You understand she's a
4 potential witness in the case?

5 The juror: Yes, sir.

6 The Court: You understand that if you're a juror on the case that you have to evaluate the
7 believability and credibility of every witness who testifies?

8 The juror: Yes, sir.

9 The Court: Just answer these questions yes or no. If you need to come down front, let me
10 know. Okay? If you need to go further with your answer, come down front. We'll talk about it down
11 here. Have you ever formed in your own mind or expressed any opinion as to whether Ms. WITNESS is a
12 believable person or not?

13 The juror: No, sir.

14 The Court: Okay. Is there anything about your relationship or experience with her that affects
15 your ability to be fair and impartial in this case?

16 The juror: No, sir.

17 The Court: Any doubt in your mind about any of that?

18 The juror: No, sir.

19 The Court: Thank you very much. Ms. [REDACTED] is juror #184. She's eligible to serve. Yes,
20 ma'am?

21 The juror: I know WITNESS

22 The Court: I forgot your name, ma'am. I'm sorry.

23 The juror: #20. [REDACTED]

24 The Court: I should remember it but -- okay, Ms. [REDACTED] Tell me again what you said.

25 The juror: I know WITNESS

1 The Court: How do you know him?

2 The juror: I've known him all his life.

3 The Court: Okay.

4 The juror: I know his family.

5 The Court: All right. You understand that he's a potential witness in the case?

6 The juror: Yes, sir.

7 The Court: You understand if you're a juror you have to evaluate the credibility, the believability
8 of every witness who testifies?

9 The juror: Yes, sir.

10 The Court: Have you ever formed in your own mind or expressed to anyone else an opinion as
11 to whether he's believable or not?

12 The juror: No, sir.

13 The Court: Can you decide the case without regard to what he may think of your decision?

14 The juror: Yes, sir.

15 The Court: Any doubt in your mind about any of that?

16 The juror: No, sir.

17 The Court: Thank you, ma'am. Ms. [REDACTED] is juror #20. Eligible to serve. Yes, ma'am?

18 The juror: I'm [REDACTED] #209. And I know WITNESS

19 The Court: You understand that if you're a juror in the case you have to evaluate the credibility
20 of every witness.

21 The juror: Yes, sir.

22 The Court: Have you ever formed in your own mind or expressed to anyone else an opinion as
23 to whether he's believable or not?

24 The juror: No, sir.

25 The Court: Can you decide the case without regard to what he may think of your decision?

1 The juror: Yes, I can.

2 The Court: You have any doubt in your mind about any of those things?

3 The juror: No, sir.

4 The Court: Ms. [REDACTED] is 209. Eligible to serve. Yes, sir? In the red shirt.

5 The juror: [REDACTED] #43. My mother is--

6 The Court: Hold on a minute. I've got to find it. [REDACTED] is #43. And your mother is what,
7 sir?

8 The juror: She works at the town hall as a clerk. Town hall. Does she have anything to do with
9 court cases?

10 An officer: No, sir.

11 The Court: What does she do?

12 An officer: Clerk treasurer for town hall.

13 The Court: Treasurer.

14 An officer: For the town of Sahuda.

15 The Court: [REDACTED], is there anything at all about your relationship or experience with your
16 mother that would affect your ability to be a fair and impartial juror in the case?

17 The juror: No, sir.

18 The Court: You have any doubt about that?

19 The juror: No, sir.

20 The Court: Can you decide the case without regard to what she or anybody with the town of
21 Sahuda might think of your decision?

22 The juror: Yes, sir.

23 The Court: Sure?

24 The juror: I guess so. I suppose the town of Sahuda wouldn't hold that against me.

25 The Court: I can't hear you.

1 The juror: I said I suppose the town of Saluda wouldn't hold anything against me for my
2 decision. Or hold anything against her.

3 The Court: Do you have any doubt about your ability to be fair and impartial in the case?

4 The juror: No, sir.

5 The Court: Okay. Thank you. 43 is eligible to serve. Yes, ma'am?

6 The juror: [REDACTED] #10. And I know the family.

7 The Court: Ms. [REDACTED] is juror #10. And you know which family?

8 The juror: The [REDACTED] family.

9 The Court: Oh, okay. How do you know them? Are they friends, acquaintances?

10 The juror: They're friends and family.

11 The Court: They're family of yours?

12 The juror: Some of 'em is.

13 The Court: Is there anything about that relationship that affects your ability to be fair and
14 impartial?

15 The juror: No, sir.

16 The Court: You don't know if you're related to this young man or not?

17 The juror: I don't know if I'm related to him or not.

18 The Court: You don't know? Can you decide the case without regard to what anyone in that
19 family may think?

20 The juror: Yes, sir.

21 The Court: You have any doubt at all about your ability to be fair and impartial?

22 The juror: No, sir.

23 The Court: Thank you, ma'am. Ms. [REDACTED] is 10. She's eligible to serve. Yes, ma'am?

24 The juror: [REDACTED] #117. My niece's husband—

25 The Court: Hold on just a moment, Ms. [REDACTED] I've got to get to your page. 117. Your

1 niece's husband?

2 The juror: Is a deputy.

3 The Court: All right. I'll set you aside on this case. 117 Ms. [REDACTED] is related to Mr. [REDACTED] who
4 is with the sheriff's office. Have any of you formed or expressed any opinions about these cases? If so,
5 please, stand. Are any of you aware of any interest, bias or prejudice that you might have for or against
6 the state or for or against the defendant Mr. Gains; for or against anyone or any entity involved in the
7 case? If so, please, stand. Can each of you give both the state of South Carolina and the defendant
8 Montavis Kentrail Gaines a fair and impartial trial? If you know of any reason why you cannot, please,
9 stand now. Further questions from the state?

10 Mr. Young: None from the state, Your Honor.

11 The Court: From the defense?

12 Mr. Ellisor: None, Your Honor.

13 The Court: Thank you very much. The jury panel is qualified. The strikes are 5 for the state, 10
14 for the defense. We'll proceed to draw a jury. Assuming there's no objection to the clerk drawing the
15 names.

16 Mr. Young: No objection.

17 Mr. Ellisor: None, Your Honor.

18 The Court: Folks, y'all know the drill.

19 #88 [REDACTED] white male - accepted

20 #213 [REDACTED] - white female - accepted

21 #51 [REDACTED] - white male - accepted

22 #7 [REDACTED] - white female - accepted

23 #187 [REDACTED] - white male - accepted

24 #132 [REDACTED] - white male - excused by defense

25 #204 [REDACTED] - white male - accepted

1 #202 [REDACTED] - white female - accepted
2 #95 [REDACTED] - black male - accepted
3 #89 [REDACTED] - black male - excused by state
4 #184 [REDACTED] - white female - accepted
5 #195 [REDACTED] - white female - excused by defense
6 #91 [REDACTED] - white male - accepted
7 #210 [REDACTED] - white female - accepted
8 #67 [REDACTED] - white female - accepted
9 alternate
10 #46 [REDACTED] - black male - excused by state
11 #186 [REDACTED] - white male - accepted
12 #59 [REDACTED] - black female - accepted

13 The Court: Are there any matters to take up including composition of the jury before the jury is
14 sworn? From the state?

15 Mr. Young: There are no objections from the state.

16 The Court: Defense?

17 Mr. Ellisor: None from the defense, Your Honor.

18 The Court: Mr. [REDACTED], you're in the foreman's seat. Stay there and be the foreman for me. All
19 right? You'll be the last one in whenever you come back out. I have to find out from the attorneys how
20 we're going to proceed. So I'm going to have to ask you in just a moment to step back in the jury room
21 while I do that. Do not discuss this case in any way. Don't talk about the people involved, the type of
22 case it's alleged to be. Don't talk about anything at all related to the case. As you heard me tell the other
23 jury -- we've got some carryovers that have some experience, but just file all the way down as you come
24 in, please. The alternates just keep one of those two seats back there. It doesn't matter which one. Just
25 you stay on the back row unless I need to put you in as one of the 12 jurors. If you'll follow the bailiff,

1 please, I'll get to you as quickly as I can. (the following occurred in the absence of the jury.) All right,
2 Mr. Ellisor.

3 Mr. Ellisor: Your Honor, you may have said this but I don't know if I -- I'm hard of hearing.
4 The state has identified 1, 2, 3, 4, 5, 6, 7, 8, 9 potential witnesses in this case. Your Honor, since this is an
5 armed robbery case, I move that we sequester state's witnesses in this case.

6 The Court: You want to be heard?

7 Mr. Young: Your Honor, I have 3 people who were present during the armed robbery itself.
8 They were in the building, called 911 or actually looked down the hall to see what was going on. The third
9 victim was actually the person who was struck in the head with a pistol as alleged in the indictment.
10 That's Mr. VICTIM, WITNESS. Ms. WITNESS They're potentially all 3 victims if they exercise their right to
11 stay in this courtroom, I believe they have a right to do so. Other than that, I believe Arthur Turner as the
12 chief investigating officer can stay.

13 Mr. Ellisor: Your Honor, I would move to exclude the other potential witnesses in this case.
14 This is an armed robbery case. My client faces severe consequences.

15 The Court: You just want -- you just want everybody except the three he named and the chief
16 investigating officer?

17 Mr. Ellisor: That is correct.

18 The Court: All right. That's granted. Folks, those of you who are potential witnesses, you're
19 going to have to stay outside the courtroom till you're brought in to give your testimony, and you cannot
20 discuss what's happening in the courtroom. They can't tell you what some other witness said and things
21 of that nature. The chief investigating officer and the three persons who the state claims are victims may
22 stay throughout the trial. All right. Are we gonna start right into the trial?

23 Mr. Young: Yeah, we're ready to go, Your Honor. I need to get Mr. Maye out here and see
24 what he wants to do.

25 The Court: Are you ready, Mr. Ellisor?

1 Mr. Ellisor: I am. I would like a bathroom break before we proceed though.

2 The Court: All right. We're at ease for a few minutes. (there was a brief recess. Defense
3 exhibits 1-13 were marked for identification. State's exhibits 1-6 were marked for identification.) State
4 ready for the jury?

5 Mr. Young: State's ready for the jury.

6 The Court: You want Mr. Maye in here?

7 Mr. Young: He's here, Your Honor.

8 The Court: Oh, you're over there.

9 Mr. Young: My son's getting married and we've got a rehearsal dinner Friday. And I think Mr.
10 Ellisor and I would both like to do this case, complete it today. I don't know if we'll get done today, but
11 who---

12 Mr. Ellisor: In supplementation to that, I want to advise The Court that while you had car
13 troubles on the way here, I had to pull over because mine was running hot and I drove it to a mechanic
14 and he told me that I could make it all the way to Saluda but I might not make it back tomorrow.

15 Mr. Maye: We'll get Mr. Ellisor here.

16 The Court: You want to see about getting somebody to look at it here and now while you're
17 trying the case?

18 Mr. Ellisor: Cause he told me it's gonna take -- I want this other guy to look at it. It takes a
19 certain -- a seal broke on this thing. He said he had to order the part anyway. So I don't even know if we
20 can get it. So I'm gonna try to take it back over to him Thursday. And he said -- he -- I could -- he told
21 me to drive it here. He didn't guarantee this but he said yeah I think you can make it to Saluda so that's
22 why I finally came on over here today.

23 The Court: I don't know if we can get this case to the jury today now.

24 Mr. Ellisor: They've got 9 witnesses; I think we have 2.

25 The Court: Okay. I won't bet the house 'cause it's not in my name, but I doubt it seriously. All

1 right. Bring the jury. (the following occurred in the presence of the jury.) Ladies and gentlemen, I have
2 to have you placed under oath as a trial jury. Please stand and raise your right hand. The clerk will
3 administer your oath. (the jury was placed under oath at 11:23 a.m.) Thank you. Be seated. All right.
4 The first thing I want to make sure you understand is that I know that some of you have been on the other
5 jury, and you're gonna hear me say some of the same things, but every case is different, and the law that
6 relates to every case is always going to be a little bit different. What I'm going to ask you to do is just put
7 all that other stuff out of your mind and listen fresh because I may say something that starts out sounding
8 the same but switching a little bit in mid sentence. So just listen carefully and don't tune me out thinking
9 I've heard that before.

10 Now the way we're going to operate as I told you on Monday is that we typically will go until
11 about 1 o'clock and break for lunch. You'll be on your own for lunch normally and I'll give you an hour
12 to an hour and a half, somewhere in that range for a lunch break. We'll start back then at 2 or 2:30 and we
13 usually break between 5 and 5:30. You know as much about how your day is likely to go as I do right
14 now. The schedule may get changed. We may have to make some modifications to that. If I see that
15 happening I'll try to let you know as soon as I get that inkling.

16 Now the way the case is going to begin is that the attorneys are going to make opening
17 statements to you. In opening statements the attorneys are not permitted to engage in argument. Opening
18 statements are introductions, outlines, overviews. They generally are relatively brief. They're limited to
19 those things. Once the opening statements are finished, then I will call upon the state to present its
20 evidence. The state brought these charges; the state has to prove the charges beyond a reasonable doubt.
21 So I'll recognize the solicitor to present evidence in an attempt to meet that burden. When the state rests,
22 whenever that is, I have to send you out of the courtroom so I can discuss legal issues, and when we come
23 back after that, when you come back in, I'll tell you where we go from there. That's how we're going to
24 get started.

25 Now, folks, it's really important that you understand some things. You just took an oath in

1 which you promised us that you're going to decide the case based on the evidence and the law. So I'm
2 going to tell you where those things come from.

3 The evidence comes from the sworn testimony of witnesses. Evidence may also come in the
4 form of exhibits. An exhibit could be a photograph, a map, a chart, a weapon, you know, anything
5 tangible that's marked into the record. If something is an exhibit it will be back with you in the jury room
6 when you decide the case. The reason I tell you that is because it's not at all unusual for a lawyer to have
7 something like a small photograph and try to show it to you from a distance or hand it into the jury box
8 and ask you to circulate it around so that you're trying to look at this thing while you're also trying to pay
9 attention to what's going on up here at the witness stand. So just realize, please, that all the exhibits will
10 be with you in the jury room so you can look at them as much as you need to.

11 What the lawyers say is not evidence. I want you to pay attention to the lawyers but what comes
12 outta their mouths is not evidence. There is one exception to that rule. If we come upon it I'll tell you
13 about it. The law comes from me. It's my job to decide what law applies to the case and tell it to you at
14 the end of the trial. So the evidence comes from the witnesses and the exhibits. The law comes from me.
15 It's also important that you understand that there are two judges in the courtroom. I'm the judge of the
16 law. I just told you I'll instruct you on the law at the end of the trial. I'll rule on legal issues as they arise
17 during the trial and I'll preside over it. You're the other judge. You have to understand that you are the
18 only judge of the facts and that only you get to decide such things as whether evidence is believable or not
19 and whether it's entitled to any weight, and if so, how much. That's entirely your prerogative. You're the
20 only judge of the facts.

21 Now while you promised us that you're going to decide the case based on the evidence and the
22 law and you have to do that, please, understand that I am not telling you to leave your common sense
23 outside. We want you to use your common sense. Use your sense of logic and reason and your good
24 judgment. It just makes good common sense that you keep an open mind about the case and that you
25 don't make up your mind about the case until you've heard all the evidence and you know what the law

1 is. So there's a rule that we insist upon that you must follow, and it's very difficult to follow 'cause you
2 14 folks may feel that you have little in common except that you all live in Sahida county and you all got
3 picked on this jury. The rule is that you cannot discuss the case in any way until I tell you to. The logical
4 thing that you're gonna wanna do if you're back there is talk about what just happened in the courtroom.
5 You have to resist that temptation until I tell you to deliberate and then you can talk about it as much as
6 you like. Do not discuss this case with anybody else until the week is over and you've been seated on
7 any jury you might possibly be seated on. Don't discuss it with family members or friends or anybody at
8 all. If anybody should attempt to contact you and discuss the case with you, report that to me so I can
9 deal with it.

10 Do not do any independent investigation of the case. Once you find out where this is alleged to
11 have occurred, don't go up there and look around. Don't go on the internet and try to look anything up.
12 Don't try to look up law. You're perfectly qualified to do your job. You've been picked, you know, in a
13 very structured way. All you have to do is use the talent that we recognize that you had and that is that
14 you sit and listen attentively, pay close attention, watch the proceeding, and then when you get the
15 opportunity, share your views with your fellow jurors. So you just need to pay attention, share your
16 views, use your common sense, follow the law, apply it to the evidence and reach your verdicts.

17 Now, folks, throughout this trial I'm probably going to use the word case in the singular instead
18 of cases, but I told you they're separate indictments and they're all evaluated on their own merit or lack of
19 merit. So don't get thrown off by that.

20 The last thing I want to say to you, some of you have already heard this, I know you've got other
21 places to be and other things to do. You may have to wait on us. That last jury had to wait on us a lot. I
22 don't know what issues are gonna come up till we start the trial. I'll try to make a ruling as quickly as I
23 can if any come up, but sometimes I have to start reading law. As I told you, this week I don't have any
24 staff. I don't have any assistants. I have to do it all on my own. It kinda slows things down a little bit,
25 but I promise you if you're ever waiting, we'll be working to get you out here. So I thank you for your

1 participation. I know it's not necessarily voluntary, but I thank you for it. And I ask for your close
2 attention. I recognize Mr. Young for his opening statement.

3 Mr. Young: Thank you, Your Honor. May it please The Court? On October the 11th 2006,
4 [REDACTED] Avenue there was a cash advance in the town. VICTIM was behind the desk at cash advance
5 when two men came in, one of them with a gun. The man with the gun came in first. And a man
6 followed him after that. They had masks on. VICTIM was held at gun point. Asked where the
7 money is while the second guy was dodging around trying to find the money. Cell phone went off. The
8 man with the gun on him picked up that cell phone while the other guy is still looking for the money.
9 VICTIM is trying to say to him and them it's in the drawer. Eventually the guy looking for the money finds
10 it. The guy with the gun has already pulled over the drawer at a separate desk he sits at. And they run out
11 with about \$1800. In the process he's struck in the back of the head with a pistol.

12 The man that went through those cash drawers was Montavis Gaines. That man over there in
13 that white shirt.

14 The man with the gun is Jerome Rhoads. And he's gonna come up on this stand and tell you
15 what happened.

16 VICTIM is gonna tell you what happened to him after that event occurred because he
17 grabbed his head and it was bleedin'. He goes back down the hall where WITNESS has been lookin'
18 and peekin' through a door and saw part of it. And WITNESS was in the same room with her and
19 they call 911. He hits the panic button; they call 911. The first thing -- the first thing out of the man's
20 mouth is that he says I know the fellow with the gun. He was in here earlier today. WITNESS and
21 the owner of the store who has the custody of the tape, the surveillance video get back up there and play
22 that video to the law enforcement and they look at that tape and WITNESS says to WITNESS says to
23 everybody, that's Jerome Rhoads, I know him. The man with the gun. That's essentially what the state's
24 case is gonna be from the people at that scene. But there are other people, as I mentioned, Jerome
25 Rhoads is the one who actually participated. You're gonna hear from him and hear what he has to say

1 about what happened. Where the gun came from. From a third party. A third party. You're gonna hear
2 street names used. You're gonna hear street names used about what a robbery is and street names for
3 people's names. You're gonna hear probably his street name, Mr. Jerome Rhoads' street name, how they
4 refer to each other. You're gonna hear where they came and went from, and you're gonna hear from a
5 lady who lives across the street from Montavis Gaines who about an hour before the armed robbery saw 2
6 people, Montavis being one of them, trying on a mask. And you're gonna see in the video which we will
7 show to those same people put the mask on and off comin' in and outta the door. And actually one of the
8 reasons VICTIM knows this man from a previous event is because Mr. Jerome Rhoads didn't do
9 such a good job in that ski mask or whatever it was he had on because he had to pull it up, and that's how
10 VICTIM gets a look at him during the robbery. And you'll also see the man with the cash pull up his mask
11 and you will hear from law enforcement who have identified Montavis Gaines from that video sayin' that
12 was Montavis. That's him.

13 I just gave you the state's case. Now how long it takes to get all that in, I don't know. It's gonna
14 take a while to put up the witnesses, put up the camera, the video, whatever we're gonna get to see here,
15 and at the end of all this, the judge is gonna ask you to go back in there after he gives you his instructions
16 and make a decision on the credibility of the witnesses.

17 He just told you you are the judge of the facts. So as he's indicated to you, the state endorses
18 that whole idea, to pay close attention to what's goin' on. Our whole case depends on what you think,
19 not what I think, not what anybody else thinks in this room. In terms of the facts, you make the decision.
20 I want to thank you for what you're gonna do because the process is not an easy one. It's never easy for
21 someone to be called upon to make a decision about the truth. It is always important for people in their
22 day-to-day lives to make those same kinda decisions. You've gotta decide whether to rely on something
23 or not. You do it everyday of your life.

24 We're gonna ask you, of course, during the course of this to listen carefully to what our
25 witnesses have to say and any other witnesses as well and make that determination. At the end of the

1 case when you go back in there to deliberate, you're gonna be doing something that is the very
2 foundation of what our whole criminal justice system is about. And without you we don't function. We
3 don't believe in anything other than the people who are the peers of the man on trial, or the woman on
4 trial if that happens to be the case, to make that decision. We don't depend on the attorneys or judges or
5 anything to make the decision about the facts. And that's why what I'm saying is not evidence. Evidence
6 is what you hear from up here. The facts come from here; you listen to it and make a decision and you go
7 forward.

8 During my 20 years in the military I thought I really did understand what it meant to serve ones
9 country, and I'd seen a lot of things in those 20 years. But I've come to appreciate this: what you do --
10 in the same way. I know that we have people deployed all over the world doing things for their country.
11 Today, today you serve your country. You do the thing that's required of our Constitution that no one
12 else can do but you. You didn't have a choice. You got drafted. So I add my thank you to the judge's.

13 The Court: Thank you, Mr. Young. Mr. Ellisor, you're recognized for your opening statement.

14 Mr. Ellisor: Thank you, Your Honor. Appreciate it. Ladies and gentlemen, my name is Michael
15 Ray Ellisor. I live in Lexington now. I've lived in Batesburg and raised my family in Batesburg. My
16 daughter used to live in Saluda County. She married a local boy here and she now lives in Batesburg. I
17 live in Lexington now. And I have been asked to help Montavis Gaines. Montavis, please, stand, sir.
18 Thank you very kindly. Sit down. This is the man whose your -- whose fate is in your hands, ladies and
19 gentlemen. The state, from the list of the witnesses that's been given to The Court appears to be callin' 9
20 people to describe what happened that day. And you will be able to see a video evidence and we have
21 some photographs of this.

22 Now Montavis says he was not there, and we will put up what we call an alibi witness. His
23 position is that he didn't know anything about it. As the solicitor said there's a Jerome Rhoads. If you
24 look at the sequence my client has been charged with abwik which is assault and battery with intent to kill.
25 He's also been charged with robbery burglary and conspiracy and the conspirator would be this Jerome

1 Roads. And you will have to evaluate Mr. Rhoads. You'll have to evaluate every witness. It is obvious
2 that there was a robbery of cash advance and you'll have to decide if Mr. Rhoads committed that robbery
3 or Mr. Gaines along with him committed that robbery or if cash advance was robbed by possibly their
4 own employees. You will have to decide if there is a robbery. There will be evidence of time dates and
5 you'll be shown that. It is my position that if you look at the time dates and evidence that -- that
6 supposedly there were these 2 robbers there, they've identified supposedly 2. They've actually arrested 3
7 robbers, but they've got 2 they've tryin'. One of which is has rolled over conveniently and testified for
8 the state. That's Mr. Jerome Rhoads. But you got 3 they've charged with. So you don't see that third
9 one here being tried. Because your fate is here to decide Montavis Gaines' fate. That is your duty, and it
10 is an awesome duty, ladies and gentlemen. It is awesome. He stands -- 12 people stand between that
11 man's freedom. You are the 12. So all I ask for you is to consider the evidence and at this time don't
12 form an opinion. Just re-scene (phonetic) the evidence and then when you go back and deliberate -- and
13 we gonna put -- we gonna put pictures in and things like that to contradict their evidence. But all I'm
14 asking you is to give this man the benefit of the doubt when it is put in your hands, ladies and gentlemen.
15 Thank you very much.

16 The Court: Thank you, Mr. Ellisor. I want to make sure there are no pretrial issues I need to do.
17 There's no NEAL -VS- BIGGERS hearing, there's no DENNO hearing, there's nothing like that I need to
18 do.

19 Mr. Ellisor: No, sir, not that I'm aware of.

20 Mr. Young: Your Honor, if I may have a moment. Your Honor, I believe Mr. Ellisor may have a
21 motion to make.

22 Mr. Ellisor: Your Honor, I --

23 The Court: Wait a second. Folks, I -- ladies and gentlemen, there may be an issue or two that I
24 have to address before we can get started with the evidence for you. So what I'm going to do is I'm
25 gonna talk to the lawyers over here to the side and make sure I'm thinking the way I'm thinking, and then

Arthur Turner - direct examination by Mr. Young

1 I'm gonna let you go to lunch probably. You notice it may be a little cool in here. Sometimes it's a little
2 warm and muggy. If you have an opportunity if you're cold if you want to get something to put on or
3 take off to help you through it that's fine. I can't let it get real warm in here. I know none of you would
4 do it, but I do have jurors sometimes that doze on me a little bit. So -- but I can't let it get too warm. Just
5 bear with us a second. Let me see the lawyers for a minute. (there was a bench conference out of the
6 hearing of the jury and off the record.) 2 o'clock. I need you in the jury room at 2. Don't come back in
7 the courtroom please till I send for you. She'll show you how to report, those of you who don't know.
8 Just go back through there, and, please, be in the jury room at 2 o'clock. The last jury I had we had to
9 wait about 25 or 30 minutes on somebody. I have been late every day to date, so I'm not casting stones,
10 but, please, try to be here on time. Okay? Thank you. (the following occurred in the absence of the jury.)
11 All right. My understanding there is going to be an identification issue, one or more. Therefore the law
12 requires that we have an in camera hearing outside the presence of the jury under a case called NEAL -
13 VS- BIGGERS. So are you all ready to have the BIGGERS hearing? You need some time?

14 Mr. Young: Your Honor, I can do it. I have two witnesses that I intend to call Your Honor.
15 Both are law enforcement.

16 The Court: Okay.

17 Mr. Young: Your Honor, I'm not sure we couldn't go right to the meat of the issue. Let me talk
18 to Mr. Elisor real quick. I don't think it's going to be too much of a problem to describe the person.

19 The Court: We'll be at ease for a few minutes. (there was a brief recess.)

20 Mr. Young: Your Honor, we'd call Lt. Arthur Turner to be sworn for the BIGGERS hearing.

21 LT. ARTHUR TURNER, being duly sworn, testifies as
22 follows:

23 DIRECT EXAMINATION

24 BY MR. YOUNG

25 Q Lt. Turner, where do you work and for how long?

Arthur Turner - direct examination by Mr. Young

1 A Sir?

2 Q Where do you work and for how long?

3 A Saluda police department. I've been with them this time around about a little over 5 years.

4 The Court: Lean forward a little bit.

5 A I'm with the Saluda police department. I've been there for approximately 5 years.

6 Q Okay, sir, were you on duty November 11, 2006, in regard to an armed robbery call to cash
7 advance?

8 A Yes.

9 Q Okay. Did you respond to that contact?

10 A Yes, I did.

11 Q During the course of your response to cash advance, did you have opportunity to see an in-store
12 surveillance footage of the robbery sequence?

13 A Yes.

14 Q Okay. Now, Lt. Turner, I have already displayed and I believe there is no objection to me, for
15 purpose of this hearing, displaying what is a camera of this footage. And it's now currently set at October
16 11, 2006 and the time displayed on it is 14:58:38 on the screen. Would you step down and take a look at
17 the screen and tell me after looking at that screen if that screen has anything to do with the armed robbery
18 sequence that you looked at.

19 A Yes, it does.

20 Q Okay. Would that be in the start or the end or where would that be in terms of the sequence you
21 saw?

22 A This would be at the beginning.

23 Q Okay.

24 Mr. Young: Your Honor, with The Court's permission, Your Honor, I'd ask that this be played
25 for Mr. Turner so that we could view it again in the courtroom.

Arthur Turner - direct examination by Mr. Young

1 The Court: That's fine. Is he gonna be down there or up here?

2 Mr. Young: I don't think he can see it, Your Honor. That's the problem. This is the actual
3 camera -- I should say video machine that was used and we don't have the kind of machine that will
4 actually display. It won't work on any other kind of tv monitor.

5 Mr. Ellison: Your Honor, maybe you could just roll that. I mean it's got a long cord here. If we
6 could roll it forward.

7 The Court: I don't care when there's no jury. I don't care if he's down there. He's just going to
8 have to speak loudly enough for Smokey to take down what he says.

9 Mr. Young: Try that. All right. Now could I ask -- this is Mr. Herlong, Your Honor. He's going
10 to be actually operating the equipment so that it can be displayed. Mr. Herlong, can you make that run
11 forward to this point. Okay. You can stop at this point.

12 Q Is that the footage you saw?

13 A Yes, it is.

14 Q Okay. Did you also look at camera footage -- there's a new case in the screen that's a split
15 screen of 1, 2, 3, and 4 cameras. Did you look at the individual footage on those cameras as well?

16 A Yes, I did.

17 Mr. Young: Would you display camera #1 singularly during that same sequence. Run it
18 backwards. Is that as fast as it will go? Okay. Would you stop that there. Would you display camera #2.
19 I don't think you'll need to go back quite as far. Somewhere along there. Right about there. Okay. And
20 camera 3. It's about the same time frame. Okay. Okay. Is there any other camera? Is that it? That
21 one's outside. That one needs to be run back to about 14:58 or somethin'. Right there. Okay.

22 Q Lt. Turner, would you return to your seat.

23 Mr. Young: Thank you, sir. Would you reset that machine back to the beginning.

24 Q Lt. Turner, during your course of review -- first off, is this the video playback that you saw of the
25 surveillance footage?

1 A Yes.

2 Q Is that the equipment that you saw it on?

3 A It doesn't look the same.

4 Q Okay. Does it look similar though?

5 A Similar.

6 Q All right. In the course of this and your review of this equipment and the review of the footage,
7 did you make an identification of any of the people connected potentially with the crime?

8 A Yes. We had looked at the video there at the scene--

9 Q Just on the footage now.

10 A On the footage, I had noticed the guy in the white T-shirt, I've dealt with him before, a few times
11 before, and I recognized him to be Montavis Gaines.

12 Q Okay. You base that upon -- you said you'd dealt with him before. What'd you base that on
13 when you say you identified him as Montavis Gaines?

14 A By his mannerisms, the way he conducted himself there. I've seen that before.

15 Q Okay. Did you have -- notice during the course of this that the person in the white T-shirt raised
16 his mast at any point?

17 A Yes. When he was going out of the door, leaving, when he turns his head to the left, his profile,
18 that's when I was fairly sure that that's who it was.

19 Q Okay. So you made the identification of Montavis Gaines based upon your review of this
20 camera footage of the crime itself?

21 A Yes.

22 Q Okay. And how many total years have you had contact with or known Montavis Gaines?

23 A Since he was a juvenile I guess probably about 15 or 16 years old.

24 Q Okay. And during those occasions, was your contact with him face to face?

25 A It has been on a couple occasions.

Arthur Turner - direct examination by Mr. Young

1 Q Okay. And how close have you been to him during those occasions?

2 A Within arm's reach.

3 Q All right, sir. How long did those points of contact -- how long did the contact last between the
4 two of you and Mr. Gaines? How long was the contact?

5 A Just in our interview stage, questioning, that sort of thing. Probably 20, 30 minutes.

6 Q Okay. So during that period of time you became familiar with his gait, his walking stance.

7 A Well, I've seen him on the street numerous times walking.

8 Q Okay, sir. So on other occasions you've watched him walking. You ever seen him running
9 before?

10 A Yes.

11 Q All right. And have you ever seen him essentially clothed in a similar fashion?

12 A Similar.

13 Q Okay. And in all that you saw on the video tape, was there anything inconsistent with what
14 you'd previously known both the mannerism and appearance as being Montavis Gaines?

15 A No.

16 Mr. Young: Your witness.

17 CROSS-EXAMINATION

18 BY MR. ELLISOR

19 Mr. Ellisor: May I have played back the part where you said you could see his face on this tape.

20 That would've been this one right here.

21 A It could've been as he was going out the door.

22 Q That's right. I want you to show this judge -- you said you could -- you recognized his face. I
23 want you to identify the frame and all when it happened. Well, he's a -- when you -- you're saying is
24 you recognized Montavis Gaines by his gait and his walk. Correct?

25 A Correct.

Arthur Turner - cross-examination by Mr. Ellis

1 Q Okay. And you say you recognized him on one of these pictures that you could see his face.

2 A I could see his profile.

3 Q Well, did you see his face or his profile?

4 A His left side of his face here. Not his full face.

5 Q Okay.

6 Mr. Ellis: Stop it right there.

7 Q Okay. Now can you come up here okay and again point how on this screen you can see that
8 man's face at any time.

9 Mr. Ellis: You might play it -- reverse it just a little bit, please.

10 Q Is that not dark?

11 A Yes, that part you can't tell.

12 Q And Montavis Gaines is black, is he not?

13 A Right.

14 Q Okay. Now this --

15 Mr. Ellis: Now run it back. Okay. Right there.

16 Q Okay. Now you're saying that you can tell from this picture right there that's Montavis Gaines?

17 A Yes. At the time that I looked at that several times over and over.

18 Q You can identify that positively as being Montavis Gaines?

19 A That's who I believe it to be.

20 Q I didn't ask you if you believe. Can you identify that as Montavis Gaines under oath?

21 A Yes.

22 Mr. Ellis: Your Honor, I move to suppress this testimony on the fact that I think that is
23 humanly impossible to identify for him to testify -- he's talkin' about they want to put this evidence in
24 because of the way he talked about his walk, his gait, his mannerisms, and I don't think that's permissible
25 evidence under the rules of evidence, so I move to suppress his testimony concerning those things.

Arthur Turner - redirect examination by Mr. Young

1 The Court: Well, I haven't heard all the evidence yet. It's too early for me to make rulings on
2 the motion. You have other questions of the witness?

3 Mr. Ellisor: No, sir.

4 The Court: You have questions of the witness?

5 REDIRECT EXAMINATION

6 BY MR. YOUNG

7 Q Your identification is based upon all of what you previously testified to. Correct?

8 A Correct.

9 Q It isn't based upon solely a profile.

10 A Do what?

11 Q Was it based solely upon a profile or one single---

12 A No, it's based on several different factors of the video. It's not based solely on one part of it.
13 It's all of it.

14 Mr. Young: No further questions.

15 The Court: You have any other questions of the witness.

16 Mr. Ellisor: Nothing.

17 The Court: Thank you, sir. You may step down. Call your next witness.

18 Mr. Young: Charles Holloway.

19 CHARLES HOLLOWAY, being duly sworn, testifies as follows:

20 DIRECT EXAMINATION

21 BY MR. YOUNG

22 Q Lt. Holloway, give us your full name, where you work and for how long.

23 A My name is Charles F. Holloway, II. I've been employed at the Sahula police department for 11
24 years.

25 Q October 11th 2006 where were you?

1 A Iraq.

2 Q Okay. Last week or this week I believe did you have an opportunity to review some video
3 footage of an armed robbery that occurred on October 11th 2006?

4 A Yes, sir.

5 Q Okay. During the review of that video did you come to conclude as to who any of the people
6 were on that video?

7 A Yes, sir.

8 Q All right. The video has been queued up here on this machine to my left. Is this the video that
9 you actually watched?

10 A Yes.

11 Q The start of it?

12 A Yes.

13 Q Did you watch the entire sequence of it?

14 A Yes, sir.

15 Q Did you watch each one of the camera angles 1, 2, 3, and 4?

16 A Yes, sir.

17 Q During your review of that video, did you come to any conclusions as to who the persons were
18 in the video?

19 A Yes, sir. Jerome Rhoads and Montavis Gaines.

20 Q Okay. Who would Jerome Rhoads be in the sequence that you observed?

21 A Jerome Rhoads was the person that entered in, the heavier set black man.

22 Q Thank you.

23 A Mr. Gaines followed behind.

24 Q Were either one of them armed?

25 A Mr. Rhoads was.

Charles Holloway - direct examination by Mr. Young

1 Q Okay. How did you identify Mr. Gaines?

2 A I've had numerous dealings with him in the past, his mannerism, his build, the way he was
3 walkin'. It was Montavis Gaines.

4 Q Did you get a chance to see him during the course of this -- did you see anything during the
5 video in which he had exposed portions of his face?

6 A As he was exiting out the building.

7 Q Okay. And in connection with that, did you see any part of his face?

8 A You could see from here down.

9 Q You are pointing to the nose roughly down?

10 A Yes.

11 Q From your nose down?

12 A Yes, sir.

13 Q Okay. And did you say you had experience with him? How long have you known this
14 gentleman?

15 A All his life.

16 Q Okay. And on how many occasions have you had contact with him during that period of time?

17 A I'd say several times.

18 Q Okay. What -- have you been face to face with him?

19 A Yes, sir.

20 Q Have you seen him walking?

21 A Yes.

22 Q Have you seen him running?

23 A Yes, sir.

24 Q Have you seen the way he dresses and the style of dress?

25 A Yes, sir.

Charles Holloway - direct examination by Mr. Young

1 Q Okay. Did anything on this video both in either his mannerism, profile, parts of his face you may
2 have seen or not seen, anything give you any belief whatsoever that this was not Montavis Gaines?

3 A No, sir.

4 Q How long after you started your review of the video was it until you formed the opinion that this
5 was Montavis Gaines?

6 A Maybe at the most 5 minutes.

7 Q Okay. And that's reviewing all the tape.

8 A Yes, sir.

9 Q Answer any questions Mr. Ellisor has for you, sir.

10 A Yes, sir.

11 CROSS-EXAMINATION

12 BY MR. ELLISOR

13 Q So you're -- have you seen -- excuse me.

14 Mr. Ellisor: Could you play this again. This right here. Thank you.

15 Mr. Young: Your Honor, I believe Mr. Ellisor is pointing to camera 2.

16 Mr. Ellisor: Yeah. Okay. Stop.

17 Q Now when you saw that, your testimony under oath is that you recognized that person as
18 Montavis Gaines?

19 A If you can see, you can see--

20 Mr. Ellisor: Back it up.

21 Q Let me know when it needs -- how far back it needs to go.

22 A Whoa. Stop there.

23 Q Okay. Now, well, this is in -- this is in black and white but you're saying you recognized -- the
24 majority of this appears to me to be sort of nondescript. You tellin' you recognize this face--

25 A Back it up some more, please, sir.

- 1 Q Okay.
- 2 A All right. Just let it play and I'll tell you when to let it stop. Right there.
- 3 Q Okay. So you can say from that you recognize that to be Montavis Gaines?
- 4 A Yes, sir.
- 5 Q And why -- can you tell from his -- from his gait or his walk or what do you base that on --
- 6 identification on?
- 7 A If you -- if you start it back over from when they first walked in, the walk, the way--
- 8 Q Well, you -- you normally said you've known Montavis Gaines long enough to identify how he
- 9 walks?
- 10 A Yes, sir.
- 11 Q How many times have you seen him?
- 12 A In the past I've dealt with him numerous -- on numerous different occasions.
- 13 Q Okay. And you can identify his walk, his gait. Does he limp?
- 14 A No, sir.
- 15 Q Okay. Well, if he doesn't limp, how -- how can you recognize his--
- 16 A I'm familiar with him. I've been in Saluda all my life and known him.
- 17 Q Okay. Now what were -- what is there specifically about his mannerisms that you would
- 18 identify?
- 19 A His build.
- 20 Q Whatchu mean, his height?
- 21 A Yes, sir. And his body structure.
- 22 Q Okay. So--
- 23 A And he's tall, slender.
- 24 Mr. Ellis: Your Honor, again, I move to exclude this identification on the same grounds that
- 25 we made earlier that I don't -- I think it's humanly impossible for this witness to recognize and describe

WITNESS - direct examination by Mr. Young

1 for the benefit of the jury. My client's, you know, face and things like that. I move to strike his
2 testimony.

3 The Court: Once again, it's too early for me to be ruling on motions. What other questions do
4 you have, solicitor, if any?

5 Mr. Young: Your Honor, I don't have any further questions for this witness.

6 The Court: Step down, please.

7 A Yes, sir.

8 The Court: Any other witness?

9 Mr. Young: Mr. Dowdy is not going to identify -- but Ms. WITNESS will. She's subject to
10 testifying about it and I will offer her now.

11 The Court: Come around, please, ma'am, and be sworn. You got a sequestered witness?

12 WITNESS, being duly sworn, testifies as follows:

13 Mr. Young: Other than -- other than a lady who's gonna testify not about what's on this tape.

14 The Court: Well, you need to sequester 'em.

15 Mr. Young: I apologize, Your Honor. I didn't realize they were still here. Thank you.

16 The Court: What's your name, ma'am.

17 A My name is WITNESS

18 The Court: Okay. Answer Mr. Young's questions.

19 DIRECT EXAMINATION

20 BY MR. YOUNG

21 Q Thank you, Ms. WITNESS. Where do you work -- where did you work on October 11th 2006?

22 A Local finance company.

23 Q Okay. Were you present in the building that was subjected to an armed robbery on that day?

24 A Yes, I was.

25 Q Where were you?

WITNESS - direct examination by Mr. Young

1 A I was on the cash advance side of our business in Mr. WITNESS's office down the hall.

2 Q All right. Are you familiar with the location that appears on the video tape here?

3 A Yes, sir.

4 Q And you've reviewed that video tape?

5 A Yes, sir.

6 Q And reviewed the video tape in all its camera angles?

7 A Yes, sir.

8 Q All right.

9 Mr. Young: The video that's referred to, Your Honor, I'm just gonna make it clear for the
10 record. We have had it marked as state's exhibit #1. I should've done that early on and I apologize.
11 We're gonna have that qualified through other witnesses during the case in chief.

12 Q But, Ms. WITNESS, you did not -- did you see any part of the actual robbery itself from the
13 position you were in?

14 A I saw Mr. VICTIM being struck in the head by the gentleman with the gun.

15 Q Okay.

16 A And he was asked to tell them where the money was at.

17 Q Right. And from your vantage point where were you in relation to where Mr. VICTIM was?

18 A I was down the hall directly from Mr. VICTIM in Mr. WITNESS's office.

19 Q All right. Let me just for the purposes of identification, in relation to the pictures that appear in
20 these 4 camera angles with regard to the interior of the building.

21 A Yes, sir.

22 Q Okay. And I believe that's camera 2, 3 and 4 angles, okay, actually it would be 2 and 3,
23 specifically 3, referring down to camera angle 3.

24 A Yes, sir.

25 Q If I -- if I use my finger to place on which side of the building you were in relation to this camera

1 angle, where would you be?

2 A Directly to the right.

3 Q To this side?

4 A Down the hall, yes.

5 Q Just to illuminate that further just so The Court has a clear understanding your perspective, let
6 me hand you what's been marked as state's exhibit 7, and it's a photograph of something, can you tell me
7 what that is?

8 A Yes, sir, that is the hallway that I had full view of.

9 Q Okay. Is that the hallway that would've been to the right of camera angle #3?

10 A Yes, sir.

11 Q Okay. Where is the place you were on the picture that's displayed here?

12 A I was right here in this door peeking.

13 Q Okay. You peeked down that hallway?

14 A Yes, sir.

15 Q Okay. Now after it was over and people left, what did you do?

16 A We opened the door and I got Mr. VICTIM some paper towels because his head was bleeding.

17 Q Okay. When did you actually view the video tape?

18 A Whenever law enforcement came and brought the -- and the equipment was pulled up.

19 Q And state's exhibit 1 is what you reviewed?

20 A Yes, sir.

21 Q Okay. During your course of that, could you identify anybody?

22 A I did identify Jerome Rhoads.

23 Q Okay. Jerome Rhoads is not the person on trial here today.

24 A That's correct.

25 Q And how long have you known Jerome Rhoads?

WITNESS - direct examination by Mr. Young

1. A Since October of '95.
2. Q And just tell The Court how you know Mr. Rhoads.
3. A Mr. Rhoads stole my vehicle from behind at the time Delta Loans of Church Street.
4. Q Was he prosecuted in this courtroom for that offense?
5. A Yes, sir, he was.
6. Q And that's how you came to know him?
7. A We faced each other in court in October of '95.
8. Q How long did it take you to identify Mr. Rhoads?
9. A A matter of a second or two.
10. Q And you used this video tape or this video surveillance footage to do so?
11. A Yes, sir.
12. Q And what specifically, if anything, led you to believe it was Jerome Rhoads? Out of the camera
13. footage that you observed, what was it that specifically made you believe it was Jerome Rhoads?
14. A His face.
15. Q Is it specifically on the camera?
16. A Yes, sir.
17. Q Okay. And where did you see his face on the camera? Can you show that to The Court.
18. A When he pulls his mask up on the camera when he's asking Mr. VICTIM for the money before he
19. hits him and also prior to he had visited the officer earlier we saw the footage from before.
20. Q Okay. So you identified it from the footage earlier in the day---
21. A Yes, sir.
22. Q --as well.
23. A 1 o'clock.
24. Q Okay. Would you -- I'm playing the footage from camera #3 now. I believe I've gone past the
25. point. This is backwards. We're going backwards.

WITNESS - cross-examination by Mr. Ellisor

1 Mr. Young: Your Honor, may she step down here so she can see this. It's a small picture.

2 The Court: Sure. You have to keep your voice up.

3 Q You've got to speak loud enough for this microphones to pick it up and this microphone.

4 Mr. Young: Stop there. That very short sequence.

5 CROSS-EXAMINATION

6 BY MR. ELLISOR

7 Q So your testimony is that you can identify Jerome Rhoads from just walking in here and looking
8 at this right here?

9 A That's not Jerome Rhoads. The gentleman in black--

10 Q Jerome Rhoads -- but I mean Montavis Gaines. You can identify that as Montavis Gaines?

11 A No, sir. I identified Jerome Rhoads.

12 Q Yeah. Well, okay.

13 Mr. Young: You want to suppress that identification?

14 Mr. Ellisor: Huh?

15 Mr. Young: You want to suppress that identification?

16 Mr. Ellisor: Suppress the identification of Jerome Rhoads?

17 Mr. Young: Yes.

18 Mr. Ellisor: No. He's not on trial.

19 The Court: You can ask her questions about it. Now I'm not tryin' to mislead anybody, but you
20 want to talk to me, do it in the proper way.

21 Mr. Ellisor: Okay.

22 Q That -- you recognize this dark figure right here as Jerome Rhoads?

23 A Yes, sir.

24 Q And from what do you base that opinion, what grounds?

25 A From facing him in court in October of 1995.

WITNESS - redirect examination by Mr. Young

1 Q But you can tell - I mean this is totally dark. Correct?

2 A When you face somebody that close, you don't forget who they are. That looks like him to me,
3 yes, sir.

4 Q This dark thing looks like him.

5 A That is Jerome Rhoads.

6 Q Okay. Now you couldn't identify who that is?

7 A No, sir, I cannot.

8 Q Okay.

9 Mr. Ellis: No further questions, Your Honor.

10 The Court: Redirect?

11 Mr. Young: Your Honor, just one question.

12 REDIRECT EXAMINATION

13 BY MR. YOUNG

14 Q Ms. WITNESS to make sure I understand you, you've testified previously that you've had
15 sufficient contact with in the courtroom with Jerome Rhoads to recognize him on that tape?

16 A Yes, sir.

17 Q I have no further questions.

18 The Court: Recross?

19 Mr. Ellis: None, Your Honor.

20 The Court: Thank you, ma'am. You may step down.

21 Mr. Young: VICTIM

22 VICTIM, being duly sworn, testifies as follows:

23 DIRECT EXAMINATION

24 BY MR. YOUNG

25 Q VICTIM, where do you work and for how long?

1 A Local cash advance. Been there about 4 and a half years.

2 Q Okay. Where---

3 Mr. Ellison: I notice we've got this witness that needs to be sequestered.

4 Mr. Young: He's not a witness.

5 Mr. Ellison: Okay.

6 Q Which cash advance do you work at?

7 A I work all of -- all over South Carolina.

8 Q Okay. Does that include the one here in Saluda?

9 A Yes, sir.

10 Q All right. The current Saluda location of cash advance is where currently?

11 A Where is it now?

12 Q Yes, sir.

13 A It's on church street.

14 Q Okay. Where was it October 11th?

15 A It was across the -- from the post office on [REDACTED] Street.

16 Q Yes, sir. On that day on October 11th 2006 were you subjected to a robbery as part of your duties
17 there at cash advance?

18 A Yes, sir.

19 Q Can you describe where you were and what you were doing. Just briefly.

20 A I was at the desk behind the cash drawer -- the desk behind the cash drawer on my cell phone
21 and 2 people came in with mask and gun on -- and his gun in hand. I stood up, asked him what do you
22 want. The guy with the gun lifted his mask up. I recognized him from earlier that day and then he told
23 me to turn around and so I turned around; he told me to get down and I was goin' down; he hit me in the
24 back of the head. And they kept yellin' where's the cash drawer. Some other guy behind him was
25 runnin' around tryin' to find the cash and they got the cash and walked out and the cell phone rang back

VICTIM - direct examination by Mr. Young

1 and the guy with the gun came and grabbed my cell phone and left.

2 Q The person you were able to identify in connection with the armed robbery was only the person,
3 the man with the gun?

4 A That's correct.

5 Q So of the two the man with the gun was the one you could say I recognize him.

6 A That's correct.

7 Q All right. And when did you previously see him that day?

8 A He came in earlier that day about 12 o'clock or 1 o'clock asking -- he walked in and wanted to
9 know how the payday advance worked. And he said well I live with my mom in Columbia or something
10 like that, and I said well I don't do -- that's too far. He said it doesn't matter, I just want to know how
11 does it work. I explained to him how it worked and then he left.

12 Q Okay. Brief encounter.

13 A That's correct.

14 Q Was the person wearing distinctive clothing that day?

15 A Yes, sir. He had a brown shirt on with distinctive writing on the front which called my attention,
16 and it came down. It was a long brown shirt.

17 Q Okay. Now do you -- you had a video surveillance system in your business. Correct?

18 A That's correct.

19 Q All right. This business on the video surveillance system were you able to subsequently able to
20 look at the video that day?

21 A That's correct.

22 Q All right. Did you review the video for that day that which included the actual opportunity to see
23 this man earlier in the day as well as the armed robbery?

24 A That's correct.

25 Q All right. Would you be able to say whether or not the 12:48 roughly--

-VICTIM - direct examination by Mr. Young

1 A May I step down, please.

2 Q --that this is the time frame and sequence? Would you step down and take a look, please. Take
3 a look at that -- start at that sequence. Would this be the first opportunity in the robbery for you to see
4 this gentleman?

5 A That is the first opportunity.

6 Q Okay. And were you able to -- you were able to go back and look at this video after the
7 robbery?

8 A That's correct.

9 Q And this is the video from that same day?

10 A Yes, sir.

11 Q Okay. Would it refresh your recollection to look at it?

12 A No, I -- it's pretty--

13 Q Okay. All right, for The Court's attention, I just go ahead and ask that to be played just briefly.
14 It doesn't last long, does it?

15 A No.

16 Q Okay. The actual sequence completes itself at approximately 12:49:16 on October 11th 2006. Is
17 that the same day as the robbery occurred?

18 A Yes, sir.

19 Q About how much later was the armed robbery?

20 A About 3 hours later.

21 Q Okay. Would you take your seat, sir.

22 A Okay.

23 Q How close were you to the man during that first sequence?

24 A Probably 2 foot the first sequence because he was right on the other side of the counter right in
25 front of me.

VICTIM - direct examination by Mr. Young

- 1 Q Is the counter on that -- in the timing mechanism accurate on this machine?
- 2 A Yes, sir.
- 3 Q So the time frame would've been roughly a minute or so that you were actually in contact with
- 4 him?
- 5 A That's correct.
- 6 Q Face to face 2 feet apart?
- 7 A That's correct.
- 8 Q His clothing and everything you saw?
- 9 A Yes.
- 10 Q Okay. Did the same clothing appear on this person that you believe to be the same man with the
- 11 gun later, the same clothing?
- 12 A Yes, except the shirt was flipped inside out because it -- you could see the imprint of the
- 13 scribbling on the -- you know, when it was flipped out, you could see it.
- 14 Q He was wearing essentially the shirt turned inside, the same one you saw?
- 15 A That's correct.
- 16 Q And you could see it through the shirt.
- 17 A Yes, I mean it was -- like I said.
- 18 Q During your opportunity did you actually visually have contact with the man who had the gun?
- 19 During the robbery sequence how much opportunity did you get to see his face?
- 20 A He lifted the mask up and I recognized it immediately. I said that's the same individual that
- 21 came in earlier.
- 22 Q Okay. Were you standing or on the ground at that time?
- 23 A Standing.
- 24 Q Okay. Was he facing you or away from you?
- 25 A He was facing me.

VICTIM

- direct examination by Mr. Young

1 Q Okay. Was the gun pointed at you or away from you?

2 A Pointed at me.

3 Q Were you focused on the gun or his face?

4 A Both.

5 Q Okay. Was your attention split to the degree you could not form any opinion about whether it
6 really was him or not?

7 A No. I could -- I knew it was him.

8 Q Did he say anything?

9 A Yeah, he told me where was the money and he told me, you know, turn around.

10 Q Did you recognize the voice?

11 A I don't know.

12 Q So you're basing your recognition on his clothing.

13 A Yes.

14 Q And his facial appearance to you.

15 A Yes.

16 Q How much of his face could you see when he pulled up his mask?

17 A All of it except the top part where his hair was at.

18 Q I'm sorry. I may have asked this. I don't know. How far apart were you during that period of
19 time when you saw the gun pointed at you?

20 A He was probably with -- 'cause the gun was almost touching me. So I would say we were
21 probably within 2 foot or less.

22 Q Answer any questions defense counsel has for you.

23 The Court: Cross.

24 CROSS-EXAMINATION

25 BY MR. ELLISOR

- 1 Q So your testimony is you saw Jerome Rhoads.
- 2 A That's the person with the gun?
- 3 Q Yes, sir.
- 4 A Yes.
- 5 Q And you were layin' down at the time?
- 6 A When he -- well, when he came in?
- 7 Q No. 2 of 'em come in. Right?
- 8 A That's correct.
- 9 Q Did you ever see a third person?
- 10 A No. I saw 2 people come toward me.
- 11 Q Okay. And one was dressed in white clothes. Correct?
- 12 A That's correct.
- 13 Q And baggy pants?
- 14 A Yes.
- 15 Q Mr. Rhoads did he have baggy pants?
- 16 A He had a long shirt. I couldn't really say if he had baggy pants on or not.
- 17 Q Okay. Now You got hit by Mr. Jerome Rhoads from looking at this tape.
- 18 A That is correct.
- 19 Q And when he hit you he hit you on the back of the head.
- 20 A That's correct.
- 21 Q And did that knock you to the floor?
- 22 A No. I was already going down to the floor.
- 23 Q So you were going down to the floor and he hit you in the back of your head.
- 24 A That is correct.
- 25 Q Okay. So when you were laying down there, did he reveal his face in any way?

- 1 A Before he hit me he revealed his face.
- 2 Q He revealed -- well, he had a mask on, did he not?
- 3 A Yeah, but he pulled the mask when he came in he pulled it down too far, he had to pull it back
- 4 up; that's when I saw his face.
- 5 Q Okay. Now this mask did it have like holes where eyes would be?
- 6 A I would guess it would.
- 7 Q Well, did it?
- 8 A I don't know. I did not see if it had holes for eyes. All I ever saw was the mask and him pullin'
- 9 it up.
- 10 Q Okay. But the mask was over his entire face, was it not?
- 11 A Right when he ran in, he pulled it out.
- 12 Q And he came in first I believe.
- 13 A That is correct.
- 14 Q And the defendant or whoever is claimed to be the defendant came in second. Right?
- 15 A That's correct.
- 16 Q And while you were laying down, you noticed Mr. Rhoads -- you had -- you had to go back
- 17 and see -- you had told somebody that you had seen him in the store previously. Right? Some 3 hours
- 18 before.
- 19 A That is correct.
- 20 Q And so y'all went back and looked at the tape. Right?
- 21 A That is -- when the law officers got there, yes.
- 22 Q That's right. So y'all reviewed the thing and then you in the presence of the law officers, you
- 23 identified that as Jerome Rhoads.
- 24 A I didn't know what his name was but I --
- 25 Q Okay. You identified that as the person who committed the robbery.

- 1 A That is correct.
- 2 Q Okay. Now did Ms. WITNESS see Mr. Rhoads?
- 3 A I did not see. I mean Ms. WITNESS was at the hallway. I was not focused on her.
- 4 Q Okay. But you don't know if she saw him or not.
- 5 A Right. I did not look down the hallway when--
- 6 Q Now did you see Mr. Gaines? Montavis Gaines.
- 7 A Yes.
- 8 Q Okay. Now when you saw him was his face covered?
- 9 A Yes, when he came in.
- 10 Q Okay. And you have subsequently looked at the video of this. Correct?
- 11 A That's correct.
- 12 Q Okay. Now from looking at those videos, can you tell us if you recognize Montavis Gaines in
- 13 that video?
- 14 A No.
- 15 Q Or do -- I mean in other words, when you looked at the video from whatever condition that
- 16 video was in, whether it was dark, vivid or not, when you looked at it, did you recognize that as Montavis
- 17 Gaines?
- 18 A The one with the white shirt on?
- 19 Q Yes.
- 20 A I did not. I've never seen him before so I couldn't reco -- tell you.
- 21 Q So you can't -- you can't identify him now.
- 22 A Oh, if I could identify him now?
- 23 Q Well, I mean you're look at him right now, but from that video when you looked at it, could you
- 24 identify it was Montavis Gaines?
- 25 A From the tape?

1 Q Yeah.

2 A No.

3 Q Okay.

4 Mr. Ellisor: No further questions, Your Honor.

5 The Court: Redirect?

6 Mr. Young: No further questions.

7 The Court: Thank you, sir. You may step down.

8 A Yes, sir.

9 The Court: Anything else from the state?

10 Mr. Young: Nons.

11 The Court: Defense have any evidence to present on the issue of identification?

12 Mr. Ellisor: No, sir.

13 The Court: All right. Y'all have me confused now. I'm going to give you an opportunity to
14 state whatever motions you want to state and we'll be considering any that you've raised so far. Mr.
15 Dowdy is not going to point in the courtroom and say that's the man in the white shirt that was at the
16 robbery. Is that correct?

17 Mr. Young: That is a correct statement. He's unable to do so. The state would not offer that.

18 The Court: All right. So the only people that are going to be saying that the person in the video
19 is this defendant, Mr. Gaines, are going to be officer Turner and officer Holloway.

20 Mr. Young: No, sir. Actually Jerome Rhoads is gonna come in and testify.

21 The Court: Well, I'm sorry—

22 Mr. Young: He's not here right now. I can bring him over here to do that.

23 The Court: That's not a -- that's not -- that's a different issue altogether. The witnesses who
24 have testified so far, the only ones who are going to say that that man sitting there, Mr. Gaines, is the same
25 person that is on that video tape are those two officers.

1 Mr. Young: That is correct.

2 The Court: All right. What are your motions?

3 Mr. Ellison: Your Honor, based upon that I move again at this particular time to suppress the
4 identifications by the officers who have testified here at the identification of Mr. Gaines because it is
5 obvious from looking at that thing that it is humanly impossible to recognize who that was on those tapes.
6 The evidence that the state wishes -- it has to be credible in some manner whosoever, and I submit that
7 that is totally unbelievable that they can identify from the same videos that you and I watched, Your
8 Honor, and that they testified from the witness stand when they looked at 'em, they're gonna testify that
9 they could recognize the defendant from that, and I submit that was -- is humanly impossible, and I move
10 to suppress 'em at the trial and if denied I would move again at the trial for suppression.

11 Mr. Young: The state's position they had prior knowledge, Your Honor, of Montavis Gaines'
12 appearance both in regard to his gait, outward appearance, his manner of dress, running, walking, his
13 facial -- his facial appearance, sufficient profile was showing for one officer to say that's him. Another
14 officer in a very short period of time said exactly the same thing. Mr. Ellison's argument, Your Honor,
15 basically, in my opinion, goes to the weight and not the admissibility.

16 The Court: Anything else?

17 Mr. Ellison: No, sir, Your Honor.

18 The Court: All right. STATE -VS- MILLER which is a 2006 case from South Carolina 367
19 South Carolina 329 in general terms provides that when an accused, in this case Mr. Gaines, is on trial, he
20 has standing to challenge the identification of a co-defendant. It's a little more complicated than that, but
21 that's a broad general statement. So he can challenge both his identification and the identification of the
22 co-defendant; however, I making the challenge, this is a due process consideration The Court's going
23 through, and NEAL -VS- BIGGERS and its progeny deal with situations where there has been some
24 unduly suggestive action on the part of law enforcement that gives rise to the likelihood of
25 misidentification. It typically arises in situations where there is a show-up where they just bring one

1 person who -- in front of a victim typically and say is this the man that did it. Of course, there's
2 suggestiveness involved in that when the law enforcement brings a guy up and says is this the guy that did
3 it. That's the type of thing you evaluate. Or if they do a photographic lineup, the police do, and, you
4 know, they -- they use people who don't have similar appearances, the defendant is completely different
5 looking than everybody else or there's something about the photographic lineup that's suggestive in some
6 way. So what The Court primarily is looking to is the actions of law enforcement in -- in suggesting to
7 the victim this is the person did it. Well, there is no evidence that's been presented in this hearing that that
8 ever took place. You've got two law enforcement officers who say that they can recognize this defendant
9 on a video tape of a security camera system based on his gait, how he walks, how he runs, his size.
10 Whether those things are believable or not are completely jury issues. They're not for me. I don't know
11 that -- that's a tactical decision y'all have to make about whether you up that evidence in or not. That's
12 not my choice to make and the only thing I could see on the tape is whoever was in the white shirt was
13 hoppin' around. Other than that very baggy, loose-fitting clothes, how somebody can identify from that,
14 that's a factual issue. That's a jury issue. Likewise, with the testimony of --

15 Mr. Young: Your Honor--

16 The Court: --the testimony -- sir?

17 Mr. Young: --are you going to address the co-defendant issue because I can present Jerome
18 Rhoads here to testify about his ability to--

19 The Court: I'm fixing to rule with you.

20 Mr. Young: I'll shut up.

21 The Court: I mean I don't have any choice but to rule with you. There is no evidence of police
22 suggestiveness at all. There is nothing in this record to indicate that I even get to the second prong of the
23 DENNO analysis, but I've got to put my findings on the record and to make sure that you know that I'm
24 not basing it on evaluating whether Mr. Turner or Mr. Holloway's testimony is believable or not. That's a
25 jury consideration. Likewise with Ms. ^{WITNESS}. You know, I didn't see anything but a dark blob there.

1 She said that she can tell that's that man's face, the co-defendant's face. That's for the jury to evaluate.
2 That's not for me to evaluate.

3 Now if the police came in and suggested isn't that so and so, then we've got an issue for The
4 Court to step in and have to make a determination not beyond a reasonable, but by a lesser standard that
5 the state has established that there is some indicia of the liability to it.

6 With regard to the in-court identification of this defendant, the only evidence that I'm aware of
7 that's going to be presented is from these two officers and a co-defendant. A co-defendant it's not a
8 NEAL-VS- BIGGERS situation. He presumably knew who was with him because the two people on that
9 tape were obviously acting in concert.

10 As for Ms. WITNESS identifying the co-defendant in court, this defendant can challenge that, but it
11 would, again, be the same analysis of whether her identification was based on something suggested to her
12 in some fashion by the words, actions, whatever it may be, by law enforcement, and there's no evidence
13 of that. She said she saw the video tape; she knows who it is. She didn't say the police told me you think
14 that might be so and so or asked the question or said that is so and so. There is no evidence of
15 suggestiveness. So I don't even get to the second prong of the in-court identification or the identification
16 being so reliable that regardless of the suggestiveness it should nonetheless be admitted because it's so
17 reliable it should be allowed for the jury to consider. So based on my understanding of NEAL -VS-
18 BIGGERS and all the cases that have interpreted it, you don't have a BIGGERS situation here because
19 this situation doesn't involve suggestiveness. The evidence will be admissible. Cross-examination, as one
20 of the cases points out, is the way to attack when somebody is testifying to something that- that you
21 want to attack both the credibility of that testimony. I've never gone into a situation where a co-defendant
22 is identifying somebody and it being a BIGGERS situation. All right. Is Mr. Gaines in custody?

23 Mr. Ellison: Yes, he is. He has chains and all.

24 The Court: Okay. I just want to know to tell him he can go to lunch or not. All right. Court's in
25 recess till 2 o'clock. (there was a lunch recess.)

WITNESS - direct examination by Mr. Young

1 Mr. Young: Your Honor, we believe we have a stipulation as to state's exhibit 1 which is a video
2 tape of the scene. Is that correct, Mr. Ellisor?

3 Mr. Ellisor: That is correct, Your Honor.

4 Mr. Young: All right. Well, I would still offer my first witness to the state, what it is and how it
5 works. I think we have a stipulation that it's admitted as the video recording of the surveillance camera
6 during the armed robbery on October the 11th and the preceding hours prior to that.

7 The Court: We got all the jurors?

8 Mr. Young: I need to get Mr. Maye in here.

9 The Court: State ready for the jury?

10 Mr. Young: State's ready, Your Honor.

11 The Court: Defense?

12 Mr. Ellisor: Ready, Your Honor.

13 The Court: Bring 'em in. (the following occurred in the presence of the jury.) Call your first
14 witness.

15 Mr. Young: State calls Mr. WITNESS

16 The Court: Come around, please.

17 WITNESS, being duly sworn, testifies as follows:

18 DIRECT EXAMINATION

19 BY MR. YOUNG

20 Q Mr. WITNESS, the thing you want to be cautious about speaking into is that box.

21 A Okay.

22 Q So the court reporter can hear everything. Sir, would you give us your name, where you work
23 and for how long.

24 A WITNESS Owner local cash advance and we've been open almost 4 years.

25 Q All right, sir. On October 11th 2006 where was your cash advance located?

WITNESS - direct examination by Mr. Young

1 A [REDACTED] here in Saluda.

2 Q Is that in Saluda county?

3 A Yes.

4 Q All right, sir. And on that day did -- were you present in your business when a robbery
5 occurred?

6 A I was.

7 Q Just briefly describe where you were and what happened from your perspective and where you
8 were.

9 A I was -- my office is down the hall out from me 20, 30 feet away from the cash advance office.
10 At approximately 3 o'clock WITNESS was in my office across from the desk from me and we heard
11 a commotion that I -- best I could describe, and I asked her to crack the door and see if we could, you
12 know, tell what was goin' on and at that time her eyes just kinda popped out of her head. She didn't say
13 anything. She did like this--

14 Q So -- so -- the court reporter will not be able to demonstrate--

15 A Okay. I put my fingers and do my hands like up like it's a pistol.

16 Q Okay.

17 A And I instructed her to shut the door and get over in the corner, and I got on the phone with 911.

18 Q Okay. Now is your business equipped with any kind of surveillance equipment?

19 A Yes, sir, it is.

20 Q Okay. Is any of that equipment present in this room?

21 A Yes, sir.

22 Q All right. What's present in this room?

23 A Monitoring system. It's a DPR I think is what they call this equipment. 4 different camera
24 angles and records just--

25 Q And I'm pointing in this direction. Is this the white box that you just talked about?

1 A Yes, that's the recorder, and the black tv lookin' device is the monitor.

2 Q Okay. And then is there any other type of equipment at the location?

3 A There's 4 -- 4 cameras that show a couple inside shots and 2 outside shots.

4 Q Now are you referring to the equipment that was at your current location or at the location you
5 described in October?

6 A It was at our location in October.

7 Q Last year?

8 A Of '06.

9 Q Okay, sir. And, sir, in a prior session you had an opportunity to look at that -- that recording. Is
10 that true?

11 A That's correct.

12 Q All right. And have you looked at that recording since then?

13 A Yes.

14 Q And I have marked and placed into that VCR a hard drive. Is that where that particular item that
15 we talked about as a recording, is that where that's located?

16 A Yes. We probably 2 hours after the robbery, we took that hard drive out, preserved it, you know,
17 till we needed it again, and that's the one, you know, we had to replace it, but that's the one of the
18 robbery.

19 Q And where has that hard drive since the time of the robbery?

20 A In my possession.

21 Q Okay. And have you looked at that recording since that time?

22 A Yes.

23 Q Is every thing on that recording from that day true and accurate?

24 A Yes, sir.

25 Q Of what occurred on the day of October 11th 2006 both prior to and during the robbery?

WITNESS - direct examination by Mr. Young

- 1 A Yes.
- 2 Q Now who else was in your business on this day, if anyone?
- 3 A WITNESS and
- 4 Q Okay. And who is ?
- 5 A is a regional supervisor who supervises multiple offices for us.
- 6 Q Okay. Where was he in relation to you during the robbery sequence?
- 7 A He was 20 or 30 foot up the hallway behind a desk.
- 8 Q Okay. And does anything regarding appear on this video you talked about?
- 9 A Yes.
- 10 Q Okay.
- 11 Mr. Young: Your Honor, state's exhibit 1 is located in the hard -- as the hard drive, the DVR
- 12 previously described. It is located in this white box that's been installed and is in position where it can be
- 13 properly displayed. The state would now offer state's exhibit #1 into evidence.
- 14 The Court: Any objection?
- 15 Mr. Ellisor: Without objection, Your Honor. (state's exhibit #1 received in evidence.)
- 16 Mr. Young: With The Court's permission I'd like to publish that to the jury.
- 17 The Court: Yes, sir.
- 18 Q All right, sir. Let me get you to describe, which sequences that are on this pertain to any matters
- 19 pertinent to the -- to the armed robbery? And as to the armed robbery prior to that.
- 20 A There's a -- I think it was around 1 o'clock when one of the alleged robbers came in what I call
- 21 scoping the place out. That was at 1 and then the robbery actually happened right about a minute before 3
- 22 o'clock I think.
- 23 Q All right. I'm gonna have him locate the sequence--
- 24 A Okay.
- 25 Q --in that time frame and first have you identify whether that's the correct sequence.

1 Mr. Young: Okay. Without going into the sequence can you locate the one that's in that time
2 frame? When it gets to approximately that time frame I want you to stop. All right, sir. Could I, with The
3 Court's permission, could I have him come down and start to identify that location where the first
4 sequence might be related to the armed robbery in some fashion.

5 Q First off, just describe the screen generally so that the jury will understand what we're talking
6 about.

7 A Well, this is the interior office where the incident happened. This is right outside this door. This
8 is the front door right there and this is the side building facing like where the country peddler is.

9 Q If somebody here is not familiar exactly where [REDACTED], is there some other commonly known
10 landmark?

11 A Right in front of the post office is where our office is -- was.

12 Q All right. The first camera position is looking where?

13 A Toward the country peddler basically. That's looking here's the front door of our entrance right
14 there.

15 Q All right. And camera 2 is looking at what?

16 A The entrance of the business.

17 Q And that's cash advance's business.

18 A Right.

19 Q Camera 3 is what?

20 A It's virtually about 80 or 90 percent of the entire office. The wall just comes back probably
21 another 6 or 8 feet behind this desk right here.

22 Q Okay. And this camera which is camera 4.

23 A Is looking out on [REDACTED] avenue. To the immediate left would be adage cleaners, country peddler
24 down 378 headed west.

25 Q All right. Do we need to advance this forward to be closer to the time frame that you believe

WITNESS I - direct examination by Mr. Young

1 may be pertinent?

2 A I believe right around this time frame is when one of the alleged victim -- robbers came in and I
3 would say scoped the place out. I think it was around 1 o'clock.

4 Mr. Young: Would you go ahead and play it, sir.

5 Q And tell us when we need to stop. Step back at your seat so the jury can see. If you would
6 indicate when you believe the person who may be connected first begins to appear in the scene, I'd
7 appreciate it. Has anyone appeared yet?

8 A No, not yet. There---

9 Q Sir?

10 A Now they're -- beyond the upper left end. Right there. He's comin' in right there and he's
11 talkin' to Mr. VICTIM right here. Camera 3.

12 Q All right, sir. Would you step back up at your seat, please. All right. Is that the same person
13 leaving there?

14 A Yes.

15 Q All right. That sequence ends at 12:49.24 according to what I just observed that person leaving
16 out of the scene.

17 Mr. Young: Would you stop it there, sir.

18 Q All right. Now the next sequence that's connected with this is what as far as your--

19 A His actual robbery.

20 Q Okay. About what time was that?

21 A 3 o'clock.

22 Q Okay.

23 A About a minute before 3 o'clock.

24 Q A minute before. Now, sir, I'm retired military, I'm familiar with military time. What time is
25 shown?

WITNESS - direct examination by Mr. Young

1 A 14 -- I'm not familiar with it. 14:59.

2 Q All right. 14:59.29, 30. Sir, if you could come up here and tell us when the first part of the
3 sequence connected with the armed robbery if you can.

4 Mr. Young: Stop it right there.

5 Q Now tell us when you believe the sequence begins.

6 A Okay.

7 Q State the time into the record.

8 A It's 14:28--

9 Q 28.

10 Mr. Young: Go back to 28. Can you do that on 28.

11 The Court: If y'all want this on the record. You're going to have to talk differently from what
12 you're doing now.

13 Mr. Young: All right. Stop it right there.

14 Q Go back to your seat.

15 The Court: Hold on a second. Y'all cannot stand over there and talk so that some people might
16 be able to hear you and some people might not be able to hear you and it's not goin' on the record. I'm
17 not going to let that happen. Stop doing it.

18 Mr. Young: Yes, sir.

19 Q All right, sir. The time now appears as 14:59.25.

20 A Correct.

21 Q Okay. Is this what you believe to be the start of the sequence?

22 A Yes.

23 Mr. Young: All right. Would you play it from this point forward.

24 Q All right, sir. Is this the near the end or is this the end of the sequence?

25 A That's it.

WITNESS - direct examination by Mr. Young

1 Q All right. The Time is 15—

2 A You can see Mr. VICTIM as he looked the door and hit the panic button in that bottom left hand--

3
4 Q Let's continue on. I'm sorry I interrupted you. What is happening? Did you ever see Mr.
5 VICTIM at any time after the sequence?

6 A Yeah, he -- after he hit the panic button he came down the hall and knocked on my door.

7 Q And who is this person appearing?

8 A That was the lady that works next door to us. We have a finance office that's right next door.
9 She took a notion and came over there as well.

10 Q Who is this outside the door now walking back in? Holding his head.

11 A That's Mr. VICTIM.

12 Q Is it appropriate to stop the sequence about this time frame?

13 A Yes.

14 Q It's 15:02:02. Thank you. All right, sir. Other than yourself, who, if anyone, viewed this video
15 that day?

16 A Several -- a couple officers from the sheriff department and the city arrived there about the same
17 time.

18 Q Did anyone in your office also view it?

19 A Mr. VICTIM did. Ms. WITNESS did.

20 Q All right, sir. Thank you. Would you, please, answer any questions Mr. Ellisor has for you.

21 A Sure.

22 Mr. Young: Mr. Ellisor, you want this on or off?

23 Mr. Ellisor: Yes, if you could please. Excuse me. If you'd come forward, sir.

24 CROSS-EXAMINATION

25 BY MR. ELLISOR

1 Q I apologize because of my vision. This is dated October 11, 2006, and it's got the time and that's
2 military time which would be 3:02.04. Right? So that would be 3 o' -- 3 o'clock and 2 minutes and 4
3 seconds. Right?

4 A That was my understanding. Correct.

5 Q Now this camera here and this camera here, are these -- is this camera synchronized? Cause you
6 got 4 cameras so are they all synchronized--

7 A I think it's every 4 seconds it's flashin' is my understandin' of it.

8 Q Okay. But the point is it is synchronized.

9 A They're all runnin' at the same time.

10 Q That's what I mean.

11 A Yes.

12 Q So it all runs simultaneously--

13 A Yeah.

14 Q --and it's accordin' to what has happened on there. So basically all these events happened
15 approximately 3:02.04.

16 A Correct.

17 Q Okay. Now you were in back I believe.

18 A Correct.

19 Q Now you did not see Montavis Gaines, did you?

20 A No, sir.

21 Q Now as a matter of fact, you didn't witness any of the things that transpired on this screen so far
22 because you were in the back, so you didn't get to see any of it.

23 A That's correct.

24 Q You eventually viewed it when the detectives came. Correct?

25 A Other than Mr. VICTIM when he came, you know, he came down the hall--

WITNESS - redirect examination by Mr. Young

- 1 Q Right.
- 2 A --I did not see, you know -- I heard some commotion. I did not see anything.
- 3 Q Okay. So now so you wouldn't be able to recognize Montavis Gaines from actually eyewitness
- 4 identifying him.
- 5 A No, sir.
- 6 Q Okay.
- 7 Mr. Ellison: No further questions of this witness at this time.

8 The Court: Redirect?

9 REDIRECT EXAMINATION

10 BY MR. YOUNG

- 11 Q When Mr. VICTIM down the hall, did you see any evidence that he'd been harmed in any
- 12 way?
- 13 A He was holdin' his head and it was bleedin'.
- 14 Q Okay. No further questions.
- 15 The Court: Recross?
- 16 Mr. Ellison: None, Your Honor.
- 17 The Court: Thank you, sir. You may step down. Call your next witness.
- 18 Mr. Young: Thank you, Your Honor. The state calls
- 19 The Court: Come around, please.

20 VICTIM , being duly sworn, testifies as follows:

21 DIRECT EXAMINATION

22 BY MR. YOUNG

- 23 Q VICTIM , would you give us your full name again, where you work and for how long.
- 24 A VICTIM , I work for local cash advance. I've been there almost 4 years.
- 25 Q Sir, in specific, what's your connection, if any, to the local cash advance that was in existence on

1 11 October 2006?

2 A I was the regional manager, and I was workin' in that office that day.

3 Q Okay. On [REDACTED] Avenue here in Saluda?

4 A Yes, sir.

5 Q Okay. So were you present when a robbery took place—

6 A Yes.

7 Q —on that day?

8 A Yes, sir.

9 Q Okay. Sir, for The Court's information and for the jury's edification would you tell us what
10 happened during the robbery sequence.

11 A Yes. At the time I was on my cell phone at the desk, two people came in. One -- the front one,
12 of course, pulled the gun out, and the second person behind him with the white shirt came in. I stood up,
13 asked him what do you want. That's when he told me, you know, where is the money turn around.

14 Mr. Ellis: Excuse me. I can't hear, Your Honor.

15 A Oh, I'm sorry. And that's when I -- he told me, you know, where is the money. I had already
16 stood up. He told me to turn around and get on the floor. I turned around. As I was gettin' on the floor
17 he hit me in the back of the head. And he kept on yellin' where's the money where's the money. That's
18 when the guy behind him in the white shirt was bouncin' around I kept tryin' to point to the desk in the
19 cash drawer which is in front of the desk.

20 Q Mr. VICTIM:

21 A Yes, sir.

22 Q Talk over this way.

23 A Okay.

24 Q Okay? If you want to take your seat and move it back a little bit to the left.

25 The Court: He can't move that seat.

VICTIM

- direct examination by Mr. Young

1 Q You might want to move that microphone over to the right. VICTIM, now you were in --
2 where were you actually physically located inside this building at cash advance?

3 A They have two desks behind the counter. I was at the desk closer to the counter that's almost in
4 the hallway that you can see back where the chair's at. The hallway to Mr. WITNESS's office you can
5 actually see.

6 Q Okay. Are you familiar with any pictures taken after the robbery?

7 A Yes.

8 Q Okay. Let me hand up what has been marked as state's exhibit #3.

9 Mr. Ellis: Without objection, Your Honor. (state's exhibit #3 received in evidence.)

10 Q All right. I hand it up to you and ask you if you can recognize it.

11 A Yes. That's the desk I was sitting at.

12 Q All right, sir. And the desk you were sitting at, there -- can you describe generally the location of
13 the desk you were sitting at as to any other furniture that might be in the building.

14 A The counter that the cash drawer is at, the monitor and all is probably 8 foot or 9 foot and 10 on
15 the other side of the counter is a -- the office area of the lobby where people can come in and then at that
16 point to the left hand side is where the door that you'd come in.

17 Q All right.

18 Mr. Young: Your Honor, we'd ask that he step down and point this -- I'll publish it for the jury.

19 The Court: Yes, sir.

20 Q Hold it while you describe it. Sir, would you point out what you previously described. Where is
21 your desk?

22 A This is the desk that I was sitting at.

23 Q Stand back right there so that lady can see it.

24 A I was sitting at this desk. This is where the cash drawer, that's where the money was. This is --

25 The Court: Speak up.

- 1 A --on the other side of the counter.
- 2 The Court: She's havin' a hard time hearing you.
- 3 A Oh, I'm sorry. And, of course, this is the front door entrance where the 2 people came in.
- 4 Q Okay. Take your seat.
- 5 Mr. Young: Your Honor, I'm handing the jurors the photograph.
- 6 The Court: It's in evidence?
- 7 Mr. Young: State offers state's 3.
- 8 Q Okay, sir.
- 9 Mr. Ellison: Without objection, Your Honor. (state's exhibit #2 received in evidence.)
- 10 Q This is state's exhibit #2. I hand it up and ask you if you can identify it, sir, and tell us what it is.
- 11 A Yes, sir, that's the cash drawer that the money was in that was taken.
- 12 Q Okay. Can you describe the condition of that cash drawer before the robbery occurred.
- 13 A The door was -- the cash drawer was shut and there was some money in it.
- 14 Q Approximately how much money?
- 15 A About 1300.
- 16 Q Okay. And afterwards what was in that drawer?
- 17 A Only change.
- 18 Q So taken out of there was dollar bills?
- 19 A Dollar bills was taken out. The coins was left.
- 20 Q The paper currency.
- 21 A That's correct.
- 22 Mr. Young: Court's permission to publish state's 2.
- 23 The Court: Yes, sir.
- 24 Q All right, sir, let me hand up after I show defense state's exhibit #4.
- 25 Mr. Ellison: Your Honor, I've approved all these without objection.

VICTIM

- direct examination by Mr. Young

Mr. Young: State would offer then 4, 5, 6 and 7, Your Honor. (state's exhibits 4 through 7 received in evidence.)

Q I'll hand these up for identification. Sir, can you tell us what state's exhibits 4, 5, 6 and 7 are.

A Exhibit 4 is the hallway. That's where I lay down and where I got hit in the back of the head. #1 That's where he struck me where the blood went.

Q I'll hold it up. Exhibit 4 shows #1?

A Yes, sir. Right here. I was layin' down here. I got struck in the back of the head. The impact is where my blood landed.

Q All right. What's state's #7?

A 7 is the hallway at the end of the hallway as Mr. McDaniel's office and right there where the picture is taken is where the hallway begins where the desk is at.

Q So the relationship -- I'm sorry. What's state's 6?

A #6 is where the desk is at that I was sitting at and then the hallway that goes to Mr. McDaniel's office.

Q This picture then relates to the hallway that's in another picture that's been handed over.

A Yes, sir.

Q Okay. And what is state's exhibit #5?

A That was the rag that was given to me as I was wiping some blood off the back of my head.

Q All right. I have published all those photographs. The jury has them. All right. Now in connection with where you were and what was happening, can we go back to the point where you first observed people coming into the office area? What were you doing at that time?

A As they was comin' in I was on my cell phone. I put it down; I stood up. That's when they rushed in. The first person pulled out a gun. I had stood up and said whatchu want. He said we want money. And the other guy behind that's what I -- when they came in, I was sitting and on the cell phone.

Q Okay. So they came in, this person comes in and pulls a gun.

VICTIM

- direct examination by Mr. Young

1 A That is correct.

2 Q All right. So they came in, this person comes in and pulls a gun.

3 A That is correct.

4 Q All right. At the point you stand up and see the gun, what else do you see, if anything?

5 A I see someone with him, behind him, and then I -- they approached me with the gun and stuck it
6 in my face, but as he was comin' in pulled down the mask -- sorry -- he pulled it up a little bit.

7 Q Who did?

8 A The guy with the gun. And that's when I recognized that that is the person that came in earlier
9 that day. No doubt in my mind. And then I could notice that the shirt he had on -- the first time he came
10 in, I noticed it was an odd shirt and had a lotta drawin'. When he came back in the second time, it was
11 flipped inside out. I noticed the shirt, the gun and the man who he pulled his mask up. I said I know who
12 this is; that's the person.

13 Q Just briefly describe the gun how it looked to you.

14 A It looked like a cannon, but it was a 38, either a 38 or 45 black automatic or -- it wasn't a
15 revolver.

16 Q Okay. All right, sir. And as you saw the gun pointed at you, was the mask pulled up before or
17 after the gun was pointed at you or during the same time frame? Do you recall?

18 A Repeat that.

19 Q In relation to the gun being pointed at you, when was the mask pulled up? That's what I'm
20 asking.

21 A He had the gun pulled and he was coming toward me, and that's when he had to adjust his mask
22 and pull the mask up. The gun was already pulled out.

23 Q How far did that mask go up?

24 A Almost to the top of his hair.

25 Q Okay.

VICTIM

- direct examination by Mr. Young

- 1 A Forehead.
- 2 Q And at that point you -- is that the point in which you made the determination who this was?
- 3 A I knew that's the person that came in earlier that day.
- 4 Q But you don't know the man.
- 5 A No.
- 6 Q But you realized he'd been there.
- 7 A That's correct.
- 8 Q All right. Did you recall when he'd been there earlier?
- 9 A Couple hours before, and I remember the conversation we had.
- 10 Q All right. Tell me about that conversation.
- 11 A He came in; he wanted to know how did the payday business work. I started to explain it to him.
- 12 I said where you live at, and he says I live in Columbia, South Carolina. I said I can't help you; that's too
- 13 far, we only do, you know, around Saluda areas:
- 14 Q Would you continue.
- 15 A Yes. And then I explained him all what he needed and then he left.
- 16 Q Okay. And roughly the time frame again?
- 17 A It was 2 or 3 hours before the robbery. I mean I had that form out. I knew he had just came in
- 18 earlier and it was around lunch time when he came in earlier.
- 19 Q You actually testified as to what time the robbery occurred, what time the robbery occurred in?
- 20 A The robbery occurred at about 4 o'clock.
- 21 Q 4 o'clock?
- 22 A At 3:59.
- 23 Q 3:59?
- 24 A In other words, it's 14:59 military time.
- 25 Q Okay. All right. Let me -- if 12:00 -- if 12:00 is midday and you just counted to the next

1 sequential 2 hours as that sequence as being 14:00; what would -- what would 14:59 be?

2 A Be 3:59.

3 Q 2 hours after?

4 A Well, when the guy came in with the gun that was a couple hours.

5 Q But you're pretty sure it's 14:59 the robbery occurred on the tape?

6 A Yes.

7 Q Okay. So it would've been what time that you saw him?

8 A The robbery?

9 Q What time did you see him previously prior to that?

10 A It was 12 -- 50 -- 12.

11 Q What time prior to the robbery did you say?

12 A It right at lunch time; around 1 o'clock.

13 Q Okay. All right. So would you -- would you be able to recognize the sequence again if you saw
14 it?

15 A Yes.

16 Mr. Young: With The Court's permission could I get him to come down and look at this video
17 portion here?

18 The Court: Yes, sir. Just keep your voice up.

19 Mr. Young: I'll do my dead level best.

20 Q Sir, I want you to come right down here and take a look at what is on the screen that's now
21 visually displayed and can you identify what this screen is.

22 A Yes. That's 4 cameras. That's the outside front door entrance. That's the front door. That's me
23 sitting at the front desk or at the counter where the cash is at. That's the side of the building.

24 Q What is the time displayed and the date displayed that you see?

25 A That's 12:48 and October the 11th 2006.

VICTIM

- direct examination by Mr. Young

1 Q All right. Based upon what you're looking at here, could you identify this as being connected in
2 any way with what you previously testified to?

3 A Yes, sir, that -- about that time is when the guy with the gun first came in and asked me about
4 the payday business.

5 Q Did he come in with a gun the first time?

6 A No, sir.

7 Q All right.

8 Mr. Young: With The Court's permission--

9 Q Have a seat, sir. Is this the beginning of that sequence?

10 A Yes, sir.

11 Mr. Young: Would you go ahead and play that again. Stop it right there, sir.

12 Q All right. At this point, sir, I want to ask you about your prior experience with this video. You
13 previously looked at this video: Correct?

14 A As to the robbery, yes.

15 Q Yeah. And did you look at the individual camera angles?

16 A Yes.

17 Q Individualized. Which one of those camera angles gave -- gives in your opinion the best view of
18 what you had of the man that had the gun?

19 A Well, best camera angle, I would say the bottom left.

20 Q Camera 3?

21 A Camera 3.

22 Mr. Young: Could you isolate camera 3. All right. Would you play camera 3 forward. Would
23 you stop the camera somewhere right about now.

24 Q Sir, what you see on the -- what you see from your perspective as you're sitting there behind
25 that desk at this point as to this gentleman on the other side of the counter from you? What do you see?

1 A I can see his face very clearly. I can see the upper part of his shirt.

2 Q Okay. How would you describe what your -- what the camera sees here -- not the camera saw,
3 but what you saw?

4 A I saw a gentleman with a sorta like a beard, a little beard, light beard and with a brown shirt on.

5 Q Okay. Was there anything on his shirt?

6 A Yes. Some writin' or some type of detail on the front that was squiggly lines or whatever. I--

7 Q How far down does the shirt go?

8 A It goes above, right above his knees. I mean goes all over his butt.

9 Q So is this shirt in or out?

10 A Out.

11 Q Okay. It's out.

12 Mr. Young: All right. Go ahead and play the sequence. Okay, sir, could you stop it right about
13 there.

14 Q Okay. How far apart were you from this man that you looked at?

15 A Probably about 2 foot.

16 Q Okay. About 2 foot just on the other side of the counter?

17 A Yes, sir.

18 Q It's hard to tell perspective and depth here so I just -- wasn't -- if this was the counter, was he
19 up against the counter or--

20 A He was leanin' almost onto the counter.

21 Q Okay. All right. And did you -- you said you had a conversation with him?

22 A Yes, sir.

23 Q Okay. And you believe that the time element displayed on this machine would be an accurate
24 reflection of the total time he was with you?

25 A That's correct.

VICTIM

- direct examination by Mr. Young -

1 Q Okay. All right, sir. And you indicated I believe also in your testimony that the second time that
2 you saw him was around 14:59?

3 A Yes, sir.

4 Mr. Young: All right. Would you re-cue that to the approximate time frame. Rerun it back all
5 the way back to the very beginning of about right there. Thank you.

6 Q All right, sir, would you come down and step down again and tell me -- I want you to be able to
7 see what's up here. This -- as I read this it says 14:58:37. Was it before or after that period of time that
8 this began?

9 A It was after that.

10 Q Okay. How much further?

11 A Probably a minute.

12 Q All right, would you go ahead and push the play button and tell us when to stop, stop it so we
13 can see exactly when it started. Say when to stop.

14 A It started there.

15 Mr. Young: Stop it. 14:59 roughly 28 or 27, somewhere in there.

16 Q Okay. Would you go back to your seat, sir. Now that sequence as it started right there, that's
17 the sequence that begins the robbery?

18 A Yes, sir.

19 Q All right. From your perspective as to what happened inside the room during the robbery
20 sequence, which of these three cameras will give the best perspective of what happened to 'em, what you
21 were able to see?

22 A I would still say camera #3.

23 Q All right.

24 Mr. Young: Could you focus on camera #3, sir. Isolate that. Could you play that sequence right
25 there.

VICTIM

- direct examination by Mr. Young

1 Q Tell us when to -- tell us when you first see this man pull up the mask--

2 Mr. Young: And I want you, sir, to stop it when he says stop it.

3 Q Tell us when to stop it when you see the mask come up.

4 A Yes, sir. Stop it.

5 Mr. Young: Okay. Go back a little. We have to go back. Stop right there.

6 Q Sir, come down and make sure this is the correct timing on it. All right. Look at the time on it.

7 What does it display on the screen?

8 A 15:00.

9 Q What's this number back here?

10 A 09.

11 Q 15:00:09. All right, sir, would you return to your seat, please. Thank you. I know that's hard to
12 see, but I appreciate your patience with us. All right. Now I'm gonna ask you at this point on this video
13 and your surveillance what you see from your perspective; what's happening to you and where are you
14 because are you anywhere in the picture?

15 A Not in the picture, no.

16 Q Okay. Where are you?

17 A At the chair standing up, and I've already hung up the cell phone and that's when I stood up and
18 told him what did he want, and that's when he was already on me with the gun.

19 Q All right. Let me -- let me identify what's previously been admitted as state's exhibit #3 and 4.
20 You testified as to 3 and 4 I believe were something to do with the location of your -- I'm gonna hold it
21 up. Where are you in -- in relation to -- in relation to that event at that time and using this picture state's
22 exhibit #3 as a guide, where are you?

23 A Right behind where the chair would be, that's where I would be standing.

24 Q And this is state's exhibit 3 which is a table.

25 A Yes, sir, a desk.

- direct examination by Mr. Young

1 Q A desk. Okay. All right, using state's exhibit #4, where are you in state's exhibit #4?

2 A After he hit me in the head I was layin' down in the floor way so that actually almost in the
3 center of the hallway.

4 Q Okay.

5 A But—

6 Q When he strikes you -- I'm talkin' about this point in time, as you see the picture right there on
7 the screen of the television, sir—

8 A Okay. I'm standing right here. This is the part of the desk and this would be where the chair is,
9 so I'd be standing up right here.

10 Q Okay. I'm gonna refer to these again, so as this camera moves forward, we may actually refer
11 back to these photographs. Okay? All right, sir, now would you -- now referring to the tv screen, are you
12 in what relation to the face of this man? Where are you in relation to his face?

13 A Almost right in front of the tv screen behind the desk.

14 Q If I'm -- if I'm using -- let's put it this way: if I am him, okay, are you facing him, turned
15 around—

16 A I'm facing him.

17 Q Facing?

18 A Yes.

19 Q All right. Tell me when I need to stop in order to be as close as he was to you at this time.

20 A Okay.

21 Q I'm gonna walk forward now. Tell me when to stop.

22 A Stop.

23 Q Okay. All right. Now in relation to what you see there, where are my hands positioned at the
24 time on that screen? Where -- if I am the man who's got the gun.

25 A That arm's up.

VICTIM

- direct examination by Mr. Young

1 Q This arm's up.

2 A Yes.

3 Q Okay. And so am I capable of touching you at this point?

4 A No, sir.

5 Q Okay. So I'm not close enough to touch you. How far apart is my hand from you?

6 A Probably 3 foot. Well, a couple foot.

7 Q Okay. And so if we freeze frame this at this point in time, the man's gun is up as we see on this
8 picture right here. He's facing you and so is the mask.

9 A Correct.

10 Q And what do you think when you see this happen?

11 A I said that's the same man that came in earlier that day.

12 Mr. Young. Sir, would you hit the play button. I want you to stop it now.

13 Q All right. Where is he now?

14 A On the right.

15 Q All right. Let's go back to those same pictures that are up by you. Using these pictures as a
16 guide, would you place yourself in relation to these pictures on either -- on the ground or standing up or
17 wherever you would be.

18 A I would've been on the ground behind the desk and my head facing toward the hallway.

19 Q All right. Are you face down?

20 A Yes, sir.

21 Q Are you on your back?

22 A I'm on my stomach.

23 Q You're on your stomach. Where did that man on the far right of the black blob that's now in the
24 far right of the screen, where is he in relation to your feet?

25 A To my feet? He would be -- 'cause I was leaning over to the side pointin' where the desk and all

VICTIM

- direct examination by Mr. Young

1 I could see this guy jumpin' around and I said the money's over there, over there and I had already gotten
2 hit in the head.

3 Q At this point you had been hit in the head. And where is the man in that blob in relation to your
4 feet? I'm not sure—

5 A He's sorta over.

6 Q So at this point you're kinda on the ground and he's over you.

7 A That's correct.

8 Q All right. I'm just makin' sure I understood what you said. In terms of your actions, you said
9 you were leaning some direction?

10 A I was not tryin' to get up. I was on my stomach. He had already hit me in the head. I was
11 pointing to -- he kept yelling where's the money, where's the money and I kept pointing over there
12 leaning. I mean sorta turned to my side but on the ground. The money's that way.

13 Q So this -- using which arm?

14 A Using my left arm.

15 Q And so in what direction are you pointing. If I have this screen--

16 A I was pointing to the counter where the computer is at. The computer screen right below that is
17 where I was pointing.

18 Q Which -- right here?

19 A In that direction 'cause the cash drawer is right next to it.

20 Q Okay. So the cash drawer which is state's exhibit #2?

21 A Yes, sir.

22 Q You were tryin' to point in that direction.

23 A That's correct.

24 Q All right. Now as you or as you try to point in this direction, what can you see of this man?

25 A I just saw a -- I saw a guy in a white shirt jumpin' around lookin' for the money. Once he got

VICTIM

- direct examination by Mr. Young

1 in front of the desk I couldn't see him as he was goin' through the cash drawers or whatever he was doin'
2 because the guy was behind me with the gun.

3 Q This man right here did you ever see him as to his face?

4 A No, sir.

5 Q Did you ever see anything other than -- what -- let me ask you, what was he wearing?

6 A He was wearin' a white colored shirt, but beyond that I didn't know.

7 Q Could you see his face at all?

8 A No.

9 Q Why not?

10 A Because the guy with the gun was the one I was focusin' on was up front.

11 Q Did he have any covering on his face?

12 A Did what?

13 Q Did this man have any covering on his face?

14 A Yes. I mean I didn't see his face; I was -- there again I was focused on--

15 Q What I'm asking you did you see any covering on his face.

16 A Oh, yes. Yes, he had a hood pulled over his face also.

17 Q Oh. So -- so this man's hooded. Did you ever see him lift his hood?

18 A No.

19 Q Okay. All right, now in terms of what's goin' on at this point of what has happened here, you're
20 on the ground. I'm gonna ask you a question as to where or when you got up off the ground.

21 A After they left.

22 Q So you stayed on the ground until they left.

23 A That is correct.

24 Q So your view of this man was limited from the start.

25 A That is correct.

VICTIM

- direct examination by Mr. Young

1 Q And you were unable to actually focus on this man.

2 A That's correct.

3 Q Okay. You were focused on the man with the gun.

4 A Yes.

5 Mr. Young: Stop it right there.

6 Q All right. You just saw this sequence. You see this man now. What was -- where was he at in
7 relation to the cash drawer?

8 A He was right in front of the cash drawer.

9 Q This is the man in the white shirt.

10 A That is correct.

11 Q This is the man you never saw his face.

12 A That is correct.

13 Mr. Young: All right. Play it.

14 Q Tell me when you get up off the ground.

15 A Right there -- a few seconds after they left after I heard the door shut.

16 Q All right.

17 A And I looked out the door and looked it and pressed the panic button.

18 Q What happens next?

19 A Then I went to the back office where Mr. McDaniel's office was at. I knew he was back there
20 and that's when I knocked on the door. I did not know they was aware of what had happened.

21 Q It appears that you had your hands up above your head. Why is that?

22 A 'Cause I had got struck in the back of the head with the gun.

23 Q Okay. Did those two people that just left ever come back in?

24 A No, sir.

25 Q Did you ever see them again in the office again?

VICTIM

- direct examination by Mr. Young

1 A No, sir.

2 Q Okay. All right. Thank you. Now with regard to -- with regard to this event in terms of where
3 you were during the early part of the day, okay, where were you in the early part of the day around 11
4 o'clock?

5 A In that office.

6 Q Okay. And you say you identified someone else come in. Right?

7 A Yes.

8 Q Okay. And the person that you saw in this event with the gun, how would you describe the
9 clothing he's wearing?

10 A It was brown and flipped -- I mean I could -- it was wrinkled on the outside. It looked like there
11 was indentations of some type of drawing on the other side of the shirt.

12 Q Pointing to the chest, what are you referring to?

13 A When somebody turned the shirt inside out, it's got some type of drawing or something on the
14 front side of the shirt. They took it inside out how it's got indentions and all. That's how -- I mean I
15 remembered that part of the shirt.

16 Q How did the -- how did the clothing that you saw in the actual robbery compare or relate in any
17 way to the clothing that you saw on the person around 11 o'clock in the earlier sequence?

18 A Same colors, about the same length of the shirt.

19 Q Okay. Was the engravings in the same relationship to each other as you saw on the outside, just
20 turned inside?

21 A It is. That's correct. It was flipped inside.

22 Q Now with regard to the time you had -- the actual time sequence, is it accurate in terms of how
23 long they were there?

24 A Yes, sir.

25 Q And how long they were in there?

VICTIM

- cross-examination by Mr. Ellisor

1 A You askin' how long were they in there?

2 Q Yeah. Was it an accurate reflection---

3 A Yes, it is accurate.

4 Q So what's on the tape you think accurately reflects the total time it took for them to be in there.

5 A That is correct.

6 Q All right. I will want to ask one question. Did you make any statements at all when you went
7 back down the hall about who may have committed the robbery?

8 A Yes, sir.

9 Q What'd you say?

10 A I said the guy that hit me in the back of the head was the guy that came in earlier.

11 Q Okay. And did you ask them to do anything with regard to video surveillance?

12 A Yeah, I told them they needed to look back at the video. I said that's the same person in that
13 video that had robbed me.

14 Q Okay. And so the video we see today is the video you saw then?

15 A That's correct.

16 Q Okay.

17 Mr. Young: I don't have any further questions of this witness.

18 Q Would you please answer Mr. Ellisor's questions.

19 The Court: Cross.

CROSS-EXAMINATION

BY MR. ELLISOR

22 Q Now this is the gentleman, the alleged robber that's dressed -- that had white. Right?

23 A Correct.

24 Q Okay. Now as I heard, he has a white T-shirt that went down to his knees?

25 A He had a long shirt, yes.

VICTIM

- cross-examination by Mr. Ellisor

1 Q Okay. But he was the first one to leave. Right?

2 A That's correct.

3 Q Okay.

4 Mr. Ellisor: Now keep going. Now stop it.

5 Q Okay. Now this one right here, this is the one that you said you had recognized from comin' in
6 there earlier.

7 A Yes, sir.

8 Q Okay. Now right now military time this would be 3 o'clock and 49 seconds. Do you understand
9 that?

10 A That's 15:00?

11 Q Yes. I mean would you come forward, please, so you can read this 'cause I'm blind as a bat, so I
12 hope everybody can see it. But as I understand it, 15:00 is like 3. So that would be 3 o'clock with 49
13 seconds to go. Correct? Is that how you interpret it?

14 A I would thought 15:00 was 4 o'clock, but—

15 Q Well, you got 12 and 3—

16 A I was never in the military.

17 Q Yeah, no problem; no problem. But that would be like — that would be like 3 hours in addition
18 to 12. So that'd make it 15:00 and then you got 49 seconds.

19 A Okay.

20 Q Okay.

21 Mr. Ellisor: Now continue goin', please. Okay. That would be the second goin' out. So keep it
22 goin'. Okay. Now stop it.

23 Q So basically this incident ended at 15:00 with 53 seconds left on it.

24 A Yes.

25 Q Okay. If you would go please sit down in your seat. I wanna show you this marked as

VICTIM

- cross-examination by Mr. Ellisor

1 defendant's exhibit #2, sir, if you'd be kind enough. Can you read across the -- now this camera
2 accordin' this -- now that's 15:00, it's got -- of course, it's got 53 seconds up here. What's the time on
3 that one?

4 A It says 15 and I don't know what that -- I can't read the last--

5 Q That would be basically 51 seconds. Right?

6 A If that's what it says.

7 Q Okay. Well, let's show it to this jury.

8 Mr. Young: Your Honor, is he gonna offer that as an exhibit?

9 Mr. Ellisor: Yeah, I am. I apologize. I stand corrected. I apologize.

10 Mr. Young: Without objection, Your Honor. (defendant's exhibit #2 received in evidence.) Is
11 that exhibit #2, Your Honor?

12 Mr. Ellisor: This is exhibit #2.

13 Q Okay. Now if you would come forward, please, sir. This is 15:15 and then it's got 41.
14 Accordin' to this everybody has left by 51 seconds after that. So they would've -- how -- how is this
15 gentleman -- in y'all's picture, how is this gentleman still in the building?

16 A I don't know what time -- I can't read that, but I know what that picture indicates that 15:53
17 there ain't nobody in that door. That's the same gentleman that's walkin' out that door.

18 Q Okay. But if y'all's cameras saved all this stuff, how is it 51 seconds still -- this man is still in
19 this building 51 seconds and accordin' to this he'd already been outta the buildin'?

20 A I don't know what the last part of that number is. No, sir, I don't know.

21 Q Well, if 15 is 12 and you add the 3 to it, so that'd make it 3, then the 2 hours and then it would be
22 a 3 with 51 seconds or 58 seconds left.

23 A You said it's 51 but I -- I -- like I said, that's not clear to me. I apologize but I've already stated
24 that's not clear to me. But I see that picture and I see that picture.

25 Q Okay. So -- okay. Well, I'm gonna -- I've got this into evidence. We'll show it to the jury

VICTIM

- cross-examination by Mr. Ellisor

1 later.

2 Q Okay. Now you're saying that the gentleman that left earlier that was -- not this gentleman right
3 here, but the other one that was in there earlier, is this a picture of him? I just want him to identify it first.

4 A Yes.

5 Q Okay. Now this is the gentleman that came in earlier. Right? And according to this that time
6 was 12--

7 Mr. Young: I hate to interrupt. Could you identify the exhibit so we know what we're referring
8 to.

9 Q Exhibit 13. Now according to this, it's got the date of the incident October 2--6 and then it's got
10 12 which would be -- looks like 58 seconds and 29 -- 58 minutes and 28 seconds. So that would be
11 approximately the time he came in to see y'all earlier.

12 A That is correct.

13 Q Okay.

14 Mr. Ellisor: Sir, would you come forth, please. I want you to run this back to 150049. I need
15 you to go back just 4 seconds. Okay. Right there. Okay. Right there.

16 Q Now if you would come forward again, sir. Now I want to show you defendant's exhibit #4 for
17 identification purposes. Okay. This is the guy that you saw first. Correct. That came in there at 12
18 o'clock approximately.

19 A That looks like him, yes.

20 Q I want to show you this --

21 The Court: Can't hear you.

22 Mr. Young: No objection, Your Honor.

23 The Court: I don't know what he said. I just heard some mumbling over there.

24 Mr. Young: I didn't say anything, Your Honor, to---

25 The Court: If y'all are gonna talk it has to go on the record.

VICTIM

- cross-examination by Mr. Ellis

Mr. Ellis: Could you come forward. Okay. That's it right there.

Q Now this -- is that the defendant right there?

A That's the guy that came in earlier.

Q He's the only one that had a gun. Right?

A Yes.

Mr. Ellis: Okay. I want to show that to the solicitor.

Mr. Young: Defense exhibit #3?

Mr. Ellis: Yes, sir.

Mr. Young: No objection. (defendant's exhibit #3 received in evidence.)

Q Now accordin' to this, when -- from your own recollection, when did y'all -- you claim that he left this building? At what time?

A I don't know what time he had left. I mean I just know that--

Q Well, if--

A If I looked at the camera.

Q But you wouldn't argue with the fact that at 3 -- at 48 seconds after 3 o'clock that defendant walked through that -- left that building.

A That's correct.

Q Okay. Okay, no further questions. -- I mean -- now you were layin' down on the ground and I think your testimony is you never saw Montavious Gaines.

A I never saw his face. I saw a person in a white shirt come in behind a white shirt.

Q Okay. Now did he have -- do you remember what he was wearing? I mean it's a long T-shirt I would imagine. Correct?

A That's correct. It was a long shirt. Long white shirt.

Q Okay. Now you had stated earlier that you had signed a statement and in your statement you had said that basically the -- this gentleman that came in earlier in the day, not Montavious but the

1 gentleman that came in earlier in the day had come in about 12:48. Is that approximately the time that he
2 had come in?

3 A Yes.

4 Q Okay. But you didn't see Montavious at that time, did you?

5 A I saw only one person.

6 Q Okay. Now you had a cell phone in your hand?

7 A When they came in, yes, sir.

8 Q Okay. And then when you got up you looked the door.

9 A Yes, sir.

10 Q Okay. WITNESS was workin' there at that time. Right?

11 A She had went to Mr. WITNESS office, yes, sir.

12 Q She was in the back, was she not?

13 A Yes.

14 Q So she couldn't see anybody that would be Montavious Gaines, could she?

15 A She could look through the crack of the door. I don't know what she could -- she could see me
16 layin' on the ground 'cause you visually see -- it's a straight hallway.

17 Q Okay. But the robbers came in and came through the door and the first one was the gentleman
18 you saw previously, and then supposedly the defendant came in following him and he went past the desk,
19 did he not?

20 A The--

21 Q Mr. Gaines if he was the defendant -- I mean if he -- if he was the robber, he would've went
22 past the desk. Now she was in the back. So the desk is not visible from the back, is it?

23 A No.

24 Q Okay.

25 Mr. Ellis: No further questions, Your Honor.

VICTIM

- redirect examination by Mr. Young

The Court: Redirect?

REDIRECT EXAMINATION

BY MR. YOUNG

Q I'm holding defense exhibits 2, 3 and 13. Have you looked at these?

A Yes, sir.

Q When you reviewed the video tape?

A Yes, sir.

Q Which is -- which offers a clearer image of what happened?

A #3.

Q Which of the two between the video tape and defense exhibits, which offer clearer images of what happened?

A Video tape.

Q And you base your -- you base your testimony off of these pictures or the video tape?

A Video tape.

Q No further questions.

The Court: Recross?

Mr. Ellisor: Nona, Your Honor.

The Court: Thank you, sir. You may step down. Ladies and gentlemen, we'll take a 15-minute break. Don't discuss the case. Follow the bailiff, please. (there was a brief recess.) You ready?

Mr. Young: We're ready, Your Honor.

The Court: Mr. Ellisor, you ready?

Mr. Ellisor: Yes, I am, Your Honor.

The Court: Bring the jury. (the jury entered) Call your next witness, please.

Mr. Young: State calls WITNESS

The Court: Come around, please.

WITNESS being duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MR. YOUNG

Q Ms. WITNESS, I want you to talk all the way over to me so the jury can hear you. Give us your full and complete name and where you work and for how long.

A My name is WITNESS. I -- I work for the local finance company. We've been open approximately 4 years.

Q We're losing you. Take that microphone and lean it over toward you. On October of 2006 specifically 11 o'clock, where were you working?

A I was working at local finance company.

Q Okay. Where was that located?

A [REDACTED]

Q Okay. Were you present in that building during the commission of an armed robbery that day?

A Yes, sir, I was.

Q All right, sir. Excuse me. During that period of time, specifically where were you in the building?

A During the robbery I was in Mr. WITNESS's office.

Q Okay. Where is that located?

A That is located on the back side of our local cash advance office.

Q Okay. Who else was in the business at that time?

A Mr. WITNESS and Mr. VICTIM.

Q Where was Mr. VICTIM located?

A Mr. VICTIM was located at the main desk in the local cash advance office.

Q Are these office areas located together in some fashion or connected together in some fashion?

A They are side by side, separated with two separate entrances.

WITNESS - direct examination by Mr. Young

- 1 Q Okay. Is there anything to connect one side of the office to the other?
- 2 A No, sir.
- 3 Q Okay. Let me give straight to you or hand to you what's previously been marked as state's
- 4 exhibit #7 and ask you if anything you've testified to previously appears in that exhibit.
- 5 A Yes, sir.
- 6 Q What appears in that picture that you've testified about?
- 7 A The doorway to Mr. WITNESS's office where I was at in the hallway that led up to the cash.
- 8 advance office.
- 9 Q And you're familiar with the rest of the office area where Mr. VICTIM was?
- 10 A Yes, sir.
- 11 Q Okay. Does any part of the hallway appear in state's exhibit #6 which I hand you now?
- 12 A Yes, sir.
- 13 Q What part of it?
- 14 A This part right here.
- 15 Q Okay. So that is the hallway that connects -- and that is the hall that is also in this picture.
- 16 Correct?
- 17 A Yes, sir.
- 18 Q Where were you specifically then in Mr. WITNESS's office?
- 19 A I was in Mr. WITNESS's office right here in this doorway.
- 20 Q Okay. And from that perspective, what, if anything, did you see or hear with regard to the
- 21 robbery?
- 22 A At first we heard a loud commotion and loud voices. Mr. WITNESS asked me to take a peek and
- 23 see what was goin' on up front which would've been in the cash advance office. I barely opened the
- 24 door, peeked out at about a half an inch of a crack and saw a man with a gun hit Mr. VICTIM in the back of
- 25 the head as he was goin' to the floor and he was yellin' wanting to know where the money was at.

1 Q Okay. What else did you see, if anything, from that point forward?

2 A Mr. VICTIM trying to tell him where the money was, and then I quietly shut the door back not to
3 alarm the man with the gun so that Mr. McDaniel would know we were being robbed and we needed to
4 call somebody.

5 Q All right. And were you present when the call for assistance was made?

6 A Yes, sir, I was.

7 Q How long after you reported what you knew to Mr. WITNESS was the call made?

8 A Within a couple of seconds.

9 Q Okay. And then did you ever see Mr. VICTIM again later?

10 A Yes, sir, I did.

11 Q How long after you made the 911 call or the 911 call was made?

12 A Approximately 5 minutes. He knocked on our door or on Mr. WITNESS's door that I had shut
13 and, you know, said we've been robbed we've been robbed, and I opened the door and he was holding
14 his head and he was bleeding.

15 Q Okay. Did you offer him any assistance with regard to the bleeding?

16 A Yes, sir, I went and wet some paper towels and gave them to him for him to put on his head.

17 Q What is state's exhibit #5?

18 A The paper towels that I wet to put on his head.

19 Q Okay. Did you observe the blood on those paper towels yourself?

20 A Yes, sir, I did.

21 Q With regard to what happened from that point forward, did you become -- well, I want to ask a
22 different question and withdraw that one. Do you have surveillance equipment inside this area?

23 A Yes, sir. We had surveillance equipment in the office.

24 Q Did you ever review that surveillance equipment or review the recordings off the surveillance for
25 that day?

WITNESS - direct examination by Mr. Young

1 A Yes, sir. Once law enforcement arrived and started going through the equipment, they asked me
2 could I identify anybody on the tape.

3 Q All right. And so you reviewed the tape from your office.

4 A Yes, sir.

5 Q All right. And loaded in this machine state's exhibit 1, have you - are you aware of the
6 approximate time that the robbery took place?

7 A Yes, sir, I am.

8 Q What time was it?

9 A It took place at approximately a few seconds or one minute before 3 o'clock.

10 Q 3 o'clock?

11 A Yes, sir.

12 Q Would you be able to identify it if you saw it on the screen?

13 A Yes, sir.

14 Q Would the time on the screen be a more accurate reflection of what you recall or would your
15 memory of the time?

16 A The screen.

17 Q Okay. So you would rely more on the screen than your recollection at this point?

18 A Yes, sir.

19 Q Okay. Let's take -- You're right. Maybe I'm stupid.

20 A 14:59 was one minute before 3 o'clock.

21 Q I stand corrected. All right, ma'am. Thank you for your recollection. All right. Would you step
22 down. It's previously cued up to a time frame of approximately 15:47. 15:00:47.

23 Mr. Young: Would you reset this to approximately 1 minute before 3 o'clock. 15:00.

24 Q Just have a seat back up there. I'll call you down in just a minute. Ma'am, would you come
25 forward, now. The time I had him stop that appears on the screen is 14:58:36. I'm gonna ask him to play

1 it forward and when the sequence begins I'm gonna ask you to tell him to stop the machine. Okay? First
2 thing you see connected to the robbery.

3 A Stop.

4 Q Okay. All right. So the time displayed on the screen now is approximately what?

5 A 3 o'clock.

6 Q Okay. It shows 15:00:00.

7 A Yes, sir. 1500.

8 Q Thank you very much. Now with regard to what happened from this point forward, I want to ask
9 you to return to your seat so the jury can see it, and is there one particular camera angle that you believe
10 best reflects what you are able to testify to about the armed robbery?

11 A At this point?

12 Q Yes. From this point forward, what camera angle would best give the perspective that you may
13 have had, if any, from hallway is what I'm asking.

14 A Camera 3.

15 Q Camera 3?

16 A Yes, sir.

17 Mr. Young: Would you focus on camera 3, sir. All right. Would you play it.

18 Q And when something begins to happen that is connected with what you saw from the hallway,
19 please, instruct him to stop.

20 A Stop.

21 Q Okay. At this point you've asked to stop. What were you able to see from the hallway, and,
22 again, let me hold up state's exhibit #7? Where were you in the hallway from the perspective?

23 A I was inside this doorway right here peekin' outta this doorway.

24 Q Okay.

25 A And—

WITNESS - direct examination by Mr. Young

1 Q You were looking in what direction? Was anything -- what do you see in state's exhibit 6, if
2 anything?

3 A I was lookin' what was happenin' right here.

4 Q Okay. The area in front of where there's a mark on the floor and before that little one that's in
5 the corner.

6 A Yes, sir.

7 Q Okay. Now what could you see there?

8 A A man with a gun pointed at -- pointed at Mr. VICTIM asking him to get down; him strikin' him
9 in the head and askin' he was -- the man with the gun was also askin' for where the money was at, where
10 the money was at. Mr. VICTIM was tryin' to tell him. When he -- you know, Mr. VICTIM was on his way
11 down to the floor and when he was just about, you know, on his knees was -- once he got to that
12 position, that's when he was struck in the head.

13 Q Uh-huh.

14 A And I saw him actually get struck in the head being asked again for the money, and then that's
15 when I shut the door.

16 Q Okay. So when did you stop seeing something, and I'm gonna ask you to say again when you
17 basically, the camera here, tell him to stop again when you were unable to see anything basically because
18 you had then shut the door or it went out of your view.

19 Mr. Young: Start that.

20 A It would be -- it would be there.

21 Q Okay. So a little bit prior 15:00:21.

22 A Yes, sir.

23 Q Okay. Thank you. Now with regard to what you did at this point, you say you went and told
24 your co-worker Mr. WITNESS what was going on, how long until you actually saw Mr. VICTIM again
25 from that point?

- 1 A About 5 to 7 minutes. It wasn't long.
- 2 Q Okay. All right. Is there anything on this tape that you've seen or saw then that gave you an
- 3 idea as to who might be connected with this armed robbery?
- 4 A Yes, sir.
- 5 Q There is?
- 6 A Yes, sir.
- 7 Q All right. Have you -- has it already occurred on the tape? Has it already occurred--
- 8 A Yes, sir, it has already occurred.
- 9 Q Okay.
- 10 Mr. Young: Could you reverse the tape, please, and start back with to where she first saw him.
- 11 All right. Now play it forward.
- 12 Q Tell us when you see something.
- 13 A Right there.
- 14 Mr. Young: Can we stop it there.
- 15 Q Okay.
- 16 Mr. Young: Could you go to that scene. All right. Stop right there. Thank you.
- 17 Q Did you see that from your perspective at the end of the hallway?
- 18 A No, sir.
- 19 Q All right. So when did you actually see something on this tape that said hey I connect this with
- 20 something?
- 21 A After the robbery happened and law enforcement was reviewing the tape.
- 22 Q In your review.
- 23 A Yes, sir. In my review.
- 24 Q Was it later that day or what does later mean?
- 25 A It was just a little later on on the same day.

WITNESS - direct examination by Mr. Young

- 1 Q Okay. And when you saw this and reviewed this tape, is this what you saw actually?
- 2 A Yes, sir, that is the surveillance I saw.
- 3 Q That's the surveillance you saw?
- 4 A Yes, sir.
- 5 Q What was your reaction to what you saw?
- 6 A Oh my goodness I know that per -- I know that person.
- 7 Q Who was it?
- 8 A Jerome Rhoads.
- 9 Q How do you know Jerome Rhoads?
- 10 A He stole my car in 1995.
- 11 Q What street?
- 12 A From Church street.
- 13 Q How much opportunity let's just say to get to know Jerome Rhoads have you had?
- 14 A We faced one another in court in October of '95.
- 15 Q What court?
- 16 A This court. Saluda--
- 17 Q This courtroom?
- 18 A Saluda county courtroom, yes, sir.
- 19 Q And how close did you get to him then?
- 20 A From where you are to the -- he and I were standing in front of the table.
- 21 Q If I was standing here, where was Mr. Rhoads?
- 22 A Mr. Rhoads was there and I was--
- 23 Q Tell me where to stop.
- 24 A Right there. Mr. Rhoads was there and I was there.
- 25 Q So where this yellow pad is to where this mike--

1 A Where that microphone is, yes, sir.

2 Q Okay. And how much of an opportunity to see him in terms of his position in relation to you did
3 you have? Did you face him, beside you?

4 A I was here the whole entire time they were discussin' it, my case about my car being stolen. I
5 was asked to approach if I had anything that I would like to say or present as far as my feelings about
6 what had happened, was there anything that I would like to say to Mr. Rhoads. I was given an
7 opportunity to speak to him or actually if I had any questions for him or anything I would like to say
8 before.

9 Q When you were reviewing this video tape on the day of the incident, how long after you saw this
10 image did you determine in your mind that it was Jerome Rhoads that you were lookin' at?

11 A Immediately.

12 Q Was there a doubt in your mind?

13 A No, sir.

14 Q Now let me ask you a question about this other person back here. You don't know who that is.

15 A No, sir, I do not.

16 Q Have no idea.

17 A No, sir.

18 Q Please answer any questions that Mr. Ellisor may have for you.

19 CROSS-EXAMINATION

20 BY MR. ELLISOR

21 Q Ms. WITNESS, you gave the Sahda police department a statement in this case, did you not? On
22 October -- it's dated October the 10th '06 but I believe this thing happened on October the 11th.

23 A Yes, sir.

24 Q But in that statement you said the robber was a black male, medium to stocky built, wearing a
25 black baggy T-shirt, real baggy blue jeans with a black stocking cap pulled over his face. Did you see the

WITNESS - cross-examination by Mr. Ellisor

1 mask pulled over the face?

2 A Yes.

3 Q When these defendants came in, did you actually see the mask?

4 A I saw the man with the gun who had a mask over his face.

5 Q Okay.

6 A Assault Mr. VICTIM That's the only one I saw.

7 Q Now when you -- the position you were seeing him at and this the guy that you identified as
8 Jerome Rhoads.

9 A Yes, sir.

10 Q Now did you see Montavis Gaines?

11 A No, sir. I didn't.

12 Q Okay. Now you said the robber stepped over VICTIM pointing an all silver glock style gun
13 demanding all the money and shouting obscenities.

14 A That's what the gun looked like.

15 Q Okay. Now you had recognized him from reviewing this tape previously. Right?

16 A Yes, sir.

17 Q And that's because you had been in court with Mr. Jerome Rhoads.

18 A Yes, sir.

19 Q Okay. Now from your vantage point this is the door right here that comes into this -- the office.
20 Right?

21 A Yes, sir.

22 Q Okay. Well where -- would you -- you would've been back this way looking up forward?

23 A Yes, sir.

24 Q Okay. So you couldn't see -- you didn't actually have the ability to see this door up close, did
25 you?

1 A No, sir, I did not.

2 Q So you don't actually know what time anybody left, do you?

3 A No, sir, I do not.

4 Q Okay. As a matter of fact, you were -- you had closed the door because you were in the back
5 office.

6 A Yes, sir.

7 Q Okay. Now when you looked at this -- this -- lookin' from your own -- does he appear to be
8 pointing a gun? Do you know if he pointed -- this gentleman right here is pointing a gun?

9 A From this distance I -- I can't tell from this distance.

10 Q Okay. But Mr. VICTIM was on the floor. Correct?

11 A Yes, sir, he was.

12 Q And how long did it take him to get up? You didn't actually see him get up, did you?

13 A No, sir, I did not.

14 Q And he is actually the one that eventually called 911?

15 A No, sir. Mr. WITNESS called 911.

16 Q Mr. WITNESS called 911. You don't know if Mr. VICTIM called also?

17 A I wasn't aware of what his actions were at point.

18 Q Okay.

19 A I told Mr. McDaniel we were in the process of being robbed and he needed to call 911.

20 Q Okay. Now Mr. VICTIM came to the back and you provided something that keeps the blood
21 from comin' off his head. Correct?

22 A He came to our door, said, you know, knocked. I opened the door. We followed him back to
23 the front. That's when I got paper towels for him to apply to his head.

24 Q Okay. But you don't have any doubt that Jerome Rhoads, the person you identified as Jerome
25 Rhoads definitely was a part of this robbery.

WITNESS - redirect examination by Mr. Young

1 A Yes, sir.

2 Q Okay.

3 Mr. Ellisor: No further questions, Your Honor.

4 The Court: Redirect?

5 Mr. Young: One question. Your Honor, Court's permission, have her step down from the stand
6 and come here and look at the screen that Mr. Ellisor was describing earlier.

7 The Court: Yes, sir.

8 REDIRECT EXAMINATION

9 BY MR. YOUNG

10 Q Ma'am, would you get close enough to whether you can tell me from looking at this screen now
11 that you're closer to it whether or not the picture of the man who is in the black shirt and is pulling up his
12 mask, can you tell me whether or not from this perspective you can tell that's a gun or not.

13 A Yes, sir.

14 Q Okay. Thank you very much. No further questions.

15 The Court: Recross?

16 Mr. Ellisor: None, Your Honor. None.

17 The Court: Thank you, ma'am.

18 Mr. Ellisor: Thank you so much, ma'am. I appreciate it.

19 The Court: Who's your next witness?

20 Mr. Young: State would call Lt. Arthur Turner.

21 The Court: Hold on just a second. Folks, I'll ask you to step in the jury room please. Don't
22 discuss the case. You won't be back there long. (the following occurred in the absence of the jury.)
23 During the in camera hearing the officers both made statements about numerous dealings with the
24 defendant in the past. You all will have to be very careful of that.

25 Mr. Young: Yes, sir.

1 The Court: Do you need a chance to talk with them before they—

2 Mr. Young: I've made it very clear to them—

3 The Court: I'll give you a few minutes to do it. Now while I've got this opportunity, there's
4 something else I need to say. Monday I gave an instruction, a general instruction, but I understand people
5 may not have been here then that are here now. Folks, it's very important that you realize that you are not
6 to have any contact of any kind with any juror, nor are you to in any way try to coerce, threaten,
7 intimidate, harass any witness. What was reported to me during the break was that there was an incident
8 where one of the witnesses had something said to that witness, and I just want whoever may have been
9 involved in that to realize that the solicitor can indict you for that. It is a crime. Also, if it is reported to
10 me, I can cite that person for contempt of court. If it's outside of my presence, I would have to have a
11 court hearing on it, but I don't have to give the person a jury trial. I would appoint an attorney and cite
12 that person for contempt and then at some point would have a trial and if I determine that person was in
13 contempt, I can send that person to prison for 6 months without a jury trial, a year with a jury trial, and I
14 get to decide on whether a jury trial is granted or not. This is no place to be playin' or takin' chances like
15 that. Whatever you want said to the jury in the courtroom in a proper manner is fine. But I better not
16 hear anymore stuff about people sayin' things to witnesses or anything like that. If the solicitor doesn't
17 do something about it, I will. We're in recess for 5 minutes.

18 Mr. Young: Thank you, Your Honor. (there was a brief recess.)

19 The Court: Ready?

20 Mr. Young: I'm ready, Your Honor.

21 The Court: Okay. Bring the jury. (the following occurred in the presence of the jury.) Call your
22 next witness, solicitor.

23 Mr. Young: Lt Arthur Turner.

24 The Court: Come around and be sworn, please.

25 LT. TURNER, BEING DULY SWORN, TESTIFIES AS FOLLOWS:

Lt. Turner - direct examination by Mr. Young

DIRECT EXAMINATION

BY MR. YOUNG

Q Lt. Turner, give us your full and complete name, where you work and for how long.

A James Arthur Turner. I work for the Saluda police department. I've been there for a little over 5 years.

Q Sir, were you on duty with the Saluda police department on the 11th of October 2006 and dispatched to a call regarding an armed robbery?

A Yes.

Q Where was that armed robbery reported?

A It was at the local cash advance on [REDACTED] Avenue.

Q Is that in the city of Saluda?

A In Saluda.

Q Sir, during the course of -- what was your role in arriving and what did you do?

A I was the first officer on the scene along with deputies from county sheriff's office.

Q And were you the investigating officer for this matter?

A Yes.

Q In connection with that, sir, did you review video tape of the surveillance cameras at the cash advance store?

A Yes, I did.

Q During your review of the cash advance video surveillance tapes or recording were you able to begin to focus on one or more of the possible suspects?

A On one.

Q Okay. And during the course of that review of the video tape and the focusing on a person, would you be able to point out when your attention became focused on one or more of these subjects in reviewing the video tape itself if I showed it to you here in the courtroom?

1 A Yes.

2 Q All right, sir.

3 Mr. Young: I'm gonna ask you would you come up here, sir, and reset this. Set it back to 14:59
4 and 58. Hold it. Right there.

5 Q What time did you respond to this, sir?

6 A It was a little after 3 o'clock.

7 Q Okay. What time did the reported incident itself in terms of the time for the incident?

8 A It was just a minute or so before 3.

9 Q Okay, sir. Would you step down from the podium and come up here and tell me, looking at the
10 surveillance tape which is state's exhibit #1, would you -- I want to play it forward from the time about
11 14:58:07 and tell us when your attention began to be focused on the video screen on one or more of the
12 suspects. When you see that happen, please, instruct him to stop the tape.

13 A I don't think the tape is movin'. Stop it.

14 Q Okay, sir. Who'd it show -- if -- or who, if anyone, are you looking at and which camera?

15 A I'm looking at camera #4, the guy with the white shirt and top. Trousers.

16 Q Okay. Now that is where your attention first began to focus on.

17 A Correct.

18 Q All right. We're now looking solely at camera 4.

19 Mr. Young: Would that play that for us.

20 Q At some point in time you began to believe you can recognize who that person is.

21 A At this point on this camera angle, by the guy's--

22 Mr. Young: Stop it there.

23 A --by the guy's mannerisms, the way he's moving and so forth, I recognized that from before.

24 Q Okay. All right. So you start to recognize the angle or the mannerisms or what'd you say that
25 you recognized?

Lt. Turner - direct examination by Mr. Young

1 A The way he carries himself, his gestures, the way he dressed.

2 Q All right. You begin to know who this is or start to believe you know who this is?

3 A I'm starting to believe that I know who this might be.

4 Q At some point you become firmly convinced you know who this is.

5 A Yes.

6 Q All right. Do we need to stay in this camera or go to another camera?

7 A Go to another camera.

8 Mr. Young: I'd look at a general view of the camera, sir. Thank you.

9 Q Now the cameras are now back 1, 2, 3, and 4. They're now exhibited. I want to play these
10 cameras until you start to see something here that says I'm becoming convinced I know who this is, and
11 you tell us when you see that point happen, instruct him to stop, please.

12 A All right. Here in these movements. Camera #3.

13 Mr. Young: Stop it, sir.

14 Q All right. Are you now at this point convinced you know who this is?

15 A Not solely convinced yet. His movements, like I say, are adding up to my thinking I know who
16 this is.

17 Q So in other words, you're still forming your opinion.

18 A I'm still forming my opinion.

19 Q All right. That's fine, sir. So we can continue to play it?

20 A Continue.

21 Q All right. Thank you.

22 A Stop.

23 Q All right, sir.

24 Mr. Young: We need to -- also can you go slowly for him? All right. Would you advance that
25 and do it frame by frame.

Lt. Turner - direct examination by Mr. Young

1 Q Which camera would you be focused on?

2 A Camera #2.

3 Mr. Young: All right. Would you now focus on camera #2 solely. All right. Can you now
4 advance it frame by frame.

5 Q Tell us when to stop, sir.

6 A Stop.

7 Q Right there?

8 A Yes. There.

9 Q Okay. All right, are you at this point starting the complete opinion or are you pretty sure now?

10 A - ~~in these frames he turns his head to the left and you can see the side of his face. and when I saw~~
11 ~~the side of his face,~~ I recognized him to be the defendant Mr. Gaines.

12 Q You recognized him to be who?

13 A The defendant Mr. Gaines.

14 Q Okay. Would you return to your seat, sir. How is it you recognized him? Do you know him or-

15

16 A I've seen him around town. I've had contact with him in the past.

17 Q All right. And in terms of seeing him around town, have you had the opportunity to observe his
18 walking and his gait?

19 Mr. Ellison: Your Honor, I object. That's a leading question.

20 The Court: Rephrase it.

21 Mr. Young: All right.

22 Q To what extent, if any, have you been able to observe his physical movements by walking or
23 running?

24 A I've seen him walking the streets in town. I've seen him running.

25 Q Okay.

Lt. Turner - direct examination by Mr. Young

- 1 A Just the normal everyday routine.
- 2 Q Okay. Would that include his manner of dress?
- 3 A Yes.
- 4 Q His stature?
- 5 A Yes. Tall, slim.
- 6 Q His build?
- 7 A His build. He's sort of muscular fellow.
- 8 Q And based upon -- are you basing your opinion on just a few frames or the whole video?
- 9 A The whole video in its entirety by his movements and by his profile there.
- 10 Q And did you review each one of these camera angles?
- 11 A Yes, I did.
- 12 Q And did your review individually the camera angles and--
- 13 A Yes.
- 14 Q --slow them down and speed them up?
- 15 A Yes, I did. I viewed them several times.
- 16 Q So when you made that decision you had had the opportunity to review this tape would you say
- 17 carefully or not carefully?
- 18 A Very carefully.
- 19 Q Is there any doubt in your mind as to whether the person in this video tape is Montavis Kentrail
- 20 Gaines?
- 21 A There's no doubt.
- 22 Q Please answer any questions defense counsel may have for you.
- 23 The Court: Cross.
- 24 CROSS-EXAMINATION
- 25 BY MR. ELLISOR

1 Q Officer Turner, how many times have you seen Montavis wearing clothes, dressed? How many
2 times have you seen him dressed?

3 A Several times. I've seen him since he was probably 15 or 16 years old.

4 Q Ever seen him wear a suit?

5 A No.

6 Q Ever seen him wear baggy clothes like—

7 A Yes.

8 Q —what was in this?

9 A Yes.

10 Q Okay. So judging from baggy clothes, his gestures, you are willing to tell this jury that you can
11 identify this man based upon that picture.

12 A Yes, sir.

13 Q You have seen him run before?

14 A Yes, sir.

15 Q And you have seen his gait and his walk.

16 A Yes, sir.

17 Q And you used that along with lookin' at this picture. Right?

18 A Correct.

19 Q And based upon that, you can say without a doubt in your mind that that picture right there is
20 Montavis Gaines?

21 A Correct.

22 Mr. Ellisor: No further questions, Your Honor.

23 The Court: Redirect?

24 REDIRECT EXAMINATION

25 BY MR. YOUNG

Lt. Turner - redirect examination by Mr. Young

1 Q You base your opinion on just this picture or what you saw in the entire video?

2 A The entire video.

3 Q Okay. No further questions.

4 The Court: Recross.

5 Mr. Ellisor: None, Your Honor.

6 The Court: Thank you, sir. You may step down. Call your next witness.

7 Mr. Young: Thank you, Your Honor. Lt. Charles Holloway please.

8 The Court: Come around and be sworn, please.

9 LT. HOLLOWAY, BEING DULY SWORN, TESTIFIES AS

10 FOLLOWS:

11 DIRECT EXAMINATION

12 BY MR. YOUNG

13 Q Lt. Holloway, give us your full and complete name, where you work and for how long.

14 A Charles M. Holloway, II. Been employed with the Saluda police department for 11 years.

15 Q Okay, sir. I'm gonna ask you a question as to where you were on 11 October 2006. Where were
16 you?

17 A Iraq.

18 Q Okay. I want to ask you have you had the opportunity to review state's exhibit 1 the video tape
19 of the surveillance of the armed robbery on [REDACTED] avenue on 11 October 2006?

20 A Yes, I reviewed it Monday.

21 The Court: Lean forward a little bit please.

22 Q Just so you get to that microphone.

23 A Okay.

24 Q All right. Thank you. When you reviewed that video tape, did you see the entire video tape?

25 A Yes.

1 Q And when you reviewed the video tape, did you focus on one or more of the subjects that were
2 apparently displayed there as they came into the business?

3 A Yes.

4 Q And in your review of the video tape, did you look at individual camera angles?

5 A Yes.

6 Q Do you know any of the people that appeared in that video?

7 A Yes.

8 Q Who?

9 A Jerome Rhoads and Montavis Gaines.

10 Q Who was Jerome Rhoads in the video tape?

11 A Jerome Rhoads was the first man that entered the business and he was followed in by Montavis
12 Gaines.

13 Q How long have you known Jerome Rhoads?

14 The Court: He was followed in by. Is that what you said?

15 A Mr. Gaines followed Mr. Rhoads inside the business.

16 Q All right. And how long have you known Jerome Rhoads?

17 A 6. Maybe 6 years.

18 Q How long have you known Montavis Gaines?

19 A All his life.

20 Q During that period of his life, had you become familiar with how he walks?

21 A Yes, sir.

22 Q How he runs?

23 A Yes, sir.

24 Q How he has individual mannerisms to himself?

25 A Yes, sir.

Lt. Holloway - cross-examination by Mr. Ellisor

1 Q His stature?

2 A Yes, sir.

3 Q His build?

4 A Yes, sir.

5 Q Is there any doubt in your mind that the man in the video in state's exhibit 1 that follows in
6 Jerome Roads is Montavis Gaines?

7 A No, sir, there's no doubt in my mind.

8 Q Please answer any questions defense counsel may have for you.

9 A Yes, sir.

10 The Court: Cross.

11 CROSS-EXAMINATION

12 BY MR. ELLISOR

13 Q When you state that you know how Mr. Gaines walks, how many times have you seen him
14 walk?

15 A I've saw Mr. Gaines walk numerous times in the past.

16 Q Okay. You have seen this frame right here. Correct?

17 A Yes, I saw the frames on it.

18 Q Okay. Now can you tell me if this is a profile of Montavis Gaines?

19 A As you look at it, the features of his -- if you look at the features of his shoulders it's similar to
20 Mr. Gaines.

21 Q So it's similar.

22 A Yes.

23 Q But how many people do you know personally would have these features?

24 A Dozens.

25 Q Dozens.

- 1 A Yes, sir.
- 2 Q Perhaps hundreds.
- 3 A Yes, sir.
- 4 Q So you can identify him even though there are hundreds of people that have these features, but
- 5 you -- you are telling this jury that you can identify him from his mannerisms and his features. Right?
- 6 A I'm a hundred percent certain that's Montavis Gaines right there.
- 7 Q Right here. In this picture right here. And it's a little dark, isn't it?
- 8 A Yes.
- 9 Q I mean can you see a nose, an ear, a mouth or anything that you would recognize as a human
- 10 feature in this picture?
- 11 A Not on that photo.
- 12 Q So what you're saying is you got this guy right here who whatever muscles he may have or
- 13 whatever, you can't -- you can see these, but you're tellin' me even though you look here you can't
- 14 recognize that right there as Montavis Gaines.
- 15 A No, sir.
- 16 Q Okay. So you don't know if it is or is not from that picture right there.
- 17 A From his features I'm certain that's Montavis Gaines.
- 18 Q Okay. So his features. Now you've seen him walk you say?
- 19 A Yes, sir.
- 20 Q Okay. Now and of course we're talkin' about the features. Now how many people would walk
- 21 like Montavis Gaines?
- 22 A No one but Montavis Gaines.
- 23 Q So he walks different from everybody else in the world. He's the only person that walks the way
- 24 you're describing.
- 25 A Everybody has a different walk.

Lt Holloway - redirect examination by Mr. Young

- 1 Q Everybody has a different walk.
- 2 A Yes, sir.
- 3 Q So his walk would be different from my pacing back and forth or anything else.
- 4 A Yes, sir.
- 5 Q Okay. But does he have a limp or anything like that that would cause you to particularly notice
- 6 how he walks?
- 7 A No, sir.
- 8 Q Okay. But when you come back and you view this tape, you ain't got no doubt in your mind
- 9 that guy right there is Montavis Gaines.
- 10 A No doubt.
- 11 Q And you're willing to tell the jury that.
- 12 A Yes, sir.
- 13 Q No further questions.
- 14 The Court: Redirect?
- 15 REDIRECT EXAMINATION
- 16 BY MR. YOUNG
- 17 Q Is your opinion based on just this picture or on the total video?
- 18 A No, sir.
- 19 Q I'm sorry. What is your opinion based on?
- 20 A I know that's Montavis Gaines. I'm very familiar with him. I've had ample opportunities to be
- 21 in close proximity of him. I'm a hundred percent sure that that is Montavis Gaines.
- 22 Q And what I was asking you before, is your opinion based on just this picture or on your review
- 23 of the entire video?
- 24 A The entire video.
- 25 Q Okay. Thank you.

Jamie Mae Bonham - direct examination by Mr. Young

1 Mr. Ellison: No further questions, Your Honor, from the defense.

2 The Court: You have any further witnesses today?

3 Mr. Young: Yes, sir.

4 The Court: Call your witness.

5 Mr. Young: Ms. Jamie Mae Bonham.

6 JAMIE MAE BONHAM, BEING DULY SWORN, TESTIFIES AS

7 FOLLOWS:

8 DIRECT EXAMINATION

9 BY MR. YOUNG

10 Q What's your full name?

11 A Jamie Mae Bonham.

12 Q Thank you. Where do you live, Ms. Bonham?

13 A [REDACTED]

14 The Court: [REDACTED]?

15 Q [REDACTED]. Is that what you said?

16 A Yes.

17 Q Ms. Bonham, I'm gonna ask you if you know Montavis Gaines?

18 A Yes, I know him.

19 Q Is he in this courtroom?

20 A Yes.

21 Q Where is he?

22 A He's over there.

23 Q Where is he, ma'am?

24 A He's over there. Right there. He's the defendant.

25 Q The gentleman in the white shirt?

Jamie Mae Bonham - direct examination by Mr. Young

1 A Yes.

2 Mr. Young: Your Honor, we're gonna ask that the record reflect that Montavis Gaines has been
3 correctly identified by Ms. Jamie Mae Bonham.

4 The Court: All right.

5 Q Ms. Bonham---

6 The Court: She -- she pointed out the defendant. Go ahead.

7 Mr. Young: Thank you.

8 Q Ms. Bonham, are you aware of a robbery that happened at a business here here in Saluda on the
9 11th of October 2006?

10 A Yes, I was.

11 Q Okay. Now on the day that robbery happened, how did you find out about the robbery?

12 A Well, it was -- I think it was some of the children come in was tellin' me about it had happened.

13 Q Okay.

14 The Court: Some of the children came in and told you about it?

15 A Yeah.

16 Q When you heard from the children, had you seen something earlier that day that might've been
17 connected in your mind with the robbery?

18 A Well, yes, I saw Montavis and another young man they was tryin' on some ski caps I call it over
19 their face. They pull 'em off, put 'em back in their pocket and I didn't see 'em no more after that.

20 Q Yes, ma'am. That'll come and go on us. That mike. Would you repeat what you just said. We
21 didn't quite hear everything you said. Repeat what you just said. Talk a little louder.

22 A I saw 'em earlier, they stand between two houses tryin' on -- they was tryin' on some ski caps I
23 call 'em.

24 Q All right. When you saw these ski caps being pulled on, how long after that did you hear about
25 the robbery?

Jamie Mae Bonham - direct examination by Mr. Young

1 A I really don't know but it coulda been a couple hours or more.

2 Q Okay. But it was the same day and possibly---

3 A It was the same day but I --

4 Q ---possibly within a couple hours you hear that the robbery happened.

5 A Yes.

6 Q Okay. Now when you -- when you say you saw Montavis between a couple houses, where was
7 that house located?

8 A Across the street in front of me.

9 Q In front of you?

10 A Across the street in front of my house.

11 Q Okay. And you say there was another person with Montavis.

12 A It was another young man with him but I don't know him.

13 Q Okay. How long have you known Montavis?

14 A Most all of his life.

15 Q Okay. And when Montavis was there across the street from you, you heard about the armed
16 robbery later, did you subsequently tell what you knew about this to anyone?

17 A Well, I was -- well, that was later on in the week I went to get -- to the finance place to renew a
18 loan and the conversation come up between me and the girl that was in there workin'.

19 Q Do you know what the name of that finance place is?

20 A Local finance.

21 Q Okay. So you went to the Local finance, and did you talk to anybody there?

22 A Nobody but WITNESS I think.

23 Q WITNESS ?

24 A (nodded yes.)

25 Q Okay. And when you went in to WITNESS ; did you tell her what you just -- anything

Jamie Mae Bonham - direct examination by Mr. Young

1 about what you just told us?

2 A Well, we got to talkin' about it, you know. She said they hadn't caught 'em yet. Yeah, I told
3 'em, you know, that I seen them puttin' the mask on or puttin' on mask but I didn't -- you know, ski cap
4 but I didn't know about where they was goin' to. But I didn't know nothin' 'cause I didn't 'em no more
5 after that.

6 Q Yes, ma'am. Did you see Montavis any time after the robbery?

7 A Yeah, I seen him. I saw him.

8 Q All right. Now what day did you think you went to Cash Advance or the Local finance place?

9 A That was on the 13th of October. 13th of October. It was on Friday.

10 Q Yes, ma'am. So on Friday the 13th of October you went to the Cash Advance. All right. Now
11 when you went to the Cash Advance and talked -- is that when you talked to Ms. WITNESS

12 A Yes.

13 Q Okay. Had you seen Montavis that day?

14 A Yes, I seen him.

15 Q You'd seen Montavis later that day? Earlier that day?

16 A I seen him earlier that day.

17 Q Okay. All right. Did you tell Ms. WITNESS about how he was dressed or how he looked that day?
18 On the 13th I'm talkin' about.

19 A What day now?

20 Q The 13th. In other words, did you -- did you ask about had they talked to anybody yet?

21 A We was talkin' about and she was tellin' me they hadn't caught nobody yet. And I told 'em that
22 day I don't Montavis hidin' 'cause he across the street at his mother and grandmother house. That's
23 exactly what I said.

24 Q Okay. And did you describe how Montavis was dressed that day?

25 A I told her, you know, he had on a blue outfit.

- 1 Q Blue outfit.
- 2 A With a hood on there.
- 3 Q I'm sorry?
- 4 A A blue outfit with a hood on it.
- 5 Q With a hood on it. Okay.
- 6 A And I didn't see him after that.
- 7 Q Okay. And so in connection with that later that day, did you see law enforcement anywhere near
8 your house?
- 9 A Well, after I left from the finance place, I went to the grocery store Reece's and when I come
10 back there was a white van parked out in front of my buildin'. Officer Shorter he jumped out and was
11 runnin' through there. I didn't know what was goin' on then you know. I didn't go back. It had been
12 about 40 minutes at the most, you know, and I didn't know what was goin' on then. Nobody -- where he
13 was goin' at, you know, but I know they was there and he jump out and run across the, you know--
- 14 Q Did you see anybody in front of officer Shorter?
- 15 A No, wasn't nobody in front of him. I didn't -- really I didn't know what was goin' on until
16 Montavis mother come runnin' across there hollerin'. She told me she said they--
- 17 Q Stop. That's fine.
- 18 A --got him. That was all I know. That was the last I heard to speak of.
- 19 Q Yes, ma'am.
- 20 A I went on in the house.
- 21 Q Yes, ma'am. When -- if I could go back to the day of October 11th when you saw Montavis
22 tryin' on the ski mask, did you see Montavis leave with anyone or stay right there with his mask? Did
23 you see him stay or go?
- 24 A Well, they -- him and this young man that was with him, they left. They didn't stand there.
25 They put this back in their pocket and they went on. I don't know which way they went. Only thing I

Jamie Mae Bonham - cross-examination by Mr. Ellisor

1 know they didn't stay where they was.

2 Q They left from there.

3 A Yeah.

4 Q Okay. And they departed from your view.

5 A Yeah, from my view I -- I just happen to look out the window, you know, and saw them.

6 Q All right. Okay. Would you please answer any questions Mr. Ellisor has for you.

7 CROSS-EXAMINATION

8 BY MR. ELLISOR

9 Q Ms. Bonham, how are you today, ma'am?

10 A Fine.

11 Q I represent Montavis Gaines. He's the gentleman right there. You obviously recognize. He's
12 been your neighbor for sometime, has he not?

13 A Yes.

14 Q When you were -- when you first inquired -- the police first inquired about this after you talked
15 with Ms. ^{WITNESS} I believe it was. Right? So the police came out and talked to you. Did you talk to that
16 gentleman sittin' over there? Officer David Farmer, chief of police from Saluda?

17 A No, I didn't.

18 Q You didn't?

19 A I haven't talked to no -- I didn't talk to no officer after that. After they arrested him I never
20 talked with anybody.

21 Q Okay. Now do you remember what day of the week this robbery was?

22 A Well, it had to be on -- this was on the 13th when I had gotten -- that was on a Friday.

23 Q The 13th was--

24 A The 13th was on Friday so that had to be a couple of days--

25 Q So that would've been 2 days before--

- 1 A Wednesday. It musta been on Wednesday I imagine 'cause that was on a Friday.
- 2 Q That would've been —
- 3 A Yeah, okay.
- 4 Q Now the person you saw with Montavis how far away from the 2 people were you, ma'am?
- 5 A At least from here to that one over there.
- 6 Q To the what?
- 7 A At least from here to that one over there.
- 8 Q To the back?
- 9 A Yeah, to the back.
- 10 Q So that would've been maybe 4 yards?
- 11 A Yeah, coulda been.
- 12 Q And—
- 13 A It might not been quite that far but—
- 14 Q And your house is caddy cornered to the where Montavis lives. Right?
- 15 A Straight across.
- 16 Q Straight. Sorta at an angle. Is it not at an angle?
- 17 A No, it's not on a angle. Just straight.
- 18 Q Straight. Okay. Now I want to show you a picture here. Can you identify who that is?
- 19 A No.
- 20 Q Okay. So you cannot identify -- so this person right here, you couldn't identify this as the
- 21 person who was talking with Mr. Gaines?
- 22 A No, I cannot 'cause I didn't know him.
- 23 Q Okay. And you did not tell Chief Farmer that this incident happened on a Saturday?
- 24 A No, I didn't.
- 25 Q Okay. You're sure it happened 2 days before Friday the 13th?

Jamie Mae Bonham - cross-examination by Mr. Ellison

- 1 A It had to 'cause this was on -- this happened a couple days before I -- that was on the 13th
2 Friday when I was over at the--
- 3 Q But you don't know who Montavis was talkin' to; you didn't recognize him.
- 4 A No, I didn't know him. I didn't know that young man.
- 5 Q Was he big as Montavis or smaller?
- 6 A He was about -- he was big as he is but he was shorter than Montavis was. I think he was a little
7 shorter than Montavis.
- 8 Q Maybe a little shorter. Okay. Was he stocky?
- 9 A Kind of a little bit. He was a little heavier than Montavis too.
- 10 Q Okay. Now the ski mask I think you described as them putting on the ski mask. Right?
- 11 A (nodded yes)
- 12 Q You remember the colors?
- 13 A Yes, I do.
- 14 Q What color was it?
- 15 A Montavis was green and the other was a dark color. Like it mighta been black or blue.
- 16 Q Now did you see what they did with these two ski masks?
- 17 A They pulled 'em off and put 'em back in their pocket.
- 18 Q And then they walked off.
- 19 A Then they left. Well, I know they left. I didn't -- you know, I didn't continue to look 'cause I
20 didn't know what they was -- I thought they were just -- you know, I didn't know what they was up to.
21 I didn't know what was goin' on. I thought they was just tr -- playin', you know, like young men do.
- 22 Q Okay. You say you were from about this wall back here to where you are now from them. The -
23 - how long did this happen? Over how long a -- how long did you have an opportunity to watch them?
- 24 A It was just a few minutes.
- 25 Q How--

1 A About 5 minutes or---

2 Q Okay, and you were sitting on the porch?

3 A No, I was inside the house.

4 Q So you were in. So you're looking outside the house and are you -- do you have blinds in your
5 home?

6 A Yeah, I got blinds in but the blinds was up.

7 Q The blinds, okay, the blinds were up. So basically your view was unobstructed. Cause you got a
8 chance to see 'em and they had these -- they were masks -- I mean ski caps of some type. Right?

9 A (nodded yes)

10 Q Okay. Now but you don't know who the other person was; you couldn't identify who the other
11 person was. You didn't know that---

12 A I don't even know that person.

13 Q And---

14 A My son or whoever come in and told me though. My daughter she told me the boy's name. She
15 come in and she told me what had happened, you know, and everything.

16 Q In other words, apparently someone told you what had happened subsequently.

17 A Yeah.

18 Q Okay. Now what time of the day was it?

19 A I don't even remember. I think it was afternoon you know. It wasn't late afternoon but it was
20 after 12 o'clock I think.

21 Q After 12.

22 A It was after lunch time.

23 Q And then you found out supposedly that an incident happened---

24 A Yeah.

25 Q --a couple hours later.

Jamie Mae Bonham - cross-examination by Mr. Ellisor

1 A Yeah. About--

2 Mr. Ellisor: No further questions, Your Honor. Thank you.

3 The Court: Redirect?

4 Mr. Young: I have no further questions of Ms. Bonham.

5 The Court: Y'all help her down. Wait just a minute.

6 Mr. Young: May she be excused?

7 Mr. Ellisor: Without objection, Your Honor.

8 The Court: You're free to go.

9 Mr. Young: Your Honor, the state thinks this is a convenient time to stop for the day. Our next
10 two witnesses will be the concluding witnesses. The second of the two will probably be lengthy. This
11 might be the most convenient time to stop.

12 The Court: Ladies and gentlemen, we'll start in the morning at 9:30. Be in the jury room at 9:30.
13 Don't discuss the case. Thank you. They'll take you through the jury room. (the following occurred in
14 the absence of the jury.) All right. As you leave the courtroom be very careful that you don't have any
15 conversations that might be overheard by a juror or be any contact with a juror. I try to say this in every
16 case. You may think the jurors have cleared out and that they're gone, but sometimes they stay around.
17 Some step in the restroom. Some are waiting on a ride. Be real careful. It's very easy to walk down a
18 hallway and turn a corner and there stands a juror and you've been talkin' about somethin' you shouldn't
19 have been talkin' about in front of a juror. So be careful. All right. 9:30 in the morning. (the following
20 occurred the next day.) Y'all ready?

21 Mr. Young: One moment.

22 Mr. Ellisor: Yes, sir, Your Honor.

23 The Court: If you have a stipulation, put it on the record.

24 Mr. Young: Your Honor, my understanding we have a stipulation of the fact as to the arrest in
25 this case. It will be testified to in a few moments by Captain Zeb Shorter. It is Robert Shorter with the

Captain Shorter - direct examination by Mr. Young

1 Saluda county sheriff's office who made the arrest and states his testimony will be regarding running from
2 him as an attempt was made to arrest him. We've got pictures to support that. The stipulation as we
3 understand it that the state, Captain Shorter in particular, had a valid basis to arrest Montavis Gaines on
4 the 13th of October 2007. Is that your understanding?

5 Mr. Ellisor: I agree with the stipulation.

6 The Court: All right. Are you ready?

7 Mr. Young: Yes, Your Honor. You want me to put Mr. Shorter on the stand?

8 The Court: No. Defense ready? Defense ready?

9 Mr. Ellisor: Yes, sir, Your Honor. I didn't hear you. (the following occurred in the presence of
10 the jury.)

11 The Court: All right. Call your next witness.

12 Mr. Young: State calls Captain Robert Shorter.

13 CAPTAIN SHORTER, BEING DULY SWORN,

14 TESTIFIES AS FOLLOWS:

15 DIRECT EXAMINATION

16 BY MR. YOUNG

17 Q Captain Shorter, would you give us your full and complete name, where you work and for how
18 long?

19 A Robert Shorter. I'm employed by the Saluda county sheriff's office. I've been there since 2001.
20 I've been in law enforcement since 1990.

21 Q All right, sir. Could you tell us on October the 13th 2006 did you come into contact with one
22 Montavis Kentrail Gaines?

23 A Yes, I did.

24 Q All right. And what was the underlying basis concerning in terms of trying to come into contact
25 with him? Why did that come about?

Captain Shorter - direct examination by Mr. Young

1 A I was working that evening and I received a phone call stating that someone that we wanted was
2 standing in an area near [REDACTED]. I received a phone call stating that the gentleman we wanted was
3 standing near a residence on [REDACTED] and I was given a description of what he was wearing.

4 Q What was that description given?

5 A A light blue -- they described it as North Carolina Tar Hills color blue sweat suit.

6 Q Okay. Did it have any kind of attachment to the coat?

7 A It was a hooded sweatshirt.

8 Q All right. Was the person identified to you by name as to who you were looking for?

9 A Yes, sir.

10 Q What was the name given to you?

11 A Montavis Gaines.

12 Q Okay. What efforts, if any, did you make to try to find out where Montavis Gaines was?

13 A What I done, we had a full van out at the sheriff's office that we seized, and the back seats were
14 removed from it, so I got officer Crouch, Freeman and Clark from our office to go. When I talked with
15 'em, none of the guys that I had workin' with me that evening with the sheriff's office knew Mr. Gaines
16 on sight. So I then called the police department. We got ahold of Officer Long with the police
17 department. Officer Long stated that he did know Mr. Gaines on sight. So we went by and picked Officer
18 Long up also.

19 Q Okay. Once Officer Long was with you, what else did you do?

20 A We drove there to the area of -- well, we went in on Pringle Street. Pringle Street runs parallel
21 with [REDACTED] off of Bouknight Ferry Road. Based on my prior knowledge of the area -- I used to
22 be a city police officer also -- I knew that there was a pathway, a pedestrian pathway from Pringle Street
23 over to [REDACTED] between the house. So we went in that way.

24 Q All right.

25 A And while driving in on Pringle Street, we looked to our right and we observed a person wearing

Captain Shorter - direct examination by Mr. Young

1 a North Carolina Tar Hill blue in color sweat suit walking away from us toward Pringle Street and Officer
2 Long at that time identified him as being Mr. Gaines.

3 Q Okay. Do you have any pictures or anything that can describe this area to assist the jury in their
4 understanding of it?

5 A Yes, sir, I do.

6 Q I'm gonna hand you state's exhibit 7, 8, 9, 10 and 11 and ask you to take a look at them and tell
7 me what they are.

8 A State exhibit 7 is a photograph of the path taken from [REDACTED]. And you will notice [REDACTED]
9 in --

10 Q Don't show them to the jury yet. Just tell them what they are.

11 A You will notice [REDACTED] in the photograph. I was parked immediately across the street at [REDACTED]
12 [REDACTED] when the photograph was taken.

13 Q Okay. Tell them what the others are.

14 A Exhibit 8 is the same photograph. It's just not nearly as close.

15 Q Okay.

16 A Exhibit 9 is a photograph of the same path taken from the other street, Pringle Street. It was
17 taken at [REDACTED]. And that's the photograph looking back the other way on the same path.
18 Photograph, exhibit 10, is a photograph of the same as exhibit 9. It's just not zoomed in as close. And so
19 is exhibit 11. Same angle zoomed out even further from the street.

20 Q All right. So if I held up exhibits 7 and 8, these as a group represent what?

21 A That's the photographs taken from [REDACTED].

22 Q All right. And that's -- is that one end of the path you described?

23 A Yes, sir. Same end.

24 Q 9, 10, 11, what are they?

25 A They're taken of the path from Pringle Street.

Captain Shorter - direct examination by Mr. Young

- 1 Q So that's your other angle?
- 2 A Yes, sir.
- 3 Q All right. Is that both ends of the pathway?
- 4 A Exactly.
- 5 Q And when end of the pathway was -- did you ever observe Montavis Gaines?
- 6 A We initially observed him from the [REDACTED] view which is depicted in 9, 10, and 11.
- 7 Q So 9, 10 and 11 is where you first saw him.
- 8 A Right.
- 9 Q Is that upon exiting or entering?
- 10 A That's upon entering.
- 11 Q Which street again is that?
- 12 A Pringle Street.
- 13 Q Okay. And how does that relate -- how does it relate, if any, to the other pictures?
- 14 A Well, what we done is we drove on down Pringle and it runs into Brooks and Ralston Park, a ball
- 15 field, a softball field and playground. And then you run into the parking lot of the playground, you go
- 16 through the parkin' lot and you come back out on [REDACTED]. And that's what we done.
- 17 Q When you came out on [REDACTED], what happened?
- 18 A I parked immediately in front of this mailbox here. I parked in back this way. I got [REDACTED]
- 19 [REDACTED] on this side, and then I got the mailbox with [REDACTED] on this side and the path is right there. A clear this
- 20 view of this path.
- 21 Q All right. Well, hold that picture in your hand a second.
- 22 Mr. Young: We're gonna move the admission of all these photographs, Your Honor, which
- 23 would be state's exhibits 7 through 11.
- 24 Mr. Ellisor: Without objection, Your Honor.
- 25 The Court: All right. (state's exhibit 7 through 11 received in evidence.)

Captain Shorter - direct examination by Mr. Young

1 Q Exhibit #8 that you're referring to, all right, I'd like for you to refer that -- is that the one you're
2 referring to or which one?

3 A I was referrin' to 7 but they're the same. It's just zoomed out different.

4 Q Okay. Let me have -- let me pass to the jury exhibit #7.

5 Mr. Young: We request permission to publish this, Your Honor.

6 The Court: Yes, sir.

7 Q All right. State's exhibit #7 which is being passed to the jury is not an identical but a separate
8 photograph you have in your hand. Right?

9 A That's right.

10 Q It's the same basic picture but a different zoom--

11 A Yes, sir.

12 Q All right. Would you refer them to that one and tell us what you did again.

13 A Well, we drove up to this location, parked right in front of [REDACTED] Mr. Gaines was
14 walkin' in that direction when we saw him on Pringle.

15 Q Uh-huh.

16 A I stopped the van. Immediately upon recognizin' that we were police officers, he turned and ran
17 back toward Pringle Street.

18 Q Now you said the van was how -- marked? How was the van marked?

19 A It was a plain white I think it was a Ford mini van.

20 Q Okay. So there's no external markings on it to indicate it's a police car?

21 A No, sir. No, sir. It's -- I mean that's the purpose of (unintelligible)

22 Q All right. Well, how were you and the officers you were with attired?

23 A We were dressed in uniform.

24 Q Okay. So when did he begin to go the other direction?

25 A Immediately upon me stoppin' the vehicle. He realized who we were and he ran.

Captain Shorter - direct examination by Mr. Young

1 Q Okay. Would they be in the front seat or --

2 A I was drivin'.

3 Q You were drivin' so who was in the right front seat?

4 A I can't remember who was in the front seat. The rest of the officers were in the car in the back,
5 it's got no seats in the back.

6 Q Was the guy, the person in the right passenger's seat, was he in uniform?

7 A Everybody was, yes, sir.

8 Q Okay. Windows up or down?

9 A I don't know.

10 Q Is there any tinting on those windows; could you see into the car?

11 A There's no tinting on the windows. It was just like it was when we got it.

12 Q Okay. So upon -- upon the van stopping, what were the actions again of Mr. Gaines?

13 A He ran.

14 Q And what direction did he go?

15 A Back toward -- he turned and went back toward Pringle Street.

16 Q All right. And on Pringle Street, the direction of Pringle Street would be depicted in exhibits 9,
17 10, and 11?

18 A 9, 10 and 11 were taken from Pringle Street lookin' back toward [REDACTED]

19 Q Right.

20 A He actually ran in that direction away from [REDACTED]

21 Q Toward Pringle Street.

22 A Right.

23 Q So he ran in the direction that is depicted in this photo?

24 A Exactly. He ran in the direction where that photograph was taken from.

25 Q Right.

Captain Shorter - direct examination by Mr. Young

1 A I was standing in Pringle Street when I took that photograph--

2 Q If a person were standing in the driveway depicted here--

3 A Right.

4 Q --what -- what would they be able to see in terms of the direction of travel exhibited by Mr.
5 Gaines' departure?

6 A Well, if you're standing in that driveway looking toward [REDACTED], Mr. Gaines would have
7 been running toward you.

8 Q All right.

9 Mr. Young: Request permission to publish the photograph.

10 Q So Mr. Gaines ran toward 9, 10 and 11.

11 A Right.

12 Q As Mr. Gaines ran toward 9, 10 and 11, what happened?

13 A The officers gave chase.

14 Q All right. How far'd they go?

15 A Oh, maybe 200 yards at the most.

16 Q Okay. Was he running the entire time?

17 A I wasn't there. They radioed in and said they had him in custody and they walked him back to
18 the van.

19 Q Okay. When they walked him back to the van, who had him in custody?

20 A The officers there -- the remaining officers that gave chase.

21 Q All right. Now from the perspective you had there on [REDACTED], the first set of
22 photographs, that first group of 2 photographs #7 and 8, all right, you said you parked your vehicle at a
23 location. You know the residence you parked that vehicle in? Who lives at the residence you parked the
24 vehicle at?

25 A I don't know who lives at [REDACTED]. Ms. Bonham lives at [REDACTED] across the street. And the defendant

1 lived at [REDACTED] which is one house up from [REDACTED].

2 Q Okay. So in relationship to where you parked your vehicle, where is Ms. Bonham's house?

3 A She would've been right across the street. I would've been parked between -- my vehicle
4 would've been between her house and the path that the defendant ran down.

5 Q Okay. So your vehicle is parked in front of Ms. Bonham's house and he runs away from Ms.
6 Bonham's house down--

7 A The path.

8 Q --on this path. So in other words, that would be the direction of travel: away from her house.

9 A Yes.

10 Q So your vehicle would've been clearly visible from Ms. Bonham's residence?

11 A It was parked in the middle of the street, yes, sir, right in front of her house.

12 Q Nothing to obstruct the view of your vehicle.

13 A No, sir.

14 Q Would your vehicle have obstructed the view of the path?

15 A Well, sure. I was parked right in the entrance of the path. The path is between two houses which
16 would've been [REDACTED] and [REDACTED] and that's where I was parked at.

17 Q Okay. All right.

18 Mr. Young: Your Honor, could we have The Court inform the jury about the stipulation?

19 The Court: If y'all have a stipulation you want to publish to the jury, you can do it. I don't
20 know if it's necessary or not. Go ahead.

21 Mr. Young: Your Honor, we have a stipulation of fact that there was a valid basis for officer --
22 deputy -- excuse me -- Captain Shorter to make an arrest of Mr. Montavis Kentrail Gaines in this case.

23 All right.

24 Q Would you please answer any questions Mr. Shorter -- I mean excuse me -- Mr. Ellis has.

25 A Yes, sir.

CROSS-EXAMINATION

BY MR. ELLISOR

Q Mr. Shorter, how many defendants were arrested in this robbery at the Cash Advance?

A Again, I didn't investigate this case. I'm aware of two.

Q Two?

A Yes, sir.

Q You're not aware of a third?

A No, sir. Again, this is a city case. I didn't investigate it.

Q So nobody has told you there were 3 people arrested.

A I'm not aware of how many were arrested. I know of two.

Q But in this case did you issue a search warrant for Mr. Gaines' house?

A One was not necessary, no.

Q Why do you say it was not necessary?

A We had no intention of goin' in his house.

Q There was a ski mask involved in the robbery. So you didn't think a ski mask was important enough to issue a search warrant for Mr. Gaines' home?

A Again, Mr. Ellisor, I work for the Saluda County Sheriff's office. This is a police department case. I was not involved in the investigation whatsoever. I don't know the details of it.

Q Okay.

A I simply assisted in making the arrest.

Q What's that?

A I simply assisted in making the arrest.

Q Okay. Now so you didn't go down to the Cash Advance store and look at the videos.

A No, sir.

Q Okay. Do you know if there has been an audit in this case?

Jerome Rhoads - direct examination by Mr. Young

1 A Again, Mr. Ellisor, I'm sorry. I don't have any details of this investigation.

2 Q So the only thing you know about is the arrest.

3 A That's correct. I actually didn't handle this investigation.

4 Q Okay. So you haven't looked at any of the evidence or participated or talked with anybody.

5 A No, sir.

6 Q So you haven't talked with the chief of police Farmer.

7 A No, sir.

8 Q Okay. No further questions.

9 The Court: Redirect?

10 Mr. Young: No questions, Your Honor.

11 The Court: You may step down.

12 Mr. Young: State calls Jerome Rhoads. Mr. Rhoads, would you come around and be sworn.

13 JEROME RHOADS, BEING DULY SWORN, TESTIFIES AS

14 FOLLOWS:

15 DIRECT EXAMINATION

16 BY MR. YOUNG

17 Q Mr. Rhoads, how are you today?

18 A All right.

19 Q You're in an orange jumpsuit.

20 A Yes, sir.

21 Q Are you indicted on charges of armed robbery in connection with the break in and assault and
22 battery with intent to kill, conspiracy to commit armed robbery on the Cash Advance in October 2006?

23 A Yes, sir.

24 Q 11 October. Excuse me. Sir, have you been previously convicted of crimes in the state of South
25 Carolina and other states?

1 A Yes, sir.

2 Q Have you been convicted of forgery in '97 in Sahuda?

3 A Yes, sir.

4 Q And grand larceny in '96?

5 A Yes, sir.

6 Q Have you been convicted of breaking and entering into automobiles in 2002, possession with
7 intent to distribute drugs and attempted grand larceny in 2006?

8 A Yes, sir.

9 Q Pointing firearms in 1992.

10 A Yes, sir.

11 Q Being party to a crime at that same time?

12 A Yes, sir.

13 Q For a related larceny offense in '93; possession of a stolen vehicle in '93; burglary convictions in
14 '93; parole revocation on a larceny conviction. I guess you were on probation at some point from a
15 larceny conviction in '95.

16 A Yes, sir.

17 Q Another petty larceny; breach of trust with fraudulent intent '96; 4 forgeries in '96 and a burglary
18 in '96?

19 A Yes, sir.

20 Q From another state it appears to be North Carolina in 1991 guilty apparently of possession of
21 stolen goods and -- does that just about cover it?

22 A Yes, sir.

23 Q Okay. Do you know Montavis Kentrail Gaines?

24 A Yes, sir.

25 Q Is he present in this courtroom?

Jérôme Rhoads - direct examination by Mr. Young

1 A Yes, sir.

2 Q Was he in any way involved in the armed robbery you committed?

3 A Yes, sir.

4 Q Here in this county on 11 October at the Local Cash Advance?

5 A Yes, sir.

6 Q Tell the court what happened.

7 A On October the 11th me and Mr. Gaines went to the Local Cash Advance and robbed it.

8 Q Okay. Tell us what happened.

9 A Well, we went by his grandmother house on East End Drive.

10 Q I'm sorry. You gonna have to understand something. This jury's gotta hear you and this lady's
11 gotta hear you. I mean it's kinda hard to hear you. I'm gonna adjust this microphone. This one amplifies
12 your voice to the whole room. This one goes to the court reporter's equipment. Okay?

13 A All right, sir.

14 Q All right, try again.

15 A On October 11th me and Mr. Gaines went to his grandmother house tryin' to come up with some
16 money and he said he had a lead.

17 Q All right. I'm gonna ask you what's a lead.

18 A A robbery.

19 Q All right.

20 A So we got some hats, some skull caps and we had -- you know, we had to find a gun, so we
21 went to his cousin house and had him meet us in the path and we got the gun from him. And from there
22 we went to the Country Peddler store for about an hour waitin' for the right time and we went in the place
23 and robbed the place.

24 Q What place did you go in and rob?

25 A Cash Advance.

- 1 Q Where is that located? Across from the Country Peddler?
- 2 A Right next to the Country Peddler.
- 3 Q Okay. What'd you get out of it?
- 4 A Money wise?
- 5 Q Uh-huh.
- 6 A About \$250. Somethin' like that.
- 7 Q That's what you got?
- 8 A Yes, sir.
- 9 Q Okay. Did you ever touch the money when you were inside the Local Cash Advance?
- 10 A No, sir.
- 11 Q Okay. When did you actually get your money?
- 12 A We got over on Graham Street behind a house.
- 13 Q We got there. Who is we?
- 14 A Montavis Gaines.
- 15 Q Let me ask you, first off, how do you know Montavis Gaines?
- 16 A I been knowin' him all my life.
- 17 Q How do you know him?
- 18 A His grandmother raised me.
- 19 Q Is he in any way related to you?
- 20 A Not really.
- 21 Q Okay.
- 22 A But his grandmother raised me though.
- 23 Q Okay. Now in terms of -- in terms of where you were initially, where is the residence you
- 24 indicated or the place you indicated you actually had a mask or tried a mask on? Where was that
- 25 location?

Jerome Rhoads - direct examination by Mr. Young

- 1 A On the path. Well, we tried them on at the house but then we went to the path to cut the holes
2 out and the eyes.
- 3 Q Whose house?
- 4 A At his grandmother house.
- 5 Q Where does she live?
- 6 A [REDACTED]
- 7 Q Okay. And you say you tried 'em on and then you did what with the mask?
- 8 A Cut holes in 'em.
- 9 Q All right.
- 10 A For the eyes.
- 11 Q Okay. And then you say you went somewhere to get a gun?
- 12 A Yes, sir.
- 13 Q Who'd you get a gun from?
- 14 A Bug.
- 15 Q Bug?
- 16 A Yes.
- 17 Q Does Bug have another name?
- 18 A Jonathan Long.
- 19 Q Jonathan Long? Is that what you said? I'm tryin' to hear you.
- 20 A Yes, sir, Jonathan Long.
- 21 Q Okay. All right. Now what kinda gun was this?
- 22 A 380.
- 23 Q Okay. Is it a pistol or automatic?
- 24 A Handgun.
- 25 Q Handgun. Does it work by -- can you just pull the trigger and it'll go off or how--

1 A Clip.

2 Q It has a clip?

3 A Yes.

4 Q Slide action?

5 A Yes.

6 Q Okay. Now when you went in or went to Country Peddler, at what point did you decide to go
7 into the business of the Cash Advance?

8 A Once it was no traffic and a truck was parked at the Country Peddler. Once the truck moved we
9 knew we was gonna go in but we stopped outside for a few minutes because traffic was goin' by and then
10 we went in.

11 Q Okay.

12 A I went in first.

13 Q Now you've seen the surveillance video on the inside of it, haven't you?

14 A Yes, sir.

15 Q Okay. Would you be able to recognize the surveillance video again if you saw it?

16 A Would I recognize?

17 Q The surveillance video.

18 A Yes, sir.

19 Q Would you be able to recognize yourself and Montavis Gaines?

20 A Yes, sir.

21 Q All right.

22 Mr. Young: Sir, could I get you to come up here.

23 Q Now did you ever go into the Local Cash Advance -- did you ever go into the Local Cash
24 Advance before you robbed it?

25 A Yes, sir.

Jerome Rhoads - direct examination by Mr. Young

1 Q Did you go on the same day or earlier?

2 A Earlier that day.

3 Q Okay. What'd you do when you went in?

4 A Ask him about cashin' my check.

5 Q Okay. Did you know who you were talkin' to?

6 A I reckon the owner.

7 Q Would you be able to recognize the owner if he was here?

8 A Yes, sir.

9 Q You see anybody in this courtroom look like the man that you talked to?

10 A Yes, sir.

11 Q Who?

12 A That guy right there.

13 Q Which guy?

14 A In the blue shirt.

15 Q Blue shirt? About what time did you go in? Do you recall the first time the Local Cash
16 Advance?

17 A About 12.

18 Q About 12?

19 Mr. Young: Your Honor, Court's permission I'll have him step down here and see if he can
20 recognize the time frame on this video.

21 The Court: He can step down. He's got to keep his voice up.

22 Mr. Young: I'm not sure he can recognize the small screen. That's why I'm asking that he come
23 down here so he can see it close up.

24 Q All right. You're gonna have to keep your voice up. All right. That's the microphone right
25 there. All right. I want you to watch this camera and if you see yourself come in at some point, I want

1 you to tell him to stop.

2 A That's me walkin' up right there.

3 Mr. Young: Stop it right there.

4 Q All right. These are 1, 2, 3, 4 camera lens angles.

5 A See, that's when I came at 12 o'clock earlier that day.

6 Q All right.

7 The Court: No one can hear him; he's standing in front of the jurors.

8 Q Stand back. Stand back. Talk here to me. All right. Lookin' at that screen and talkin' to the
9 jury, say what you said again.

10 A That's me in the top screen comin' in to check at 12 o'clock. That's after 12.

11 Q Okay. You see anybody else in there you recognize?

12 A That's Mr. VICTIM standin' in the corner right there.

13 Q All right.

14 Mr. Young: Go ahead and run me that thing forward.

15 A See, right there I'm by myself.

16 Q All right. And what are you doin' now?

17 A Askin' the man about a check to cash.

18 Q And the man you talked to is in this picture?

19 A That's him sittin' right there.

20 Q Which camera number?

21 A Bottom.

22 Q Is that camera 3?

23 A Yes, sir. And he's tellin' me about the camera -- I mean they don't cash checks from outta town
24 Columbia.

25 Q Okay. And did you talk to him did anything happen during this time just talkin' to him?

Jerome Rhoads - direct examination by Mr. Young

- 1 A Yes, sir, it--
- 2 Q What was the purpose of goin' in there?
- 3 A To see where the camera was at.
- 4 Q Did you see the camera?
- 5 A Yeah, I seen one camera in the corner up top. That's it.
- 6 Q Tell me when you're going.
- 7 A I'm leavin' now.
- 8 Q All right. Now would you be able to recognize yourself again during the out robbery sequence?
- 9 A Yes, sir.
- 10 Q All right. About what time did you go there?
- 11 A About 3.
- 12 Q All right. I'm gonna stop the camera just before 3. All right. You see anybody in this picture
- 13 you recognize?
- 14 A Yeah, that's me comin' up in the corner screen right there.
- 15 Mr. Young: Stop it right there please.
- 16 Q What are you doing?
- 17 A Waitin' for the traffic to go by.
- 18 Q Do you see anybody else?
- 19 A Yeah, that's Mr. Gaines behind me comin'.
- 20 Q All right. Which camera are you referring to?
- 21 A Camera one.
- 22 Mr. Young: All right. Play that.
- 23 Q Who's that in camera 4?
- 24 A Mr. Gaines.
- 25 Q You say you're waiting for traffic to clear?

1 A So nobody won't see us put the mask on.

2 Mr. Young: Now stop it right there.

3 Q Have you and Mr. Gaines said anything at this point to each other?

4 A Yeah, let's go. I told him let's go.

5 Q Okay.

6 Mr. Young: Go ahead. All right. Stop it right there.

7 Q Who's that comin' in the door?

8 A That's me in the bottom screen, the 3rd.

9 Q Bottom left?

10 A Yes, sir.

11 Q Who's this in the right top?

12 A Mr. Gaines.

13 Q All right. What are you doing at this point with your hands?

14 A Pointin' a gun at the guy.

15 Q All right. Is that the gun you received earlier?

16 A Yes, sir.

17 Mr. Young: Go ahead and play it. All right. Stop it right there.

18 Q What's goin' on and what's happening?

19 A Well, we lookin' for the money.

20 Q All right. Between the time that this man starts looking for the money in the white shirt and the
21 time you're off the screen to the right, what is happening to the man, if any -- was anyone else in the
22 room?

23 A Yes. The guy that was sittin' at the thing, at the computer.

24 Q Okay. Where is he?

25 A He's on the floor. I told him to get on the floor. I hit him with the gun.

Jerome Rhoads - direct examination by Mr. Young

- 1 Q And he's on the floor at this time.
- 2 A Yes, sir.
- 3 Q What is he saying or what are you saying?
- 4 A Well, right now I ain't sayin' nothin'. He was layin' on the floor.
- 5 Q Uh-huh.
- 6 A But as it go on I ask him where the money was because it's not in the drawers.
- 7 Q Uh-huh. So what -- did you look in any drawers?
- 8 A No -- yeah, I looked in the bottom drawer over here. That was it.
- 9 Q Which -- what -- point where you were looking.
- 10 A Right here. The bottom drawer right there.
- 11 Q This -- this drawer, this piece of furniture?
- 12 A Yes, sir.
- 13 Q All right. And what is the person in the white shirt doing?
- 14 A He's lookin' for the money.
- 15 Q And who is that?
- 16 A Mr. Gaines.
- 17 Mr. Young: All right. Play it for me.
- 18 A Since he can't find the money so I'm goin' back to the guy and I ask him where the money is
- 19 and he told me so I pointed and told Montavis where it was at.
- 20 Q And what happened at this point?
- 21 A At this point he gettin' the money. I'm talkin' to him.
- 22 Q Now did you see him do that?
- 23 A No, I didn't see him get the money.
- 24 Mr. Young: Stop it. Run it backwards. Run it backwards. Run it backwards. Stop it.
- 25 A I told him where the money was at. I didn't actually see him get the money because I was too

1 busy talkin' to him 'cause his phone had rang.

2 Q Okay. What happened to his phone?

3 A I took it because it was ringin'. I didn't want him to pick it up and tell somebody.

4 Q All right. So at this point you're off the screen and what is -- what is Montavis doing?

5 A Supposed to get the money.

6 Q Okay.

7 Mr. Young: Play it forward.

8 Q Does he have anything in his hands?

9 A Yeah, money.

10 Q What's happenin' now?

11 A We leavin' 'cause I'm still talkin' to him.

12 Mr. Young: Stop it.

13 Q All right. What's Montavis doing now?

14 A Fixin' to take his mask off 'cause we leavin'.

15 Mr. Young: Play it forward.

16 Q Did you take your mask off?

17 A Yes, sir.

18 Q Return to your seat, sir. Thank you. All right. This has been admitted as state's exhibit #2. Do
19 you recognize anybody in that picture?

20 A Yes, sir.

21 Q Who is that?

22 A That's Montavis Gaines.

23 Mr. Young: Court's permission to publish, Your Honor?

24 The Court: Yes, sir.

25 Q All right. When you got -- when did you get arrested on this matter?

Jerome Rhoads - direct examination by Mr. Young

- 1 A November the 29th or 30th, something like that.
- 2 Q Okay. And you've been in jail since then?
- 3 A Yes, sir.
- 4 Q When you were picked up, what'd you tell law enforcement you did?
- 5 A Sir?
- 6 Q When you were picked up, did you tell law enforcement you were involved in this? ..
- 7 A Yes, sir.
- 8 Q Did you confess?
- 9 A Yes, sir.
- 10 Q Did they make a deal with you?
- 11 A No, sir.
- 12 Q You got any deal now?
- 13 A No, sir.
- 14 Mr. Young: Your witness.
- 15 The Court: Cross-examination.
- 16 CROSS-EXAMINATION
- 17 BY MR. ELLISOR
- 18 Q Mr. Rhoads--
- 19 A Yes, sir.
- 20 Q You got a sister?
- 21 A Yes, sir.
- 22 Q What's her name?
- 23 A Nicole Rhoads.
- 24 Q Nicole. Did you talk with Nicole Rhoads yesterday and tell her that the state--
- 25 Mr. Maye: Object to the hearsay. Object to the hearsay of a third party, Your Honor.

1 Mr. Ellis: Your Honor, I'm asking him did he talk, not what somebody -- what the other
2 person said.

3 The Court: That's not hearsay.

4 Q Did you talk to your sister yesterday about this?

5 A Yes, sir, I talked to my sister yesterday.

6 Q Okay. And you told your sister that if you didn't testify against Montavis Gaines you were
7 gonna get 30 years, did you not?

8 A I had already told her that.

9 Q What was that?

10 A I'd already told her that.

11 Q So you already told her that. You told your sister that the state was offering you 30 years if you
12 testified.

13 A I told my sister that with the charge of the crime that I did, I'm lookin' at about 30 years.

14 Q Now I didn't ask you that. I asked you if you told your sister that the state was sayin' if you
15 didn't testify they were gonna give you 30 years.

16 A No, sir.

17 Q You didn't tell her that.

18 A No, sir.

19 Q Okay. Now when you -- Mr. Gaines has been arrested for conspiracy: to conspire with you; to
20 commit this armed robbery. Let's go through the details.

21 A Okay.

22 Q You were over at his house earlier that day. Right?

23 A Yes.

24 Q Okay. And it's been testimony that was around 12 o'clock. So you went over to his house
25 about 12 o'clock.

- 1 A No, I was at his house early that morning.
- 2 Q So you were over there earlier that morning. Well, when did the ski mask incident happen?
- 3 A When did we came up with the—
- 4 Q Huh?
- 5 A When did we—
- 6 Q Well, did y'all try on ski masks?
- 7 A Yeah, that was after 12.
- 8 Q After 12?
- 9 A Yeah, that was after I had done went to the Cash Advance. We had already walked over there.
- 10 Q Run that by me again.
- 11 A We had already walked over there to the Cash Advance.
- 12 Q So you had your ski mask with you when you walked -- when you went to Cash Advance.
- 13 A Not the first time we went to Cash Advance now.
- 14 Q Okay. So you had already gone to Cash Advance which earlier I think the testimony was about
- 15 1 o'clock, 12 o'clock.
- 16 A Yes, sir.
- 17 Q So you had already gone to Cash Advance. Then you left Cash Advance and went back over to
- 18 Montavis Gaines' house. Right?
- 19 A Yes, sir.
- 20 Q Okay. Now how long did it take you to go from Cash Advance back to Montavis Gaines'
- 21 house?
- 22 A I don't know. We walked.
- 23 Q Yeah, but how long is that? It's only a couple of blocks, isn't it?
- 24 A Yes, sir.
- 25 Q Okay. So you got back over to his house sometime around 12.

1. A Well, after -- probably about one.

2. Q About one. Well, you were at Cash Advance at one.

3. A I was at Cash Advance at 12. Right around 12. I left Cash Advance Montavis Gaines was at the
4. path and we walked up to his grandmother's house.

5. Q What was that?

6. A We walked back to his grandmother's house.

7. Q We? So Montavis Gaines was with you when you went to Cash Advance?

8. A He was in the path waitin' on me.

9. Q He was in the path how far from Cash Advance?

10. A I'd say about the post office, in the path between the post office and--

11. Q Okay. The post office is right across the street from Cash Advance. Right?

12. A Yes, sir.

13. Q So you left Cash Advance, went over to the post office with Montavis Gaines. Is that when you
14. out the holes in it?

15. A No, we went back to his house.

16. Q So you went back to his house. Okay. Now what time did you go back to his house?

17. A What time? After one I think.

18. Q Okay. Now this robbery happened at 3 o'clock. Okay. Now when did you meet with Montavis
19. Gaines to prepare this robbery?

20. A I don't understand your question.

21. Q Well, you had a robbery and y'all had already made the plans to go rob the place. Right?

22. A We didn't have the tools to rob the place. We had the mask and we had the gun. So that's why
23. it took so long for the robbery to happen 'cause we had to get the mask and the gun.

24. Q So long for the robbery to take place? This robbery took place in exactly one minute. You run
25. from that tape, this robbery lasted one minute on that tape.

Jerome Rhoads - cross-examination by Mr. Ellis

- 1 A Yes, sir.
- 2 Q Okay. So who'd you get the gun from?
- 3 A Bug.
- 4 Q Bug?
- 5 A Bug.
- 6 Q Jonathan Bug. Jonathan Long?
- 7 A Yes.
- 8 Q Where -- when did you go get the gun?
- 9 A We went to his mother house. I think that's his mother's trailer.
- 10 Q I said when did you go get the gun?
- 11 A We got the gun before we did the robbery.
- 12 Q Before you did it. So when you went over to Cash Advance you already had the gun on you
- 13 when you went into Cash Advance.
- 14 A No. Not at 12. No.
- 15 Q So you'd gone over at 12; then you left and you came back, and you went back to Montavis'
- 16 house.
- 17 A Yes.
- 18 Q Okay. Now you already had the gun at that time.
- 19 A No. We didn't have the gun till we left the house the second time.
- 20 Q Tell me when you went -- the sequence of events of this thing.
- 21 A Okay. The sequence of events is I went over to there to see (unintelligible)
- 22 Q Okay.
- 23 A Okay. We went back to Montavis Gaine house. We got the mask. Then we went back to find a
- 24 gun. So we went and found Bug.
- 25 Q Mr. Long.

1 A Mr. Long. Met him in the path. Got the gun. Put the holes in the mask. That it was it. Did the
2 robbery.

3 Q Mr. -- how tall is Mr. Long?

4 A About my height.

5 Q Well, is he skinny.

6 A Yeah, he's sorta slim, yeah.

7 Q Well, what if I told you two people told me they saw--

8 Mr. Young: I object, Your Honor. He cannot--

9 Mr. Ellisor: I admit. I agree.

10 Q Do you know if anybody saw you commit this robbery?

11 A No, sir.

12 Q So you didn't leave take your mask off and run -- where'd you run?

13 A After we came out the place?

14 Q Uh-huh.

15 A We run through the trailer park and back through the path and--

16 Q When you left the building, did anybody almost hit you with a car?

17 A It happened so fast, I don't remember nobody--

18 Q Happened so fast. Okay. Now what time did you get the gun?

19 A It was about after one, maybe two. I'm not sure, but it was before the robbery because we had
20 to get the gun and the mask. You need all the tools and elements, you know, to pull somethin' off. So
21 you really don't -- only thing we was worried about was makin' sure the robbery happened before Brent
22 came on shift.

23 Q Before what?

24 A Before Officer Brent -- Brent Long? Police officer?

25 Q I didn't understand you.

1 A Officer Brent Long. All we were worried about that the nature of the robbery went down before
2 Officer Brent Long came on duty.

3 Q I want to get this straight. Did Montavis go to you -- Montavis did not go with you over to the
4 Cash Advance.

5 A When?

6 Q When you went in there to talk with them about --

7 A Cashin' a check.

8 Q Yeah.

9 A No.

10 Q Okay. So he wasn't with you then.

11 A No.

12 Q So then you went back to his house.

13 A Yes.

14 Q Okay. Now when did you come together with this tacit understanding of robbing Cash
15 Advance? Were you back at your house by that time?

16 A Yes, sir.

17 Q So you'd gone over there and checked on cashin' a check. So you came back over to Montavis'
18 house and you and he talked about this robbery.

19 A Yes.

20 Q Okay. And he agreed to go with you.

21 A Yes.

22 Q And then you left and came back toward Cash Advance and that's when you cut the holes in it.

23 A Yes.

24 Q What'd you cut the hole in it with? I mean what type of instrument did you cut the holes in the
25 mask?

- 1 A Little scissors.
- 2 Q Where'd you get the scissors from?
- 3 A From his grandmother.
- 4 Q So y'all when you left you took the scissors with you to cut holes.
- 5 A (nodded yes.)
- 6 Q Now what'd you do with your mask?
- 7 A Threw them away and ran.
- 8 Q Threw 'em away and ran. So you don't know where you threw 'em at?
- 9 A In the woods.
- 10 Q Well, how far from the post office did you throw them?
- 11 A Over by the woods -- where the woods like goin' to [REDACTED]
- 12 Q Okay. Now your testimony is you haven't been promised anything to testify?
- 13 A No, sir.
- 14 Q When you were arrested you were questioned. Right?
- 15 A Yes.
- 16 Q You didn't sign a statement admitting these facts.
- 17 A A statement when Saluda arrest me?
- 18 Q That's right.
- 19 A Not in Saluda county.
- 20 Q So you didn't sign anything confessing your guilt?
- 21 A Not in Saluda County.
- 22 Q Well, when is the first time you told somebody you were guilty?
- 23 A I told 'em when I got locked up in Aiken. Wayne Clark. An officer named Wayne Clark askin'
- 24 me did I do it, make sure I tell the truth, it'd work better for me.
- 25 Q You got arrested in Aiken?

Jerome Rhoads - cross-examination by Mr. Ellisor

1 A Yes, sir.

2 Q Okay. But the robbery happened on October the 11th 2006.

3 A Yes, sir.

4 Q So when were you arrested in Aiken?

5 A On the same day I came to Saluda.

6 Q When?

7 A November 29th.

8 Q Nothin' happened October 11th. November 29th a month later.

9 A That's when I got arrested.

10 Q November 29th.

11 A (nodded yes.)

12 Q Okay. Now what were you arrested for over there?

13 A Somebody called them and told 'em I was over there.

14 Q Somebody called. Okay. And so you were -- when they brought you back from your residence
15 in Aiken, brought you back over here, you didn't -- nobody questioned you about this?

16 A I think -- well, I didn't wrote no statements. Now I think Officer Holloway when he came back
17 from wherever he was.

18 Q Well, Officer Holloway was in Iraq was the earlier testimony. He wouldn't a got back for about
19 6 months.

20 A Well, when he talked to me, that's when I told him. But I ain't never wrote no statement or
21 nothin'.

22 Q Okay.

23 A It was more verbal.

24 Q And when did that your interview with Officer Holloway, when was it? When did he talk to
25 you?

- 1 A I can't remember.
- 2 Q You don't remember.
- 3 A No, sir.
- 4 Q Okay.
- 5 A Cause he brung me a warrant for assault and battery with intent to kill.
- 6 Q Which is what you were arrested for.
- 7 A That was the last one they served me.
- 8 Q You were -- Officer Holloway who's been in Iraq comes back and you get a warrant for assault
- 9 and battery for this incident. Right?
- 10 A Yes, sir.
- 11 Q And he's been gone maybe 6 months and they then wait 6 months to serve a warrant on you?
- 12 A When I got arrested November 29th he came and picked me up in Aiken County, Officer
- 13 Holloway did.
- 14 Q Holloway?
- 15 A Picked me up in Aiken County.
- 16 Q Okay. Now all the evidence is thrown away. Now you saw this tape and you, of course, you
- 17 identified Montavis.
- 18 A Uh-huh.
- 19 Q Okay. And the jury's gonna look at this thing later, but your testimony other than these videos is
- 20 the only testimony connecting Montavis Gaines with this robbery. Right?
- 21 A I reckon.
- 22 Q So it's your credibility on the line. Correct?
- 23 A I reckon so.
- 24 Q And they haven't offered -- you haven't pled to anything yet, have you?
- 25 A No, sir.

Jerome Rhoads - cross-examination by Mr. Ellisor

- 1 Q Okay. And you don't know whatchur gonna get.
- 2 A No, sir.
- 3 Q So they haven't promised you anything.
- 4 A No, sir.
- 5 Q Okay. And you tell your sister that if you didn't testify they were gonna give 30 years.
- 6 A No, sir.
- 7 Q Okay. Now you heard the list of your convictions read off earlier. '97 you were arrested. '96
- 8 you were arrested. 2002 you were arrested. 2002 again you were arrested. You are a career criminal, are
- 9 you not?
- 10 A Well, if you consider me bein' a career criminal--
- 11 Q Well, you've been in jail most of your life.
- 12 A Yes.
- 13 Q And why -- how'd you get back to Sahuda? When did you come back to Sahuda?
- 14 A It was October.
- 15 Q October. And you came back because your relatives had gone over and got you out of a crack
- 16 house?
- 17 A Naw. Naw. I was workin' in Columbia. If you check -- if you go to Columbia and check, I
- 18 never failed a drug test since I been on probation and I had two jobs.
- 19 Q You were stealin' this money because you had to go over to probation in Richland County is
- 20 why you were actually tryin' to steal this money, was it not? You were on probation in Rich -- you were
- 21 on probation in Richland County before--
- 22 A Yes, I was. Yes.
- 23 Q So you had to go over there, did you not?
- 24 A Did I had to go to Richland County?
- 25 Q To Richland County.

1 A Yes.

2 Q You had to pay some fines or what?

3 A Restitution for Saluda County.

4 Q Restitution for Saluda County. Okay. Now this -- you got a 1996 burglary charge. Where was
5 that?

6 A In Saluda.

7 Q Saluda?

8 A '96

9 Q '96. Okay. You can't remember where it was?

10 A It was out in the country.

11 Q Out in the country. Okay. So you have broken into people's houses; you've now gone down --
12 and you don't deny that that's you pointin' that gun.

13 A Naw, but about you bringin' about me breakin' in people house, that's the only burglary charge I
14 ever had, and I didn't break in the house. The door was already open, so I just went in it.

15 Q Okay. That was still you pointin' that gun, wasn't it?

16 A Yes.

17 Q That was not Montavis Gaines, was it?

18 A Naw.

19 Q Okay. So he didn't have a weapon on him, did he?

20 A Naw, he gave the weapon to me. See, Bug gave the weapon to him. He was scared to use the
21 gun. So I used the gun.

22 Q So he did -- Montavis then gave you the gun.

23 A Yes.

24 Q So you the one that went in and brandished this in Mr. Dowdy's face. Right?

25 A Yes.

- 1 Q Did you hit him over the head with it?
- 2 A Yes.
- 3 Q Okay. So how long did that take? On the tape it lasts approximately 60 seconds. And Mr.
- 4 VICTIM or somebody said earlier it was about 5 minutes. I want to know how long that thing lasted.
- 5 A Not long. It was quick and fast.
- 6 Q It was fast. And nobody saw you runnin' out.
- 7 A I said I don't know if somebody saw me runnin' out.
- 8 Q Well, Mr. Long, Terrence Long -- Terrell Long. It's Terrell Long, isn't it?
- 9 A I don't know Terrell.
- 10 Q Well, you mentioned Long as giving you the gun.
- 11 A That's Bug.
- 12 Q Bug.
- 13 A Yeah.
- 14 Q You don't know if his name is not Terrell?
- 15 A I don't know that.
- 16 Q You don't know his name. Bug gave you the gun.
- 17 A (nodded yes.)
- 18 Q Bug. Did Bug go over to Cash Advance with you?
- 19 A No, sir.
- 20 Q Okay. So he just gave you the gun.
- 21 A (nodded yes.)
- 22 Q And y'all went over there. How long have you known Bug?
- 23 A For a long time.
- 24 Q Long time too. So all of these are friends of yours.
- 25 A Yes, sir.

1 Q You're saying that Montavis' grandmother has been good to you. Right?

2 A Yes, sir.

3 Q Okay. And here you are testifying against her son.

4 A Grandson.

5 Q Grandson. Okay. So how long has she taken care of you?

6 A Just about all my life.

7 Q All of your life.

8 A Since I was young.

9 Q Okay. Now does your sister know your reputation for honesty and dishonesty?

10 A I can't really say because well I ain't seen my sister for a long time until--

11 Q Well, you talked with her on the phone yesterday.

12 A But I'm sayin' before then, I hadn't seen my sister since god knows how long since she was like
13 11 or 12 because she was in a group home (phonetic) and I was--

14 Q Would your sister know Montavis Gaines' reputation for honesty and dishonesty? How long
15 has she known Montavis Gaines?

16 Mr. Young: Your Honor, I--

17 The Court: Hold on just a minute. Yes, sir.

18 Mr. Young: Your Honor, I object to the question as to what another witness may know or may
19 not know.

20 Mr. Ellisor: I agree with you. I'll withdraw the question, Your Honor. It was improper. I yield
21 to opposing counsel.

22 Q Who actually came up with the idea to rob the Cash Advance?

23 A Sir?

24 Q Who actually came up with the idea to rob the Cash Advance, you or Montavis?

25 A Montavis.

Jerome Rhoads - cross-examination by Mr. Ellison

- 1 Q So Montavis decided the robbery, and you decided to go along with it.
- 2 A (nodded yes.)
- 3 Q Okay.
- 4 A And I felt like it was a come up so---
- 5 Q You felt like what?
- 6 A A come up.
- 7 Q A cup? What's that?
- 8 A Put money in your pocket.
- 9 Q Put money in your pocket. And how much money -- I believe you said \$250.
- 10 A Yeah, about 250.
- 11 Q There was some testimony earlier it was at least \$1000. But you only got 250?
- 12 A Cause I ain't know how much it was.
- 13 Q Well, when you went back over to the house, you and Montavis didn't count this money?
- 14 A Naw, he just gave me money -- gave money behind [REDACTED] Street, behind Sara -- Ms. Logan
- 15 old house and once we got to [REDACTED], we split direction. I went -- I went to Aiken and I don't
- 16 know where he went.
- 17 Q So after this robbery, you just left.
- 18 A Yes, sir.
- 19 Q Didn't stay around anybody.
- 20 A No, sir.
- 21 Q You went to Aiken with \$250.
- 22 A Yes, sir.
- 23 Q You didn't go back over to Richland County to pay the restitution?
- 24 A No, sir.
- 25 Mr. Ellison: One moment please. I have no further questions, Your Honor.

1 The Court: Redirect.

2 REDIRECT EXAMINATION

3 BY MR. YOUNG

4 Q Mr. Ellisor asked you a lot of questions about your sister talkin' to you about this. Has your
5 family pressured you not to testify against Montavis?

6 A Yes.

7 Q No further questions.

8 The Court: Recross?

9 Mr. Ellisor: None, Your Honor.

10 The Court: Thank you, sir. You may step down.

11 Mr. Young: State rests, Your Honor.

12 The Court: Ladies and gentlemen, I told you when the state rests, I have to confer with the
13 attorneys about some legal matters. This generally takes about 20 minutes. I'll send word to you if it's
14 gonna be longer. Don't discuss the case yet. Please follow the bailiff. (the following occurred in the
15 absence of the jury.) Motions.

16 Mr. Ellisor: Your Honor, on behalf of the defendant, I'd move for a directed verdict based upon
17 the insufficiency of evidence in this case. You have a person who obviously was a participant in the
18 robbery testifyin'. He has stated in these exhibits that the state has given as evidence, he did point to Mr.
19 Gaines supposedly was there, but I don't think that based upon the totality of the evidence, I don't that
20 the state has proven beyond a reasonable doubt that the defendant is guilty of these charges.

21 The Court: There is ample evidence to go to the jury on all causes of action. The motion is
22 denied. Mr. Gaines, I have to go over some things with you now. I have to do this with everybody's on
23 trial whether they're on trial for a traffic offense or murder. I need your responses under oath. Would
24 you raise your right hand please. (the defendant was sworn to tell the truth.) You need to speak up
25 loudly now. We've reached the stage of the trial where the state has rested. And the next thing that I will

1 do is to give your side the opportunity to present evidence for the jury to consider. You understand
2 where we are in the trial?

3 The defendant: Yes.

4 The Court: He said yes. Mr. Ellisor, you need to slide back or he needs to come forward. The
5 problem is she can't see him. I can see him fine. He said yes. But she can't see him. All right. In that
6 regard, Mr. Gaines, if you want to testify, you certainly may testify. If you choose not to testify, I'm
7 gonna tell that jury they cannot hold your silence against you in any way at all. You understand that?

8 The defendant: Yes, sir.

9 The Court: Okay. Now whether you testify or not, you can have other witnesses testify for you.
10 So you and other witnesses can testify or you can just have other people testify and you not testify. You
11 understand that?

12 The defendant: Yes, sir.

13 The Court: Nobody can make you testify. You're in a criminal court. You have an absolute
14 right to remain silent. You understand?

15 The defendant: Yes.

16 The Court: You need to speak up.

17 The defendant: Yes, sir.

18 The Court: Okay. This decision about whether you testify, this is your decision to make and
19 yours alone. You know that?

20 The defendant: Yes, sir.

21 The Court: I expect you might confer with your attorney, your family members or friends or
22 anybody whose opinion you value on important decisions but this is your call to make. You're the one
23 on trial, and you're the one who has to make the decision. You understand?

24 The defendant: Yes, sir.

25 The Court: Does he have a prior criminal record that would subject him to impeachment?

1 Mr. Young: Your Honor, I have provided to Mr. Ellisor a copy of his rap sheet. He has, Your
2 Honor, a juvenile conviction which, if he testifies, and in my opinion and the state would offer, on
3 credibility. His conviction for purpose of impeachment. Which is breaking and entering into an
4 automobile. This occurred in June 8th 2004. There's also a receiving stolen goods. That's in conjunction
5 with the same conviction. We believe both of these would be admissible on the issue credibility as well as
6 petty larceny.

7 The Court: You want to be heard on these, Mr. Ellisor?

8 Mr. Ellisor: No, sir.

9 The Court: All right. Rule 609 provides that the evidence of an accused who's been convicted of
10 a crime shall be admitted if The Court determines that the probative value of admitting this evidence
11 outweighs the prejudicial effect to the accused.

12 It also provides that evidence that any witness that's been convicted of a crime shall be admitted
13 if it involves dishonesty or false statement in regard to the person. In order for the first of those rules to
14 apply, the crime had to carry the possibility of more than a year in jail as punishment. Breaking and
15 entering an automobile carries more than a year in jail as punishment. Receiving stolen goods it depends
16 upon the amount involved. It could be anywhere from 30 days up to 10 years as a maximum punishment.
17 The maximum could be 30 days depending on some offenses. Petty larceny carries 30 days. Receiving --
18 breaking and entering an automobile was not involved -- dishonesty or false statement as it's been
19 interpreted under the laws. Receiving stolen goods and petty larceny would. The crimes also have to
20 have occurred or the ultimate disposition or the last time that the person served any time on the charge
21 would have to have occurred -- time including probationary time -- within 10 years. These are said to
22 have occurred in 2004. If he takes the stand, The Court rules that he can be asked about receiving stolen
23 goods and petty larceny. He cannot be asked about breaking and entering an automobile because The
24 Court cannot find that that is a situation where the prejudicial effect -- I'm sorry -- the probative value
25 outweighs the prejudicial effect to the accused. If you take the stand, Mr. Gaines, what I ruled is that they

1 can ask you if you've previously been convicted of receiving stolen goods, and they can ask you if you've
2 previously been convicted of petty larceny. They cannot ask you specifics of the crime. They can only
3 ask you that question about if you have ever been convicted, if you've been convicted of it on a certain
4 date. And then I will tell the jury that they cannot consider that against you in any way at all except on
5 the issue of your credibility, your believability. They can't use it for any other purpose. You understand
6 all that?

7 The defendant: Yes.

8 The Court: Now the only way they'll be able to ask you about the breaking and entering the
9 automobile is if you open the door for them to ask you in some fashion. You can talk to your lawyer
10 about what I mean about opening the door, but basically the best example I'll give you is the one that
11 occurs most frequently is I will rule that the state cannot ask about a defendant's prior criminal record on
12 something or all of it, and then that defendant get on the stand and say I've never been in any trouble with
13 the law. Well, that's an out and out lie. And that opens the door for them to ask weren't you arrested or
14 convicted and whatnot. You understand what I mean by all that?

15 The defendant: Yes, sir.

16 The Court: Today are you under the influence of anything at all that affects your thinking?

17 The defendant: No, sir.

18 The Court: How long you been in jail?

19 The defendant: 10 months.

20 The Court: Do you suffer from any physical or mental problems that affect your thinking?

21 The defendant: No, sir.

22 The Court: All right.

23 Mr. Ellis: Your Honor, may we take a recess?

24 The Court: We're gonna take a recess as soon as I make these findings. All right. Well, Mr.
25 Gaines, what I'm gonna do is that I'm gonna make a determination that whatever decision you've made

1 about testifying or not testifying that it's free, knowing, voluntary and intelligent. You know your basic
2 rights related to testifying, not testifying, you understand what I'm going to tell that jury as far as the
3 limiting instructions; you know that this is your decision to make and yours alone, and you're clearheaded
4 today and you know what you're doing. So if anybody does attempt to exercise any undue influence
5 over you to get you to testify or not testify, you have to let me know that immediately. You understand?

6 The defendant: (nodded yes.)

7 The Court: Sir?

8 The defendant: Yes, sir.

9 The Court: And whatever decision you make — I don't know what decision you make, but
10 whatever decision you've made right now, if you want to change your mind, you can change your mind
11 until such time as you actually come up here and testify. Once you're on the stand, you're subject to
12 cross-examination. You understand all that?

13 The defendant: Yes, sir.

14 The Court: All right. We're at ease for 5 or 10 minutes. (there was a brief recess) All right. The
15 defense has evidence to present as I understand?

16 Mr. Ellisor: Yes, sir. Correct. We have 2 witnesses.

17 The Court: Bring the jury. Are they in the courtroom now?

18 Mr. Ellisor: I think — they were. (the following occurred in the presence of the jury.) Ladies
19 and gentlemen, the state has rested and the next thing that we will do is to give the defense an opportunity
20 to present evidence for you to consider. Now this doesn't change the burden of proof. The burden of
21 proof is entirely on the state to prove the guilt of the defendant beyond a reasonable doubt. But the
22 defense is given the opportunity to present evidence for you to consider in deciding whether the state has
23 met its burden or has failed to meet its burden of proof. Now the defense apprises me that there are 2
24 potential witnesses for the defense and you are not asked when we did the qualifications yesterday about
25 these individuals, so I'm going to have them stand and ask you a few questions. Which of you is Tonya

1 Kinard? And you're Nicole Rhoads?

2 Ms. Rhoads: Yes.

3 The Court: Thank you. You may be seated. Are any of you on the jury related by blood or
4 marriage, connected by employment, have any connection whatsoever with either of these ladies? If so,
5 raise your hand. Is there anything at all about their involvement in the case that would in any way affect
6 your ability to be a fair and impartial juror in the case? If so, raise your hand. Y'all have any other
7 questions you want me to direct to the jury?

8 Mr. Young: None from the state.

9 Mr. Ellisor: None from the defense, Your Honor.

10 The Court: All right. First witness, please, Mr. Ellisor.

11 Mr. Ellisor: Your Honor, we call Nicole Rhoads to the stand please.

12 The Court: Come around over here to the clerk, please, ma'am.

13 NICOLE RHOADS, BEING DULY SWORN, TESTIFIES

14 AS FOLLOWS:

15 DIRECT EXAMINATION

16 BY MR. ELLISOR

17 Q Ms. Rhoads, if you'd be kind enough to tell us who you are and where you live.

18 A Nicole Rhoads. I live in Saluda, South Carolina.

19 Q Saluda, South Carolina. And you are the brother of Jerome Rhoads?

20 A No. I'm his sister.

21 Q His sister. Thank you. Do you know Jerome Rhoads' reputation as to honesty and dishonesty
22 within Saluda County?

23 A Yes.

24 Q Okay. At -- what is your opinion as to his honest or voracity, ability to tell the truth, credibility?

25 A Poor.

- 1 Q Ma'am?
- 2 A It's not good.
- 3 Q It's not good. Now how do you mean not good?
- 4 A He's a big liar.
- 5 Q He's what?
- 6 A He tell lies. He manipulates you.
- 7 Q Okay. Now in addition to that, you have talked to Mr. Rhoads, have you not?
- 8 A Yes.
- 9 Q What was the last time you talked with him?
- 10 A Last night.
- 11 Q Last night? Did he tell you if he had any bias -- is there any kinda bias concerning his
- 12 testimony?
- 13 A Whatchu mean?
- 14 Q Well, did he tell you that there was -- does he have a motive for the state promisin' him
- 15 anything?
- 16 A He said if he didn't testify against Montavis Gaines, he'd get 30 years.
- 17 Q Okay.
- 18 Mr. Ellisor: No further questions, Your Honor.
- 19 The Court: Cross.
- 20 CROSS-EXAMINATION
- 21 BY MR. YOUNG
- 22 Q You saw him last night?
- 23 A No, I didn't see him; I talked to him on the phone.
- 24 Q Okay. And when you talked to him on the phone, you were upset at him, weren't you?
- 25 A I was upset?

Nicole Rhoads - cross-examination by Mr. Young

1 Q You were upset at him?

2 A No. We was talkin'.

3 Q He was talkin' and you didn't say anything?

4 A Yes, we both was talkin'. He told what he - he said he hadn't made the decision about being the
5 state witness against yet he said it's up to him. And he said that y'all offer him to testify against Montavis
6 or get 30 years.

7 Q Let me ask you a simple question. Did you want him to testify or not testify?

8 A I want him to be honest.

9 Q You do?

10 A Yes.

11 Q No further questions.

12 The Court: Redirect?

13 Mr. Ellisor: No redirect, Your Honor.

14 The Court: Thank you, ma'am. You may step down.

15 Mr. Ellisor: Thank you, ma'am.

16 The Court: Call your next witness.

17 Mr. Ellisor: Okay. We'd call Ms. Tonya Kinard please.

18 The Court: Come around, please, ma'am.

19 TONYA KINARD, BEING DULY SWORN, TESTIFIES AS

20 FOLLOWS:

21 DIRECT EXAMINATION

22 BY MR. ELLISOR

23 Q Ms. Kinard, have you been sworn?

24 The Court Reporter: She has.

25 Q Okay. Do you know Montavis Gaines?

- 1 A Yes, sir.
- 2 Q And how do you know him?
- 3 A My boyfriend.
- 4 Q Your boyfriend. Does he have any kind of -- like stutter or stammering; do you have any
- 5 problems understanding him?
- 6 A Sometimes.
- 7 Q Huh?
- 8 A He stutters.
- 9 Q He stutters. Okay. Does he suffer from any attention deficit disorder?
- 10 A He does.
- 11 Q He does. Okay. Now on October 11th 2006 did you see Montavis that day?
- 12 A Yes.
- 13 Q When? Can you be specific as to how do you know when you saw him and what the
- 14 circumstances were.
- 15 A I was together our bed.
- 16 Q Huh?
- 17 A We was together at my house.
- 18 Q Okay. But what time did that start?
- 19 A About approximately 9:45.
- 20 Q 9:45.
- 21 A In the mornin'.
- 22 Q In the mornin'. Okay. And how long did he stay there?
- 23 A Well, my little boy get outta school about 4.
- 24 Q About 4? So he was there from 9 to 4. Okay. Now you also -- I want to show you some pay
- 25 stubs. How familiar are you with Montavis' --

1 A I used to take him to work.

2 Q You took him to work?

3 A Yes.

4 Q Okay. Now I want to see -- do you recognize--(defense exhibit #14 marked.)

5 Mr. Young: Your Honor, before he shows that information the state would like to have an
6 opportunity to see it.

7 Mr. Ellisor: Okay. Well, I was just gonna have her identify it first before we--

8 Mr. Young: May we address this matter outside the presence of the jury. I think we should take
9 it up outside the presence of the jury.

10 The Court: Ladies and gentlemen, please step in the jury room. Don't discuss the case. (the
11 following occurred outside the presence of the jury.) Yes, sir?

12 Mr. Young: Your Honor, these pay records are being -- have been marked now. And they are
13 now marked by Mr. Ellisor's hand as defense exhibit 14 collectively as defense exhibit 14. And they
14 purport to be some kind of document pertaining to an individual named Montavis K. Gaines. Your
15 Honor, I'm gonna object to any testimony whatsoever regarding these pay records unless he can establish
16 what they are. And she does not -- I don't believe this lady is gonna be able to testify as the custodian of
17 records or be able to testify that these records are what they purport to be.

18 The Court: What do you want to ask her, Mr. Ellisor?

19 Mr. Ellisor: Your Honor, she testified earlier that she had taken him to work and that she had
20 seen these -- she supplied these to me. She had seen these records and she knows the truthfulness -- it's
21 got the amounts that he was paid each week, and I think this would -- I mean it's knowledge that she
22 knows of. Whether -- I mean I don't have to come and have the -- document these payroll records. She
23 has seen 'em. She took him back and forth to work. She's seen these exhibits. She gave 'em to me. I
24 think you gave 'em to me. Or somebody gave 'em to me.

25 A I got them from my house.

Tonya Kinard - direct examination by Mr. Ellis

1 The Court: How is it not hearsay?

2 Mr. Ellis: Because she is familiar with the checks and all that is shown on the payment of this
3 information.

4 The Court: It's hearsay. Go ahead and make your offer of proof. Make your proffer.

5 Mr. Ellis: Okay.

6 Q You -- these right here that's been marked, do you -- how do you know about this exhibit 14?

7 A How do I know about the checks?

8 Q Yeah, how do you know--

9 A He worked third shift at Arnick's. I used to take him to work and pick him up. And when he'd
10 cash a check, he'd bring it to the house.

11 Q Okay. And these are the receipts.

12 A Receipt checks. They got the dates on 'em.

13 Q Okay. And each one of these shows the date that he got paid.

14 A And the last one October the 5th.

15 Q Right.

16 A One on September the 14th I think.

17 Q Uh-huh.

18 A And September the 22nd.

19 Q So you had seen all these. Did you see the checks?

20 A Yes.

21 Q So you actually had firsthand knowledge of the checks.

22 A I knew he was workin'.

23 The Court: I don't know what she said.

24 Q Keep your voice up.

25 A I knew he was workin'.

Tonya Kinard - direct examination by Mr. Ellis

1 Mr. Young: I'm sorry. I didn't understand what she just said either.

2 A I knew he was workin'. I used to take him.

3 Mr. Ellis: I'll tell you what I'll do: I'm gonna withdraw this proffer 'cause I'm just gonna ask
4 her on the stand if she knows he got paid and he was working the day this crime was committed. So I
5 withdraw my—

6 Mr. Young: I don't have an objection to that question.

7 Mr. Ellis: I'm ready to bring the jury back out.

8 The Court: Bring the jury please. (the following occurred in the presence of the jury.) Objection
9 sustained. Go ahead. Well, the issue is withdrawn. I'm sorry. Go ahead.

10 Mr. Ellis: Okay.

11 Q Ms. Kinard—

12 A Yes, sir.

13 Q —where was your boyfriend workin' on October 11th 2006?

14 A He worked at Arnick's.

15 Q Arnick's?

16 A Yes.

17 Q Okay. And has he been paid? Do you know if he was paid?

18 A Yes.

19 Q Okay. From October 11th do you know when he was last paid?

20 A No.

21 Q Okay. So he was — at the time this crime was committed he was—

22 A He was workin'.

23 Q And the reason why he was was that you took him to work.

24 A He worked third shift.

25 Q Third shift. Okay.

- 1 A And he sleep through the day.
- 2 Q Huh?
- 3 A He sleep through the day.
- 4 Q Right.
- 5 A He be in bed.
- 6 Q Okay. Now let's go back to the time this robbery occurred supposedly at 3 o'clock. Now, again,
- 7 tell us where was Mon -- where was Montavis Gaines at 3 o'clock.
- 8 A My home.
- 9 Q He was at your home.
- 10 A Yes.
- 11 Q Okay. And, again, what was the basis for that; how'd you know?
- 12 A Cause we was in bed.
- 13 Q And you had a son that--
- 14 A Got outta school.
- 15 Q Okay. And what--
- 16 A --get up at the time he get off the school bus and open the door for him.
- 17 Q And when did he come home?
- 18 A My baby get off the bus like 15 after 3 every day.
- 19 Q 15 after three. So--
- 20 A Approximately 3:15.
- 21 Q So your testimony is he couldn't have been with Jerome--
- 22 A No.
- 23 Q --Rhoads at that time.
- 24 A Cause my baby could tell you he was there too.
- 25 Q Okay.

Tonya Kinard - cross-examination by Mr. Young

Mr. Ellispr: No further questions, Your Honor.

The Court: Cross.

Mr. Young: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. YOUNG

Q Ma'am, are you testifyin' today under subpoena or did you come here voluntarily? Were you subpoenaed to be here? A piece of paper says you'd be up here?

A I don't know 'cause I hadn't checked my mailbox.

Q You haven't checked your mailbox; you don't have any papers as far as you know?

A I would have to go out there and see.

Q Well, if you don't have a piece of paper, you don't have a piece of paper. Right?

A It might be out there. I just ain't check the mailbox.

Q Okay.

A I think I was subpoenaed; I just didn't check the mailbox.

Q You think you were but you haven't checked.

A I can check my mailbox when I go home.

Q Mr. Ellispr asked you to come and testify. Right?

A Yes.

Q Okay. How long have y'all been boyfriend and girlfriend?

A Goin' on 2 years. December 26, '05.

Q I'm sorry. December?

A 26, '05.

Q December 26, '05. Okay. Now when you -- when did you first find out about Montavis being arrested?

A When I first found out?

1 Q Uh-huh.

2 A I knew it. I was at home. He was walkin' -- he was at the snack bar. I found out right then.

3 Q He was at the snack bar when you found out he got arrested?

4 A Yeah.

5 Q So he got arrested at the snack bar?

6 A No, he got arrested on the back road walkin' in front of the snack bar. Here in Sahuda.

7 Q Okay. So he got arrested as far as you know when, what day?

8 A The 13th. October Friday.

9 Q Okay. When'd you first go see him?

10 A I go see him all the time.

11 Q Okay. How many times have you seen him since this happened?

12 A Montavis? Every time he have a visit. I can't count the times.

13 Q Okay. So you've been there regularly. How much chance you had to talk to him?

14 A Sir?

15 Q How much chance have you had to talk to him?

16 A I didn't get to talk with him lately because they---

17 Q I didn't ask that question, ma'am. Let me ask the question a different way so you understand
18 what I'm asking. How many times have you had a chance to sit down and physically talk to Montavis
19 since October 13th 2006?

20 A We talk all the time. I go to visit.

21 Q So every time you've been to visit.

22 A Yes.

23 Q Okay. And you've known this whole time haven't you---

24 A No way.

25 Q I was fixing to finish my question. You've known this whole time, haven't you, about this alibi

Tonya Kinard - cross-examination by Mr. Young

1 that he was with you on October 11th. Isn't that right?

2 A I knew he was with me then.

3 Q That whole time.

4 A I knew he was with me.

5 Q That's what I'm askin' you. You did know that. Correct?

6 A He was with me.

7 Q The answer is yes to my question or no?

8 A Yes, he was with me.

9 Q All right. So you knew about it and did you go to the police right then on October 13th 2006?

10 A Cause the police---

11 Q Surely -- surely you have gone and talked to Charles Holloway.

12 A I ain't talk to Charles.

13 Q Ma'am?

14 A Charles away.

15 Q That's Charles Holloway.

16 A Yeah, I know Charles.

17 Q You gone and talked to him and told him and told him exactly what was goin' on.

18 A Why should I tell him? They wasn't gonna listen to me. (unintelligible)

19 The Court: I have no idea about 3 fourths of what she said. But I really need to know what she
20 said.

21 A Why should I go and talk to anybody? They wasn't gonna listen to me. That's what I'm sayin'.
22 They don't listen to nobody when you go and talk to them.

23 Q So Montavis Gaines has been in jail this whole time and you've told nobody in law enforcement
24 anything about that.

25 A Why should I -- why I have to tell anyone? I knew he was with me. He knew he was with me.

1 My baby knew.

2 Q So you kept it to yourself

3 A Kept it? Who -- I ain't kept it. His family knew he was with me.

4 Q Ma'am. Ma'am, I asked you you kept it to yourself. This issue, the statement you made he was
5 with me on October--

6 A (unintelligible) what I said--

7 Q You have kept it to yourself

8 A Kept to myself? Whatchu mean?

9 The Court: Have you told anybody else about it is what he's tryin' to ask you.

10 Q Who'd you tell?

11 A My friends, my mama he was with me.

12 Q Friends and your mama. And you would tell them but you wouldn't tell law enforcement?

13 A Why would I tell law enforcement? They don't wanna listen to me.

14 Q Is he held by law enforcement now?

15 A Yes.

16 Q Has he been in jail because of law enforcement?

17 A Yes.

18 Q But you didn't tell them.

19 A No.

20 Q What day of the week is October 11th?

21 A Sir?

22 Q What day of the week is October 11th 2006?

23 A Thursday I think.

24 Q Thursday? What day of the week is the 13th of October 2006?

25 A It was a Friday.

Tonya Kinard - cross-examination by Mr. Young

1 Q Okay. So the 11th is Thursday and---

2 A Wednesday.

3 Q Wednesday. You know when he got arrested, don't you, but you're not sure when he got --
4 what day of the week it was when he got---

5 A I knew both. You tryin' to confuse me.

6 Q No, ma'am. I just asked you when it was. I don't have any further questions.

7 The Court: Redirect?

8 Mr. Ellis: None, Your Honor.

9 The Court: Thank you very much, ma'am. You may step down.

10 A Thank you.

11 Mr. Ellis: Your Honor, that concludes the defense.

12 The Court: Ladies and gentlemen, please, give me your attention. I need to give you an
13 instruction now---

14 Mr. Young: Your Honor, may I interrupt you just briefly. Does the state have an opportunity of
15 rebuttal of any kind?

16 The Court: Yeah.

17 Mr. Young: I'm sorry. I didn't mean to interrupt.

18 The Court: I need to give you an instruction now and emphasize to you that the fact that the
19 defendant in this case elected not to testify is not a factor to be considered by you in any way in your
20 deliberations and in your consideration on the question of whether Mr. Gaines is guilty or not guilty. His
21 decision not to testify must not be considered by you in any manner whatsoever against him. An accused
22 has a constitutional right to remain silent and the assertion of that right cannot and must not be considered
23 by you in any way against him in your deliberations. Under the oath you've taken, you're to reach no
24 inference; you're to draw no conclusions whatsoever from the fact that Mr. Gaines elected not to testify.
25 His decision not to testify should not be discussed by you in the jury room. It should not enter your mind

1 in making your decision. The burden of proof, as I told you repeatedly, is entirely on the state to prove
2 every essential element of each offense charged beyond a reasonable doubt. An accused has no burden to
3 prove anything at all. Does the state have reply or anticipate reply testimony?

4 Mr. Young: We do, Your Honor. If I could take a few moments to figure out exactly when that
5 will occur.

6 The Court: All right. The next step, folks, is that the state is given the opportunity to respond to
7 whatever the defense just brought out, and as soon as they're ready, I'll get you back out here. If it looks
8 like that it's a good time for us to break for lunch, I'll get you back out and break for lunch. Let me see
9 what they have in mind and I'll get back with you. Don't discuss the case yet. Follow the bailiff (the
10 following occurred in the absence of the jury.) All right. What do you anticipate?

11 Mr. Young: Your Honor, we -- Chief Farmer during the course of the testimony by Ms. Kinard.
12 I asked Chief Farmer if he could verify through human resources at Arnick's the employment status of
13 Mr. Montavis Gaines. According to the information I hope to be able to present in the next -- was
14 terminated on October 3rd 2006.

15 The Court: Do you want me to send the jury to lunch or do you want--

16 Mr. Young: I want to check to find out how long it will take to get this person up here.

17 The Court: All right. We're at ease. (there was a brief recess.) I don't know if this is a problem
18 at all. I don't know who actually is doing the talking but there's somebody outside who is talking very
19 loudly. Can probably be heard by the jury and it sounds like that lady that just testified. If she's down
20 there goin' off-- she may be talkin' about the weather for all I know cause I couldn't -- like I said before,
21 I have trouble understandin' her up here. Just nicely move her away from where she is. Court's at ease.
22 (there was a brief recess.) Bring the jury in. (the following occurred in the presence of the jury) All right.
23 Ladies and gentlemen, when you first went out almost as soon as you got out the door, I was told that
24 they thought they could be ready in about 10 minutes. Well, that's obviously not the case. So I have told
25 them that I think the smart thing to do is let you folks go on to lunch. I'll try to handle several different

1 things during this break. There's no sense in you waiting on us back there twice. I want you back at 2
2 o'clock. It's a little bit long lunch break, but I think it's gonna take that long to get everything squared
3 away. So I hope you have a pleasant lunch. I need you back in the jury room at 2 o'clock. You will get
4 the case this afternoon. (there was a lunch recess.) All right. That's a draft of the charge. I want you all
5 to read it over lunch break and I want you to meet me back here at a quarter till 2.

6 Mr. Young: Yes, sir.

7 The Court: Okay? So I need Mr. Gaines back at 2. Thank you.

8 Mr. Young: Thank you, Your Honor.

9 Mr. Ellis: Thank you, Sir.

10 The Court: We're at ease. (there was a lunch recess.) Are there any comments about the
11 proposed draft of the charge? From the state?

12 Mr. Young: Just one moment, Your Honor. No objection. No comments or additions.

13 The Court: All right. the defense have any comments about the draft?

14 Mr. Ellis: About the what?

15 The Court: The draft of the charge.

16 Mr. Ellis: Oh, no, none whatsoever.

17 The Court: Are all the jurors here? We're at ease till the jury is here. (there was a brief recess.)

18 Mr. Young: We're ready, Your Honor.

19 The Court: Defense ready?

20 Mr. Ellis: Defense is ready, Your Honor. Bring the jury in please. (the following occurred in
21 the presence of the jury.) State have reply evidence?

22 Mr. Young: The state has a reply witness, Your Honor. The state would call Ms. Anissa Turner.

23 ANISSA TURNER, BEING DULY SWORN,

24 TESTIFIES AS FOLLOWS:

25 DIRECT EXAMINATION

BY Mr. YOUNG

1 Q Ma'am, where do you work and for how long have you worked there?

2 A I work at Amick Farms. The date of employment was December the 14th of 2000.

3 Q What is your job?

4 A I am human resource manager.

5 Q And as part of your job are you responsible for the record keeping regarding hiring and firing of
6 the personnel?

7 A Yes, I am.

8 Q Are you the custodian of records there for all persons who have worked for Amick's Farms?

9 A Yes, sir.

10 Q Ma'am, do you have records in your possession as to the hiring of one Montavis Gaines?

11 A Yes, I do.

12 Q All right. Does he have an employee number?

13 A Yes, sir, he does.

14 Q What is his employee number?

15 A [REDACTED]

16 Q Okay. Let me hand you what I've had previously marked as state's exhibit #12. I hand you and
17 ask you if you can identify it.

18 A Yes, I can identify this picture. This picture is taken from software from Amick's Farms. It has
19 the employee number on there that would go back to Montavis Gaines who then the employee number
20 relates back to a social security number. So it is a unique number. And that is Montavis Gaines' picture
21 on there.

22 Mr. Young: State would offer state's exhibit #12.

23 The Court: Without objection.

24 Mr. Ellisor: Without objection.

25

Anissa Turner - direct examination by Mr. Young

Mr. Young: Like to publish it to the jury.

The Court: Yes, sir.

Q Ma'am, in connection with your job, do you have information as to when Montavis Gaines was employed? Periods of employment.

A Yes, sir, I do.

Q Do you have records that would indicate whether he was employed during the month of October 2006?

A Yes, I do.

Q What would be the dates he was employed with your business during October of 2006?

A He was employed on October first, second and was then terminated on October the third of 2006.

Q Do you have anything in your records indicating he was ever re-employed after that?

A Not after that, no, sir.

Q So was he employed with your business on October the 11th of 2006?

A No, sir.

Q I have no further questions.

The Court: Cross.

CROSS-EXAMINATION

BY MR. ELLISOR

Q You're the custodian of the records?

A Yes, sir.

Q Okay. I want to show you for identification purposes, is this the payroll records of Amick's Poultry? Amick's Processing? What's the date on that?

A The date on this, the check date is October the 5th for pay period ending October the first.

Q Okay. So and what's the amount on that check?

- 1 A The net pay is \$103.40.
- 2 Q Okay. Now from your records, when would that check have cleared?
- 3 A From when the check would have cleared. I don't have that. All I have, sir, is a list of all his
- 4 checks that were issued, that was the last check issued to him in October.
- 5 Q Okay. So you don't know the conditions of which he left employment. Is there anything in
- 6 records as to why he left?
- 7 A A 3-day no call in. That means 3 consecutive days of not showin' up and not callin' in.
- 8 Q Okay.
- 9 Mr. Ellis: Your Honor, I'd like to have this marked as the last payment record for October.
- 10 Mr. Young: No objection. (defendant's exhibit #14 received in evidence.)
- 11 Q Now, ma'am, you can identify this as the check that -- the records that -- the check for
- 12 Montavis Gaines?
- 13 A Correct. And that check there would've been for the last week work of September.
- 14 Q Last week work of September. But he was terminated on what day?
- 15 A He was terminated on October the 3rd.
- 16 Q So October the 3rd. So he was employed till October the 3rd.
- 17 A Correct.
- 18 Q Okay. Now you don't know if he's worked anywhere else since then. You don't know anything
- 19 about that.
- 20 A I don't know anything about the gentleman.
- 21 Q The only thing you know is you have this record through October 3rd.
- 22 A Correct.
- 23 Q No further questions.
- 24 The Court: Redirect?
- 25 Mr. Young: No further questions.

1 The Court: Thank you, ma'am. You may step down.

2 Mr. Young: The state has no further rebuttal, Your Honor.

3 The Court: All right. Ladies and gentlemen of the jury, just like I had to confer with the lawyers
4 at the close of the state's case originally, I have to confer with them again. I told you I was gonna try to
5 multi-task while you were gone. So we've been over some of the things I need to go over already, but I
6 still have to do this. It shouldn't take long. I need you to step in the jury room. When you come back
7 out, you're going to hear the closing arguments and the law. Don't discuss the case. (the following
8 occurred in the absence of the jury.) Motions.

9 Mr. Ellisor: Your Honor, I would move for directed verdict of not guilty on the fact of
10 insufficiency of evidence in this case.

11 The Court: All right. There is sufficient evidence to allow the case to go to the jury on each
12 charge.

13 Mr. Young: Your Honor, may I have a brief break?

14 The Court: We're gonna take a break. All right. We'll be at ease. (there was a brief recess.)
15 State ready for the jury?

16 Mr. Young: Yes, sir.

17 The Court: Defense.

18 Mr. Ellisor: Yes, sir.

19 The Court: I handed you a draft of the proposed verdict form. The only one I really need to talk
20 to you about is the one for assault and batter with intent to kill because there's a lesser included offense as
21 an option for the jury. Now the way I've always done these verdict forms is I state them in the order that
22 it's most beneficial to the defendant. So the jury could find the defendant not guilty or the jury could find
23 the defendant guilty of the lesser included offense of assault and battery of a high and aggravated nature
24 or the defendant could be found guilty of assault and battery with intent to kill. I usually put those all on
25 one form with those options listed because I think it's less confusing. I think there is some authority if

1 you want it, I have to give a not guilty option on each of the possible verdicts. But I've never had
2 anybody ask for it yet. Do y'all want me to change the verdict form?

3 Mr. Young: The state does not, Your Honor. We're satisfied with the practice you follow.

4 The Court: Defense?

5 Mr. Ellisor: The defense is satisfied.

6 The Court: Thank you. Bring the jury. (the following occurred in the presence of the jury.)
7 Members of the jury, The Court-- this proceeding -- excuse me -- has two more stages that remain
8 before you get the case: the closing arguments and the charge. In these closing arguments you're gonna
9 hear from the attorneys who are not permitted to use the art of advocacy to try to get you to see things the
10 way they'd like you to see them on behalf of their respective positions. It doesn't change the burden of
11 proof. The burden is entirely on the state. Now the way this will work is that defense counsel will make
12 the first closing argument, and then the state's attorney or the prosecutor will make the last closing
13 argument. I always take a break between the closing arguments and the part that I do. It's usually a very
14 short break. Sometimes I take a break between the arguments depending on how long they talk. So we'll
15 play it by ear. So I invite your close attention. Mr. Ellisor, you're recognized for your closing argument.

16 Mr. Ellisor: Thank you so much, Your Honor. Ladies and gentlemen, it's been a pleasure trying
17 this case in front of you. I appreciate your attention to the details. The judge will eventually in several
18 minutes charge you with the forms of the verdict. I was looking at the forms here, and I wanna read a
19 section of the charges that's been approved by both attorneys, and it deals with intent. It says intent is a
20 necessary element however because there must have been a common scheme or design to commit the
21 crime. Okay? Now remember that there must be a common design or scheme to commit the crime. Now
22 let's first go to what the defendant has been charged with. Now let's go to assault and battery with intent
23 to kill. Now you saw Jerome Rhoads point that gun. Now I submit to you that even if Montavis was
24 there, there was no common intent and design to commit the crime of armed robbery. And I leave that
25 with you. Now let's go on to some of these other situations. You've got -- my client has stated that he

1 was not at the scene.

2 Now the state's evidence for his being at the scene -- WITNESS who sits here, she could
3 not identify him.

4 There's been no identification by any of the victims of this crime, and you've seen the tape, and,
5 of course, it can be brought back and you can look at it later if you need refreshment. But there's been no
6 identification of Mr. Gaines being there.

7 Jerome Rhoads obviously was there even though he hasn't been charged or he's been
8 incarcerated, but you're not here passing judgment on him 'cause you don't know what his situation is.
9 His sister told you that if he testified against Montavis Gaines they had promised him 30 years. They may
10 or may not do -- I don't know what -- I mean I don't work for the state so I don't know. But I submit to
11 you that Montavis' (sic) testimony is purchased at a price. In other words, he is buying his freedom
12 because if you look at those pictures and they were dark, but I don't care what Holloway and the other
13 officer said, there is no way a reasonable person could look at those pictures and say that that was
14 Montavis Gaines. I don't -- they're not that proficient in my opinion to know -- to do what is the duty of
15 a jury to decide. Their mannerisms. They don't want -- what they're trying to say is they recognize how
16 he walks, how he ran and the profile of a picture.

17 Well, I submit to you and I was lookin' at it, I couldn't tell you that, but maybe they can because
18 they have expertise as a police officer they can recognize that. But that's not their job. Your job is to
19 look at it and see if you can recognize that that is Montavis Gaines. There's been no testimony other than
20 Jerome Rhoads that Montavis Gaines was even there. Now I don't know who he used to help him rob
21 that, but he obviously robbed that store. He had the gun. There's no question about that. This robbery
22 happened about a minute. Let's go back to the testimony. This crime happened at 3 o'clock on October
23 11th. Now Jerome Rhoads said he was over on -- the neighbor said that Jerome Rhoads theoretically was
24 over at Montavis Gaines' house at 12 o'clock. That's at 12 o'clock. Now if -- and they have -- we have
25 exhibit in here that at 12 I think that's 58:28 so about 1 o'clock. So Rhoads was at the Cash Advance at 1

1 o'clock.

2 Now she's saying that she saw him at 12. So in other words, he would've had to have gone over
3 to Cash Advance, come back and did this. I don't see how he could've been there at 12, Your Honor --
4 Jury, if that's the case.

5 Now at 3 o'clock this robbery occurred. Now you look into the video and I don't think you can
6 recognize that as being Montavis Gaines, any human being could recognize that as being Montavis
7 Gaines. In other words, this whole case is based upon the false testimony of Jerome Rhoads whose sister
8 came in and said she wouldn't believe his credibility, and she'd also said that she'd talked with him and
9 he'd told her what the deal was. That's his only family member. I don't think she would lie about this,
10 ladies and gentlemen. Use your common sense. So we know Jerome Rhoads committed this robbery.
11 He's obviously charged with it. But you don't have any proof. The judge will charge you with
12 circumstantial evidence.

13 Now let's look at the circumstantial evidence. Their testimony is that at 12 o'clock Jerome
14 Rhoads was with Montavis Gaines. But this robbery happened 3 hours after that, ladies and gentlemen.
15 So you don't know if Jerome Rhoads and the other people have been charged with if one of them
16 participated or not. You don't know who did this because the only person we know did it is Jerome
17 Rhoads. You couldn't identify Montavis in any of those pictures. I submit to you you can look at it, it is
18 humanly impossible to identify Montavis Gaines in those pictures.

19 Now they pointed out dark spots on the thing and says that's Montavis Gaines. I just don't
20 think they're that professional enough to recognize somebody's gait and walk and mannerisms and
21 profile and then to come in here and tell you that they have that ability. I don't think any police officer in
22 the world has that ability, ladies and gentlemen. The ones I know certainly I don't think have it. So what
23 the state has now put the burden -- the case -- eventually gonna put it in your hands and you have to
24 decide to believe.

25 Now you can consider the circumstantial evidence, but, again, that circumstantial evidence was 3

1 hours after this robbery. Who is to say that Mr. Long whom they got the gun from, you don't know if
2 Montavis got the gun from him or if he was a participant in it. You don't know what happened in those 3
3 hours. All we know is accordin' to them is you have a neighbor who said they saw these parties together
4 at 12 o'clock, and I forgot him name, it was Ms. Bonham, sweet lady, she come in and said she was told
5 about the robbery an hour later. Well, the robbery she would've said that would've been 1 o'clock. Well,
6 the robbery was actually at 3 o'clock. So I think that information would've been bad. I mean I don't
7 know -- I -- somebody that age, I just don't know how well their faculties are and that they can
8 remember things. All I know is my client's liberty is in your hands, and based upon the evidence that the
9 state has presented, I submit that it is your duty to acquit him because I think -- I submit to you that it's
10 beyond a reasonable doubt. You don't see him on the tape that a reasonable person could identify him as
11 bein' on the tape.

12 Now Montav -- Jerome Rhoads says that's him, but Jerome Rhoads, I submit to you, is a
13 pathological liar. He will do anything to save himself. They have promised him whatever they gonna
14 eventually give him and we don't know and you don't know, but I guarantee you it was purchased at a
15 price of honesty, ladies and gentlemen. Again, it's in your hands of whether Jerome Rhoads can
16 convince you that Montavis Gaines was with him or somebody else was with him.

17 Now has he met that burden of proof that he has convinced you that Montavis Gaines was with
18 him? You heard his testimony. You know, he's got too much to lose in this case -- excuse me -- he's
19 got lots to gain in this trial. So I submit to you that a verdict of not guilty is the appropriate verdict in this
20 case. There was -- again, we go back to there was no -- this armed robbery was -- I mean not the armed
21 robbery, the assault and battery with intent to kill, how could -- even if Mr. Gaines was there, how could
22 he know that Jerome Rhoads was gonna assault with intent to kill 'em? I mean that's not the crime; the
23 crime is robbery. So whoever was with Jerome Rhoads went in there for the purpose of a robbery, not to
24 assault somebody.

25 Now Jerome Rhoads obviously had a gun and he hit him with the gun, but you didn't see

1 Montavis - if it was Montavis Gaines, you didn't see Montavis Gaines hit anybody. He was goin'
2 through money cause it was a robbery. The common scheme and design was a robbery.

3 So I submit to you that the state has failed to meet their burden of proof because they have called
4 the only person they know who did this because he had been in that store earlier. They reviewed the
5 tapes; they found out they knew who he was, so he obviously is guilty and they can prove the case
6 against him, but I submit to you that there is nothing on that tape that shows that Montavis Gaines was
7 there or Mr. Long was there or anybody else. I asked Mr. Rhoads how tall Mr. Long was, and I don't
8 know how accurate his description was, but I don't think it - this gentleman right here, his height and
9 build, I don't think that could compare with my client.

10 So I have submitted a couple of exhibits on these things and I'm satisfied with the testimony of
11 the officer - I mean of the state's witness on these numbers. And, again, that's just my eyes. But we do
12 have onsting here. This is 12 -- about 1 o'clock. That obviously appears to be Jerome Rhoads. So he
13 was there at 12 o'clock. And then according to his testimony he left there and he came back over. Well,
14 if he was there at 1 o'clock, how does Ms. Bonham see him at 12 o'clock? Ms. Bonham's testimony, I
15 don't know, you know, with her age and she was supposedly 60 yards away from 'em. So -- and she
16 said she didn't recognize who Montavis was with at all. So he could've been with somebody else. So
17 there's still no identification of whether Jerome Rhoads was there -- that person or not.

18 So, again, this whole case by the state is circumstantial evidence, ladies and gentlemen, and I
19 submit to you that you have to evaluate that and give a verdict that's favorable to the defendant because,
20 again, there's not one shred of evidence that shows that Montavis Gaines was anywhere in that picture
21 and that anybody saw him. Could've been -- obviously there was a second robber, but you have no
22 proof that that other robber is Montavis Gaines other than Jerome Rhoads' who I submit to you is a
23 pathological liar and will do anything to save his life. I will turn it over to your hands, ladies and
24 gentlemen. The solicitor's office is very persuasive. You have a fine solicitor's team over here. I practice
25 in Lexington and I have the pleasure of coming over to this county. It's a little county, but, again, you got

one of your own here that you have to pass judgment on, and you have to decide if the state has proven its case beyond a reasonable doubt. You have to go back and look at these pictures again and see if you recognize Montavis Gaines. I submit to you that you cannot; I submit to you those police officers could not, and if you don't recognize him, if they can't maintain that circumstantial burden of proof, then it's your obligation to return a verdict of not guilty. Thank you very much.

The Court: Thank you, Mr. Ellisor. Mr. Young, you're recognized for your closing argument.

Mr. Young: Thank you, Your Honor. May it please The Court? On October 11, 2006,

was in his office doin' what he does for a livin'; a man came in with a black shirt with some writing on it or some figures on it, outside, long, black shirt; talked to him for a few minutes about check cashing. Mr. VICTIM explained to him he couldn't do that out of Columbia for him cause he's from Columbia; he doesn't work there. And that man walked out of that business a few minutes later. A couple hours pass; a man comes in the door wearing a black mask; another man follows him. The man wearing the black mask and the other man with a mask and have different shirts on. One's white; one's black. The man in the black shirt has a gun in his hand; his shirt is turned inside out and he can see the writing on the inside of it.

From Mr. Dowdy's perspective he sees a big barrel pointed at him. A gun. He's told to get down. He's struck in the back of the head; his blood flies across the place. He's on the ground. He's telling him where the money is. He can't see what's going on cause he's on the ground. A few minutes later they're gone. About \$1000 was taken. He hits the panic button. He goes in the back. He tells the people in the back what's going on. One of the people in the back WITNESS : WITNESS had been peeking out and she sees essentially the blow to the back of the head and going to the ground that happened to Mr. VICTIM Mr. WITNESS is in the back. He calls 911. He's got a tape machine and a video surveillance machine that he can play back and they look at it. Within a matter of minutes of looking at that video surveillance tape, several things happen. The first thing is that WITNESS identifies Jereme Rhoads. I know him. I sat in this courtroom or stood in this courtroom no further from here to

1 there and looked at his face. That's Jerome Rhoads. That's the man with the gun. Police come in. This
2 officer right, Lt. Arthur Turner, watches the entire tape. Goes through the sequence of the tape in terms of
3 each camera, the angles and the footage. He looks at it and he says I know the walk; I know the
4 mannerisms; I know the way that person does business because of the way he walks and acts and how he
5 looks and his profile. I know who that is. Montavis Gaines. That didn't happen - that didn't happen in
6 November 29th when Jerome Rhoads was arrested. That happened on October the 11th, the day it
7 happened. On that day they knew Montavis Gaines committed an armed robbery. On that day they
8 knew Jerome Rhoads committed an armed robbery. Your Honor, may I approach a second?

9 The Court: Yes, sir. (there was a bench conference out of the hearing of the jury and off the
10 record.) Folks, step in the jury room for a few minutes. Don't discuss the case. (the following occurred
11 in the absence of the jury.)

12 Mr. Young: Your Honor, the purpose of the break was—

13 The Court: Which juror do you think was sick?

14 Mr. Young: The lady right here in front of me. The third one. She was making a motion like she
15 was going to throw up. She kept acting like she might.

16 The Court: Hold a second. I can handle it. Check on the jurors and see if they're all okay. See
17 if any of them are sick.

18 The Bailiff: She says she's not sick, that she was just holding a paper towel to her face because
19 she thought she might have to cough.

20 The Court: Okay. If they're ready, bring 'em back. (the following occurred in the presence of
21 the jury.) You may continue, Mr. Young.

22 Mr. Young: I apologize for the delay. Ladies and gentlemen, at the point in time that Ms. WITNESS
23 and Mr. WITNESS are doing their looking at the video tapes, and Mr. VICTIM is looking at the video tape,
24 Mr. VICTIM doesn't know anybody. Okay? He doesn't know anybody. This lady, Ms. WITNESS
25 has an independent knowledge based upon who she knows, what she sees on that video tape as to who

1 Jerome Rhoads is. She independently knows him.

2 This man right here, Lt. Arthur Turner, is not by himself saying I know who that is. Charles
3 Holloway when this event occurred in October last year, he was in Iraq. He's back in time to take Jerome
4 Rhoads back Sahda, to bring him back from Salda in November, and when Jerome Rhoads comes back
5 after that he looks at that video tape, and he says that's Montavis Gaines. And we're not by ourselves in
6 this event, Your Honor -- ladies and gentlemen. We're in the middle of a very significant series of events
7 which are basically when the truth starts to be told, it starts to fit.

8 Ms. Jamie Mae Bonham has known Montavis Gaines, like Charles Holloway, all his life. I think
9 everyone in this courtroom was impressed by the fact that this lady doesn't want to hurt anybody. She's
10 not out to hurt anyone. She's just tryin' to tell the truth about what she knows. And she saw Montavis
11 Gaines 2 hours before the armed robbery roughly. 2 hours before that saw him with another man. Stocky
12 built fellow. Shorter than me. Shorter than Montavis outside the house that Montavis lived in. Tryin' on
13 some masks with another fellow. Montavis took 'em outta his pocket, gave the other fellow. Jerome
14 Rhoads was a sequestered witness.

15 All these witnesses, Charles Holloway, was sequestered. He doesn't know what they said.
16 Jerome Rhoads was sequestered. He didn't know what Ms. Jamie Mae Bonham knew. When he came in
17 and said that he stood outside Montavis' grandmother's house with him, the house where the
18 grandmother that raised Jerome Rhoads lived, and when he was given a cap to pull over his head, and he
19 had to take a pair of scissors to cut it out. Cut out the eyes; cut out the nose. I wonder if that's
20 significant. It's a minor thing I agree. It's not a huge thing. But you notice him having to pull up the
21 mask. He couldn't see. Couldn't see good. And he had a hard time seein'; had to pull it up to see who
22 you dealn' with; whatchu doin'; what are you doin', you know. Is the coast clear when I'm leavin'. Pull
23 it up and look. Montavis Gaines needed money. Isn't that what Jerome Rhoads said? Yes, sir. Ma'am.
24 That's what he said. Needed money. Needed money.

25 Well, the defense has made something out of this and they had their alibi witness come in and

1 testify that this man was working and had third shift. Somethin' like that I believe. Amick's Farms. And
2 October 11th 2006 was home in bed all day. Well, ladies and gentlemen, you heard from the personnel
3 resource person, human resource manager for Amick's Farms come in here and say that on October 3rd
4 Montavis Gaines was not employed at Amick's Farms. In fact, he'd been layin' out for 3 days. That's
5 why he got terminated. He hadn't even been there for 3 days as of October 3rd. He hadn't been workin'.
6 He needed money. There's your motive. It's not an element of proof, but there you go.

7 Another factor. Jerome Rhoads is a ting. Pure and simple. The man -- I don't have a problem
8 with Mr. Ellisor calling him a career criminal. That's what he is. He's been in more trouble than you can
9 shake a stick at. Think about it though. Who hands the masks over? This is Ms. Bonham talkin' now.
10 Who hands the masks over to the other fellow standing outside Montavis' grandmother's house across
11 the street from Ms. Jamie Mae Bonham? Montavis does that. So Montavis is the one handing over the
12 implements that will be used. What does Jerome Rhoads say they next do? They go to Bug, Jonathan
13 Long, for the gun.

14 Now Jerome Rhoads says you gotta have the materials and the stuff to do it with if you're gonna
15 do an armed robbery, you gotta have it to do a lick. So there you go.

16 Now you can believe it not whether he had the gun loaded. That's pretty self serving. But one
17 thing's quite sure: and you got it on tape. You got him bending over on tape doin' somethin' and his
18 testimony says while I was doin' that I was hittin' that man in the back of the head. That man he's not
19 sure he can -- I think he said Mr. WITNESS was the person he hit in the head. He had that mask on. He
20 couldn't see what he was doin'. But he could see well enough to hit him in the back of the head. And
21 there's the blood. And there's the blood spot on the floor at that #1.

22 The evidence in this case, ladies and gentlemen, is not contrived. It is not made up. It is what it
23 is. It is the case the state has presented to you against a man who used a felon to try to do his deeds, and
24 frankly, ripped him off. Over \$1000 taken, Jerome got 250 for it. He came in here with his witness and
25 tried to convince you I was home in bed with my girlfriend. I was in that bed with my girlfriend all day

1 long cause I work third shift. She's just telling you what she can tell you to try to get him out from under
2 all this. That's completely a lie.

3 Jerome Rhoads is gonna have to face his music and it's coming. Today Montavis Gaines is
4 facing his music. We played the song.

5 We're gonna submit this case to you to go back in that deliberation room and decide the truth. I
6 don't want to beat this to death but, folks, again, I appreciate it. I told you you got drafted to do this. I
7 told you that what you're doing here serves your country. You're doing it just like anybody else does
8 when they take up the banner. It's a hard thing to do. But we don't trust people like me to make that
9 decision. Don't trust anybody to make that kind of decision. Trust you.

10 We ask you to go back into that deliberation room; go through these charges and ask yourself on
11 this day October 11th 2006 was Montavis Gaines in that armed robbery. If you say he was, then that tape
12 demonstrates that those 2 people acted in that room acted together. They acted from the start together.
13 They waited outside for each other to get together and go out. Jerome said let's go. In they went. In they
14 went. The gun comes out; this man gets hit in the back of the head. Where's the money. Where's the
15 money. Jerome's got the gun. Montavis is tryin' to jump around usin' his T-shirt to try to prevent
16 fingerprints from being left somewhere apparently, grabbed the money up and out the door he goes. And
17 you ask yourself a simple question about whether \$253 is all he's got? Jerome Rhoads said to you, I
18 didn't never see him get the money. Look at the tape. He didn't see him get it. He's too busy with him.
19 He's focused on him. In fact, he's almost out the door before you see Jerome Rhoads get up to go out
20 the door with him. And the money's no longer apparent. When the money comes out and it's in his
21 hand and he's goin' past the cash drawer, this cash drawer right here, out the door he goes. Jerome
22 Rhoads is still leaning over pointing at or directed at Mr.

23 Ladies and gentlemen, this man, Lt. Turner, on the day it happened saw the tape and said that's
24 Montavis Gaines in that white shirt. Charles Holloway back from Iraq views the tape and says that's
25 Montavis Gaines. Jerome Rhoads stood on that stand right there -- took that stand right there and said I

1 did it and Jerome Rhoads (sic) was with me start to finish. Ms. Bonham. Ms. Bonham says she views
2 Montavis across the street 2 hours before this happened passing masks. Folks, there's no reason to doubt
3 that. There's no reason not to believe it. Not that many ways, not that many different elements of people,
4 different people talkin' about it independently can come up with a contrived story like that.

5 One last thing. I told you Jerome's a thug. His sister got up here and you got to see her. You
6 got to see her attitude. He's being pressured by his family not to do what he did today. He told you the
7 truth about what he did during this armed robbery, and he told you the truth. Montavis Gaines was right
8 there with him the whole time. Thank you.

9 The Court: Thank you, solicitor. Ladies and gentlemen, I'm gonna send you out of the
10 courtroom for just not more than 5 minutes. I'll bring you back in and give you the law. It's gonna take
11 me about 32 minutes to tell you the law. Don't discuss the case. Follow the bailiff. (there was a brief
12 recess.) (the following occurred outside the presence of the jury.) All right. If anybody outside wants in,
13 they need to come in now. If anybody inside wants out, they need to go out now. During the charge,
14 please, stay still; stay quiet; don't do anything to distract the jury. Absent an emergency, don't be
15 moving around; don't be talking; don't do anything to take their attention off of what I've got to tell them.
16 It's hard enough for them to concentrate on all this anyway. Bring the jury in. (the following occurred in
17 the presence of the jury.) Before I begin, ladies and gentlemen, I want to remind you that those of you
18 who were on the other jury, you're gonna hear a lot of the same thing that you heard before but there are
19 some differences as we go along. So please don't tune me out thinking you've already this. There will be
20 a lot of repetition particularly in the first part, but you need to listen to it just like it's fresh to you. All
21 right.

22 Members of the jury, all the evidence has been presented. You've heard the arguments of
23 counsel. It's now time for me to instruct you on the law that applies to the case. Please continue to pay
24 close attention during this next stage of the proceeding.

25 Now first you need to understand some basic ground rules. You the jury members are the sole

judges of the facts. You decide all the issues of fact. You alone determine the truth of the evidence, its effect, its value and its weight. You alone judge the credibility of witnesses. In other words, whether or not a witness' testimony is believable. In that regard you may believe all that a witness says or none of it. You may believe part of what a witness says and not believe the balance. You may believe one witness against many or many against one. You may consider any interest, bias or prejudice that you feel that the witness has in the case. You may consider the demeanor and the appearance of the witness and the opportunity for knowledge that the witness had. You may consider whether a witness is being consistent or inconsistent. You may consider the lack of evidence presented by the state. But you're not permitted to exercise these considerations arbitrarily. What you need to do is use your sense of logic and reason. Use your sense of logic and reason and your good judgment. Just use your good common sense.

Now it's not proper for me to give you a charge on the facts of the case. I can't discuss the facts with you. I'm not even permitted to convey to you an impression as to what personal opinions I may develop about a case as it goes along. So if during any stage of this trial you have developed an impression that I've got an opinion about the facts, you have to remove that totally from your mind. You're the sole judges of the fact.

Now I am the judge of the law that applies in the case and under your oath you have to accept and apply the laws I give to you. If you've got conflicting ideas about what the law is or what it should be, you have to abandon those. I give you the law; you apply it to the facts as you determine them to be. In that way, you reach your verdict. It's also my job to decide what evidence is admissible. If I've ruled something inadmissible or told you to disregard something, you're not to consider those things in arriving at your verdicts. Base your verdicts on the competent evidence before you. Consider the testimony of the witnesses, the exhibits submitted in the trial and the stipulation of counsel.

Now I remind you and emphasize once again that the fact that the defendant in this case elected not to testify is not a factor to be considered by you in any manner whatsoever in your deliberations and in your consideration on the question of whether he is guilty or not guilty. His decision not to testify must

1 not be considered by you in any manner whatsoever against Mr. Gaines. An accused has a constitutional
2 right to remain silent. The assertion of that right cannot and must not be considered by you in any way
3 against him. Under the oath you've taken, you are to reach no inference; you are to draw no conclusion
4 whatsoever from the fact that Mr. Gaines elected not to testify. You shouldn't discuss that in the jury
5 room. It should not enter your mind in making your decision as to whether he is guilty or not guilty. He
6 has no obligation to prove anything at all. He is presumed innocent. The state has the whole burden of
7 proof.

8 Now as I just said, Mr. Gaines is presumed to be innocent. This is no mere legal theory. It's a
9 fundamental and substantial right to which everyone is entitled. It's been described as being like a robe of
10 righteousness that's placed around an accused and it remains with him through every stage of the trial. It
11 remains after you go back to your jury room to deliberate so that he is presumed to be innocent unless
12 and until you the jury determine that the state has proven him guilty beyond a reasonable doubt. The
13 defendant is not required to prove his innocence. He's not required to prove anything. The burden is
14 entirely on the state to prove the guilt of the defendant beyond a reasonable doubt, and it's required that
15 every essential element of an offense charged is proven by the state beyond a reasonable doubt. That
16 doesn't mean that the state has to prove the guilt of the defendant beyond all doubt or beyond every
17 doubt. The appropriate standard is proof beyond a reasonable doubt.

18 Some of you may have served as jurors in civil court, and if you have, you know that the burden
19 of proof in civil is different. It's a lesser standard. If I have a burden to prove something in civil court, I
20 have to establish that it is likely, that it's probable, more likely than not. We call that the greater weight or
21 preponderance of the evidence. But here in criminal court, the burden is much stronger and the standard
22 is much higher than what we require in civil court. And I've told you over and over, the burden of proof
23 required of the state in these cases is proof beyond a reasonable doubt. So what do we mean by that?
24 Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There
25 are a few things in the world that we know with absolute certainty, and the law does not require proof that

overcomes every possible doubt. If based on your consideration of the evidence you are firmly convinced that the defendant is guilty of a crime charged, then you are to find him guilty of that crime. If on the other hand, you think there is a real possibility that he is not guilty, then you have to give him the benefit of the doubt and find him not guilty as to that charge.

Now there is no obligation on the part of Mr. Gaines to raise any other possibility or create any doubt. He is presumed to be innocent, and the state has to prove that he is guilty to the exclusion of any other real possibility.

I need to explain to you that there are two types of evidence generally presented during a trial. There's direct evidence and there's circumstantial evidence. Direct evidence is evidence of direct perception including testimony of a person who asserts or claims to have actual knowledge of a fact such as an eyewitness.

Now circumstantial evidence is proof of a chain. It's proof of a chain of facts and circumstances indicating the existence of a fact in issue. The law makes absolutely no distinction between the weight or the value to be given to direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. What you need to do is weigh all the evidence in the cases, and after weighing all that evidence if you're not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.

I also need to explain to you something called accomplice liability, and to let you know that a person can be guilty of committing a crime either by perpetrating it himself or by being present and aiding, abetting and assisting in the commission of the crime. This is typically called the hand of one is the hand of all or accomplice liability. Where someone does an act in the presence of and with the assistance of another person, the law considers that the act is done by both of them, and where two or more people acting with a common design or intent to perform a criminal act while present at the commission of the crime, it does not matter who was the one actually performing the act, all are guilty. Intent is a necessary element, however, because there has to have been a common design or intent to

1 commit the crime, and the crime must've been committed pursuant to that common design or intent, and
2 further, the person who is aiding, abetting and assisting in the commission of the crime has to do so by
3 some overt act. The person aiding, abetting and assisting has to be sufficiently near to aid, abet and assist
4 in the commission of the crime. That means they have to be present and sufficiently near to aid, abet and
5 assist in the crime.

6 Another issue you need to understand is that of identification. One of the issues in this case is
7 the identification of the defendant as the perpetrator of the crime either as the direct perpetrator or under
8 the theory of accomplice liability that I just explained to you. The state has the burden of proving the
9 identity of the defendant beyond a reasonable doubt. You have to be satisfied beyond a reasonable doubt
10 that the accuracy of the identification of the defendant as the perpetrator of the crime before you may
11 convict him. Identification testimony is an expression of belief or impression by a witness. Its value
12 depends on the opportunity that the witness had to observe the offender and to make a reliable
13 identification.

14 Now in appraising identification testimony, you must consider the credibility of each
15 identification witness in the same way you do the other witnesses. Consider whether the witness is
16 truthful and whether the witness had the capacity and the opportunity to make a reliable observation of
17 the matter that was covered in his or her testimony. If the identification made had been influenced by the
18 circumstances under which the defendant or his likeness was presented to the witness for identification,
19 then that identification should be scrutinized with great care.

20 Now as you know, folks, there are three separate and distinct indictments in this case. One
21 charges armed robbery; another charges assault and battery with intent to kill, and the other charge is
22 criminal conspiracy. All these indictments allege that the defendant committed these offenses in Saluda
23 County, South Carolina on or about October the 11th 2006. The armed robbery indictment alleges that Mr.
24 Gaines while armed with a deadly weapon, specifically a handgun, feloniously took from the person or
25 presence VICTIM by means of force or intimidation goods or monies of the local Cash Advance

1 in that he threatened with a handgun and took U.S. currency with the intent to deprive the owner
2 permanently of it. The indictment for assault and battery with intent to kill alleges that Mr. Gaines did
3 with malice aforethought commit an assault and battery with intent to kill by striking Mr.

4 in the head with a handgun during an armed robbery. And the indictment for criminal conspiracy
5 alleges that Mr. Gaines willfully and unlawfully united, combined, conspired, confederated, agreed or had
6 a tacit understanding with Jerome Rhoads for the purpose of accomplishing the crime of armed robbery.

7 I caution you once again that an indictment is not evidence. It has no evidentiary value. It's
8 merely the formal means by which someone is charged and brought to trial.

9 All right. At this point I'm going to define for you the offense of armed robbery. The law
10 provides that a person who commits a robbery while armed with a deadly weapon is guilty of armed
11 robbery. So armed robbery is what the name suggests: robbery while armed with a deadly weapon. To
12 establish this offense of armed robbery, the state has to prove beyond a reasonable doubt the following
13 elements: first, that the defendant, Mr. Gaines, either directly or as an accomplice under accomplice
14 liability as I've explained that to you, took and carried away personal property of the local Cash Advance.
15 Second, that he did so with a felonious intent; that is, that he did so willfully with a criminal intent to steal
16 the property, to permanently deprive the owner of it and to convert it to the defendant's own use. Third,
17 that the property was taken from the person or presence of Mr. VICTIM. Now within the presence of a
18 person means to be within his reach, inspection, observation or control so that he could retain possession
19 of the property if he was not overcome by violence or by fear. And, fourth, the taking must've been
20 accomplished with violence or with the threat of violence. And, fifth, the defendant either directly or
21 through an accomplice acting under the principles of accomplice liability as I explained those to you was
22 armed with a deadly weapon while performing the robbery. The state has to prove to you that a deadly
23 weapon was used to obtain possession of the property either by violence or by facing the victim -- I'm
24 sorry -- by placing the victim in fear of violence.

25 The state has to prove all those necessary elements beyond a reasonable doubt in order for you

1 to find the defendant guilty of armed robbery.

2 Now I'm going to turn to assault and battery with intent to kill. First I need to explain to you
3 some general things about these terms of assault and battery. Most people associate the term assault as a
4 striking or a hitting of someone. Actually, the terms are broader than that and it's not the assault, but the
5 battery that is the unlawful touching of another person. A battery is any touching of another person
6 unlawfully in a rude, insolent or angry manner. The actual touching can be flesh to flesh or it may be by
7 some instrument that's put in motion by the perpetrator. So if the battery is the unlawful contact, the
8 unlawful touching, what is the assault?

9 The term assault refers to the threat to commit the battery. Now the threat does not have to
10 involve any words being spoken. It may be communicated through actions or by posture, but to
11 constitute an assault, there has to be a present ability to carry forth with the unlawful touching. In other
12 words, the perpetrator has to be sufficiently close to the victim to carry out the battery.

13 Now there are various levels of assault and battery, and here the state charges Mr. Gaines with
14 committing assault and battery with intent to kill. Assault and battery with intent to kill has four elements.
15 It's an unlawful act of violent injury to the person of another accompanied by malice aforethought.
16 Unlawful act of violent injury to the person of another accompanied by malice aforethought. So let's go
17 over those four elements individually. The state has to establish to you beyond a reasonable doubt that
18 the defendant committed an unlawful act. An unlawful act means that the act was not justified, nor was it
19 warranted under the law. The second necessary element is that the conduct must've involved a violent
20 injury. You should give to those terms violent and injury their plain and ordinary meaning. Now while
21 violent injury is a necessary element of assault and battery with intent to kill, it is not necessary that the
22 conduct has to result in serious bodily injury. The third necessary element is that this must've occurred to
23 the person of another, and here: And, finally, the assault and battery must've been
24 accompanied by malice aforethought. Malice is an essential element of assault and battery with intent to
25 kill. The malice has to be aforethought, that is, thought of just before and at the time the blow was struck.

1 It's not required that the malice exist for any particular length of time, but it has to exist in the mind of the
2 accused just before and at the time of the commission of the act.

3 Now what does malice mean? Malice imports wickedness, and it excludes any just cause or legal
4 excuse. Malice is something that springs from depravity, from a heart devoid of social duty and fatally
5 bent on mischief. It does not necessarily import ill will toward the specific person injured, but signifies
6 rather a general malignancy towards and a recklessness for the life and safety of another or a condition of
7 the mind that shows a heart without regard to social duty, is fatally bent on mischief. There must have
8 been a combination of this evil intent, this malice, existing aforethought and the act that produces the
9 battery.

10 Now, obviously, malice is a state of mind. The state has to prove malice by direct evidence or
11 circumstantial evidence or a combination of both. If you deem it appropriate, malice may be inferred
12 from the use of a deadly weapon, but this inference is evidentiary only, and it's to be considered by you,
13 if at all, only along with all the other evidence in the case and given such weight, if any, that you decide it
14 should receive.

15 Now the law recognizes that certain crimes include within them lesser crimes. They're called
16 lesser included offenses. Assault and battery with intent to kill has within it the lesser included offense of
17 assault and battery of a high and aggravated nature. So in evaluating the charge of assault and battery
18 with intent to kill, you may consider the lesser offense of assault and battery of a high and aggravated
19 nature. Malice is not a required element for the lesser offense of aggravated assault and battery, but
20 malice can exist even in the lesser included offense. So the presence or the absence of malice alone will
21 not determine whether the offense is the greater crime charged: assault and battery with intent to kill, or
22 the lesser included offense: assault and battery of a high and aggravated nature.

23 Assault and battery of a high and aggravated nature has 4 elements also. The first three are the
24 same: an unlawful act of violent injury to the person of another. The fourth element is: accompanied by
25 circumstances of aggravation. As I told you, malice is not a required element for this lesser offense, but in

1 order to prove the defendant guilty of assault and battery of a high and aggravated nature, it's required
2 that the state has to prove to you that one or more of the circumstances of aggravation were present
3 during the assault and battery.

4 So what are the circumstances of aggravation? The law recognizes several. And they include the
5 infliction of severe bodily injury, the intent to commit a felony, the purposeful infliction of shame and
6 disgrace, and the use of a deadly weapon or a dangerous instrumentality.

7 So to recap about assault and battery: assault and battery with intent to kill is an unlawful act of
8 violent injury to the person of another accompanied by malice aforethought. There's a lesser included
9 offense of assault and battery of a high and aggravated nature. It's an unlawful act of violent injury to the
10 person of another accompanied by one or more circumstances of aggravation.

11 And, finally, I need to talk to you on the charges about conspiracy. In a separate indictment the
12 defendant is charged with criminal conspiracy. A conspiracy is an agreement between two or more
13 persons to do an unlawful act or to do a lawful act by unlawful means. The essence of conspiracy is the
14 agreement. A conspiracy is a separate and distinct criminal offense. In order to prove the defendant
15 guilty of criminal conspiracy, the state has to prove to you beyond a reasonable doubt that the defendant
16 conspired and agreed in advance with the other person named in the indictment who commits the offense
17 of armed robbery. The state has to show to you that the defendant was a party to the conspiracy and that
18 he intentionally participated in the conspiracy with a view and a purpose to further the common design.
19 The defendant and the other alleged conspirator must've intended to act together for their shared view to a
20 benefit within the scope of the conspiracy that's charged. In determining whether a conspiracy existed,
21 the jury should consider the actions and the declarations of all the alleged participants; however, in
22 determining whether a particular defendant was a member of a conspiracy, the jury should consider his
23 acts and statements only. In order to be a member of a conspiracy, one does not have to have full
24 knowledge of all the details of the proposed wrongdoing.

25 Now we're getting close. We've got about 2 minutes. One of the issues in this case relates to

1 alibi. Alibi means elsewhere, that the defendant was not present and could not have committed the crime.
2 There is no burden on the defendant to prove that he was elsewhere. It is the burden of the state to prove
3 beyond a reasonable doubt that the defendant was not elsewhere, but that he was, in fact, present at the
4 scene of the crime and actually participating in it. If the state has failed to prove to you beyond a
5 reasonable doubt that the defendant was at the Local Cash Advance business on the date in question and
6 at the time and place and participated in the crimes alleged, then you must find him not guilty. The state
7 must prove that the defendant committed the crime either by his own conduct or by being present at the
8 scene and aiding, abetting and assisting in the commission of the crime.

9 The final thing I have to tell you about the law is that the defendant is entitled to every reasonable
10 doubt arising in the entire case and in any defenses that are asserted. If upon any issue of fact essential to
11 a conviction you have a reasonable doubt as to how that should be resolved, you have to resolve that in
12 favor of the defendant. If you have a reasonable doubt as to whether the defendant is guilty of a greater
13 crime charged or a lesser included offense, you have to give him the benefit of the doubt and find him
14 guilty only of the lesser offense, but you cannot find him guilty of any offense, greater or lesser, unless
15 you're satisfied that the state has proven all the essential elements of that offense beyond a reasonable
16 doubt. If upon reviewing the entire case you have a reasonable doubt as to whether the defendant has
17 been proven guilty of a particular charge, he is entitled to that doubt and a verdict of not guilty on that
18 charge. If on the other hand, after reviewing the entire case you're satisfied that the state has proven every
19 essential element of a charge against this defendant beyond a reasonable doubt, it is equally your duty to
20 find him guilty on that charge.

21 Now that's the law.

22 Folks, when you go back to your jury room to decide the case, cases, you're going to have with
23 you the exhibits that have been admitted in the trial and these verdict forms. On these verdict forms
24 you're going to tell us your decisions.

25 Now there are three separate ones, one for each indictment. So there's one for the armed

1 robbery indictment; there's one for the criminal conspiracy indictment; there's one for the assault and
2 battery with intent to kill indictment.

3 Now I'm gonna go over these with you, and I'm supposed to tell you that you are not to infer
4 from the order in which I state these that I'm suggesting anything to you. I've gotta say one thing first,
5 one thing second and so on. You will see that in bold letters it states which charge you're considering.
6 This one reads as to the charge of criminal conspiracy, we the jury find the defendant -- and you have
7 two options. You may find him not guilty or you may find him guilty of criminal conspiracy. This
8 verdict form deals with the charge of armed robbery. As to that charge it reads we the jury find the
9 defendant -- again, you have two options. You may find him not guilty, you may find him guilty of
10 armed robbery. The third verdict form is as to the charge of assault and battery with intent to kill. On this
11 one you have three possible forms of verdict. You may find the defendant not guilty, you may find him
12 guilty of a lesser included offense of assault and battery of a high and aggravated nature or you may find
13 him guilty of assault and battery with intent to kill.

14 Mr. Foreman, part of your job is gonna be to record the verdict for me. I think you'll find it's
15 self explanatory. These sheets are pretty easy to read, to follow. Just check the response, responses
16 chosen by the jury, and there's a signature line on each form. Sign your name on the signature line.

17 Ladies and gentlemen, how you go about your deliberations, how you go about taking your
18 votes is all in your discretion subject to this requirement: your verdict must be unanimous; all 12 of you
19 must agree before the foreman can record a verdict. You cannot do anything to change the requirement
20 that the verdict be unanimous.

21 Okay. In just a few minutes I'm gonna send you back into the jury room, but you can't discuss
22 the case yet. The law says that I have to go over with the attorneys what I just told you, and the reason
23 for that is just common sense. We don't want you back there deciding the cases using the wrong law. I
24 gave this printout to them. I finished it last night, printed it out, brought it with me this morning and gave
25 it to them before we broke for lunch, met with them before you got back and we've already discussed

1 this. But the truth is I never read the thing verbatim. As a matter of fact, I see that I had several errors in
2 there in the draft that I corrected when I said it. But sometimes I say things and don't even realize it. So if
3 I said something wrong, they have to be given a chance to point it out to me. But here's the signal you
4 need to look for: if I'm satisfied with what I told you, I will send in these three verdict forms and all the
5 exhibits that have been admitted in the trial. The bailiff will bring the two alternates out. When it's the 12
6 of you in there by yourselves and the door is closed, you start talking about the case. You don't have to
7 wait another second. When you have reached your verdict, knock on the door. The bailiff will respond to
8 your knock.

9 Now, folks, that security camera video is on a computer hard drive, and there are reasons I won't
10 go into 'em as to why it's still on the hard drive. So if you want to view any of that, you just send word
11 to me and I'll have the person who can operate it show it to you, but it has to be out here in the
12 courtroom. I can't send anybody in there with you to do that during your deliberations. I'm sorry about
13 that, but I've inquired into it. There's reasons why it's not done; there are reasonable reasons. But if you
14 need to see any of it, you let me know. We'll bring you back out and show it to you out here. Okay?
15 Thank you very much for your attention. You may retire to the jury room. (the jury retired to the jury
16 room at 3:25 p.m.) State for the record exceptions, additions, objections to the charge. From the state?

17 Mr. Maye: None from the state, Your Honor.

18 Mr. Ellisor: None from the defense, Your Honor.

19 The Court: Thank you very much. Check the verdict forms; check the exhibits. When you're
20 satisfied, send those in by the bailiff, please. (the alternate was dismissed by The Court.) (the following
21 occurred sometime later.) I've been advised the jury has the verdicts. I don't know what the verdicts are.
22 Whatever they are, you need to stay still and stay quiet. Don't show signs of approval or disapproval of
23 the verdicts. Don't shake your head in agreement or disagreement. Don't show anything to demonstrate
24 to the jury your approval or disapproval of the jury's verdicts. Bring them in. (the jury returned to the
25 open courtroom to render its verdict at 3:55 p.m.)

1

The defendant: Yes, sir.

2

The Court: Good Inok.

3

Mr. Ellis: Thank you, Your Honor.

4

*****endoftranscript*****

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Certificate

I, the undersigned, smokey perry, do hereby certify that the foregoing is a true and accurate transcript to the best of my ability and skill.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

1 State of South Carolina) In the Court
 2 County of Saluda) Of Common Pleas

3
 4 Docket No: 2009-CP-41-0176

5
 6 Montavis Gaines,)
 7 Petitioner,)

8 vs.)

Transcript of Record

9
 10 State of South Carolina,)
 Respondent.)

11
 12
 13 January 31, 2012
 Lexington, South Carolina

14
 15
 16 B E F O R E:

17 The Honorable Eugene C. Griffith, Jr., Judge.

18
 19 A P P E A R A N C E S:

20 Richard R. Gleissner, Esquire
 Attorney for the Applicant

21 Kaelon E. May, Assistant Attorney General
 22 Attorney for the Respondent

23
 24
 25 Brenda J. Sigwald, Circuit Court.
 P.O. Box 206, Jackson, South Carolina 29831

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1 THE COURT: All right. What do we have this
2 morning, Ms. Maye.

3 MS. MAYE: May it please the Court, Your Honor.
4 The first case we'd like to call is Montavius Gaines v.
5 State. It's case number 2009-CP-41-0176. Do you want to
6 bring Mr. Gaines...

7 MR. GLEISSNER: Please.

8 MS. MAYE: If you could have Mr. Gaines come over
9 here and sit with his attorney.

10 This case comes from an application filed by Mr.
11 Gaines on November 6th, 2009. Mr. Gaines was indicted for
12 armed robbery, criminal conspiracy, and assault and battery
13 with intent to kill.

14 He underwent trial pursuant to which he was found
15 guilty on July 24th, 2007; and Judge Keesley sentenced Mr.
16 Gaines to an aggregate period of twenty years on the
17 charges. A notice of appeal was filed on his behalf and
18 the Court of Appeals subsequently affirmed his conviction
19 and sentence by an order dated September 1st, 2009.

20 At this time I'll let Mr. Gleissner expand upon his
21 claims.

22 THE COURT: All right, Mr. Gleissner.

23 MR. GLEISSNER: May it please the Court. I'm Rick
24 Gleissner. I'm here on behalf of Mr. Gaines. We're here
25 on Mr. Gaines' original application; and then I

1 supplemented that application. Here is his original
2 application, Your Honor. And here is my second amended
3 application. There you go, Your Honor.

4 And I -- I'm going to apologize to the Court up
5 front. I'm going to apologize to the Court because this
6 is -- although I've been a practicing attorney for a while,
7 this is my first ever post conviction relief trial; And my
8 understanding is that the Court needs a copy of the
9 transcript of the criminal trial under --

10 THE COURT: I've got it.

11 MR. GLEISSNER: You have one?

12 THE COURT: I've got it.

13 MR. GLEISSNER: Here's one, Judge, just in case we
14 refer to it. And then Your Honor, here's some excerpts
15 from it that I included in my -- in my application. And
16 then, Your Honor, I think one of the issues at hand relates
17 to a -- we've alleged that one of the reasons to reverse
18 this was because of a ineffective assistance of counsel or
19 prosecutorial misconduct based upon a deal that was between
20 the State and a codefendant by the name of Jerome Rhodes.
21 And with the Court's permission, I will hand up to the
22 Court a transcript of his guilty plea.

23 So Your Honor, basically, we are here claiming
24 ineffective assistance of counsel and prosecutorial
25 misconduct in the trial of the case -- this is a -- it was

1 a criminal trial held out in Saluda in 2007. Basically,
2 the testimony was that two men entered into a Cash Advance
3 out in Saluda. The two men, one was Jerome Rhodes. He
4 admitted to being one of the men. He admitted to being the
5 gun-yielding one of the armed robbers; and during the
6 testimony identified my client, Mr. Gaines, as the person
7 in the ski mask. It was video-taped surveillance, but the
8 ski mask was never removed. There was testimony by Mr.
9 Rhodes that that individual was Mr. Gaines; and then the
10 only other testimony during that matter was, two police
11 officers testified that they were able to recognize Mr.
12 Gaines based upon his mannerisms because the entire dealing
13 was with Mr. Gaines.

14 And we're -- we're claiming that in fact, Mr.
15 Rhodes had a deal, although he denied it. In the closing
16 argument of the prosecutor, the prosecutor emphasized the
17 fact that Mr. Rhodes was a -- let's see, I think he called
18 him a thug and that he would get his day in court and that
19 the jury was just responsible for Mr. Gaines. Mr. Rhodes
20 was a thug and that he was going to get his day in court
21 later, but that Mr. Gaines' day in court was today.

22 So, Your Honor, we are alleging, basically, that
23 the testimony of the police officers' attorney was
24 ineffective because he failed to object to the inference
25 that there were prior bad acts; and Your Honor if you look

1 at the Court of Appeals' ruling in this matter, the Court
2 of Appeals looked at that and said evidence of prior bad
3 acts is not admissible to prove the defendants -- but that
4 in fact, that issue was not preserved on direct appeal.
5 And so we are raising that issue here today in post
6 conviction relief.

7 Let's see. So those are our two primary things:
8 Prosecutorial misconduct, ineffective assistance of counsel
9 because of the lack of discovery of the deal that was made
10 with Mr. Rhodes -- I mean, yeah, with Mr. Rhodes for his
11 testimony. And then the second is as relates to allowing
12 the prior bad acts to be inferred without objection by the
13 attorney.

14 THE COURT: All right.

15 MR. GLEISSNER: All right.

16 THE COURT: Very well. All right.

17 MS. MAYE: If I may, Your Honor, briefly?

18 THE COURT: Yes, ma'am.

19 MS. MAYE: We had counsel appointed for Mr. Rhodes
20 prior to his testimony here today and -- which is Mr.
21 Jessie Near (phonetic), and Judge McMahon signed the order
22 appointing, it looks like January 19th; And it was not
23 filed with the clerk; it was given to the clerk yesterday
24 so we could appoint an attorney. I just wanted to bring it
25 before the Court that this has not been officially filed.

1 It has been signed by Judge McMahon.

2 MR. NEAR: Judge, I received notice of the order
3 yesterday afternoon. I've had a chance to look at the file
4 and I spoke with Mr. Rhodes and I'm fine proceeding. It's
5 my understanding, I was appointed just for the limited
6 purpose of advising him for the purpose of his witness
7 testimony today. So with that being said, I don't want
8 that -- the failure to clock that order in or have a
9 clocked copy of the order to hold up the proceeding, you
10 know, entirely.

11 So with the Court's permission, I'm fine to proceed
12 as if it's an order that's been issued and it will at least
13 be clocked in perhaps today or whenever.

14 THE COURT: So you have notice of your
15 representation by appointment of Mr. Rhodes. Mr. Rhodes
16 now met with you short -- briefly?

17 MR. NEAR: Yes, Judge.

18 THE COURT: All right. Well, being so appointed,
19 if you deem it appropriate, you can advise your client at
20 the appropriate time.

21 So we'll move forward.

22 MR. NEAR: Thank you, Judge.

23 MR. GLEISSNER: May it please the Court, we would
24 call Jerome Rhodes to the stand.

25 THE COURT: All right. Come forward, be sworn, and

Jerome Rhodes - Direct Examination by Mr. Gleissner

1 have a seat.

2 THEREUPON,

3 JEROME RHODES,

4 after being duly sworn, testified as follows:

5 THE CLERK: Have a seat and state your name for the
6 record.

7 THE WITNESS: State my name? Jerome Rhodes.

8 DIRECT EXAMINATION

9 By Mr. Gleissner:

10 Q Mr. Rhodes, My name is Rick Gleissner. We've never
11 met, have we?

12 A No, sir.

13 Q Thank you. And we've never spoken?

14 A No, sir.

15 Q We don't correspond; is that right?

16 A No, sir.

17 Q All right. You entered into the Cash Advance in
18 Saluda back in 2006, and you committed an armed robbery; is
19 that right?

20 A Yes, sir.

21 Q And you were, in fact, the gentleman in the video
22 tape in the back that was actually holding the gun; is that
23 right?

24 A Yes, sir.

25 Q All right. Now, even though you were the gentleman

Jerome Rhodes - Direct Examination by Mr. Gleissner

1 holding the gun, and -- let me -- I'm going to hand you --
2 with the Court's permission, I'm going to hand you a copy
3 of your guilty plea.

4 MR. GLEISSNER: Is that okay, Your Honor?

5 THE COURT: Yes, sir.

6 MR. GLEISSNER: All right.

7 By Mr. Gleissner:

8 Q Now, that's a copy of your transcript of record of
9 your guilty plea -- the guilty plea that would have took
10 place in October of 2008. Do you remember that?

11 A Yes, sir.

12 Q And they dismissed the assault and battery of a
13 high and aggravated nature against you; is that right?

14 A Yes, sir.

15 Q And they dismissed the armed robbery against you;
16 is that right?

17 A Yes, sir.

18 Q And they dismissed the civil conspiracy against
19 you; is that right?

20 A Yes, sir.

21 Q And they allowed you to plea for --

22 THE COURT: Civil conspiracy?

23 MR. GLEISSNER: -- simple -- I'm sorry, criminal
24 conspiracy; I apologize, Your Honor.

25 Again judge, I'm new at this. In my world, it's

Jerome Rhodes - Direct Examination by Mr. Gleissner

1 civil conspiracy. I understand that it's criminal
2 conspiracy here, Judge.

3 THE COURT: There's no jail time for civil
4 conspiracy.

5 MR. GLEISSNER: I apologize, Your Honor.

6 By Mr. Gleissner:

7 Q And they allowed you to plead guilty to just simple
8 robbery; is that right?

9 A Yes, sir. Common law.

10 Q Common robbery, okay. And you got --

11 THE COURT: That would be strong armed robbery?

12 THE WITNESS: Yes, sir.

13 THE COURT: Okay.

14 By Mr. Gleissner:

15 Q And you got four years?

16 A Yes, sir.

17 Q And you actually got time served; is that what you
18 got?

19 A Yes, sir.

20 Q All right. And you're in jail now because of a
21 crime you committed after you got out; is that right?

22 A Now?

23 Q Yeah.

24 A Yeah, I caught four crack charges.

25 Q Okay. All right. Now, when you testified at the

Jerome Rhodes - Direct Examination by Mr. Gleissner

1 criminal trial of Mr. Gaines, okay, prior to your
2 testimony, had the police -- had they threatened you with
3 thirty years in prison?

4 A The police?

5 Q Yes.

6 A Yes. The police did that, yes.

7 Q Yes. And did they say -- did they give you an
8 incentive to testify as it relates to Mr. Gaines being the
9 other person in the store?

10 A No, I mean, could you explain that a little better
11 for me?

12 Q They encouraged you to testify that Mr. Gaines was
13 the other person in the store that was committing the
14 robbery?

15 A I can't --

16 THE WITNESS: I'm going to plead the fifth on that,
17 Your Honor.

18 THE COURT: Okay.

19 MR. NEAR: Judge, if I may, it's my understanding
20 from speaking with Mr. Rhodes that he intends to invoke his
21 Fifth Amendment Rights as to any questions that he believes
22 are incriminating or could later be incriminating. Just
23 wanted to clarify that that's what he's intending to do.

24 MR. GLEISSNER: So --

25 THE COURT: All right.

Jerome Rhodes - Direct Examination by Mr. Gleissner

1 THE WITNESS: As far --

2 THE COURT: You can claim the Fifth Amendment right
3 at whatever time you'd like.

4 THE WITNESS: Yeah, that's what -- I mean, just as
5 far as certain questions, that's it.

6 By Mr. Gleissner:

7 Q That's fine. The last time I learned anything
8 about the Fifth Amendment was when I was in law school and
9 that was many, many years ago, so I'm not going to contest
10 your right to the Fifth Amendment.

11 All right. Now, in your trial testimony, you
12 testified that you did not have a deal with the police or
13 prosecutors. Now, that's what you testified to?

14 A Yes. I mean, I testified to that. I had no deal
15 with the solicitors or nothing like that, I only knew what
16 the officer -- what the police officer said, that was it.

17 Q Okay. So did you have a deal with the police
18 officers?

19 A I mean, as far as to testify on him?

20 Q Yeah, to testify.

21 A Nah, they was just saying different things, that's
22 it.

23 Q They were just telling you that if you didn't
24 testify that you were going to get put away for a long
25 time?

Jerome Rhodes - Cross-Examination by Ms. Maye

1 A Yes.

2 Q And if you did testify, that you wouldn't get put
3 away for a long time?

4 A Sort of, that's basically -- yeah. Pretty much.

5 Q Now, you testified that it was Mr. Gaines that was
6 in the Cash Advance store with you. That's what you
7 testified to. The guy in the video tape that never took
8 off his mask, that was Mr. Gaines?

9 A That's what I testified in court, yes, sir.

10 Q Was it Mr. Gaines that was in the store with you?

11 A I'm going to plead the fifth to that, too.

12 MR. GLEISSNER: I beg the Court's indulgence.
13 That's all I have, Your Honor, thank you.

14 THE COURT: Okay. Cross?

15 CROSS-EXAMINATION

16 By Ms. Maye:

17 Q Mr. Rhodes, so is your testimony here today that
18 you did not have a deal with the solicitors prior to
19 testifying at Mr. Gaines' trial?

20 A No, I ain't never had no deal with the solicitors;
21 I just went on by what the police officer was telling me at
22 the time.

23 Q Okay. But the solicitors never made a deal with
24 you prior to your testimony at trial?

25 A No, sir -- no, ma'am.

Montavis Gaines - Direct Examination by Mr. Gleissner

1 Q No more questions. Thank you?

2 THE COURT: You may step down.

3 MR. GLEISSNER: May it please the Court? We would
4 call Montavis Gaines.

5 THE COURT: All right. Come forward, be sworn, and
6 have a seat.

7 THEREUPON,

8 MONTAVIS GAINES,
9 after being duly sworn, testified as follows:

10 THE CLERK: Have a seat and state your name for the
11 record.

12 MR. NEAR: Your Honor, it's okay that we excuse Mr.
13 Rhodes from testifying; isn't it?

14 THE COURT: He's excused.

15 MR. NEAR: All right. Thank you, Your Honor.

16 DIRECT EXAMINATION

17 By Mr. Gleissner:

18 Q Mr. Gaines, could you go ahead and state your name
19 for the record?

20 A Montavis Gaines.

21 MR. GLEISSNER: Your Honor, before Mr. Gaines
22 testifies, I know he's embarrassed by it, but in my
23 discussions with him I've noticed that he has a --
24 sometimes a significant stammer, a speech defect, and I
25 just wanted to notify the Court and just beg the Court's

Montavis Gaines - Direct Examination by Mr. Gleissner

1 indulgence if he starts and stops and starts and stops
2 and -- you know, it's just a speech impediment that he's
3 had for a long time.

4 THE COURT: All right. We'll be patient with him.
5 In court, testifying's a little bit nervous, I understand
6 that.

7 By Mr. Gleissner:

8 Q Mr. Gaines, would you start off by telling the
9 Court the nature of the criminal trial that you were
10 involved in?

11 A It was a violent crime. I was charged with armed
12 robbery, assault and battery with intent to kill, and
13 criminal conspiracy.

14 Q Okay. And this armed robbery occurred where?

15 A In a Cash Advance in Saluda County.

16 Q And at the trial, tell the Court about -- there
17 were two masked men that they entered the location?

18 A Yes, sir.

19 Q Okay. And one of the men had a gun; is that right?

20 A Yes, sir.

21 Q And in trial, who admitted to having the gun?

22 A Jerome Rhodes.

23 Q All right. And in your intention -- the first
24 problem that you had is with the testimony of Lieutenant
25 Turner and Lieutenant Holloway; and could you tell the

Montavis Gaines - Direct Examination by Mr. Gleissner

1 Court what you believe is the problem with the testimony of
2 Lieutenant Turner and Lieutenant Holloway?

3 A Yes, sir. Counsel presently -- when Lieutenant
4 Turner with the Saluda Police Department testified that
5 they would ID me from bad dealings. See trial transcript
6 page 106, line 14 through 16, without objection.

7 And Lieutenant Holloway also with the Saluda Police
8 Department testified that he had no more than life. See
9 transcript page 110, line 18 through 19, without objection.

10 The case was improbable and bolstered for two
11 police officers against testimony without objection of any
12 kind. Prior to Lieutenant Turner's testimony, the judge
13 held an in-camera hearing. The officers both made
14 statements about my past. The judge told them they had to
15 be very careful. See transcript page 101, line 21 to page
16 102, line 2.; for the evidence of prior crime or other bad
17 act is not admissible to prove my guilt for the crime
18 charged unless the prior bad act meets the expectation of
19 trial.

20 Although, Lieutenant Turner testified he had
21 contact with me in the past because of two prior -- or
22 prior bad acts.

23 Q Okay. So these two police officers, Lieutenant
24 Turner and Lieutenant Holloway testified that the man in
25 the mask in the video tape was you; is that right?

Montavis Gaines - Direct Examination by Mr. Gleissner

1 A Yes, sir.

2 Q And they were able to testify to that because they
3 said in their testimony that they had prior dealings with
4 you; is that right?

5 A Yes, sir.

6 Q All right. And you believed that by testifying to
7 that prior dealing with you, those police officers were
8 inferring that those prior dealings with you were because
9 of your prior bad acts and criminal behaviors; is that
10 right?

11 A Yes, sir.

12 Q All right. And your attorney didn't object to that
13 testimony?

14 A No, sir, he did not.

15 Q And he didn't ask for a period of instructions to
16 the jury to say that you shouldn't infer any prior bad acts
17 because of these police officer's dealings with Mr. Gaines;
18 is that right?

19 A Yes, sir.

20 Q All right. So no objection, no period of
21 instructions, he just let them testify; is that right?

22 A Yes, sir.

23 Q Now, there was a video of the masked men; is that
24 right?

25 A Yes, sir.

Montavis Gaines - Direct Examination by Mr. Gleissner

1 Q All right. Now, did the masked men ever take their
2 masks off?

3 A Mr. Rhodes did.

4 Q Okay. So Mr. Rhodes took his mask off?

5 A Yes, sir.

6 Q But the other guy never took his mask off?

7 A No, sir.

8 Q So these officers were just testifying about what
9 they saw in the video tape?

10 A Yes, sir.

11 Q Okay. Did your attorney object to them testifying
12 about what they saw in the video tape?

13 A No, sir, he did not.

14 Q Okay. Did he go through the video tape and ask
15 them what peculiar mannerisms this second person had that
16 allowed them to identify that second person as you?

17 A No, sir.

18 Q Okay. Can you tell the Court what problems you had
19 with the use of this video tape?

20 A Counsel's failure to argue the admission of the
21 video tape per South Carolina Rules of Evidence 403, as the
22 video tape was not at all able to defeat me as a
23 possible existence, that a reasonable person could ID me by
24 a video tape. The tape was prejudice to me and Counsel
25 allowed the police officers to testify that they had -- I

Montavis Gaines - Direct Examination by Mr. Gleissner

1 meant, that they -- Lieutenant Turner and Lieutenant
2 Holloway had contacted me back and Lieutenant Holloway had
3 not gains or the like.

4 Counsel failed to -- he failed to enter to
5 objection the video tape at the time it was entered into
6 evidence as required by the South Carolina Rule of Evidence
7 103. See transcript page 59, line 11 through 15.

8 Since the admission of the video tape was not
9 objected to, this prejudiced me going on trial; and failure
10 to object allowed Lieutenant Turner and Lieutenant Holloway
11 to imply that I had other bad acts from dealing with the
12 police in violation of Rule 404(b) State v. Lyle. The
13 police was able to infer prior criminal conduct by
14 testifying they recognized me in the video tape, which is
15 impossible, by stating he had prior contact with him.
16 Trial counsel should have objected to the video tape at the
17 time it was offered into evidence. I also, due to -- also
18 due to Counsel not objecting, the issue was not preserved
19 on direct appeal.

20 Q Now, you had a problem with another witness that
21 testified that she saw you trying on masks; is that right?

22 A Yes, sir.

23 Q Okay. And could you tell the Court what the
24 problem was with that testimony?

25 A Counsel failed to enter an objection to Ms. Johnny

Montavis Gaines - Direct Examination by Mr. Gleissner

1 Mae Varne's verbal statement, reduced to a written
2 statement by Chief Foreman that was inconsistent to her
3 testimony that she saw me trying on masks the day of the
4 robbery. When the prior statement was made, she claimed
5 she saw me trying masks on a Saturday. This prior
6 inconsistent statement could have been used to impeach her
7 credibility as to which she saw us on Saturday trying on
8 masks. She was not credible to the defense. She had
9 testified in trial no masks were seen on Saturday which is
10 a prior inconsistent statement taken by Chief Foreman would
11 have been relevant to impeach her credibility and her
12 ability to recall events. See trial transcript page 120,
13 line 22 through 24.

14 And at this time, Your Honor --

15 Q Wait -- wait. Let me -- let me --

16 MR. GLEISSNER: We're going to offer this into
17 evidence.

18 (WHEREUPON the attorneys were conferring over an
19 exhibit.)

20 MS. MAYE: No objection.

21 MR. GLEISSNER: May it please the Court? I'd like
22 to have this marked as Plaintiff's Exhibit No. 1.

23 THE COURT REPORTER: Petitioner's?

24 MR. GLEISSNER: I'm sorry, Petitioner's; I thought
25 I was a Plaintiff there for a second. I hope I never have

Montavis Gaines - Direct Examination by Mr. Gleissner

1 to do this again.

2 By Mr. Gleissner:

3 Q All right. Let me hand you, Mr. Gaines, what's
4 been marked as Petitioner's Exhibit No. 1. Is that the
5 prior written statement of Ms. Bonham that you're referring
6 to in your testimony?

7 A Yes, sir.

8 Q All right. And the highlighted part there in red,
9 is that the inconsistent part of her statement?

10 A Yes, sir.

11 Q All right. And your problem is that your attorney
12 never objected to her testimony concerning the trying on of
13 the masks; is that right?

14 A He never -- he never -- No statements of evidence
15 that were inconsistent with what she -- what she testified
16 in the trial.

17 Q So in the trial, she testified that she saw you
18 trying masks on Wednesday --

19 A On the Saturday.

20 Q Well, in that statement, she says that she saw you
21 trying on the mask on Saturday; is that right?

22 A Yes, sir.

23 Q So trial, Wednesday; that statement, Saturday; is
24 that right?

25 A Yes, sir.

Montavis Gaines - Direct Examination by Mr. Gleissner

1 Q And your trial attorney didn't use that statement
2 in cross-examination?

3 A No, sir.

4 Q All right. Now, before the trial started, were
5 there any problems with your appearance before the jury?

6 A Yes, sir.

7 Q Okay. Can you tell the judge what the problem was
8 with your appearance before the jury before the trial
9 started?

10 A Counsel failed to object during a jury selection
11 pretrial motion. The jury were allowed to see my in leg
12 irons. See trial transcript page 55, line 23 through 24.
13 The trial counsel failed to object to me being brought
14 before the jury -- and jury selection while wearing leg
15 irons. This is identified in transcript page -- line 22
16 through 24. This is a legal -- this is a legal error and I
17 was prejudiced by the jury having -- my right to a fair
18 trial.

19 Q So the jury got to see you wearing shackles and leg
20 irons?

21 A Yes, sir.

22 Q All right. All right. Now, let's talk about
23 that -- the videotape and the testimony of Mr. Rhodes. The
24 guy in that videotape, I guess Mr. Rhodes testified that he
25 was the guy in the videotape that was wielding the gun,

Montavis Gaines - Direct Examination by Mr. Gleissner

1 right?

2 A Yes, sir.

3 Q And I guess he testified that he was allowed to
4 just plead guilty to common robbery; is that right?

5 A Yes, sir.

6 Q All right. So -- all right. Let's see. Did you
7 have a problem with the way the prosecutor handled Mr.
8 Rhodes during the -- during his testimony?

9 A Yes, sir.

10 Q All right. Tell the Court what the problem with
11 the evidence about Mr. Rhodes. Tell the Court what the
12 problem is with that.

13 A Jerome Rhodes had been offered a deal to testify
14 against me in exchange for reduced charges in exchange for
15 reduced charges. The State failed to disclose under State
16 versus Kemp. It should have been disclosed that this could
17 be used to impeach Jerome Rhodes in pursuant to Rule 608(c)
18 South Carolina Rule of Evidence. The State failed to
19 disclose Jerome Rhodes plea bargain -- would not allow him
20 the opportunity to feel guilty until he had testified
21 against me.

22 This here -- they allowed the State to come come
23 clear and given to Mr. Rhodes in exchange for his testimony
24 until after I was convicted. This was a violation of my
25 Fifth and Sixth Amendment of the United States

Montavis Gaines - Direct Examination by Mr. Gleissner

1 Constitution.

2 Q Okay. Was there evidence presented at trial by the
3 prosecution that Mr. Rhodes did not have a deal?

4 A Did not have a deal?

5 Q Did not have a deal.

6 A No, sir.

7 Q Okay. Did they solicit Mr. Rhodes to testify as it
8 relates to a deal or not a deal?

9 A Yes, sir.

10 Q All right. And what did Mr. Rhodes say in response
11 to those questions?

12 A He didn't have a deal.

13 Q All right. Do you -- do you know what happened to
14 Mr. Rhodes after the trial?

15 A Yes, sir. Mr. Rhodes -- Mr. Rhodes received four
16 years for strong armed robbery -- four years for strong
17 armed robbery -- the State -- his criminal conspiracy was
18 non process and the assault and battery to kill was non
19 process, as well as the State -- it was signed by Solicitor
20 Frank Young.

21 THE WITNESS: And I would like to give that exhibit
22 two, three, and four, Your Honor.

23 MR. GLEISSNER: All right. Let me -- let me get
24 a copy -- let me see what you got here. All right. Thank
25 you, Mr. Gaines.

Montavis Gaines - Cross-Examination by Ms. Maye

1 With the Court's permission, I'm going to show the
2 sentencing sheet to...

3 (WHEREUPON there was discussion about the exhibit.)

4 MR. GLEISSNER: Your Honor, this is the sentencing
5 sheet for Mr. Rhodes, and we're going to have that marked
6 as Petitioner's 2. Your Honor, we would move into evidence
7 Petitioner's 1 and Petitioner's 2. I think there's not an
8 objection to that.

9 THE COURT: Ms. Maye, do you have any objection to
10 either of these exhibits --

11 MS. MAYE: No, Your Honor.

12 THE COURT: -- coming in.

13 MS. MAYE: No, Your Honor.

14 THE COURT: All right. They're both in.

15 (WHEREUPON Petitioner's Exhibits 1 and 2 were
16 entered into evidence.)

17 MR. GLEISSNER: Thank you, Mr. Gaines. Please
18 answer any questions that the prosecution might have.
19 Thank you.

20 **CROSS-EXAMINATION**

21 By Ms. Maye:

22 Q Mr. Gaines, with regards to Lieutenant Turner and
23 Lieutenant Holloway's testimony that you mentioned earlier,
24 did they ever testify to any prior criminal acts?

25 A No -- yes, they were basically testifying they had

Montavis Gaines - Cross-Examination by Ms. Maye

1 a dealing with me since I was a -- since I was a juvenile
2 when I was about 15 or 16 years old; and that -- they had
3 gave the jury the impression that they -- that the jury --
4 they assaulted my character before I went to trial.

5 Q Okay. But on Lieutenant Turner's testimony on page
6 106 at lines 12 through -- 12 on down, he testified to --
7 that he's only seen you around town, that he's had contact
8 with you, correct?

9 A Yes, ma'am.

10 Q He didn't specifically mention that he's arrested
11 you or that he's had any -- or had any dealing with you
12 with regard to a prior bad act.

13 A That going -- going in-camera hearing, the judge
14 had warned them about the past dealing with me. He had
15 made it clear to them about that, but the judge said, he
16 still testified that he had past dealings with me.

17 Q Okay. And the jury never heard the in-camera
18 testimony, correct? They were out?

19 A Excuse me?

20 Q The in-camera testimony you just mentioned, the
21 jury was out and in chambers, right?

22 A Yes, ma'am.

23 Q Okay.

24 MS. MAYE: I have no further questions.

25 MR. GLEISSNER: Nothing further, Your Honor.

Montavis Gaines - Cross-Examination by Ms. Maye

1 THE COURT: Okay. You may step down.

2 THE WITNESS: I have one more thing question before
3 I step down, Your Honor.

4 MR. Gleissner: Okay. You've got one more thing you
5 want to say?

6 THE WITNESS: Yeah.

7 MR. GLEISSNER: Did I screw up and miss a question?

8 THE WITNESS: Yes, I believe you was to question
9 about the opinion testimony -- about Lieutenant Turner and
10 Holloway.

11 MR. GLEISSNER: The expert opinion testimony?

12 THE DEFENDANT: Yes.

13 MR. GLEISSNER: I'm sorry Mr. Gaines. I skipped
14 that question because of a recent supreme court ruling, so
15 we're skipping over that questions, but thank you.

16 We're not getting into -- okay.

17 Your Honor, originally in my -- in the petition, we
18 alleged that the testimony by Mr. Turner and Mr. Holloway
19 was expert opinion testimony, you know, based upon -- and
20 it should have been objected to based upon expert opinion
21 testimony, but there was a case that came out of the South
22 Carolina Supreme Court that said that wasn't an opinion --
23 it's not expert testimony that a person -- a lay person can
24 testify based on past experience with a particular witness.

25 So that's where the confusion lies and so that's

Montavis Gaines - Cross-Examination by Ms. Maye

1 the reason why -- the supreme court ditched our argument on
2 that and so we -- we don't have and argument there. Okay?

3 It's -- I mean, it's a court of appeals case, the
4 State versus Gerald Phipp (phonetic). So that's the reason
5 why we're not going to -- we don't need this judge to hear
6 that argument, but thank you. Is that okay?

7 THE WITNESS: Yeah. I would like to bring to the
8 Court and my attorney's attention that I am entitled to a
9 ruling upon these issues 17-27-80; and I asked my attorney
10 to file a 59(e) motion that the State brought a
11 dismissal...

12 MR. GLEISSNER: Okay. All right. I'll do that.
13 Hopefully we won't have to file a 59(e) motion. Hopefully
14 the prosecutors will have to file a 59(e) motion. But if
15 we come to that point, I'll do it. Okay?

16 THE WITNESS: All right.

17 MR. GLEISSNER: Your Honor, could I have Mr.
18 Gaines ---

19 Mr. Gaines, can you come back here? I may need
20 your help with the next witnesses.

21 THE COURT: He knew the transcript better than all
22 of us.

23 MR. GLEISSNER: He's got -- he's got -- well, he's
24 had more time than we have.

25 Thank you, Mr. Gaines.

Ervin Maye - Direct Examination by Ms. Maye

1 Your Honor, the Plaintiff rests -- I mean the
2 Petitioner rests. Thank you, Your Honor.

3 MS. MAYE: Your Honor, the State would like to call
4 Ervin Maye.

5 THE COURT: All right. Come forward, be sworn, and
6 have a seat.

7 THEREUPON, .

8 ERVIN MAYE,
9 after being duly sworn, testified as follows:

10 THE CLERK: Have a seat and state your name for the
11 record, please.

12 THE WITNESS: My name is Ervin Maye; I'm an
13 assistant solicitor for the 11th Judicial Circuit.

14 DIRECT EXAMINATION

15 By Ms. Maye:

16 Q Okay. That was my first question, where are you
17 employed.

18 How long have you been employed at the solicitor's
19 office?

20 A Since 1994 and since 1996, I've been managing
21 McCormick, Edgefield, and Saluda counties for Solicitor
22 Myers.

23 Q And do you recall a case that you worked on,
24 Montavis Gaines v. State?

25 A I do.

Ervin Maye - Direct Examination by Ms. Maye

1 Q Okay. Do you recall in preparation for that case
2 any plea negotiations with his codefendant, Jerome Rhodes?

3 A I have reviewed the transcript, and also from my
4 memory on dealing with this case, we did not have any plea
5 negotiations or agreements with Mr. Rhodes prior to him
6 testifying against Mr. Gaines.

7 I have been in the prosecutor's office since '94; I
8 can only recall one occasion where we had any specific plea
9 negotiations with someone prior to testifying in a case
10 that I tried with Solicitor Myers in McCormick County about
11 1995. It has been my policy throughout the time that I
12 have been in managing McCormick, Edgefield, and Saluda, I
13 don't make plea negotiations or specific as to time on any
14 cases, I don't allow any law enforcement officers to do so.

15 Lieutenant Turner and Lieutenant Holloway were
16 involved in this case. They knew that specifically our
17 policy was that the only thing that law enforcement is able
18 to say to any defendant is that they will inform us of any
19 cooperation, but they're not authorized to extend any
20 offers as to time, as to leniency, as to anything; that
21 they are only able to advise the defendant that they will
22 inform us of any cooperation and let us make the
23 appropriate decisions.

24 Jerome Rhodes was not promised anything prior to
25 his testimony. Mr. Young was also involved in a case, he

Ervin Maye - Direct Examination by Ms. Maye

1 and I both were involved to my knowledge of any dealings
2 that we had together, no one in our office was authorized
3 to offer him anything or hope or reward or any specific
4 deal as to time. And it was not done.

5 Q And I believe it's the Applicant's Exhibit 2, the
6 statement by Ms. Bonham.

7 MS. MAYE: May I approach, Your Honor.

8 THE COURT: Yes.

9 By Ms. Maye:

10 Q Exhibit 1, I'm sorry, excuse me. Mr. Maye, was
11 this turned over to Mr. Ellisor in discovery or would you
12 have --

13 A You know, Mr. Young dealt with Mr. Ellisor
14 directly. He tried the case directly, I assisted him in
15 helping and managing some of the witnesses; but we always
16 turn over anything that's in our custody to the defense and
17 if it was something that was in our custody, it was turned
18 over to the defense.

19 MR. GLEISSNER: And Your Honor, we'll stipulate
20 that was given to Mr. Ellisor. We're not saying that he
21 didn't get that.

22 THE COURT: All right.

23 MS. MAYE: May I approach, Your Honor.

24 By Ms. Maye:

25 Q And Mr. Maye, do you recognize on Exhibit No. 2 the

Ervin Maye - Direct Examination by Ms. Maye

1 signature of the solicitor on the sentencing sheet for
2 Jerome Rhodes?

3 A Yes, this is Assistant Solicitor Al Ergle who at
4 that time was assigned here in Lexington County. I think
5 in every term of court since I started in 1994, I can only
6 remember being out one term of court for an illness and I
7 had had surgery and Mr. Ergle came and assisted us in
8 running pleas; but all he did was put the pleas up that had
9 been negotiated, so he would have had no direct knowledge
10 of any of the events of this case and the only thing he did
11 was assist us in running guilty pleas during that term.

12 So he certainly didn't make anybody any plea
13 negotiations or do anything. He wasn't even involved in
14 the case at the front end. He came only during that term
15 of court. Had no involvement in any of the events that
16 would have proceeded the testimony in this trial the week
17 of July 24th, of 2007. He was in no way involved in that
18 whatsoever. He merely put that plea up after the fact.

19 But like I said, there were no deals offered to Mr.
20 Rhodes prior to him pleading -- or prior to him testifying.
21 We worked all of that out afterwards and he had no promise
22 or no hope of reward prior to testifying. He didn't know
23 what was going to happen to him so far as what we were
24 seeing. When he testified that he didn't have any deal
25 with the prosecutors, that was absolutely true because he

Ervin Maye - Direct Examination by Ms. Maye

1 had not -- we had not discussed it with him nor had we
2 authorized anybody else to discuss that with him.

3 Q Okay. With regards to -- Mr. Gaines has made the
4 allegation that Lieutenant Turner and Lieutenant Holloway
5 in their testimony testified to prior bad acts. Do you --
6 in your review of the transcript, do you see any testimony
7 of prior bad acts of Mr. Gaines?

8 A Absolutely not. Mr. Ellisor is an experienced
9 trial counsel. He had been practicing far longer than I
10 had at the time that we tried this case. The officers in
11 this case merely stated that they knew him. In fact,
12 Officer Holloway stated that he'd known him all his life.
13 Charles Holloway is from the area and it was clear from his
14 testimony that he had known him his entire life. Neither
15 of the officers made any implication in any regard that any
16 prior dealing that they had with him was in any way related
17 to any criminal activity.

18 I reviewed their testimony; we talked with them
19 about it beforehand. We had an in-camera hearing. They
20 were both specifically advised, if you had any dealings
21 with him of a criminal nature, don't talk about that in any
22 regard. Neither one of them said anything and there was no
23 testimony before the jury in any regard that even eluded to
24 any criminal activity on the part of Mr. Gaines. They
25 merely stated that they knew him, that they had seen him

Ervin Maye - Direct Examination by Ms. Maye

1 around town and it was no implication from either of the
2 officers that it had anything to do with any criminal
3 activity.

4 And Mr. Ellisor is an experienced lawyer; he
5 addressed that prior to the jury coming in and in-camera
6 hearings. He made sure that there would be no possibility
7 that the officers inadvertently could even do that. And
8 like I said, there was no way that the jury would be able
9 to draw at any conclusion that it was anything other than
10 innocent. I mean both of them just said that they knew him
11 from around town.

12 Q I have no further questions at this time. Thank
13 you.

14 A Oh. One thing that I did note in here is the only
15 time that this defendant ever came before the jury -- or
16 came into the courtroom with any leg irons or chains was in
17 an in-camera hearing. The jury was never allowed to see
18 him with any chains.

19 Mr. Ellisor, like I said, was an experienced trial
20 attorney. He thoroughly cross-examined the witnesses in
21 this case. He made sure that he was not before the jury
22 with leg irons on and our office endeavored to make sure
23 that he was not in front of the jury with leg irons. The
24 only reference to that in this transcript is during an
25 in-camera hearing.

Ervin Maye - Direct Examination by Ms. Maye

1 Q And you just stated that Mr. Ellisor worked with
2 y'all's office to ensure that he wasn't before the jury
3 in --

4 A Absolutely. We talked about it. In fact, the only
5 reference is there -- they picked up on the transcript here
6 during an in-camera testimony the judge asked, is the
7 defendant in custody? Mr. Ellisor responded back, yes,
8 he's in leg irons. But he was not brought before the jury
9 in any regard. That was during a pretrial hearing outside.
10 It was in camera outside the presence of the jury and like
11 I said, those matters were addressed by Mr. Ellisor. And
12 Mr. Ellisor additionally as an experienced lawyer, I think
13 he exercised pretty wise strategy. The more that -- if he
14 had attempted in any regard to cross --

15 MR. GLEISSNER: I'm sorry, Your Honor, I've got to
16 object to the hypothetical speculation of strategy on the
17 part of Mr. Ellisor.

18 THE COURT: It's sustained.

19 MR. GLEISSNER: This witness can't testify as to
20 someone else's strategy. Thank you, Your Honor.

21 MS. MAYE: I have nothing further.

22 THE COURT: Any questions?

23 MR. GLEISSNER: Yes, Your Honor, I have a few
24 questions.

25 ///

Ervin Maye - Cross-Examination by Mr. Gleissner

CROSS-EXAMINATION

1
2 By Mr. Gleissner:

3 Q As it relates to Mr. Ellisor, prior to the hearing,
4 he had some car troubles; isn't that right?

5 A No. If he had car trouble back in 2007, I couldn't
6 tell you, that would be outside -- I have a hard time
7 remembering if I had car trouble in 2007; I couldn't tell
8 you about Mr. Ellisor.

9 Q So when you read the transcript, you didn't read
10 the part of the transcript where he's encouraging the
11 completion of the trial to be within one day because he's
12 got to go pick up his car because it's at the mechanic's
13 shop?

14 A I didn't read this transcript in it's entirety. I
15 reviewed a little bit of it while we were sitting in the
16 courtroom, but I have not read it in its entirety.

17 Q All right. That's fair enough. All right. So as
18 it relates to the testimony of the police officers, did Mr.
19 Ellisor ask for a period of instruction to make sure that
20 there wouldn't be any inference of criminal conduct or
21 criminal bad acts based upon police officers' previous
22 contact with Mr. Gaines?

23 A No, but that would have been foolish to do so. It
24 would have only drawn attention to what was otherwise a
25 very innocuous statement on the part of the officers.

Ervin Maye - Cross-Examination by Mr. Gleissner

- 1 Asking for a period of instruction under those
2 circumstances would have put before the jury that there was
3 a possibility that the dealings that they had with them
4 were other than innocent. And I wouldn't have expected him
5 to; and he did not do so.
- 6 Q Okay. So in your opinion, that would have been a
7 foolish strategy for him to do?
- 8 A Absolutely.
- 9 Q All right.
- 10 A It would have just been like an exclamation point
11 behind it. Like I said, there was no way from what the
12 officers had said that it would have been before the jury
13 that their past dealings with him were criminal to have
14 asked for an instruction specifically that they were not to
15 draw that conclusion. I would have said it would have been
16 an exclamation point to that.
- 17 Q All right. So -- all right. Let's talk about Mr.
18 Rhodes and his testimony. Did you do the closing
19 arguments?
- 20 A No, I did not. Mr. Young did. Mr. Young tried
21 this case in its entirety. I helped him. I was in and out
22 of the courtroom. I assisted him with witnesses. I
23 assisted him with the jury draw and was in and out of the
24 courtroom during the time that he tried the case.
- 25 Q All right. And you testified that the prosecutor's

Ervin Maye - Cross-Examination by Mr. Gleissner

1 office to your knowledge did not have any deal with Mr.
2 Rhodes; is that right?

3 A Absolutely not. They did not. We did not have any
4 specific deal, nor was anyone else authorized in any regard
5 to convey to Mr. Rhodes in any way that he had any deal.
6 And we spoke with the law enforcement officers about that
7 prior to trying the case; and like I said, no one ever
8 brought to my attention that there had ever been any
9 promise to him or any hope of reward. And in fact, Mr.
10 Gaines himself testified during the trial that he had no
11 deal prior to that time and specifically refuted that.

12 Q Okay. And -- now, you obviously -- I mean, you can
13 only testify based upon your personal knowledge, and you
14 have no knowledge of what the police officers talked
15 directly to Mr. Rhodes about, do you?

16 A No. If I wasn't present, it was outside of my
17 presence. No. But I know that I talked with them and
18 spoke with them directly and asked them and they
19 specifically told me that they had not. Mr. Gaines
20 confirmed that with his sworn testimony during the trial
21 that no one had promised him anything in exchanged for his
22 testimony.

23 Q Okay. And were you there during the closing
24 arguments when -- were you there during the closing
25 arguments when Mr. Rhodes was specifically discussed by the

Ervin Maye - Cross-Examination by Mr. Gleissner

1 prosecutor?

2 A I've read the closing arguments. As to whether or
3 not I was in the courtroom at that time, I can't recall
4 whether or not I heard the closing arguments in the case or
5 not, but I looked a little bit at the closing arguments out
6 of the transcript.

7 Q Okay. So did Mr. Ellisor object to the statements
8 that Rhodes is a thug, pure and simple, a clear criminal,
9 that is what he is. He's been in more trouble than you can
10 shake a stick at. Didn't object to any of that?

11 A He was disparaging a State's witness. I can't
12 imagine why Mr. Ellisor would have objected in any regard
13 to Mr. Young disparaging Mr. Rhodes who was a State's
14 witness in this case. I can't imagine the basis for any
15 objection or why any trial counsel would have objected to
16 the State basically speaking poorly about his own witness.

17 Q All right. And what about when he said, Jerome
18 Rhodes is going to have to face the music and it's coming;
19 today Montavis Gaines is facing the music, we've played the
20 song. Did Mr. Ellisor object to any of that?

21 A No, and I can't imagine that there would have been
22 any -- that that objection would have been sustained. Mr.
23 Gaines was clearly getting his day in court. The State --
24 Mr. Young stated that Mr. Rhodes was going to be dealt with
25 later and he was dealt with later and I can't imagine a

Ervin Maye - Cross-Examination by Mr. Gleissner

1 basis for an objection or why that would have been
2 sustained.

3 Q So when Mr. Rhodes was dealt with later he got four
4 years for armed robbery?

5 A He got four years, but he testified for the State
6 in this case and that's not an unusual circumstance in any
7 regard. All of cross-examination or the basis for this PCR
8 was that somehow there was prosecutorial misconduct, which
9 is an extremely serious matter and this is a reckless
10 accusation. There's absolutely no sworn testimony from any
11 witness to support that there was any prosecutorial
12 misconduct or that there was a deal.

13 He's basically saying that Mr. Young or I one are
14 lying or that there was some conspiracy here that was not
15 disclosed and like I said, those are serious allegations
16 and no one is going to come into this courtroom and testify
17 that there was any deal ahead of time because there was
18 not.

19 It is not at all unusual for someone that testifies
20 or is a testifying witness to receive a different sentence.
21 I mean, that's just the nature of criminal prosecution.
22 That's the nature of drug prosecution where people that are
23 caught and arrested cooperate, go out and make buys against
24 individuals. Lots of time they don't go to jail at all.
25 That's just -- that goes back as far as the history of

Ervin Maye - Cross-Examination by Mr. Gleissner

1 prosecution. That's not at all unusual and that's not
2 misconduct in any regard. And Mr. Rhodes went to jail for
3 four years. That's pretty serious business.

4 I wouldn't want to go -- I wouldn't want to go to
5 jail for any length of time. And Mr. Rhodes was prosecuted
6 even though he did testify; he still went to prison. And
7 he did -- Solicitor Young was correct, he did face the
8 music.

9 Q Okay. And everybody knows about that arrangement.
10 If you testify against your other conspirator, you're going
11 to get a better deal?

12 A I don't know that everybody knows about an
13 arrangement. An arrangement suggests that there was some
14 sort of deal ahead of time and there was not. When people
15 tell the truth, they fair better in the criminal system and
16 are dealt with more favorably and quite obviously, Mr.
17 Rhodes told the truth. Investigator Holloway knew him.
18 Investigator -- I mean, Turner and Holloway both knew him.
19 They saw the videotape, I talked with them at the outset.
20 They reviewed it, they knew it was Montavis Gaines.

21 We knew that Rhodes was telling the truth and
22 people that tell the truth in court fair better than those
23 that lie and that's all I can tell you. That's the only
24 consideration that we gave him is he came in and he gave
25 truthful testimony in a very serious case that resulted in

Ervin Maye - Cross-Examination by Mr. Gleissner

1 the conviction of Montavis Gaines for armed robbery which
2 was justice.

3 Q And in fact, at the guilty plea, Mr. Seigler argues
4 on page 15, Mr. Rhodes has been fully cooperative and quite
5 frankly without his testimony I believe the conviction
6 would not have occurred in this armed robbery?

7 A I don't know that that's true, but he certainly --
8 he told the truth and he cooperated with the State, which
9 is a good thing and should be encouraged. Throughout the
10 time that I've been a prosecutor, I always have encouraged
11 witnesses to cooperate and tell the truth and Mr. Seigler,
12 his speculation that he wouldn't have been convicted before
13 that, both of these officers knew him, recognized him from
14 the tape and were able to come in the courtroom and
15 testify, I reviewed a tape of the events of this armed
16 robbery. Charles Holloway said, I've known him since he
17 was a little boy and that's him. So I can't imagine that
18 that would have been true.

19 It certainly helped the State's case in regard to
20 the fact that Rhodes testified that it was also Gaines, but
21 you had two officers that were able to identify him.

22 Q Have you seen this videotape?

23 A I haven't looked at the videotape in a long time,
24 but I saw it and the officers came in and testified that
25 they knew him and testified under oath that that's who it

Ervin Maye - Cross-Examination by Mr. Gleissner

1 was.

2 Q I mean, there is no way to identify the second
3 masked person based upon that videotape?

4 MS. MAYE: Your Honor, I'm going to object at this
5 point. This is -- was a direct appeal issue of them
6 identifying Mr. Gaines through the videotape. It was
7 already heard and ruled upon at trial and under appeal.

8 MR. GLEISSNER: I'm sorry.

9 MR. MAYE: I'll only say that I've always --

10 By Mr. Gleissner:

11 Q Referring to the videotape --

12 A I would only say that I know Investigator Turner
13 and Investigator Holloway and if they testified under oath
14 that they were able to identify him, I believe them.

15 Q Okay. All right. Several times during your
16 testimony, you mentioned that Mr. -- you referred to Mr.
17 Gaines' sworn testimony and in fact Mr. Gaines didn't
18 testify at trial; isn't that right?

19 A I misspoke as to Mr. Rhodes' sworn testimony that I
20 was confusing the two of them. But Rhodes came in and
21 testified and like I said, we believed that he was telling
22 the truth. It was corroborated by the officers.

23 Q All right. And then you also said that Mr. Rhodes
24 went to jail for four years. In fact, he just got time
25 served; isn't that right?

Frank Young - Direct Examination by Ms. Maye

1 A He still was in jail for four years. I don't have
2 anything to do -- I didn't know that he had credit for time
3 served. I know that when he left the courtroom after the
4 guilty plea, he left with a four year sentence. And as to
5 whether or not he had credit for time served, I don't know,
6 I can't remember. Like I said, during that term of court,
7 I was not present for that one term.

8 MR. GLEISSNER: Nothing else, Your Honor. Thank
9 you.

10 MS. MAYE: Your Honor, the State would like to
11 briefly call Mr. Frank Young.

12 THEREUPON,

13 FRANK YOUNG,

14 after being duly sworn, testified as follows:

15 THE CLERK: Have a seat and state your name for the
16 record, please.

17 THE WITNESS: My name is Henry Franklin Young, III.
18 I'm an assistant solicitor; I work for the 11th Judicial
19 Circuit serving the counties of Saluda, Edgefield, and
20 McCormick.

21 **DIRECT EXAMINATION**

22 By Ms. Maye:

23 Q Mr. Young, how long have you been employed by the
24 11th Circuit Solicitor's office?

25 A I seem to recall starting to work sometime around

Frank Young - Direct Examination by Ms. Maye

1 either 2003 or '4, somewhere in there. I think that's
2 about right. I have been a solicitor since 1998; prior to
3 that I was a judge advocate for the United States' Army for
4 a period of twenty years.

5 Q And do you -- I guess based on the testimony today
6 and review of your case file, do you remember prosecuting
7 the case Montavis Gaines v. State?

8 A I do.

9 Q And in your preparation for the case, did you have
10 a chance to speak with Jerome Rhodes?

11 A I did.

12 Q And can you discuss the contents of those
13 discussions, if there were any plea negotiations? I'm just
14 going to make that for plea negotiations.

15 MR. GLEISSNER: I'm sorry, Your Honor, are we
16 talking about -- I don't know what timeframe we're talking
17 about. Did he talk to him before this trial today or did
18 he talk to him before the -- the criminal trial and --

19 THE COURT: I make her quantify the question.

20 MR. GLEISSNER: Thank you, Your Honor.

21 THE COURT: Quantify the question.

22 By Ms. Maye:

23 Q Prior to Mr. Gaines' trial, did you -- were there
24 any plea negotiations with Mr. Rhodes?

25 A No.

Frank Young - Direct Examination by Ms. Maye

1 Q Was Mr. Rhodes offered any deals for his testimony
2 prior to Mr. Gaines' trial?

3 A No.

4 Q And is it your practice to offer deals prior to any
5 codefendant or witness testifying before a trial?

6 A I'm going to make one of those all encompassing
7 statements. I've been doing this since -- I started
8 practicing in, I guess 1977, with the army. My first job
9 was a prosecutor -- they call them trial counsel -- and
10 subsequently over the period of years, I did everything
11 including supervisory responsibilities over assistant U.S.
12 attorneys who handle federal magistrate courts. I've been
13 involved in the process of appeals for the military in
14 Washington for a period of several years.

15 During all of my period of time since then and up
16 to now, I have never offered anybody a deal prior to
17 testimony in a situation in which a codefendant would have
18 testified against another. And I can't frankly recall any
19 other situation in which I've offered a deal to anyone. If
20 I did so or would have thought to do so, it would have been
21 in writing and before the Court.

22 Q Thank you. I have no further questions.

23 A I'd like to make another statement, Your Honor, if
24 I could, that's on the record. Is there a position here I
25 can make a statement that this --

1 THE COURT: No.

2 THE WITNESS: Okay. Fine. Thank you, Your Honor.

3 THE COURT: Wait just a minute..

4 MR. GLEISSNER: I don't have any questions, Your
5 Honor. Thank you.

6 THE COURT: I've got a question, Mr. Young.

7 THE WITNESS: Sure.

8 THE COURT: Was there an offer made to the
9 Petitioner to plead guilty that was similar to the plea
10 that the testifying witness received?

11 THE WITNESS: You know, frankly, Your Honor, I
12 don't recall making an offer to anybody in this case.

13 THE COURT: Very well.

14 THE WITNESS: I don't think there -- I can look at
15 Mr. Maye and ask in all mind and heart whether I made
16 such -- I don't recall ever making an offer. I think Mr.
17 Ellisor and I had a long conversation about this and I was
18 lead to the position that it was a fruitless effort.

19 THE COURT: Okay.

20 MS. MAYE: There's nothing else from the State.

21 THE COURT: All right. Mr. Gleissner, anything
22 from y'all?

23 MR. Gleissner: No, Your Honor, nothing else from
24 us except, you know, I -- obviously, I'm new at all this.
25 I mean, I'd appreciate it if --

1 THE COURT: Let me clarify the two points of
2 contention. One is the prosecutorial misconduct is --
3 basically the whatever semblance of promise or inference of
4 a promise made to the testifying witness, Rhodes, against
5 your client because there was a firmer offer that, We'd
6 like your testimony against this gentleman. Something
7 beyond that. What else is there regarding the misconduct
8 other than that?

9 MR. GLEISSNER: Well, Your Honor, I'm not sure that
10 I would categorize that it's prosecutorial misconduct or
11 ineffective assistance of counsel.

12 THE COURT: Okay.

13 MR. GLEISSNER: I mean it -- it seems to fall into
14 a, you know, a combination of both. You know, if -- you
15 know, there was a witness put on the stand that said -- you
16 know, that testified as it relates to Mr. Rhodes, you know,
17 being threatened with thirty years but he was going to get
18 leniency if he testified. I believe, you know, that --

19 THE COURT: That was an exaggeration because
20 somebody who exercised their rights and was convicted by a
21 jury didn't get thirty. Didn't he get twenty?

22 MR. GLEISSNER: He got ten years for armed. He got
23 ten years for assault and battery of high and aggravated
24 nature, five years for the conspiracy.

25 THE COURT: Twenty-five total.

1 MR. GLEISSNER: Yeah, but their running
2 concurrently.

3 THE COURT: Okay. So he got ten years?

4 MR. GLEISSNER: Yeah.

5 THE COURT: All right. So, I mean, going to trial
6 on everything and he didn't get thirty, so that's an
7 exaggeration --

8 MR. GLEISSNER: Yeah Judge. I mean, it's police
9 talk. I don't know what the police say, they don't know
10 what the police say, you know, and you're right, it's
11 police talk and --

12 THE COURT: All right. So aside from that,
13 everybody is threatened with that when they come into
14 court; if you don't plead guilty, we're going to add some
15 punishment to it. That is a common practice.

16 MR. Gleissner: But I think the common practice
17 here went further is that if you do testify against this
18 guy, you know, you won't get thirty.

19 THE COURT: And that's common practice, too. So
20 that's not misconduct, that's the way --

21 MR. GLEISSNER: That's the way the system works.

22 THE COURT: -- they system works.

23 MR. Gleissner: That's the way the system works,
24 but that isn't the way the system worked -- that was not --
25 that was not disclosed as to how the system works to the

1 jury in this case. What was disclosed to the jury in this
2 case was, there wasn't any deal, formal or informal or
3 otherwise. Okay. There was no, Well, we talked about it;
4 I may get some leniency. No, none of that was disclosed to
5 the jury. It was, there is no deal, I'm testifying to the
6 truth, the truth, nothing but the truth. I'm not -- I
7 don't have an incentive.

8 THE COURT: But yet Mr. Rhodes was identified by
9 one of the employees inside the loan shop directly, I
10 recognize him, he's a customer there, he stole my car five
11 years ago, so I knew who he was.

12 MR. GLEISSNER: But Mr. Rhodes took his mask off --

13 THE COURT: But -- yeah --

14 MR. GLEISSNER: Yeah.

15 THE COURT: -- Rhodes was cold busted.

16 MR. GLEISSNER: Cold busted, but the other guy in
17 the store --

18 THE COURT: Had a mask on the whole time.

19 MR. GLEISSNER: Had a mask on the whole time.

20 Right? You know, was identified based upon prior dealings
21 with police officers.

22 THE COURT: Okay.

23 MR. GLEISSNER: Yeah, there's no inference there,
24 but -- Well, I got to tell you, you know, I have some
25 friends that are police officers and if they got on the

1 stand and said, Well, I know that guy, I'd be afraid of
2 what the jury thought about me. So Judge, yeah, I
3 obviously have probably missed something --

4 THE COURT: As far as to ineffectiveness of
5 counsel, the failure to ask for a curative instruction when
6 when the police says, I know him from past dealings.

7 MR. GLEISSNER: Right.

8 THE COURT: Other than growing up with him or
9 whatever that -- what else is there besides that?

10 MR. GLEISSNER: Well, I believe Mr. --

11 THE COURT: The inconsistent statement.

12 MR. GLEISSNER: I think -- yeah, the inconsistent
13 statement, the failure to object at the end to the
14 prosecutor's closing argument relating to Mr. --

15 THE COURT: -- Rhodes' bad record.

16 MR. GLEISSNER: Yes.

17 THE COURT: That was no objection. The witness in
18 the store says she -- that man stole my car so I new him.
19 He's robbed me before.

20 MR. GLEISSNER: I don't disagree. Mr. Rhodes was a
21 bad character, is a bad character. The problem is, they
22 are painting this defendant with Mr. Rhodes, the bad guy,
23 the thug, the criminal guy, and there was no objection.
24 And there was no objection to, you know, the fact that Mr.
25 Rhodes is going to get his day in court, when in fact the

1 informal policy or procedure, or however you want to say
2 it, is -- you know, his day in court's going to be a pretty
3 nice day.

4 THE COURT: Okay. All right. I just want to
5 understand your argument.

6 MR. GLEISSNER: That's my understanding of the
7 argument. Again, Your Honor, I'd just like to preserve
8 whatever else might be out there.

9 THE COURT: Okay.

10 MR. GLEISSNER: I just -- again, one of those
11 things. It's my first PCR and if you would --

12 THE COURT: I want to read your -- the second
13 application for PCR and then I'll let y'all know what I
14 decide. I understand your argument, so.

15 MR. GLEISSNER: I mean, if you'd like, we could
16 file something in writing, but you probably don't need it.

17 THE COURT: No, I think I've got enough here to
18 make a ruling.

19 MR. GLEISSNER: All right.

20 MS. MAYE: Your Honor, just for the record, if I
21 may, Mr. Ellisor represented Mr. Gaines at trial. Mr.
22 Ellisor recently had a stroke and has complications with
23 that stroke which is why he was unable to be here to
24 testify today.

25 THE COURT: I thought I heard something that Mr.

1 Ellisor was having health problems.
2 All right. Fair enough. I'll let y'all know on
3 that.
4
5 * * * * * END OF TRANSCRIPT * * * * *
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1 State of South Carolina)
2 County of Aiken) Certificate of Reporter

3
4
5
6 I, THE UNDERSIGNED, Brenda J. Sigwald,
7 Official Court Reporter for the Fifth Judicial Circuit of
8 the State of South Carolina, do hereby certify that I
9 reported the proceedings in the captioned case in the Court
10 of Common Pleas in and for the State of South Carolina on
11 the 31st day of January, 2012.

12 I FURTHER CERTIFY that the foregoing pages,
13 numbered 1 through 53 constitute a true, accurate and
14 complete transcript of said hearing.

15 I FURTHER CERTIFY that I am neither kin, counsel,
16 nor of interest to any party hereto.

17 IN WITNESS WHEREOF, I have hereunto set my hand and
18 seal at Aiken County, this 12th day of September, 2012.

19
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25

Brenda J. Sigwald
Brenda J. Sigwald,
Court Reporter and Notary Public
For the State of South Carolina
My commission expires
January 4, 2020.

FORM 5 FILED

STATE OF SOUTH CAROLINA

COUNTY OF Saluda

Montavis K. Gaines #323168
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

2017 APR 13 10 07 AM
CLERK OF COURT
SALUDA CO. S.C.

2017-CP-41-86

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 the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Turbeville Corr. Inst.
2. Name and location of Court which imposed sentence Saluda General Session
3. Name(s) of co-defendant(s) (if any) Jerome Rhodes
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) (2006-GS-41-419) armed robbery 20 years
 - (b) (2006-GS-41-420) Criminal Conspiracy 5 years
 - (c) (2006-GS-41-421) Assault & battery w/ high & aggravated Nature 10 years
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 7-27-2007 armed robbery 20 years concurrent
 - (b) 7-27-2007 Criminal Conspiracy 5 years concurrent

(c) 7-27-2007 Assault 3 batter w/ Hight Aggravated 10 years

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. S.C. Court of Appeals

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Denied

ii. _____

iii. _____

(c) the date of each such result:

i. September 1, 2009

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. State v. Gaines, Op. No. 2009-4P-446

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/P

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective assistance of PCR Counsel
(b) _____
(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) See Attached sheets
(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? yes
(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? yes
(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. Saluda Court of Common Pleas
ii. _____
iii. _____
iv. _____
(c) the disposition thereof:
i. denied
ii. _____
iii. _____

- iv. _____
- (d) the date of each such disposition:
- i. PCR denied 4-11-12
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. This case is still on appeal, U.S. Court
- ii. of Appeals for the fourth circuit.
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

- (b) the proceedings in which each ground was raised:

- i. N/A
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) No, because Robertson v. State was
- (b) decided in 2016.
- (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? yes
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NO
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Michael Ray Ellis, Esquire - trial Counsel
- ii. Kathrine H. Hudgins, Appellate Defender
- iii. Richard B. Gleissner, Esquire
- (b) the proceedings at which each such attorney represented you:
- i. Trial and Sentencing
- ii. Direct appeal
- iii. PCR hearing
19. State clearly the relief you seek in filing this application:
vacated Conviction and Sentence
20. Are you now under sentence from any other court that you have not challenged?
No

STATE OF SOUTH CAROLINA

County of CLARENDON

VERIFICATION

I, Montavis K. Gaines, 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.

Montavis K. Gaines

SWORN to and subscribed before me this 29TH
day of March, 2017

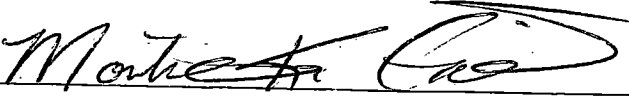
Nichelle Lynne Graham (L.S.)
Notary Public

My Commission Expires: May 24, 2026

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Montavis K. Gaines, 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.


Applicant

SWORN or affirmed to and subscribed before me this
29TH day of March, 2017.


Notary Public

My Commission Expires: May 24, 2026

Attached Sheets

1. Ineffective assistance of PCR Counsel,

Respectfully Submitted

March 29, 2017

x Montavis K. Gaines
Montavis K. Gaines # 323168

Attached Sheets

1. Ineffective Assistance of PCR Counsel

FILED
2017 APR -3 AM 11:17
CLERK OF COURT
SALUDA CO. S.C.

MEMORANDUM OF LAW

The Court in Aice acknowledged that there may be unique circumstances, where a PCR Counsel's assistance could be challenged in a successive application.

Applicant contends his PCR application should not be summarily dismissed as successive because his case presents unique circumstance warranting review of prior PCR Counsel's assistance under Martinez v. Ryan 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012)

Applicant request an evidentiary hearing pursuant to § 17-27-80 of the S.C. Code of Law on the claim of ineffective assistance of prior PCR Counsel.

RECEIVED

APR 10 2017

MAILROOM
TURBEVILLE CI

State of South Carolina
County of Saluda
Montavis Gaines #323168
Applicant,

v.

State of South Carolina
Respondent,

In the Court of Common Pleas
Case No. 2017-CP-41-86

Amended Application for
Post-Conviction Relief

FILED
2017 APR 17 AM 10:46
CLERK OF COURT
SALUDA CO. SC

Come now the (Applicant) Montavis Gaines, hereby amends the Application for Post-Conviction Relief as follows:

Paragraphs 9 and 10 of the original application for Post-Conviction Relief provided the single ground of Prior P.C.R. Counsel deemed unqualified under the uniform post-Conviction procedure Act. Applicant amends these paragraphs as follows:

Applicant was indicted during the November 2006 term of general sessions for Armed Robbery, Assault and Battery with intent to kill, and Criminal Conspiracy. The trial began on July 26, 2007. Gaines was represented by Michael R. Ellison, Esquire. Applicant was convicted of Armed Robbery, Assault and Battery of a High and aggregated Nature, and Criminal Conspiracy. He was sentenced to twenty years to run concurrently.

A timely Notice of Appeal was filed on Gaines behalf. The Court of Appeals dismissed the appeal. State v. Gaines, 2009-UP-446 (S.C. Ct. App. filed October 2, 2009).

Gaines subsequently filed a P.C.R. application on November 6, 2009 (2009-CP-41-0176).

The applicant raised the following allegations:

Ineffective assistance of trial Counsel

The Respondent made its return dated March 2, 2010. An evidentiary hearing was convened on January 31, 2012, at the Lexington County Courthouse. The Applicant was present at the hearing and was represented by Richard R. Gleissner. By order dated April 5, 2012, and filed April 11, 2012, The Honorable Eugene C. Griffith, Jr denied and dismissed the application with prejudice.

A timely Notice of Appeal was filed on Gaines behalf in the Supreme Court of South Carolina.

1. Prior P.C.R. Counsel deemed unqualified under the Uniform Post-Conviction procedure Act, and failed to competently to represent him - Applicant allegation he was denied a state-created right to qualified Counsel.

wherefore, the applicant prays that this Court grant is request for Post-Conviction Relief and grant him a new trial.

Respectfully Submitted

T. C. I.

1578 Clarence Coker Hwy

Turberville, S.C. 29162

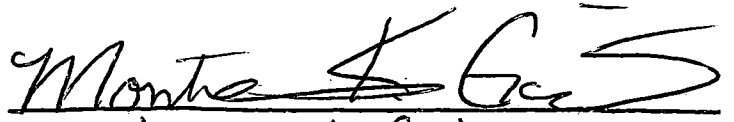
St. Montie A. Coker

Certificate of Service

I, the undersigned applicant (Montavis Gaines) do hereby certify that I have served the parties listed below in this action with a copy of the pleading(s) herein below specified by mailing a copy of the same by U.S. mail postage pre-paid to the following address.

Pleading(s): Amended Application for Post-Conviction Relief.

Office of Attorney General
Post office Box 11549
Columbia, S.C 29211-1549


Montavis K. Gaines

April 12, 2017

FILED
2017 APR 17 AM 10:49
CLERK OF COURT
SALUDA CO. S.C.

STATE OF SOUTH CAROLINA
COUNTY OF SAULDA

) IN THE COURT OF COMMON PLEAS
) FOR THE ELEVENTH JUDICIAL CIRCUIT
)

Montavis Kentrail Gaines, #323168,

) Case No.: 2017-CP-41-86
)

Applicant,

) **RETURN AND MOTION TO DISMISS**
) **THIRD APPLICATION FOR POST-**
) **CONVICTION RELIEF**
)

v.

State of South Carolina,

Respondent.

In response to the application for post-conviction relief filed on April 3, 2017, Respondent ("The State") would show this Court:

I.

The instant application is Applicant's third action for post-conviction relief ("PCR"). Petitioner has filed two previous applications for post-conviction relief which have perfected their respective appeals from the dismissal of each action. Petitioner has also filed a petition for writ of habeas corpus in the District Court of South Carolina and appealed the denial of relief to the Fourth Circuit Court of Appeals. Applicant now relies on a claim of ineffective assistance of PCR counsel, which was rejected in *Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377 (2013). This action is plainly successive, time barred, and barred by res judicata.

II.

Applicant is currently confined at the Turbeville Correctional Institution in the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court for Saluda County. Applicant was indicted by the Saluda County Grand Jury during the November 2006 Term of the Saluda County Court of General Sessions for one count of Armed Robbery (2006-GS-41-419), one count of Criminal Conspiracy (2006-GS-41-420), and one

count of Assault and Battery with Intent to Kill (2006-GS-41-421). (Attachment 1, App. at 311-16.) On July 24-26, Applicant proceeded to trial before the Honorable William P. Keesley, Circuit Court Judge, on all three charges and was represented by Michael Ray Ellisor. (Attachment 1, App. at 1-211.) The State was represented by Assistant Solicitors H. Franklin Young and Ervin J. Maye, both of the Eleventh Judicial Circuit Solicitor's Office. (Attachment 1, App. at 1-211.) On July 26, 2007, the jury convicted Applicant of armed robbery, criminal conspiracy, and the lesser included offense of assault and battery of a high and aggravated nature. (Attachment 1, App. at 208.) Judge Keesley sentenced Applicant to twenty years' confinement for the armed robbery conviction, five years' confinement for the criminal conspiracy conviction, and ten years' confinement for the assault and battery of a high and aggravated nature conviction, all to be served concurrently. (Attachment 1, App. at 209.)

Direct Appeal

On appeal, Applicant was represented by Kathrine H. Hudgins, Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense. Applicant's appeal was perfected with the filing of a Final *Anders*¹ Brief of Appellant. In the Final *Anders* Brief, counsel argued the judge erred in allowing a police officer to testify that he was able to recognize an individual in the videotape of a robbery as Applicant because the officer had contact with Applicant in the past. Applicant also filed a *pro se Anders* Brief. In the *pro se* Brief, Applicant argued the trial court erred in allowing the solicitor to exercise a peremptory challenge in a discriminatory manner. He also argued the trial court abused its discretion in admitting identification testimony that was suggesting in nature and defective under *Neil v. Biggers*². Applicant also filed an Amendment to his *pro se* Brief. In the Amendment, Applicant

¹ *Anders v. California*, 386 U.S. 738 (1967).

² *Neil v. Biggers*, 409 U.S. 188, 188 (1972).

argued the trial court erred by failing to conduct a suppression hearing on the reliability of certain witness testimony when the witness is not identify Applicant as the perpetrator.

In an unpublished opinion filed October 2, 2009, the South Carolina Court of Appeals dismissed Applicant's appeal. In the opinion, the South Carolina Court of Appeals noted Applicant appealed his convictions for armed robbery, criminal conspiracy, and assault and battery of a high and aggravated nature. After a thorough review of the record and all briefs pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Williams*, 305 S.C. 116, 406 S.E.2d 357 (1991), the Court of Appeals dismissed the appeal and granted counsel's motion to be relieved.

The Remittitur was issued on October 21, 2009.

First PCR Action

On November 6, 2009, Applicant filed an Application for Post-Conviction Relief (2009-CP-41-176), asserting claims of ineffective assistance of trial counsel. (Attachment 1, App. at 212-17.) The State served its Return on March 3, 2010. (Attachment 1, App. at 218-22.)

Applicant subsequently filed an Amended Application for Post-Conviction Relief. (Attachment 1, App. at 223-28.) In the Amended Application, Applicant raised two new issues. First, he argued trial counsel was ineffective in not discovering an agreement or promise of leniency between the solicitor's office and Jerome Rhoads. (Attachment 1, App. at 223-27.) Second, Applicant argued the prosecutor engaged in misconduct in not disclosing such an agreement. *Id.* Applicant filed a second Amended Application for Post-Conviction Relief. (Attachment 1, App. at 229-35.) In the second Amended Application, he raised the same claim as raised in the first Amended Application with additional facts.

An evidentiary hearing in the PCR action was held on January 31, 2012 before the Honorable Eugene C. Griffith, Jr., Circuit Court Judge. (Attachment 1, App. at 236-89.) Applicant was present and was represented by Richard R. Gleissner. *Id.* The State was represented by Assistant Attorney General Kaelon E. May. *Id.* On April 11, 2012, the PCR Court filed its Order of Dismissal. (Attachment 1, App. at 292-305.)

Applicant filed a Motion to Reconsider Pursuant to Rule 59 SCRE on April 24, 2012. (Attachment 1, App. at 306-10.) In the Motion, Applicant contended the PCR Court failed to include a claim that counsel was ineffective in failing to use a prior written statement of a witness to impeach the witness. (Attachment 1, App. at 307.) Applicant further challenged the PCR Court's finding that a claim relating to the testimony of the officers was withdrawn. (Attachment 1, App. at 307-08.) Applicant also asked the PCR Court to reconsider its finding that there was no agreement for Rhoads' testimony. (Attachment 1, App. at 308-10.) The Motion was denied by Order filed May 24, 2012.

First PCR Appeal

On appeal, Applicant was represented by Wanda H. Carter, Deputy Chief Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, who filed a Petition for Writ of Certiorari. In the Petition, Applicant argued trial counsel erred in failing to object to portions of the police officers' identification testimony that referred to their familiarity with Applicant based on past encounters with him because this constituted prejudicial prior bad act evidence that should not have been admitted into evidence at trial.

By Order filed December 3, 2014, the South Carolina Court of Appeals denied the Petition for Writ of Certiorari. (Attachment 2.) The Court issued the Remittitur on January 5, 2015. (Attachment 3.)

Second PCR Action

On January 16, 2013, Applicant filed an Application for Post-Conviction Relief (2013-CP-41-10), asserting claims of prosecutorial misconduct, *Brady* violations, and ineffective assistance of counsel. (Attachment 4.) The State served its Return and Motion to Dismiss on October 7, 2013.

The PCR Court filed its Conditional Order of Dismissal on February 6, 2014. In the Conditional Order of Dismissal, the PCR Court found the allegations were or could have been raised in the Prior PCR proceedings, and thus, the application was successive and barred pursuant to S.C. Code Ann. §17-27-90. The PCR Court found, further, that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the one-year filing procedures of the Uniform Post-Conviction Procedure Act. *See* S.C. Code Ann. § 17-27-10 to -160.

Pursuant to S.C. Code Ann. § 17-27-70(b), the PCR Court intended to dismiss the Application with prejudice unless Applicant provided specific reasons, factual or legal, why the Application should not be dismissed in its entirety. Applicant was granted twenty (20) days from the date of service of the Conditional Order upon him to show why the Conditional Order should not become final. The Conditional Order of Dismissal was served on Applicant on February 26, 2014. Applicant subsequently filed a document titled "Objection to response to consider conditional order of dismissal."

On September 12, 2014, the PCR Court filed its Final Order of Dismissal. (Attachment 5.) The PCR Court found Applicant had failed to establish a prima facie newly discovered evidence allegation to overcome the procedural bars regarding successive and untimely PCR actions. The PCR Court found that the factual matter at issue was extensively litigated in his prior PCR action and was further procedurally barred by the doctrine of res judicata. Simply, the PCR Court noted that the scope and manner in which PCR counsel investigated and presented Applicant's 2010 PCR case did not warrant an exception to the procedural bars concerning successive and untimely PCR applications. (Attachment 5 at 2.)

Second PCR Appeal

Applicant filed a Motion to Consolidate the appeal with the appeal from his first PCR, which was still pending, and an explanation pursuant to SCACR Rule 243(c). By Order filed October 23, 2014, the South Carolina Supreme Court dismissed the appeal. (Attachment 6.) In the Order, the Supreme Court stated that in the explanation required by Rule 243(c) of South Carolina Appellate Court Rules (SCACR), Applicant failed to show that there was an arguable basis for asserting that the determination by the lower court was improper. Accordingly, Applicant's motion to consolidate the second PCR appeal with a then pending petition for a writ of certiorari was denied as moot. (Attachment 6.) The Court issued the remittitur on November 10, 2014. (Attachment 7.)

Petition for Writ of Habeas Corpus

On December 4, 2014, Applicant filed a Petition for Writ of Habeas Corpus and Motion to Hold Petition in Abeyance with the South Carolina District Court. In his petition, Gaines set forth the following grounds for habeas relief:

Ground One: The State, and its agents, along with State's witness Rhoads conspired to deny Petitioner his constitutional right to due process, by denying him a fair and impartial trial.

Ground Two: The two prosecuting attorneys, knowingly, gave perjured testimony, and conspired to deny "any existence of a deal," when questioned

Ground Three: (Trial) counsel ineffective for failing to object to officer's testimony identifying Petitioner, by the way he walked, from a previous encounter

Ground Four: Trial counsel ineffective for failing to discover (Sweet Heart) leniency plea agreement between Rhoads and State, and use to impeach Rhoads.

Assistant Attorney General Alphonso Simon filed the State's Motion for Summary Judgment and Return and memorandum of Law in Support of Summary Judgment on March 30, 2015. The Honorable Kaymani D. West, United States Magistrate Judge, issued a Report and Recommendation on February 3, 2016, recommending the State's Motion for Summary Judgment be granted and the Petition be denied. On March 9, 2016, the Honorable J. Michelle Childs, United States Judge, accepted Judge West's Report of the Magistrate Judge, with some modifications, and ordered the State's Motion for Summary Judgment be granted and the Petition be denied. (Attachment 8.) Judge Childs also denied a Certificate of Appealability to the Fourth Circuit. *Id.*

Fourth Circuit Appeal of Habeas Petition

On May 16, 2016, Applicant filed an Informal Preliminary Brief with the Fourth Circuit Court of Appeals, which was addressed in Unpublished Opinion No. 16-6440, finding Applicant did not make the requisite showing that reasonable jurists would find the district court's assessment of the merits of the constitutional claims debatable or wrong, *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003), or that the dispositive procedural ruling of the district court was debatable, and that the petition states a

debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85. (Attachment 9.) The Fourth Circuit denied Applicant's Motion for Certificate of Appealability and dismissed his appeal. *Id.*

Attached and incorporated by reference are the following documents:

- (1) Applicant's First PCR Appendix³;
- (2) Order of Denial of Petition for Writ of Certiorari;
- (3) Remittitur (PCR Appeal);
- (4) Second Application for Post-Conviction Relief;
- (5) Final Order of Dismissal (Successive PCR);
- (6) Order Dismissing Appeal (Successive PCR);
- (7) Remittitur (Successive PCR);
- (8) Order Adopting Report and Recommendation and Denying Certificate of Appealability;
- (9) Unpublished Opinion No. 16-4440;
- (10) SCDC records; and
- (11) Saluda County Clerk of Court records.

III.

In his current, and third, application for post-conviction relief, filed April 3, 2017, Applicant alleges he is being held in custody unlawfully for the following reasons:

Ineffective Assistance of PCR Counsel

Applicant contends his PCR application should not be summarily dismissed as successive because his case presents unique circumstances warranting review of prior PCR Counsel's assistance under *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.E.2d 272 (2012.)

³ The PCR Appendix is included in the condition received, which may include some stray marks. These marks have been redacted to the best of counsel's ability without altering the substance of the document.

(Application for PCR (3rd) at 9.) In response to question 16, as to whether the Ground set forth in Question 10 was not previously presented to any state, or federal Court, Applicant answered, “No, because *Robertson v. State* was decided in 2016.” (Application for PCR (3rd) at 4.) Applicant amended his third application to add “[p]rior PCR counsel deemed unqualified under the Uniform Post-Conviction Procedure Act and failed to competently represent him.” (Amended Application (3rd) for PCR at 2.)

In addition to the records from Applicant’s prior post-conviction relief action, Applicant’s appellate records, the records from Applicant’s habeas petition to the South Carolina District Court and the Fourth Circuit, also attached and incorporated herein are the records of the Saluda County Clerk of Court, Applicant’s records from the South Carolina Department of Corrections, and the records from this third post-conviction relief action. Respondent reserves the right to amend this Return upon receipt of any relevant documents.

IV.

The application should be summarily dismissed because it is successive to Applicant’s previous two post-conviction relief applications. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the offense or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

S. C. Code Ann. § 17-27-70.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a “sufficient reason” why new grounds for relief were not raised or were not properly raised in previous applications. *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991). In this third application, Gaines claims his newly raised, but defaulted, claims are attributable to ineffective assistance of PCR counsel. Applicant cites *Martinez v. Ryan* to excuse the default of his newly raised claims of ineffective assistance of PCR counsel. Gaines also cites *Robertson v. State*, 418 S.C. 505, 795 S.E. 2d 29 (2016), for an additional reason why he did not present his claims to the state and federal courts before this third application. However, *Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013), is controlling for non-capital successive PCR applications. The *Robertson* court merely extended *Kelly* to capital cases. In *Kelly*, the South Carolina Supreme Court specifically addressed the limitations on successive PCR applications following *Martinez*:

In *Martinez*, the “precise question” addressed by the United States Supreme Court is “whether ineffective assistance in an initial review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default *in a federal habeas proceeding*.” *Martinez*, 132 S.Ct. at 1315. (Emphasis added). The Court held that “[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar *a federal habeas court* from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” *Martinez*, 132 S.Ct. at 1320. (Emphasis added). The Court went on to set forth the requirements that must be met to overcome the procedural default in a federal habeas action. *Martinez*, 132 S.Ct. at 1318–19.

Like other states, we hereby recognize that the holding in *Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.

Kelly v. State, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013) (Emphasis added).

In the present case, Applicant has failed to establish any sufficient reason why he is entitled to relief for ineffective assistance of PCR counsel in a successive collateral review action in state court. Accordingly, Applicant has failed to meet the burden imposed upon him, and the Court should summarily dismiss the application as successive to Applicant's previous post-conviction relief application and his grounds as not cognizable. Therefore, the current application is successive and barred under S.C. Code Ann. § 17-27-90.

V.

Additionally, this application should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160 ("the Act"). Specifically, the Act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of offense or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996). Applicant's conviction became final on October 21, 2009, when the Court of Appeals issued the remittitur in his direct appeal. Accordingly, Applicant was required to file this Application on or before October 21, 2010. Applicant did not file this current Application until April 3, 2017, which was well beyond the statutory filing period.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consolidated School District of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . .

that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Therefore, Respondent moves to dismiss this application for failure to file within the time mandated by the Act.

VI.

Lastly, because the allegations in the current application could have been raised in the previous state and federal proceedings, the Court must find that the 2017 application is likewise barred by principles of *res judicata*. In *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981), the appellants - Myron Foxworth and Gary Wilson - were convicted of armed robbery and sentenced to twenty-two years imprisonment. Both men appealed their convictions, but their convictions were affirmed and their appeals dismissed. *Id.* at 616, 274 S.E.2d at 415.

They then filed *pro se* petitions for writs of habeas corpus relief in the South Carolina Federal District Court, without exhaustion their state PCR remedies. The District Court considered “the trial record and the numerous allegations raised in the petitions ... and [it] dismissed [the petitions] on the merits.” *Id.*

Finally, both men filed *pro se* PCR applications, but the PCR judge found that their applications were without merit. He further found that *res judicata* barred claims raised in the applications, as well as those that could have been raised. *Id.* at 616-17, 274 S.E.2d at 415-16.

The South Carolina Supreme Court agreed. Relying upon §17-27-90 and its prior decisions construing that statute, the Court held that:

The language of Section 17-27-90 is not restricted to State proceedings but rather refers to “any other proceeding” where relief might be sought prior to the submission of a subsequent application. We, therefore, extend the reasoning espoused in *Land v. State, supra*, to the situation where, as here, an application in the State court follows a federal habeas corpus adjudication. The burden is on the applicant to prove that the alleged grounds for relief could not have been raised in federal court.

Foxworth, 275 S.C. at 618, 274 S.E.2d at 416.

Therefore, the Court should summarily dismiss the 2017 Application because it is barred by principles of *res judicata*.

VII.

WHEREFORE, Respondent moves to summarily dismiss the application as untimely and successive.

Respectfully submitted,

ALAN WILSON
Attorney General

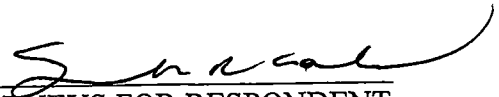
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July 18, 2017

By: 
ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA

COUNTY OF SALUDA

Montavis Kentrail Gaines, #323168,

☒ Plaintiff

v.

State Of South Carolina

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2017-CP-41-86

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: _____, Bar No. _____ Address: Montavis Kentrail Gaines, #323168 Turbeville Correctional Institution phone: P.O. Box 252 e-mail: Turbeville, South Carolina 29162		Defendant's Attorney: Susannah R. Cole, Bar No. 68383 Address: P.O. Box 11549 Columbia, SC 29211-1549 phone: (803) 734-6305 fax: (803) 734-6679 e-mail: SCole@scag.gov other: _____	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for ☒ Plaintiff / ☐ Defendant		July 28, 2017 Date submitted	
SECTION III: Motion Fee			
☐ PAID - AMOUNT: _____ ☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☒ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions			
Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE _____ CODE: _____ Date: _____	
CLERK'S VERIFICATION			
Date Filed: _____			
Collected by: _____			
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SALUDA) FOR THE ELEVENTH JUDICIAL CIRCUIT

2018 NOV -5 AM 11:09

Montavis K. Gaines, Jr., #323168,)

CLERK OF COURT
SALUDA CO. S.C.

Case No.: 2017-CP-41-86

Applicant,)

v.)

CONDITIONAL ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

This matter comes before this Court by way of an application for post-conviction relief filed by Montavis K. Gaines, Jr. (Applicant) on April 3, 2017, an amendment thereto filed April 17, 2017, and Applicant's "objection to order of dismissal" filed November 27, 2017. Respondent made its "Return and Motion to Dismiss Third Application for Post-Conviction Relief" on July 18, 2017, requesting the application be summarily dismissed.

PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Saluda County Clerk of Court. During its November 2006 term, the Saluda County Grand Jury indicted Applicant for armed robbery (2006-GS-41-419), criminal conspiracy (2006-GS-41-420), and assault and battery with intent to kill (2006-GS-41-421). Michael Ray Ellisor, Esquire represented Applicant on these charges. Assistant Solicitors H. Franklin Young and Ervin J. Maye, both of the Eleventh Circuit Solicitor's Office, prosecuted the case. On July 24-26, 2007, Applicant proceeded to trial before the Honorable William P. Keesley and a jury. Following deliberations, the jury convicted Applicant as indicted for armed robbery and criminal

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conspiracy and also convicted Applicant of the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN). Judge Keesley sentenced Applicant to a term of imprisonment of twenty years for armed robbery, five years for criminal conspiracy, and ten years for ABHAN. The sentences were to be served concurrently.

Applicant filed a timely notice of appeal, and Appellate Defender Katherine H. Hudgins, of the South Carolina Commission on Indigent Defense—Division of Appellate Defense, represented Applicant. Following the submission of an *Anders*¹ brief, Applicant filed a *pro se* brief. In this *pro se* brief, Applicant argued the trial court erred in allowing the solicitor to exercise a peremptory challenge in a discriminatory manner. He also argued the trial court abused its discretion in admitting identification testimony that was suggestive in nature and defective under *Neil v. Biggers*². Applicant subsequently filed an amendment to his *pro se* brief. In the amendment, Applicant argued the trial court erred by failing to conduct a suppression hearing on the reliability of certain witness testimony when the witness did not identify Applicant as the perpetrator. Thereafter, on October 2, 2009, the South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. *State v. Gaines*, Op. No. 2009-UP-446 (S.C. Ct. App. filed Oct. 2, 2009). The Remittitur was issued on October 21, 2009.

2009-CP-41-176

Applicant filed his first application for post-conviction relief on November 6, 2009. In that application, he alleged he was being held unlawfully for the following reasons:

1. "Ineffective assistance of trial counsel."
 - a. "Ineffective assistance of trial counsel."

¹ *Anders v. California*, 386 U.S. 738 (1967).

² *Neil v. Biggers*, 409 U.S. 188, 188 (1972).

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Respondent made its return on March 3, 2010, requesting an evidentiary hearing be held. On March 17, 2010, Applicant filed an amendment to his application adding the following allegations:

1. "Trial counsel was ineffective in not discovering an agreement or promise of leniency between the solicitor's office and Jerome Rhoads;" and
2. "The prosecutor engaged in misconduct in not disclosing such an agreement."

Subsequently, Applicant filed a second amendment to his application on January 31, 2011, which raised the same issues raised in the first amendment with additional facts.

On January 31, 2012, an evidentiary hearing into the matter was convened before the Honorable Eugene C. Griffith, Jr. Applicant was present at the hearing and represented by Richard R. Gleissner, Esquire. Assistant Attorney General Kaelon E. May, of the South Carolina Attorney General's Office, represented Respondent. After hearing all of the testimony and evidence presented, Judge Griffith issued a written order on April 5, 2012, filed April 11, 2012, denying and dismissing the application with prejudice.

On April 24, 2012, Applicant filed a motion to reconsider pursuant to Rule 59(e), SCRPC, in which Applicant contended the post-conviction relief court failed to include a claim counsel was ineffective in failing to use a prior written statement of a witness to impeach the witness. Applicant further challenged the post-conviction relief court's finding that a claim relating to the testimony of the officers was withdrawn. Applicant also asked the post-conviction relief court to reconsider its finding there was no agreement for Rhoads' testimony. The motion was denied by order filed May 24, 2012.

Applicant filed a timely notice of appeal, and Deputy Chief Appellate Defender Wanda H. Carter, of the South Carolina Commission on Indigent Defense—Division of Appellate Defense, perfected an appeal on Applicant's behalf. In his petition for writ of certiorari,

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Applicant argued trial counsel erred in failing to object to portions of the police officers' identification testimony that referred to their familiarity with Applicant based on past encounters with him because this constituted prejudicial prior bad act evidence that should not have been admitted into evidence at trial. By Order filed December 3, 2014, the South Carolina Court of Appeals denied Applicant's petition. The Remittitur was issued on January 5, 2015.

2013-CP-41-10

Applicant filed his second application for post-conviction relief on January 16, 2013. In this application, he alleged the following grounds for relief:

1. "Prosecutorial Misconduct, Brady's violation;" and
 - a. "Prosecutorial misconduct: Brady's Violation, Prosecutor failure to disclosed potentially exculpatory [sic] evidence related to the charged offenses."
2. "Ineffective assistance of counsel."
 - a. "Ineffective assistance of counsel for failure to object or file motions against Applicant's ill-legal [sic] sentences."

Respondent made its return and motion to dismiss on October 7, 2013, requesting the application be summarily dismissed as untimely and as successive. On February 6, 2014, the Honorable Benjamin H. Culbertson issued a Conditional Order of Dismissal, provisionally denying and dismissing the application. Subsequently, Applicant filed a document titled: "Objection to response to consider conditional order of dismissal." Thereafter, Judge Culbertson issued a Final Order of Dismissal, denying and dismissing the application, on September 12, 2014.

Applicant then filed a motion to consolidate the appeal with the appeal from his first post-conviction relief action, which was still pending, and an explanation pursuant to Rule 243(c), SCACR. By Order filed October 23, 2014, the South Carolina Supreme Court dismissed Applicant's appeal for failing to show there was an arguable basis for asserting the determination by the lower court was improper. Accordingly, Applicant's motion to consolidate the second

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post-conviction relief appeal with his then-pending petition for a writ of certiorari was denied as moot. The Remittitur was issued on November 10, 2014.

5:14-cv-04652-JMC-KDW

Applicant subsequently filed a petition for writ of habeas corpus, as well as a motion to hold petition in abeyance, with the United States District Court for the District of South Carolina on December 4, 2014. In his petition, Applicant set forth the following grounds for relief:

1. "The State, and its agents, along with State's witness Rhoads conspired to deny Petitioner his constitutional right to due process, by denying him a fair and impartial trial;"
2. "The two prosecuting attorneys, knowingly, gave perjured testimony, and conspired to deny "any existence of a deal," when questioned;"
3. "[Trial] counsel was ineffective for failing to object to officer's testimony identifying Petitioner, by the way he walked, from a previous encounter;" and
4. "Trial counsel was ineffective for failing to discover (Sweet Heart) leniency plea agreement between Rhoads and State, and use to impeach Rhoads."

Respondent filed its return and motion for summary judgment on March 30, 2015. Thereafter, the Honorable Kaymani D. West, United States Magistrate Judge, issued a report and recommendation on February 3, 2016, recommending Respondent's motion for summary judgment be granted and the petition be denied. Subsequently, the Honorable J. Michelle Childs, United States District Judge, denied Applicant's petition on March 9, 2016, and accepted the report and recommendation for summary judgment. Judge Childs also denied a certificate of appealability to the Fourth Circuit.

On May 16, 2016, Applicant appealed the District Court's decision by filing an informal preliminary brief with the Fourth Circuit Court of Appeals. The Fourth Circuit denied Applicant's motion for certificate of appealability and dismissed his appeal by unpublished opinion, finding Applicant did not make the requisite showing that reasonable jurists would find the district court's assessment of the merits of the constitutional claims debatable or wrong,

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Slack v. McDaniel, 529 U.S. 473, 484 (2000); see *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003), or that the dispositive procedural ruling of the district court was debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

CURRENT APPLICATION

In his *third* and current post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. "Ineffective assistance of PCR counsel"
 - a. "The Court in *Aice* acknowledged that there may be unique circumstances [sic], where a PCR Counsel's assistance could be challenged in a successive application;"
 - b. "Applicant contends his PCR application should not be summarily dismissed as successive because his case presents unique circumstance warranting review of prior PCR counsel's assistance under *Martinez v. Ryan* 566 U.S.1, 132 S.Ct. 1309, 182 L.Ed.29 272 (2012);" and
 - c. "Applicant request an evidentiary hearing pursuant to § 17-27-80 of the S.C. Code of Law on the claim of Ineffective assistance of prior PCR counsel."

Applicant subsequently filed an amendment to his application on April 17, 2017, adding the following allegations:

1. "Prior P.C.R. counsel deemed unqualified under the uniform post-conviction procedur [sic] Act, and failed to competently to [sic] represent him – Applicant allegation he was denied a state-created right to qualified counsel."

Before this Court are the records from the Saluda County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the records from Applicant's direct appeal, the records from Applicant's prior post-conviction relief actions and the appeals therefrom, the records of Applicant's federal habeas action, and the records of this current post-conviction relief action.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. § 17-27-70(b), this Court makes the following findings of fact and conclusions of law:

Failure to State a Claim

Applicant alleges he is entitled to relief on grounds his prior post-conviction counsel was unqualified and, thus, was ineffective. This Court finds ineffective assistance of post-conviction relief counsel is not a ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. *Coleman v. Thompson*, 501 U.S. 722 (1991). Once a post-conviction relief applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of post-conviction relief counsel. *Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991).

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). *Austin* recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. *Id.* *Austin* "is limited to its particular factual situation" and is only applicable in limited circumstances to correct procedural defects where an applicant is denied his "one full bite at the apple." *Id.*; *Aice*, 305 S.C. at 452, 409 S.E.2d at 394; *see also Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999).

Here, Applicant received a hearing in his first post-conviction relief action and timely appealed to the South Carolina Supreme Court therefrom. Upon post-conviction relief appellate

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counsel's submission of a petition and Respondent's timely response, the Court carefully considered the record as required by law. The Court, upon review of the decision of a lower court in a post-conviction relief action, has the power to set aside procedural bars based on issue preservation and remand for further proceedings where dismissal would be fundamentally contrary to the interests of justice. See, e.g., *Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016). It is clear Applicant enjoyed a complete adjudication on the merits of his original application—"one full bite at the apple."

Therefore, Applicant's allegations of ineffective assistance of post-conviction relief counsel do not fall within any exception to the rule barring such claims, and this Court shall dismiss the application for failing to state a cognizable claim upon which relief can be based.

Successive

This Court further finds the application must also be summarily dismissed because it is successive to Applicant's previous post-conviction relief applications. Applicant claims his newly raised, but defaulted, claims are attributable to ineffective assistance of post-conviction relief counsel. Applicant cites *Martinez v. Ryan*³ to excuse the default of his newly raised claims of ineffective assistance of post-conviction relief counsel. He also cites *Robertson v. State*, 418 S.C. 505, 795 S.E. 2d 29 (2016), for an additional reason why he did not present his claims to the state and federal courts before this third application.

Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

³ 566 U.S. 1 (2012).

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All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." *Id.* at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. *Id.* Applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

Ineffective assistance of post-conviction relief counsel is not a ground for relief and not a sufficient claim to warrant a successive application. There is no constitutional right to appointed counsel for collateral review of a conviction. *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. *Coleman v. Thompson*, 501 U.S. 722 (1991). Once a post-conviction relief applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of post-conviction relief counsel. *Aice*, 305 S.C. at 452, 409 S.E.2d at 395.

The South Carolina Supreme Court held the post-conviction relief rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." *Aice*, 305

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S.C. at 452, 409 S.E.2d at 395 (citing *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)). The court also noted, “[f]inality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice.” *Id.* at 451, 409 S.E.2d at 395. *Aice* further held that “the contention that prior PCR counsel was ineffective is not *per se* a ‘sufficient reason’ allowing for a successive PCR application under § 17-27-90.” *Id.* at 452, 409 S.E.2d at 394.

Moreover, *Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013), is controlling for non-capital successive post-conviction relief applications. The *Robertson* court merely extended *Kelly* to capital cases. In *Kelly*, the South Carolina Supreme Court specifically addressed the limitations on successive post-conviction relief applications following *Martinez*:

In *Martinez*, the “precise question” addressed by the United States Supreme Court is “whether ineffective assistance in an initial review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding.” *Martinez*, 132 S.Ct. at 1315. (Emphasis added). The Court held that “[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” *Martinez*, 132 S.Ct. at 1320. (Emphasis added). The Court went on to set forth the requirements that must be met to overcome the procedural default in a federal habeas action. *Martinez*, 132 S.Ct. at 1318–19.

Like other states, we hereby recognize that the holding in *Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.

Kelly v. State, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013) (Emphasis added).

Applicant’s contention prior post-conviction relief counsel was ineffective is not a sufficient reason to warrant a successive post-conviction relief application. Thus, Applicant has failed to show that a successive application is appropriate, and this Court shall dismiss the matter as successive to Applicant’s previous post-conviction relief application.

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Statute of Limitations

This Court further finds the application must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act ("the Act"). S.C. Code Ann. § 17-27-10 to -160. Specifically, the Act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consolidated School District of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, section 17-27-70(c) of the South Carolina Code authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

Applicant was convicted on July 26, 2007, and the remittitur from his direct appeal was issued on October 21, 2009. Applicant, therefore, was required to file this current action on or before October 22, 2010. The current application was not filed until April 3, 2017—well after the one-year statutory filing period expired. Indeed, this application was filed nearly *seven years* after the requisite filing period. Therefore, this Court shall summarily dismiss the application as barred by the statute of limitations.

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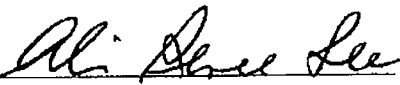
CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), this Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Saluda County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Kelly Oppenheimer, Esquire
Post-Conviction Relief Division – 11th Circuit
Post Office Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Saluda County Clerk of Court and opposing counsel within twenty (20) days, and that the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 31st day of October, 2018.


ALISON R. LEE
Chief Judge for Common Pleas
Eleventh Judicial Circuit

Columbia, South Carolina

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SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2) of the South Carolina Rules of Civil Procedure, the Director of the South Carolina Department of Corrections has designated Robin Montgomery (Server) as his duly authorized agent for the purpose of making service of the process on the below named individual.

STATE OF SOUTH CAROLINA)

COUNTY OF Sumter)

AFFIDAVIT OF PERSONAL SERVICE

On this 27 day of November 2018, I served the Conditional Order of Dismissal, on Inmate Montavis K. Gaines, Jr., SCDC Inmate #323168, D3C-0044-A, by delivering personally and leaving a copy of the same at Waterree River Correctional Institution.
Deponent is not a party to this action.

Robin Montgomery
SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME

this 27th day of November, 2018

Pamela D Hatfield (L.S.)
Notary Public for South Carolina

My Commission Expires: 3/15/2021

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ADMISSION OF SERVICE

Service of a copy of the within **Conditional Order of Dismissal** is admitted at the South Carolina Department of Corrections (Waterree River Correctional Institution), Rembert, SC 29128, Sumter County, SC this 27 day of November, 2018.

s/ Montavis K. Gaines
Inmate
SCDC Inmate #: 323168

STATE OF SOUTH CAROLINA

COUNTY OF SALUDA

Montavis Gaines #323168,

Applicant,

VS

State of South Carolina,

Respondent.

In the court of Common pleas

Case Number 2017-cp-41-86

Objection to order of Dismissal

Procedural History

This matter comes before the court Pursuant to an Application for post-conviction relief (PCR) filed April 3, 2017. Applicant amended his application in support of post-conviction relief, filed April 17. In its return the respondent (the state) made its return and motion to dismiss requesting that the application be summarily dismissed pursuant to this request, a return order of dismissal was issued 7/18/2017, never giving applicant specific 20 days from the date of service of said order in which to show why the dismissal should not become final.

Applicant issue a prose document captioned objection to order of dismissal. The applicant lays out a timeline within the case History that states specific reasons why his P.C.R. application for P.C.R. should not be ruled as successive under 17-27-90, in regards to having it filed within the one year statute of limitations, that prior p.c.r. counsel were not qualified under the uniform.

Post-conviction procedure act, and failed to competently to represent him. (Quoting... Robertson v. State, 418 s.c. 505, 795 s.c. zd 29 December 14, 2016, and were he contends that these reason were sufficient to allow him to file a timely, successive pcr application, and require a hearing on the prior pcr counsel representation, inadequately raised a claim in the original pcr proceedings who was deemed unqualified, when many procedural irregularities that occurred during course of applicant Judicial process that deprived him of due process. See Washington v. State, 324 s.c. 232 (1996).

The court in Aice acknowledged that there may be unique circumstances where a PCR counsels assistance could be challenged in a successive application. Applicant contends the state filed a order to dismissed it should not be dismissed as successive, because Gaines case present unique circumstance warranting review of prior PCR counsels assistance under Robertson v. State, 418 s.c. 505 (2016). A question of fact that's being raised, can only be resolved by a hearing. Delaney v. State 238 s.c. zd 697 (1997). Where an applicant alleges facts that would establish an exception to either a successive P.C.R. application or not; and those facts see (summary dismissal), generally are refuted by records that should be brought before the P.C. R. court when considering the summary dismissal, and view those facts in the light most favorable to applicant. McCoy v. State, 732 s.c. zd 623 (2013). Citing s.c. code Ann 17-27-80. Gaines maintains that the law should be re-evaluated based on Martinez, but see who applicant counsel was deemed unqualified and as a result deficient therefore this court must make a determination whether under Strickland applicant was prejudice, when prior PCR counsel was not statutorily qualified, under the uniform post-conviction procedure act. Was sufficient to permit a successive PCR application under 17-27-90 see attach EXA when prior PCR counsel admitted himself he have no familiarity with this area of law, and have never done a post-conviction relief matter, so I am uniquely unqualified to "represent you."

Additionally, Applicant reliance on Robertson V. State Ruling in regard to having to filed within the one year limitation granting a Successive PCR application to excuse any default of his newly raised claim of unqualified Counsel, based on a prior ruling by the S.C Supreme Court. Applicant States he didn't have a full and fair bite at the apple when he was denied a State – created right to qualified Counsel, when applicant made a motion before this Court to relieve counsel off his case, see clerk of court filed June 22, 2010.

Applicant made the requisite showing in addition to the records why his new claims for relief could not have been raised in his two previous PCR application. However ... Robertson v. State was decided in 2016 way after his two previous PCR application. This when applicant first discover he could filed a successive PCR application until Robertson ruling was decided by the S.C Supreme Court.

Moreover, to clarify the two points of contention of the res – Judicate argument that respondent makes before the court is misplace. The reasons States below:

This issue was never heard or address during any hearing proceeding, nor was it adjudicate on the merits.

Therefore, this court should firmly rejects the res – Judicata argument respondent makes before this Court. This Court must finds that the factual matter at issue was not extensively litigated in any prior PCR action to be procedurally barred by the principals of res Judicate.

In the present case, just like Robertson there a minute issue dictated allegations of ineffective assistance of PCR Counsel. The Robertson Court merely extended Kelly to Capital Cases. Applicant claims are attributable to prior PCR Counsel deem unqualified under the uniform Post – Conviction procedure Act. Citing Robertson V. State 418 S.C 505 120161.

Conclusion

Wherefore, the Applicant prays that this Court grant his request for Post – Conviction relief and grant him an evidentiary hearing.

Certificate of Service

I, the undersigned applicant (Montavis Gaines) do hereby certify that I have served the parties listed below in this action with a copy of the pleading(s) here in below specified by mailing a copy of the same U.S. mail. Postage paid to the following address.

Pleadings: Objection to order of Dismissal

Office of the Attorney General

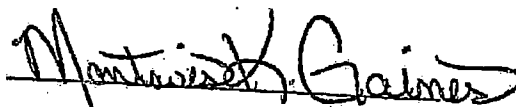
Post Office Box 11549

Columbia, S.C. 29211-1549

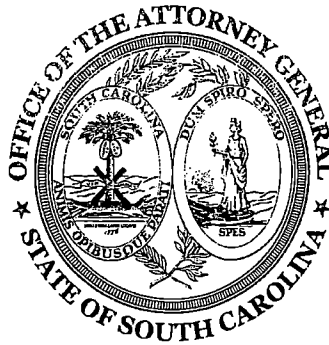
CLERK OF COURT
SALUDA CO. S.C.

2017 NOV 27 AM 11:00

FILED



Montavis Gaines



ALAN WILSON
ATTORNEY GENERAL

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NOV 15 2018
GENERAL COUNSEL

November 13, 2018

South Carolina Department of Corrections
Attn: Jonathan Eckstrom
4444 Broad River Road
Columbia, South Carolina 29221-1787

Re: Montavis K. Gaines, Jr., #323168 v. State of South Carolina
2017-CP-41-86

Dear Mr. Eckstrom:

Enclosed please find the **Conditional Order** dismissing the above-captioned inmate's post-conviction relief application. Please serve the inmate, **Montavis K. Gaines, Jr., #323168**, with the order and provide me with an affidavit of service (enclosed).

If you have any questions, please feel free to call: (803) 734-3737.

Sincerely,

Kelly Oppenheimer
Assistant Attorney General

KO/cc
Enclosures

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State of South Carolina
County of Saluda
Montavis K. Gaines #323168
V.
State of South Carolina
Respondent,

In the Court of Common Pleas
For the 11th Judicial Circuit
Case No: 2017-CP-41-86
Objection to Conditional
Order of Dismissal

This matter comes before this court pursuant to an Application for Post-Conviction relief (PCR) filed April 3, 2017, an amendment thereto filed April 17, 2017, Respondent made its "Return and Motion to Dismiss Pursuant to this request a Return order of Dismissal was on July 18, 2017, never giving the applicant twenty (20) days from the date of service of said order in which to show why the Dismissal should not become final. Applicant filed objection to order of Dismissal filed November 27, 2017, requesting that the PCR court grant the PCR application and this case be remained for and evidentiary hearing.

The Applicant lays out a timeline within the case History states specific reason why his P.C.R. application for Post-Conviction relief should not be ruled as successive under 17-27-90, in regard to having it filed within the one year statute of limitations, that prior P.C.R. counsel were not qualified under the uniform Post-Conviction relief Act, and failed to competently to represent him. (Quoting Robertson v. state, 418 s.c. 505, 795, S.E. 2d (2016). And where he contends that these reason were sufficient to allow him to file a timely, successive PCR application, and require a hearing on the prior P.C.R. counsel representation, inadequately raised a claim in the original P.C.R. proceedings who was deemed unqualified, when many procedural irregularities that occurred during course of applicant see Washington v. State, 324 s.c. 232 (1996).

Argument

In the present case, Applicant must show a satisfactory course, to refuse and dismiss his court appointed counsel, and have another counsel appointed. (citing. Richardson v. State, 659 S.E. 2d 493 (2008). Applicant showed of a satisfactory case to reject and discharge his court – appointed counsel (Richard R. Gleissner) in the above captioned case. See Attachment Exhibit A. when prior P.C.R. counsel admitted to Applicant by letter that he have no familiarity with this

area of law, and have never done a Post – Conviction relief matter, claiming to be uniquely unqualified to represent the applicant during his P.C.R. hearing.

The applicant who was seeking Post - Conviction relief on November 6, 2009, had the right to reject or discharge his Court – Appointed Counsel and proceed pro'se or retain his own counsel. See Richardson v. State, 659 s.e. 2d 493 (2008)

Rule 71.1 (d) SCRPC Provides:

If after the state has filed it's return, the applicant present questions of law or fact which appoint counsel to assist the applicant when he is indigent.

The state served it's return on March 3, 2010, requesting that a hearing be held. Additionally, Applicant motion the court to relieve his court appointed counsel and have another counsel appointed. Applicant states he did not have a full and fair complete bite at the apple during his hearing. When the lower court filed to promptly appoint a qualified counsel to promptly assist applicant. Furthermore the chief Judge for common please didn't give applicant Motion to relieve his court appointed counsel. Applicant don't get both.

While there is no constitutional obligation to appoint counsel in a P.C.R. matter. See Pennsylvania v. Finley 481 u.s. 551 (1987). In South Carolina a P.C.R. application presents questions of law or fact requiring a hearing, and the applicant is Indigent. State Law provides that counsel must be appointed or a knowing, intelligent waiver of the right to counsel must be obtained.

S.C. Code 17-27-60 (2003). Rule 71.1(d) SCRPC. Rule of procedure, like statutes, should be given their plain meaning. When the text of a Rule is clear and unambiguous Judicial inquiry is complete. The plain and unambiguous language of Rule 71.1(d) mandates the appointment of counsel for Indigent PCR applications whenever a PCR hearing is held to determine questions of law or fact. See Whitehead v. State 426 S.E.2d 315(1992).

Applicant presented question and facts that bing raised in his application, which can only be resolved by a hearing. Delaney v. State, 238 s.c. 2d 697 (1997). Applicant presented question and facts that being raised in his application, which can only be resolved by a hearing. Delaney v. State, 238 s.c. 2d 697 (1997). Applicant or not, and those facts. See (summary of Dismissal) are refuted by the records that must be brought before the P.C.R. court when considering the summary Dismissal and view those fact in the light favorable to applicant.

Mc Coy v. state 732 s.c.2d 623(2013) citing s.c. code 17-27-80.

Applicant maintains that the law should be re-evaluated based on the language in Robertson v. state. 418 s.c. 505 (2016). Should also be applied in no-capital cases under this statute, Gaines counsel who was also deemed unqualified and as a result deficient therefore this court must make a determination whether under Strickland. Applicant was prejudice when his prior P.C.R. Counsel Richard R. Gleissner was not statutorily qualified, under the uniform Post – conviction procedure Act, was sufficient reason to permit a successive P.C.R. application under 17-27-90.

Statute of Limitations

Additionally, Applicant reliance on Robertson v. State 418 s.c. 505 (2016) Ruling in regards to the filing within the one (1) year limitation granting a successive P.C.R. Application to excuse any default of his Newly raised claim of unqualified Counsel, meaning from Applicant first P.C.R always through his Appeals were tainted. Respondents cite Austin v. State 409 case: Austin is a situation where prior Post Conviction relief Counsel fails to appeal the denial of the application.

Applicant made the request showing in addition to the record why his new grounds for relief could not have been raised in No previous decided in 2016 way after applicant previous application which could'nt have been earliar raised in a previous application. This when Applicant first discover he could filed a successive P.C.R. application until Robertson, Ruling was decided by the S.C Supreme Court. Just like Robertson v. State 418 s.c 505 (2016) there a minute issue dictated allegations of ineffectibe assistance of P.C.R. Counsel.

Applicant claims are attributable to prior P.C.R. Counsel deem unqualified under the uniform Post – Conviction Procedure Act. S.C. Code 17-27-10-160, and failed to competently to represent applicant by inadequately raised a claim in the original PCR proceeding who was deemed unqualified by raising a claim that he waived said allegation set forth in application at applicant PCR hearing inside the Motion to Reconsider pur to Rule 59(e) SCRPC.

At the PCR hearing counsel withdrew Applicant Merit claim that trial Counsel was not ineffect for failing to object to the officer's testimony that they

know applicant by the way Applicant walked because of the officer's previous encounters with applicant. See Post – Conviction relief Tr. Pg 27 line 2-25 through pg 28 line 1-6, upon review of the trial transcript and records applicant would show's Counsel incompetently for waiving trial Counsel's ineffectiveness for failing to object to the officers testimony identifying applicant, by the way he walked, from a previous encounter do. Indeed, have merit.

Prior PCR Counsel improperly with-drew Applicant claim relating to the testimony of the officer during first PCR hearing. It is clear Applicant did not enjoyed or complete adjudication on the merits of his original application!

Furthermore, when Lt. Holloway testified that he had no applicant all of his life. This did not only bolstered Lt. Turner testimony, but that it was also undue prejudice, because they was testifying as a officer. Further counsel never ask for a ruling on how the officer's were going to testify. Opinion from personal Knowledge or Profession Knowledge. In viewing the identification of Lt. Turner and Lt. Holloway this opinionated testimony was not only very damaging prejudice to applicant, but that it was also impermissible under SCRE 701 opinion testimony by lay witnesses, and Rule 403. Unfair prejudice violated applicant right to a fair trial. Per u.s. const. s.c. const. and by Federal Stander.

Moreover, counsel filed to object or ask for a curative instruction regarding Lt. Turner and Lt. Holloway testimony to the effect, that the witness could not give an opinion as to who they belive was on the tape, and that the Jury should Strick any such inference from they memory that the Jury should be the ones who have to draw from what they saw on the tape, but this was not done which prejudice applicant trial.

Additionally, to clarify the two points of contention of the res-Judicate argument that respondent made before the court is Misplace. This issue was never heard of address during any hearing proceeding, nor was it adjudicate on the merits. This court must finds that the factual matter at issue was not extensively litigated in any prior PCR action to be procedurally barred by principals re-Judicta.

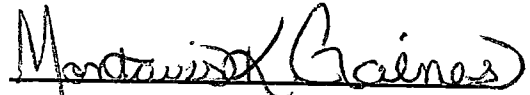
Certification of Service

1. The under signed applicant (Montavis Gaines) do hereby certify that I have served the parties listed below in this action with a copy of the pleading(s) here in below specified by mailing a copy of the same U.S. mail. Postage paid to the following address.

Pleadings: Objection to conditional order of Dismissal

Kelly Appenheimer,
Post office Box 11549
Columbia S.C. 29211-1549

11/16/18


Montavis K. Gaines