

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable Paul M. Burch, Circuit Court Judge

CHARLES PENNELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001301

APPENDIX

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INDEX

INDEX	i
TRANSCRIPT OF TRIAL HELD OCTOBER 11, 2010	1
APPLICATION FOR POST-CONVICTION RELIEF	346
RETURN.....	356
TRANSCRIPT OF POST-CONVICTION RELIEF HEARING HELD MARCH 16, 2017	362
ORDER OF DISMISSAL	424
MOTION TO ALTER OR AMEND	436
RETURN TO MOTION TO ALTER OR AMEND.....	439
ORDER DENYING APPLICANT’S MOTION TO ALTER OR AMEND.....	447
INDICTMENT.....	448

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE) COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA)

STATE,)

vs.

)TRANSCRIPT OF RECORD

CHARLES BERLIN PENNELL)

DEFENDANT.)

09-GS-21-1532
October 11, 2010
Florence, South Carolina

BEFORE:

THE HONORABLE THOMAS A. RUSSO , JUDGE;
AND JURY

APPEARANCES:

JOHN CHARLES JEPERTINGER, ESQ.
Assistant Solicitor

B. SCOTT SUGGS, ESQ.
JOHN ETHERIDGE, ESQ.
Attorneys for the Defendant

FRANCES BAKIS-RAY, RPR
Official Court Reporter

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10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

	Page
Jury qualification	3
Jury selection	21
Pretrial matters	28
Jackson v. Denno:	
Joseph Provenano	48
Micheal Robinson	53
Preliminary charge by the Court	68
Opening remarks by Mr. Jepertinger	75
Opening remarks by Mr. Suggs	83
Jonathan Wilson:	
Direct examination by Mr. Jepertinger	96
Cross-examination by Mr. Suggs	118
Michael Robinson:	
Direct examination by Mr. Jepertinger	222
Cross-examination by Mr. Suggs	238
Redirect examination by Mr. Jepertinger	259
Directed verdict motion	263
Defendant's constitutional rights	286
Closing argument by Mr. Suggs	291
Closing argument by Mr. Jepertinger	309
Jury charge	318
Verdict	329
Sentence of the Court	342

EXHIBITS**STATE'S:**

No.	Description	I.D./EVD.
1	Photo	66/66
2	Photo	66/66
3	Photo	66/66
4	Photo	66/66
5	Photo	66/66
6	Photo	66/66
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8	Photo	66/66
9	Photo	66/66
10	Photo	66/66
11	Photo	66/66
12	Photo	66/66
13	Photo	66/66
14	Photo	66/66
15	Photo	66/66
16	Photo	94/94
17	Photo	94/94
18	Photo	94/94
19	Photo	94/94
20	Photo	94/94

DEFENDANT'S:

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2	Photo	66/66
3	Photo	66/66
4	Photo	66/66

1 **MR. JEPERTINGER:** Please the Court, Your Honor,
2 the State would call indictment number 09-GS-21-1532, the
3 State against Charles Berlin Pennell. He's charged with
4 attempted carjacking. All right. Thank you very much,
5 sir.

6 Ladies and gentlemen, if I can have your
7 attention please. You have heard Mr. Jepertinger on behalf
8 of the State has called the case of State of South
9 Carolina versus Charles Berlin Pennell. That is
10 indictment number 2009-GS-21-1532. This indictment
11 charges Mr. Pennell with the offense of attempted
12 carjacking. Before we begin, let me tell you, ladies and
13 gentlemen, that an indictment is simply a formal document
14 that contains the allegations that the State has made
15 against a defendant. It is simply a piece of paper that
16 carries the charge against the defendant. It is in no way
17 evidence in this case, and it is in no way evidence
18 proving the allegations which it contains. It is simply
19 the piece of paper that brings this case into court.

20 To this indictment, to this charge, Mr. Pennell
21 has pled not guilty and that plea of not guilty places the
22 burden on the State to prove the defendant's guilt. In
23 other words, the defendant is presumed innocent of this
24 charge unless or until the State proves guilt beyond a
25 reasonable doubt. Now what is important that you

1 understand, ladies and gentlemen, is that -- come on up,
2 sir. Mr. Pennell, come on up.

3 (Defendant Pennell enters courtroom.)

4 THE COURT: What is important for you to
5 understand, ladies and gentlemen, is that this presumption
6 of innocence remains with Mr. Pennell from the beginning
7 of the trial all the way through the deliberations until
8 or unless you find him guilty of the offense. So I'm
9 going to read to you the allegations that are contained in
10 this indictment and they are as follows. That Charles
11 Berlin Pennell did in Florence County on or about May 25th
12 of 2009 take and/or attempt to take one Chevrolet Blazer
13 from Jonathan Wilson by force and violence or by
14 intimidation while said victim was operating and/or was in
15 the vehicle in violation of Section 16-3-1075
16 Subsection (b)(1) of the South Carolina Code of laws 1976
17 as amended.

18 MR. JEPERTINGER: Your Honor, if it please the
19 Court, just one slight amendment. It was a Ford Explorer,
20 not a Chevy Blazer.

21 THE COURT: It was completely opposite was I just
22 said then.

23 MR. JEPERTINGER: Yes, sir, but it was a Ford
24 Explorer, Your Honor.

25 THE COURT: With that amendment, ladies and

1 gentlemen, Mr. Pennell is charged under this indictment
2 with the attempted carjacking of the Ford Explorer of
3 Jonathan Wilson. And as I indicated to you, Mr. Pennell
4 is presumed innocent of that charge and the State carries
5 the burden of proof.

6 Is there any member of jury panel who knows
7 anything about this case based on what I've shared with
8 you thus far, if so, please stand.

9 Yes, ma'am, can I get your name please.

10 THE POTENTIAL JUROR: I do not but I am personal
11 friends with ---

12 THE COURT: I'm gonna get there in just a minute.

13 THE POTENTIAL JUROR: Okay. Janet Stalvey.

14 THE COURT: So if you'll hang with me we'll get
15 there. But is there anyone who knows anything about the
16 case based on what I've shared with you thus far?

17 (There was no response.)

18 THE COURT: Thank you, there are none. Now this
19 case is being prosecuted by the Twelfth Circuit
20 Solicitor's Office, and more directly from their deputy
21 solicitor, and I'll have him stand and introduce himself.

22 MR. JEPERTINGER: Thank you, Judge, I appreciate
23 it. My name is John Jepertinger. I'm a deputy solicitor
24 here in the twelfth circuit. The twelfth circuit is
25 comprised of both Florence and Marion Counties. I'm going

1 to be trying this one, I think, by myself. Sitting with
2 me is my administrative assistant Donna Knight, and we
3 also have our victim witness coordinator in court,
4 Mrs. Anna Meetze.

5 THE COURT: All right. Thank you, Sir. Ladies
6 and gentlemen, is there any member of the jury panel who
7 is related by blood, connected by marriage, or who has any
8 close business or personal relationship or who has been
9 represented by Mr. Jepertinger, if so, please stand.

10 (There was no response.)

11 THE COURT: Thank you. There are none.

12 Mr. Pennell, ladies and gentlemen, is represented
13 by two gentlemen and I'll have them introduce themselves.

14 MR. ETHERIDGE: If it please the Court, Your
15 Honor, my name is John Etheridge with the Gardener Law
16 Firm. I practice law here in Florence.

17 THE COURT: All right, Mr. Suggs.

18 MR. SUGGS: Thank you, Judge. Good morning,
19 ladies and gentlemen, I'm Scott Suggs. I practice law
20 here in Florence as well.

21 THE COURT: All right. Ladies and gentlemen, is
22 there any member of the jury panel who is related by
23 blood, connected by marriage, or who has any close
24 business or personal relationship with either
25 Mr. Etheridge or Mr. Suggs or who has been represented by

1 either one of their law firms, if so, please stand.

2 (There was no response.)

3 THE COURT: Thank you. There are none.

4 And Mr. Etheridge, if I could get you to
5 introduce your client. And Mr. Pennell, if I could get
6 you to stand and face the jury, sir.

7 MR. ETHERIDGE: This is Charles Pennell. He's
8 also from Florence.

9 THE COURT: All right. Thank you very much.

10 MR. ETHERIDGE: Thank you, sir.

11 THE COURT: Is there any member of the jury panel
12 related by blood, connected by marriage, or who has any
13 close business or personal relationship with the defendant
14 in this case Mr. Charles Pennell, if so, please stand.

15 (There was no response.)

16 THE COURT: Thank you. There are none.

17 Now ladies and gentlemen, I'm gonna call out a
18 list of names. These are potential witnesses. These are
19 people who may possibly testify during the course of this
20 trial. There's about five or six names here. All of them
21 may testify or just some of them. At this point I don't
22 know but; the question that I just asked you regarding
23 Mr. Pennell, that is, if you're related by blood,
24 connected by marriage, or have any close business or
25 personal relationship, that's the question that I'm gonna

1 be asking you regarding these witnesses. As I call -- as
2 I go through these names if those witnesses are present,
3 please stand and face the jury and then you can have a
4 seat. And if that question applies to any of these names,
5 when you hear that name called, if you would please stand.
6 Continue to listen, however, because it may be that you
7 know more than one individual on this list. So with that
8 question in mind, these are possible witnesses that may
9 testify during the course of this trial. Michael
10 Robinson, Chase -- is it Iseman? Chase Iseman, Joseph
11 Provenzano, Jonathan Wilson. Is this Shannon or Sharon
12 Hill?

13 MR. JEPERTINGER: Shannon.

14 THE COURT: Shannon Hill.

15 All right. And now, ma'am, can I get your name
16 please?

17 POTENTIAL JUROR: Janet Stalvey.

18 THE COURT: Ms. Stalvey. Give me one second.
19 Let me find you here. Juror Number 140, yes, ma'am.

20 THE POTENTIAL JUROR: Personal friends with
21 Michael Robinson.

22 THE COURT: All right. And Ms. Stalvey, let me
23 ask you this, ma'am. The fact that you have that with
24 relationship with Investigator Robinson, would that in any
25 way affect your ability to be fair and impartial, to be

1 fair to the State as well as fair to the Defense if you
2 were selected as a member of the jury?

3 THE POTENTIAL JUROR: No, sir.

4 THE COURT: Thank you very much, ma'am. You
5 may have a seat.

6 Anyone else?

7 (There was no response.)

8 THE COURT: All right. Now, ladies and
9 gentlemen, is there any member of the jury panel who is a
10 contributor either financially or through volunteer work
11 to an organization such as: MADD, Mothers Against Drunk
12 Driving; SADD, Students Against Drunk Driving; CAVE,
13 Citizens Against Violence. I just learned recently -- I
14 tried to find out what the E stood for but I guess the E
15 is silent. Citizens Against Violence is that
16 organization. Fraternal Order of the Police, South
17 Carolina State Troopers Association, any of those types of
18 organizations. Is there any member of the jury panel who
19 is a contributor either financially or through volunteer
20 work to those organizations, if so, please stand.

21 (There was no response.)

22 THE COURT: Thank you. There are none.

23 Ladies and gentlemen, I want to tell you as I
24 told you earlier, as we go through questions and we ask
25 you about your relationship with witnesses and lawyers and

1 things of that nature, the purpose for these questions is
2 simply this, it is our purpose and our desire that we
3 select a jury that can be fair and impartial, fair to both
4 the State and fair to the Defense. Your job as a juror,
5 as I told you earlier, is to listen to the evidence that
6 is presented and decide what the facts are in this case.
7 And what our purpose and our goal is in asking these
8 questions to determine everyone's ability to be unbiased
9 your ability to be fair and impartial. And that's what
10 we're seeking. And there's really no way to ask every
11 possible question that might address those issues.

12 So I'm gonna ask you at this time, is there any
13 member of the jury panel who knows of any reason why you
14 would not be able to be fair and impartial or that your
15 ability to be fair and impartial might be compromised in
16 an effort to determine whether you are qualified to serve
17 as a juror in this case? If there's anyone who knows of
18 any reason why you will not be able to be fair and
19 impartial I would ask that you please stand.

20 All right, your name, ma'am.

21 THE POTENTIAL JUROR: Terry Miller.

22 THE COURT: All right, Ms. Miller, let me get you
23 to come forward if we could please.

24 THE DEPUTY CLERK OF COURT: Juror 101.

25 (Potential juror approached the Bench for an

1 on-the-record discussion.)

2 THE COURT: Yes, ma'am.

3 POTENTIAL JUROR: I knew him and his sister in
4 high school, and we were friends although I haven't seen
5 him in years and years.

6 THE COURT: Mr. Pennell?

7 POTENTIAL JUROR: Yes, we were friends in high
8 school.

9 THE COURT: And you could not be fair and
10 impartial; is that correct?

11 THE POTENTIAL JUROR: Yeah, I don't think so. I
12 just prefer to be excused.

13 THE COURT: I'm gonna excuse you from serving on
14 this case and ask you to stay with us because we have
15 other matters.

16 POTENTIAL JUROR: That's fine.

17 THE COURT: Okay. Thank you very much.

18 (Potential juror was excused.)

19 THE COURT: All right. Juror 101 is excused for
20 purposes of this case.

21 (WHEREUPON, counsel approached the Bench for an
22 off-the-record discussion.)

23 THE COURT: Ms. Miller, I apologize, can I get
24 you to step up here one more time real quick. I don't
25 mean to run you back and forth.

2 (Potential juror approached the Bench for an
3 on-the-record discussion.)

7 THE POTENTIAL JUROR: He approached me when
8 we went on break.

10 POTENTIAL JUROR: Yes, he did, and said I looked
11 familiar and ---

17 THE POTENTIAL JUROR: The guy that walked back
18 in the staircase with us. He followed me in the
19 staircase, and this other guy sitting in front me followed
20 me to make sure I was okay because he reacquainted himself
21 with me and told me what the deal was.

24 THE POTENTIAL JUROR: Yes, sir.

25 MR. JEPERTINGER: This is the gentleman in the

1 yellow shirt?

2 THE POTENTIAL JUROR: Uh-huh. His name is
3 Charles Schofield.

4 THE COURT: Yeah. Anyone else that you're aware
5 of?

6 POTENTIAL JUROR: No, not that I know of.

7 THE COURT: Okay. And you haven't spoken with
8 anyone else in the jury panel about it?

9 THE POTENTIAL JUROR: The lady in the pink shirt
10 Donna beside me. Donna Shields.

11 THE COURT: Okay. Anyone else?

12 POTENTIAL JUROR: That's it.

13 THE COURT: All right. I'm gonna ask you to go
14 back and just have a seat, but I am gonna ask you to have
15 no conversation.

16 POTENTIAL JUROR: Okay. I'm just uncomfortable
17 with it.

18 THE COURT: Oh, I understand. And that's why
19 I've excused you from this case.

20 THE POTENTIAL JUROR: Okay.

21 THE COURT: Well, let me ask you this.

22 MR. SUGGS: And I don't know what she knows, she
23 just turned —

24 THE COURT: Do you feel threatened?

25 POTENTIAL JUROR: No, huh-uh.

1 THE COURT: But if you would, please have no
2 conversation with anybody at all.

3 POTENTIAL JUROR: Okay. The guy in the yellow
4 shirt knows about it.

5 THE COURT: I understand.

6 POTENTIAL JUROR: Okay.

7 THE COURT: And the lady in the pink.

8 THE POTENTIAL JUROR: Only if she really paid
9 attention to what me and him were saying.

10 THE COURT: All right.

11 (End of Bench conference.)

12 (WHEREUPON, counsel approached the Bench for an
13 off-the-record discussion.)

14 THE COURT: Mr. Schofield, can I get you to step
15 up here for a moment please.

16 POTENTIAL JUROR: Okay.

17 (Potential juror approached the Bench for an
18 on-the-record discussion.)

19 THE COURT: I understanding from Ms. Miller was
20 that you were present when defendant apparently spoke to
21 her; is that correct?

22 POTENTIAL JUROR: Yes, sir.

23 THE COURT: All right. So were you concerned
24 about her —

25 POTENTIAL JUROR: Wellbeing. That's the reason I

1 went to the stairwell.

2 **THE COURT:** All right. What I'm gonna do is,
3 would that have some bearing on your ability to be fair
4 and impartial based on what you've seen and heard?

5 **THE POTENTIAL JUROR:** I hope not but...

6 **THE COURT:** Okay, let me you do this. I'm gonna
7 excuse you from being on this case, but it's very -- have
8 you had any conversation with anyone else --

9 **POTENTIAL JUROR:** Just her.

10 **THE COURT:** --on the jury panel?

11 **POTENTIAL JUROR:** Just her.

12 **THE COURT:** Okay. We have other cases we might
13 need your help on so I ask you to return to your seat, but
14 I'm gonna ask that you maintain your silence as far as
15 what you saw or heard. Have no conversation with anybody,
16 okay?

17 **THE POTENTIAL JUROR:** I understand.

18 **THE COURT:** Great, thank you.

19 (End of Bench conference.)

20 (WHEREUPON, counsel approached the Bench for an
21 off-the-record discussion.)

22 **THE COURT:** Ms. Shields, can I speak with you
23 real quick.

24 (Potential juror approached the Bench for an
25 on-the-record discussion.)

1 MR. JEPERTINGER: 134.

2 THE COURT: Ms. Shields, I'm gonna get you to
3 step over here so.

4 POTENTIAL JUROR: Okay. Did you -- have you
5 heard or have you spoken with Ms. Miller about any
6 conversations she may have had with the defendant in this
7 case? Are you aware of that?

8 THE POTENTIAL JUROR: No, sir.

9 THE COURT: Have you seen the defendant speak to
10 Ms. Miller or anybody?

11 THE POTENTIAL JUROR: No, sir.

12 THE COURT: Okay. And is there -- do you know of
13 any reason that you might, would -- I mean, is there any
14 reason that you would not be able to be fair and
15 impartial?

16 THE POTENTIAL JUROR: No, sir.

17 THE COURT: Okay. You don't -- you've never met
18 him before?

19 THE POTENTIAL JUROR: No, sir.

20 THE COURT: Okay.

21 THE POTENTIAL JUROR: The only thing I heard that
22 she spoke to him outside and that's all she said so I
23 don't know of anything.

24 THE COURT: Okay. I'm going to ask you to go
25 back and have a seat. And just like I tell all jurors,

1 just don't have any conversation about this matter at all.
2 Just, you know, just talk about anything else in the
3 world. Just, you know, I tell all jurors that, you know,
4 you're not to have conversation about the case so. But I
5 know you haven't been selected on this case as of this
6 point, but I would ask when you to return to your seat
7 just don't have any conversation about it.

8 THE POTENTIAL JUROR: We didn't really converse.
9 She just said that and I didn't say anything back so...

10 THE COURT: Okay, thank you.
11 (WHEREUPON, counsel approached the Bench for an
12 off-the-record discussion.)

13 THE COURT: Any further questions or voir dire
14 from the State?

15 MR. JEPERTINGER: No, sir.

16 THE COURT: Anything further from the Defense?

17 MR. SUGGS: We have none, Your Honor.

18 THE COURT: All right. Now ladies and gentlemen,
19 we are about to go through the procedure to draw a jury
20 for this case. Let me tell you a little about how that
21 works. We used to be not as technologically advanced as
22 we are now. We used to take all your names and put them
23 in this drum right here and spin it around and then draw
24 your names out one by one. And if you think that's not
25 technologically advanced, back where I'm from, Edgefield,

1 South Carolina, we used to have a Tampa cigar box so. But
2 the courts all around the state now are on this same
3 system that we have now, and it is an electronic system of
4 course, as everything is nowadays. And the way we go
5 about selecting juries in general sessions court is, your
6 names, all your names appear on our juror roster and of
7 course your names on the roster appear in alphabetical
8 order. In just a moment Ms. O'Hara is going to key in
9 this case, and she's gonna hit a button. That button is
10 going to take this jury list. It's gonna take your names
11 and it's just gonna randomly scramble your names in a
12 different order. So if your name -- like if I was on the
13 jury panel and I'm Russo and I would have been juror 134
14 on this roster, I may end up being number 3 on this
15 restructured roster. It just basically jumbles the names
16 and throws them back up on a list in random order.

17 She'll take that list, she'll print a copy of
18 that list and give it to both counsel for the State and
19 the Defense. And then she'll start at the top of that
20 list and then she'll start with number one on that list,
21 and she'll call the first name. If your name is called I
22 would ask you to gather whatever belongings you brought
23 with you to court, whether it be a pocketbook or a book or
24 an umbrella or coat or jacket, whatever, but bring your
25 things. And if you would come around and come to the

1 front of the court, right up here in front of this, by
2 this -- right next to this microphone where Sammy is. And
3 just turn and face the back just like Sammy has done here
4 and you'll just stand there. At that point she'll ask of
5 the State something along these lines, what say you for
6 the State. The State will have an opportunity to either
7 excuse you or present you. If they excuse you then you'll
8 go back and you'll have a seat in your chair, and we'll
9 move on to the next juror. If they present you you'll
10 remain standing. And then she'll look to the Defense and
11 she'll ask of Defense, what say you for the Defense,
12 something along those lines, and the Defense also will
13 have the opportunity to either excuse you or seat you. If
14 they excuse you you'll go back and have a seat; but if
15 they seat you, you'll then come around and have a seat in
16 the jury box. And we'll go through that process until
17 we've selected all of our jurors. Now...

18 (Pause.)

19 THE COURT: To the attorneys, typically you know
20 we print the list out, give you each a copy. She's got
21 the list on her screen. She just can't print it. I'm
22 gonna -- we're gonna go ahead and begin. You're just not
23 gonna have the list.

24 MR. JEPERTINGER: Well, we have, you know, other
25 type, I mean, she's gonna call --

1 **THE COURT:** No, I mean, she's gonna call the
2 name. You'll have an opportunity to go through your
3 stuff. It's just you don't have the list ahead of time
4 which isn't -- it's not prejudicing anybody because we
5 used to not ever have a list to begin with.

6 **MR. JEPERTINGER:** I understand, Judge. We're
7 fine that.

8 **THE COURT:** So we're going to proceed then.
9 Ladies and gentlemen, if we can get your attention
10 Ms. O'Hara is going to proceed with drawing the names.
11 And as I said, just remind you, if your name is called
12 bring your belongings and come have a -- just stand right
13 up here and we'll go through the process. Okay?

14 Five and five on the strikes.

15 **MR. JEPERTINGER:** Yes, sir.

16 **THE DEPUTY CLERK OF COURT:** 17, Linda Bouldin
17 (white female). What say the State?

18 **MR. JEPERTINGER:** Please present the juror.

19 **THE DEPUTY CLERK OF COURT:** What say Defendant?

20 **MR. SUGGS:** Please swear Ms. Bouldin.

21 **THE DEPUTY CLERK OF COURT:** Please have a seat in
22 the jury box, ma'am.

23 78, Patricia Anderson (black female). What say
24 the State?

25 **MR. JEPERTINGER:** Please present the juror.

1 THE DEPUTY CLERK OF COURT: What say Defendant?
2 MR. SUGGS: Please swear Ms. Anderson.
3 THE DEPUTY CLERK OF COURT: Please have a seat in
4 the jury box, ma'am.
5 121, Christopher Powell (white male). What say
6 the State?
7 MR. JEPERTINGER: Please present the juror.
8 THE DEPUTY CLERK OF COURT: What say the
9 Defendant?
10 MR. SUGGS: Please swear Mr. Powell.
11 MR. JEPERTINGER: Please have a seat in the jury
12 box, sir.
13 (Juror sheet passed to attorneys.)
14 THE DEPUTY CLERK OF COURT: 43, James Dumm.
15 (white male). What say the State?
16 MR. JEPERTINGER: Please present the juror.
17 THE DEPUTY CLERK OF COURT: What say Defendant?
18 MR. SUGGS: Please swear Mr. Dumm.
19 THE DEPUTY CLERK OF COURT: Please have a seat in
20 the jury box.
21 6, Jeryl Anderson. What say the State?
22 MR. JEPERTINGER: Please present the juror.
23 THE DEPUTY CLERK OF COURT: What say Defendant?
24 MR. SUGGS: Please excuse the juror for purpose
25 of this trial only.

1 THE DEPUTY CLERK OF COURT: You've been excused
2 for this trial only, ma'am. You may return to your seat.

3 136, Kelly Shooter (white female). What say the
4 State?

5 MR. JEPERTINGER: Please present the juror.

6 THE DEPUTY CLERK OF COURT: What say Defendant?

7 MR. SUGGS: Please swear Ms. Shooter.

8 THE DEPUTY CLERK OF COURT: Please have a seat in
9 the jury box, ma'am.

10 7, Michael Anderson (white male). What say the
11 State?

12 MR. JEPERTINGER: Please present the juror.

13 THE DEPUTY CLERK OF COURT: What say Defendant?

14 MR. SUGGS: Please swear Mr. Anderson.

15 THE DEPUTY CLERK OF COURT: Please have a seat in
16 the jury box, sir.

17 69, Stoney Wrenn (white male). What say the
18 State?

19 MR. JEPERTINGER: Please present the juror.

20 THE DEPUTY CLERK OF COURT: What say Defendant?

21 MR. SUGGS: Please excuse this juror for purpose
22 of this trial only.

23 THE DEPUTY CLERK OF COURT: You've been excused
24 for this trial only, sir. You may return to your seat.

25 159, Etta Washington (black female). What say

1 the State?

2 MR. JEPERTINGER: Please present the juror.

3 THE DEPUTY CLERK OF COURT: What say the
4 Defense?

5 MR. SUGGS: Please swear Ms. Washington.

6 THE DEPUTY CLERK OF COURT: Please have a seat in
7 the jury box, ma'am.

8 134, Donna Shields (white female). What say the
9 State?

10 MR. JEPERTINGER: Please present the juror.

11 THE DEPUTY CLERK OF COURT: What say Defendant?

12 MR. SUGGS: Please excuse the juror for purpose
13 of this trial only.

14 THE DEPUTY CLERK OF COURT: You've been excused
15 for this trial only.

16 140, Janet Stalvey (white female). What say the
17 State?

18 MR. JEPERTINGER: Please present the juror.

19 THE DEPUTY CLERK OF COURT: What say Defendant?

20 MR. SUGGS: Please excuse the juror for purpose
21 of this trial only.

22 THE DEPUTY CLERK OF COURT: You've been excused
23 for this trial only.

24 139, Doretha Smoot (black female). What say the
25 Defense?

1 MR. JEPERTINGER: We'd excuse this juror for
2 purposes of this trial only.

3 THE DEPUTY CLERK OF COURT: You've been
4 excused for this trial only, ma'am. You may return to
5 your seat.

6 53, Thomas Fulton (black male). What say the
7 State?

8 MR. JEPERTINGER: We'd excuse this juror for
9 purposes of this trial only.

10 THE DEPUTY CLERK OF COURT: You've been excused
11 for this trial only, sir.

12 162, Angie Williams (white female). What say the
13 State?

14 MR. JEPERTINGER: Please present the juror.

15 THE DEPUTY CLERK OF COURT: What say Defendant?

16 MR. SUGGS: Please swear Ms. Williams.

17 THE DEPUTY CLERK OF COURT: Please have a seat in
18 the jury box.

19 30, Wilhelmina Coe (black female). What say the
20 State?

21 MR. JEPERTINGER: Please present the juror.

22 THE DEPUTY CLERK OF COURT: What say Defendant?

23 MR. SUGGS: Please swear Ms. Coe.

24 THE DEPUTY CLERK OF COURT: Please have a seat in
25 the jury box, ma'am.

1 97, Timothy McKnight (white male). What say the
2 State?

3 MR. JEPERTINGER: Please present the juror.

4 THE DEPUTY CLERK OF COURT: What say Defendant?

5 MR. SUGGS: Please swear Mr. McKnight.

6 THE DEPUTY CLERK OF COURT: Please have a seat in
7 the jury box, sir.

8 72, Rena Taylor (white female). What say the
9 State?

10 MR. JEPERTINGER: Please present the juror.

11 THE DEPUTY CLERK OF COURT: What say Defendant?

12 MR. SUGGS: Please swear Ms. Hunt Taylor.

13 THE DEPUTY CLERK OF COURT: Please have a seat in
14 the jury box, ma'am.

15 117, Deborah Pigatt (black female). What say the
16 State?

17 MR. JEPERTINGER: Please present the juror.

18 THE DEPUTY CLERK OF COURT: What say Defendant?

19 MR. SUGGS: Please swear Ms. Pigatt.

20 THE DEPUTY CLERK OF COURT: Please have a seat in
21 the jury box, ma'am.

22 THE COURT: All right. One alternate, one and
23 two.

24 THE DEPUTY CLERK OF COURT: 154, Evin Turner
25 (white male).

1 MR. JEPERTINGER: Please present the juror.

2 THE DEPUTY CLERK OF COURT: What say Defendant?

3 MR. SUGGS: Please swear Mr. Turner.

4 THE DEPUTY CLERK OF COURT: Please have a seat in
5 the jury box.

6 Do you want another alternate, Judge? That just
7 one.

8 THE COURT: Any motions regarding jury selection
9 from the State?

10 MR. JEPERTINGER: Nothing from the State, Your
11 Honor.

12 THE COURT: Anything from the Defense?

13 MR. SUGGS: We have none, Your Honor.

14 THE COURT: All right. Ladies and gentlemen of
15 this panel, I'm gonna ask you to do me a favor and step
16 back into your jury room and I'm gonna ask you -- no,
17 check that. I'm gonna send you to lunch. What I'm gonna
18 ask you to do is this, please have no conversation with
19 anybody about this case. Do not allow anyone to talk to
20 you about this case. Enjoy your lunch. I'm gonna ask you
21 to be back here at 2:30. Okay? Now when you come back at
22 2:30 you'll come to the elevator. You'll come straight
23 here to the courtroom and there will be a bailiff in the
24 hall way that'll lead you back into your jury room. When
25 you reassemble in the jury room you're still to maintain

1 no conversation about this case, okay? And obviously you
2 don't know anything about it yet. But it's important that
3 you adhere to that instruction that you don't talk about
4 this case with anyone. That even means amongst
5 yourselves. Talk about anything else you want, get to
6 know each other, introduce yourselves, but do not have any
7 conversation about the case and we'll get started as close
8 to 2:30 as soon as we get everybody reassembled, okay? So
9 everyone else remain seated and we'll see y'all back here
10 at 2:30.

11 (WHEREUPON, the jury was removed from the
12 courtroom at 12:47 p.m., and the attorneys approached the
13 Bench for an on-the-record discussion.)

14 MR. JEPERTINGER: The first thing, Your Honor, is
15 since this case has been called and we've had that issue
16 with him approaching the jurors in the stairwell, I ask
17 that his bond be revoked and that he be held since this
18 case has been called officially, Your Honor, and we have a
19 jury seated. The other thing too, Your Honor ---

20 THE COURT: Well, let me address that first. The
21 issue that we may have with that is the law requires that
22 once the jury is sworn his bond be revoked, and we haven't
23 done that. So I don't think I can -- I don't think I can
24 take him off his bond at this point, but I don't want him
25 to leave until I have a chance to speak to him. Okay?

1 MR. JEPERTINGER: Okay. Secondly, and I guess
2 more germane to the case itself, there is going to be a
3 short Miranda issue in terms of Denno and just some, just
4 another issue that we'd like to argue before and I think
5 we come back at maybe —

6 THE COURT: 2:15.

7 MR. JEPERTINGER: Well, either I pick another
8 jury.

9 THE COURT: Another jury coming through.

10 MR. JEPERTINGER: Right, I -- if we can keep -- I
11 I promise you I don't think it will take more than 15, 20
12 minutes.

13 MR. SUGGS: There's a couple other housekeeping
14 matters but nothing that's going to be all that time
15 consuming, Judge.

16 MR. JEPERTINGER: Just want to —

17 MR. ETHERIDGE: One other thing, I'm gonna be --
18 I'm working on some other stuff. I'm gonna be in and out.
19 If you'd cover me. I don't want them to think that I
20 don't care, if you'd just say something.

21 THE COURT: Absolutely.

22 MR. JEPERTINGER: We'd ask you revoke
23 Mr. Etheridge's too.

24 THE COURT: All right. We need to —

25 MR. SUGGS: You're gonna let the panel go or are

1 y'all gonna draw another one?

2 MR. JEPERTINGER: Well, they're gonna -- it was
3 my understanding they were gonna draw another one.

4 THE COURT: You know, I'm thinking I'm gonna let
5 them come back and do it 'cause it'll take us 30 minutes
6 to draw another jury.

7 MR. JEPERTINGER: Whatever you decide, Judge.

8 MR. SUGGS: They can go to the tenth floor or
9 whatever.

10 (Off-the-record discussion.)

11 THE COURT: Back on the record. Mr. Pennell.

12 THE DEFENDANT: Yes, sir.

13 THE COURT: And I'm just gonna be candid with
14 you. The State made the request that -- well, just so
15 your information, once a jury trial begins technically a
16 defendant's bond is, it's met its purpose.

17 THE DEFENDANT: Yes, sir.

18 THE COURT: So therefore you're no longer on bond
19 and you're in custody. And the State has asked the Court
20 to do that and the reason is, is because you approached a
21 juror.

22 THE DEFENDANT: Yes, sir.

23 THE COURT: I can't begin to tell you how
24 improper that is. And I will tell you this, if I find
25 you've even looked at a juror from this point on --

1 THE DEFENDANT: Yes, sir.

2 THE COURT: —I will lock you up faster than you
3 can imagine.

4 THE DEFENDANT: I understand. I just, I didn't
5 — wasn't aware of what she was.

6 THE COURT: Yes, you were.

7 THE DEFENDANT: I didn't know it was a juror. I
8 didn't know why she was here.

9 THE COURT: All I'm telling you is this, when
10 you're up here at the courthouse until we get this trial
11 started —

12 THE DEFENDANT: Yes, sir.

13 THE COURT: —you need to restrict your comments
14 to your lawyers because for the simple fact of what you
15 just shared with me. You never know who a juror is —

16 THE DEFENDANT: Right.

17 THE COURT: —who is walking around the
18 courthouse. Anyone could be a juror because they don't
19 wear anything that indicates they're jurors. There's just
20 something we probably ought to think about but at least
21 until then. So what I'm asking you to do, sir, is to have
22 no conversation with anybody about the case except your
23 attorneys.

24 THE DEFENDANT: I won't speak to no one, sir. I
25 am so sorry.

1 THE COURT: So I need y'all back at 2:30. Now
2 let me say this, and don't get me wrong, I'm not upset at
3 all about you being late when we got started. That's
4 okay, but what I'm gonna tell you is this, when we start
5 this case this trial will go forward with or without you.
6 You understand that?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: So we won't have any confusion later
9 on. You have every right to be present for your trial,
10 but you can waive that right by not showing up and if you
11 don't show up the trial will go forward without you.

12 THE DEFENDANT: I'll be here.

13 THE COURT: Now here's the thing, I just told you
14 2:30. In all reality, guys, 'cause I'm gonna pick that
15 other jury, we won't be starting at 2:30. It will be
16 closer to 3. If y'all would just make sure that you're
17 here ready to go at 3. We'll get started as soon as we
18 finish with that other jury.

19 (WHEREUPON, a lunch break was taken.)

20 MR. JEPERTINGER: Your Honor, I would envision
21 there being a motion under Jackson versus Denno hearing in
22 terms of Mirandas being given at the scene, Your Honor, by
23 Officer Provenzano who is here.

24 THE COURT: Okay.

25 MR. JEPERTINGER: We can do that in a second; but

1 more pressing, Your Honor, I will tell you when this
2 gentleman was arrested at the scene they found a quantity
3 of marijuana on him. Now I know he's not being tried for
4 drugs and you're saying, what in the world are you trying
5 to get, muck this up with drugs in this case, Your Honor.
6 However, I think the drugs are part of the res gestae in
7 this case, Your Honor. I would ask that the Court would
8 consider a State versus Adams. I didn't make a copy for
9 Mr. Suggs and I apologize to him for not doing that. We
10 can run a copy, Your Honor.

11 THE COURT: He probably knows that case.

12 MR. ETHERIDGE: He does, Your Honor.

13 MR. JEPERTINGER: Your Honor, when this defendant
14 was questioned by Mr. -- excuse me, Investigator Robinson.
15 I've also called him Mr. Robinson. But when he was
16 questioned by Investigator Robinson part of what you'll
17 hear in this case is he'll say that he was dropped off at
18 the scene by a niece with all this stereo equipment; that
19 they had tried to run to Wal-Mart; and that she left him
20 there to get high, okay. Well, the fact of the matter is
21 I think part of the res gestae is that when he was caught
22 at the scene with marijuana on his person he had an
23 ability to have her get high, if you want to believe that
24 story, Your Honor. I think it would go to impeach this
25 marijuana being on him, would go to impeach what he told

1 Investigator Robinson at the scene, Your Honor. In State
2 versus Adams that I just referenced at 322 South Carolina
3 114, 470 Southeast Second 366, it's a 1996 case, Your
4 Honor. It says one of the accepted bases for the
5 admissibility of other crimes, in this case possession of
6 marijuana, arises when such evidence furnishes part of the
7 context of the crime or is necessary to a full
8 presentation of the case or so intimately connected with
9 explanatory of the crime charged against the defendant.
10 While I understand that last part would have nothing to do
11 with an attempted carjacking, I grant it. And they go on,
12 and it's so much a part of the setting of the case and its
13 environment that its proof is appropriate in order to
14 complete the story of the crime on trial by proving its
15 immediate context or the res gestae or the uncharged
16 offenses so linked together in point of time and
17 circumstances with crime charged that one cannot be fully
18 shown without proving the other.

19 Your Honor, based on that language I'm gonna hand
20 up the case -- and once again, I apologize to my learned
21 colleague. Here's the case cite and I'll make a copy of
22 it if necessary for you.

23 MR. SUGGS: Not necessary.

24 MR. JEPERTINGER: That I would think because
25 based on his explanation to Michael Robinson what his

1 niece apparently did, Your Honor, it would call in
2 question his credibility because he had the avenue for her
3 to get high on him.

4 THE COURT: Well, it just begs the question, the
5 first thing that pops in my mind, maybe she didn't want to
6 get high with her uncle.

7 MR. JEPERTINGER: Excuse me, sir, I didn't hear.

8 THE COURT: Maybe she didn't want to get high
9 with her uncle or maybe she was going to get high with the
10 friend that she had already rang -- how does that go to
11 damaging his credibility because he had weed on him?

12 MR. JEPERTINGER: Well, I think, first of all I
13 think there's gonna be testimony from the victim in this
14 case that it was not a niece that dropped him off, that
15 his girlfriend dropped him off. Now we have a situation
16 with a niece wanting to get high. I think the whole
17 thing, and I'm not trying -- not going to try to pit
18 witnesses. I'm gonna try to pit stories if that's
19 possible and the fact that this is one of the concoctions,
20 I think, he came up with.

21 THE COURT: Mr. Suggs and/or Mr. Etheridge, any
22 response?

23 MR. SUGGS: Well again, Judge, I think you made a
24 valid point that, you know, if the testimony is that
25 Mr. Pennell made the statement that he didn't want to get

1 -- didn't want to get high, perhaps he didn't want to get
2 high with his relative or perhaps that's not his drug of
3 choice. Perhaps she wanted to get high on cocaine or she
4 wanted to get high on PCP or she wanted to get high on
5 heroine, and that's not something that he does, he gets
6 high on marijuana. Maybe that was what he meant. I don't
7 know that we're in a position to really know the answer to
8 the question that is posed.

9 THE COURT: So I just want to understand, the
10 statement made to Investigator Robinson had something to
11 do with the fact that he was dropped off by this
12 individual because this individual was gonna drop him off
13 and then go get high, correct?

14 MR. JEPERTINGER: That was my -- that was my
15 understanding, Judge, that she was gonna go somewhere to,
16 so she could get high.

17 THE COURT: Okay.

18 MR. JEPERTINGER: She left him there so she could
19 go get high per his statement, and I mean, you know, I'm
20 taking it for what it's worth. I don't know if it's
21 fictional niece or whatnot.

22 THE COURT: Yeah, I don't either.

23 MR. JEPERTINGER: I mean, I have no idea, but I
24 mean, that was purpose and the only reason was to give the
25 jury a full picture, context of what was occurring there.

1 We're not -- obviously we're not trying him for simple
2 possession of marijuana. I mean, it's ---

3 THE COURT: Yeah, I understand that. I
4 understand that.

5 MR. SUGGS: Being charged with carjacking, Judge,
6 and that's ---

7 THE COURT: I don't see the connection.

8 MR. SUGGS: It's just not there.

9 THE COURT: Even at all. I mean, it's evidence
10 which furnishes part of the context of the crime or is
11 necessary to a full presentation or so intimately
12 connected with an explanatory of the crime charged to
13 complete the story of the crime. This looks, this appears
14 to this is just being thrown in to inflame the jury. I
15 don't see how it connects to this crime at all. I mean,
16 how, tell me how it connects.

17 MR. JEPERTINGER: Judge, I'll just, I said what
18 I'm going to say on the issue; I'm not pushing it.

19 THE COURT: Okay, all right. Yes, sir.

20 MR. JEPERTINGER: Okay.

21 THE COURT: I'm -- I would deny any admissibility
22 of that marijuana based on that issue.

23 MR. JEPERTINGER: Now, let me -- I have both
24 officers here that are going to testify just crystal clear
25 for the record that, since you are doing that, they are

1 not to mention in any way, shape, or form marijuana in
2 this trial and I urge them please don't use the word
3 marijuana in Spanish or English.

4 THE COURT: In any language, I guess, yes, you're
5 correct, Mr. Jepertinger.

6 MR. JEPERTINGER: That was it, Judge. I did some
7 research on res gestae, and we don't get into it that
8 often so...

9 THE COURT: I understand.

10 MR. JEPERTINGER: And I didn't mean to inflame
11 anybody's passion. Okay.

12 THE COURT: Well, you certainly didn't mine. I
13 just think it might be the jury.

14 MR. JEPERTINGER: I understand, Judge. I
15 understand.

16 THE COURT: All right. So...

17 MR. JEPERTINGER: The next issue is relatively
18 short, Your Honor. I'll call -- and this deals with the
19 Miranda.

20 THE COURT: All right, sir.

21 MR. JEPERTINGER: Jackson v. Denno.

22 MR. SUGGS: Can we visit a couple of other
23 smaller things before we get into that 'cause I think
24 that's going to take the longest time even though that's
25 not going to take long.

1 **THE COURT:** Okay.

2 **MR. SUGGS:** When the officers were investigating
3 this case I'm not sure which officer it was made contact
4 with some members of this gentleman's family who made some
5 comments to the officer that they did not like
6 Mr. Pennell, they were afraid of Mr. Pennell, things of
7 that nature and I would -- I think I would -- I bring that
8 to the Court's attention because I don't want that
9 testimony to come out from the officers that they spoke to
10 family members of Mr. Pennell who are afraid of him or who
11 don't like him or who can say these things about him that
12 the jury might hear. Certainly that would be --

13 **THE COURT:** If I may, let me encourage everybody
14 to focus on the issue of this trial, an attempted
15 carjacking. That's the issue. Now unless you can show me
16 that there's some connection --

17 **MR. JEPERTINGER:** No, he's raising it. I agree
18 with him.

19 **THE COURT:** Okay.

20 **MR. JEPERTINGER:** Okay? And once again, I
21 informed my witnesses if his relatives hate him, that's
22 between he and his relatives, not be brought out in this
23 courtroom.

24 **MR. SUGGS:** All right, sir. Thank you, Judge.
25 And there was another -- there was supposed to be a

1 statement that Mr. Pennell made to one of the officers
2 that he said he was a paranoid schizophrenic. I know we
3 get into the Miranda issue on that to determine whether
4 that's admissible. Certainly if he was properly advised
5 and he was under custodial arrest at the time, then
6 certainly that can come out. But I think one of the
7 officers made a mental note or made a note in the report
8 that the officer said he was obviously mentally ill or
9 obviously had some mental problems. Now unless he's
10 qualified to make that diagnosis as an expert, I mean, I
11 can understand if Pennell says this is the officer and
12 it's admissible, that's one thing. But for the officer to
13 make that observation to the jury, I think that's enough.

14 THE COURT: All right.

15 MR. JEPERTINGER: We don't disagree with that,
16 Your Honor. I've instructed both officers to testify they
17 can testify to —

18 THE COURT: What they observed.

19 MR. JEPERTINGER: What they observed in terms of
20 even his demeanor.

21 MR. SUGGS: I will.

22 MR. JEPERTINGER: But they can't make any
23 conclusions.

24 MR. SUGGS: Conclusion.

25 THE COURT: Draw conclusions from it.

1 MR. JEPERTINGER: That's right. We agree with
2 that as well.

3 THE COURT: Okay.

4 MR. SUGGS: All right. And two more things,
5 Judge. One has to do with Brady, Rule 5 motions, open
6 file previously. Just make sure there's nothing else that
7 I need to have today in terms of criminal records of
8 witnesses or other statements or anything exculpatory,
9 that sort of thing.

10 MR. JEPERTINGER: I have made my whole file
11 available to him. I've provided marijuana. We know about
12 the marijuana; I provided that today. I brought the
13 marijuana just in case, Your Honor. Mr. Suggs had -- we
14 went over the file. We went over the officer's case file
15 that was presented to me. He's aware of statements that
16 he wrote to the officer. He's also aware of everything
17 that I had. I would tell him, and I told Mr. Suggs this
18 morning, that the only record that I had for this
19 defendant that I did not have a dis-- excuse me, for the
20 victim, excuse me, was a breach of peace. Apparently he
21 was arrested for a criminal domestic violence, but I've
22 been informed that he pled to breach of peace in terms of
23 that, Your Honor. And I don't think, Your Honor, that he
24 can be cross-examined on a breach of peace. The only
25 thing else that he had was he went through PTI for an

1 ABHAN, Your Honor, which I believe was a conviction, Your
2 Honor.

3 THE COURT: PTI? Successfully completed PTI?

4 MR. JEPERTINGER: I believe so. Went through PTI
5 and successfully completed it, and I --

6 THE COURT: All right, well that wouldn't be
7 initial --

8 MR. JEPERTINGER: Both of those are forbidden as
9 well to go into on cross. I was going to say for both of
10 them, yeah, but I think that's it, Judge.

11 THE COURT: Yes, sir.

12 MR. SUGGS: One other thing, Judge, before we get
13 into Miranda issue, it's the indictment. I know earlier
14 on there was a change in the indictment or an amendment to
15 the indictment concerning the vehicle.

16 THE COURT: Yes, sir.

17 MR. SUGGS: It was changed from a Chevy Blazer to
18 a Ford Explorer. I know the indictment is going to go to
19 the jury room at some point.

20 THE COURT: No.

21 MR. SUGGS: It's not going to go to the jury
22 room.

23 THE COURT: It is not, correct. The only
24 information that the jury will have regarding the vehicle
25 would be that which I spoke about when I went over the

1 indictment with them and then any testimony that comes in
2 during the course of the trial.

3 MR. SUGGS: Let me express my concern. Judge, in
4 the indictment, the indictment, it's a one count
5 indictment and it says attempted carjacking.

6 THE COURT: Yes, sir.

7 MR. SUGGS: And I may be splitting hairs on this,
8 but the -- it's entitled attempt to carjacking and it's
9 highlighted in all in bold print. But if you look at the
10 statute, the statute does not say, doesn't have attempt to
11 carjack, it just says carjacking.

12 THE COURT: And attempt is part of --

13 MR. SUGGS: It's part of that but I think if --

14 THE COURT: But this -- but if it will help your
15 concerns this, they're not gonna get this.

16 MR. SUGGS: Will they get any documentation
17 though that will say, like the verdict form which will say
18 attempted carjacking. I think the verdict form should say
19 carjacking because that's what the statute is -- that's
20 what is indicated in the book; it's called carjacking.
21 It's not called attempted.

22 THE COURT: So under 16-3-1075 Subsection (b) (1)
23 that's -- 'cause I know you're --

24 MR. JEPERTINGER: Your Honor, the statute reads,
25 it is -- the caption of 16-3-1075 it says felony

1 carjacking. And then semicolon penalties. (B)(1) reads a
2 person is guilty of the felony of carjacking who takes or
3 attempts to take a motor vehicle from another person by
4 force and violence or by intimidation while a person is
5 operating a vehicle ---

6 THE COURT: So it says a person is guilty of ---

7 MR. JEPERTINGER: The felony of carjacking.

8 THE COURT: Okay.

9 MR. JEPERTINGER: And I think what Mr. Suggs has
10 is the nomenclature of attempted carjacking when the
11 statute refers to it as carjacking even though attempt is
12 part of the statute.

13 THE COURT: So you would be of the position that
14 any verdict form that would go to a jury would be for the
15 charge of carjacking, not ---

16 MR. SUGGS: Yes, sir.

17 THE COURT: ---attempted carjacking?

18 MR. SUGGS: Yes, sir. I think it would
19 confuse -- I think it would confuse the jury if they
20 thought that attempted carjacking was possibly a lesser
21 included offense on which they could convict and it's not.
22 And I don't -- I want to make absolutely clear to the jury
23 that they have to convict him or not convict him on
24 carjacking and not on attempted carjacking. I think
25 that's danger that we fall into.

1 THE COURT: Okay.

2 MR. SUGGS: Even though it's the same thing they
3 may not realize that.

4 THE COURT: All right. But, and this is -- and I
5 don't disagree with you; but that when it comes to
6 argument to the jury, you can't then decide to treat them
7 differently.

8 MR. SUGGS: Yes, sir.

9 THE COURT: In other words, I'm gonna charge them
10 the law and I'll charge the statute.

11 MR. SUGGS: Yes, sir.

12 THE COURT: And then y'all can argue the statute.

13 MR. SUGGS: Yes, sir.

14 THE COURT: But so --

15 MR. SUGGS: I think --

16 THE COURT: So Mr. Jepertinger, does the State
17 have a position regarding the indictment?

18 MR. JEPERTINGER: I guess tech--

19 THE COURT: I mean, the verdict form.

20 MR. JEPERTINGER: Technically, the crime is
21 called carjacking, I guess, but attempt is part of, falls
22 under that so I mean.

23 THE COURT: And you can go over that with the
24 jury when you address them.

25 MR. JEPERTINGER: Absolutely, uh-huh.

1 THE COURT: We'll revisit that to clarify and
2 make sure we've got it when it comes time to have a
3 verdict form presented. But I would tell you that this
4 document is not going back.

5 MR. SUGGS: Yes, sir, yes, sir.

6 THE COURT: And so I wouldn't -- you don't need
7 to be concerned about that. And then as far as I know I
8 don't know what the State may have in their evidence and
9 documentation; but, and whatever the Court provides in,
10 say, verdict form, we'll review that and make sure
11 everybody is in agreement on that.

12 MR. SUGGS: Please don't let me forget, Judge.

13 THE COURT: Oh, I won't, I won't, 'cause that's a
14 little bit of a different issue.

15 MR. SUGGS: Yes, sir.

16 THE COURT: Not dealt with.

17 MR. JEPERTINGER: And that was in it except
18 in-camera.

19 THE COURT: All right.

20 MR. JEPERTINGER: And I have one more thing other
21 than in-camera, Your Honor. I showed these -- let me
22 count them. There are 15 photographs. There was a stereo
23 system that was left at the scene by the defendant, and
24 the scene would be the former Hollywood Video. Your
25 Honor, instead of bringing that whole stereo system up

1 here and introducing it into evidence, Your Honor, with a
2 limited place to put in the evidence room, Mr. Suggs is
3 aware that we took photographs. I don't think he has a
4 problem with the photographs as opposed to the whole
5 stereo system.

6 MR. SUGGS: Well ---

7 THE COURT: I mean, I guess, you'll have somebody
8 that can testify that that's the stereo system and those
9 are fair and accurate representation of so...

10 MR. SUGGS: If we can just look at -- let the
11 client look at them and if he's okay with them, Judge, and
12 they're a fair representation, then you know, we can just
13 go ahead and mark them.

14 THE COURT: Okay.

15 MR. JEPERTINGER: That's what I would like to do
16 to save some time.

17 THE COURT: And if it's okay, let Mr. Pennell
18 look at those and we'll move forward with the Jackson v.
19 Denno.

20 MR. SUGGS: Yes, sir.

21 THE COURT: Well, is Officer Provenzano ready?

22 MR. JEPERTINGER: Officer Provenzano is.

23 THE COURT: Ready to take the stand, I'll get him
24 to come up if you're ready Mr. Jepertinger.

25 MR. JEPERTINGER: I'm ready, Judge.

JACKSON V. DENNO HEARING

1 **THE COURT:** All right. Officer, if you'd come
2 up, sir, and we'll go ahead and get started on this
3 hearing here.

4 **THE DEPUTY CLERK OF COURT:** If you, sir, place
5 your left hand on the Bible, raise your right hand.

6 **WHEREUPON,**

7 **JOSEPH PROVENZANO,**
8 having been duly sworn by the Deputy Clerk of Court,
9 testified as follows:

10 **THE DEPUTY CLERK OF COURT:** Please be seated
11 and state your full name for the record.

12 **THE WITNESS:** Joseph Provenzano.

13 **DIRECT EXAMINATION**

14 **BY MR. JEPERTINGER:**

15 **Q** Yes. Officer Provenzano, and you work for the Florence
16 Police Department?

17 **A** Yes, I do.

18 **Q** And you work for patrol?

19 **A** Yes, I do.

20 **Q** And how long have you been employed for the police
21 department in patrol?

22 **A** A little over six years.

23 **Q** All right. And therefore you were a patrol officer
24 back on Monday, May 25th, 2009?

25 **///**

JACKSON V. DENNO HEARING

1 **A** Yes, I was.

2 **Q** All right. Did you have an occasion to go out to 2107
3 West Palmetto Street which at the time was a business
4 known as Hollywood Video?

5 **A** I did.

6 **Q** Okay. And when you got there can you tell the Court
7 how you came in contact with the defendant in this case,
8 Mr. Pennell?

9 **A** As I responded to the scene we were notified that there
10 was a suspect, a subject lying on -- at the -- in the
11 parking lot of that business in an orange shirt. When I
12 responded to the business nobody was to be found. He was
13 later -- subject matching description of the subject
14 laying in the ground, on the ground, was located a couple
15 of blocks away.

16 **Q** Well, let me ask you, where he was located, would that
17 be the old Naturally Outdoors Business?

18 **A** Yes.

19 **Q** About a block away behind Hollywood Video?

20 **A** Yes, it was.

21 **Q** On the corner of Palmetto and I guess Evans Street?

22 **A** Yes.

23 **Q** All right.

24 **A** Officer Iseman is the one that investigative detained
25 the subject to bring him back. He was identified by the

JACKSON V. DENNO HEARING

1 employees there who seen that subject in the parking lot.
2 I spoke with the subject. I read him his Miranda
3 warnings.

4 Q Now stop right then and there. You read him his
5 Miranda rights. Did you read them off a piece of paper or
6 a card or what did you ---

7 A I read them off my card.

8 Q And do you have that card with you today? Please read
9 to the judge exactly what you read to Mr. Pennell on
10 Monday, May 25th, 2009.

11 A "You have the right to remain silent. Anything you say
12 can and will be used against you in a court of law. You
13 have the right to talk to an attorney, have him or her
14 present with you while being questioned. If you cannot
15 afford to hire an attorney one will be appointed to
16 represent you before any questioning if you want. You can
17 decide at any time to exercise these rights and not answer
18 any questions or make statements. You understand these
19 rights I've explained to you."

20 Q All right. And did he seem to you to understand those
21 rights?

22 A I asked him if he understood, he said yes.

23 Q All right. And at that point did you ask him if he had
24 been involved in an altercation at Hollywood Video?

25 A I did. He stated, yes.

JACKSON V. DENNO HEARING

1 Q He stated yes, okay. And can you tell the Court
2 basically what he told you?

3 A He said he was just walking through the parking lot
4 taking some equipment back to Wal-Mart when at that time
5 the victim pulled up in his vehicle, jumped out, shot one
6 shot in the air, and he said he backed away and from the
7 victim.

8 Q All right. And is that all he mentioned or did he
9 mention anything else to you?

10 A At that time that was all he said.

11 Q All right. And at that point did -- not at that point,
12 but thereafter, did Investigator Robinson come on scene?

13 A Yes.

14 Q And did she have the opportunity to talk to him as
15 well?

16 A Yes.

17 Q Was he under arrest at the time that either you talked
18 to him or Investigator Robinson talked to him?

19 A No, he was not under arrest at that time. He was just
20 under investigative detention.

21 Q Okay. And was normal policy of investigative detention
22 do you read everybody their rights?

23 A I, yes, sir.

24 Q Did you inform Investigator Robinson that you had read
25 him --

JACKSON V. DENNO HEARING

1 **A** I did.

2 **Q** --his rights? And she spoke to him at that point.

3 **A** Yes.

4 **Q** All right. And were you present when she spoke to him?

5 **A** Sometimes I was talking to the victim 'cause he
6 returned.

7 **Q** Okay. And not him -- what did -- if I need to ask
8 anymore questions about Investigator Robinson should I ask
9 her?

10 **A** Yes.

11 **Q** All right. Thank you very much. That's all I have in
12 terms of this issue.

13 **THE COURT:** Mr. Suggs, yes.

14 **MR. SUGGS:** I don't have any questions, Judge.

15 **THE COURT:** Thank you very much, sir. You may
16 step down.

17 Yes, sir.

18 **MR. JEPERTINGER:** We would call Investigator
19 Robinson to the stand.

20 **THE COURT:** Ma'am, if you'd please come around.

21 **WHEREUPON,**

22 **MICHEAL ROBINSON,**
23 having been duly sworn by the Deputy Clerk of Court,
24 testified as follows:

25 **THE DEPUTY CLERK OF COURT:** Please be seated

JACKSON V. DENNO HEARING

1 and state your full name for the record.

2 **DIRECT EXAMINATION**

3 BY MR. JEPERTINGER:

4 Q If you could tell the Court, Investigator Robinson, how
5 you came in contact with this defendant on Monday,
6 May 25th, 2009, please.

7 A Okay. I'm Investigator Michael Robinson of the
8 Florence Police Department, and I was on call that night.
9 We refer to it as duty. I was notified by Officer
10 Provenzano that they needed assistance or needed a
11 detective at the incident location, which is Hollywood
12 Video.

13 Q All right. And when you arrived on scene what did you
14 do?

15 A Well, the victim and the defendant were both at the
16 scene and so I spoke with Officer Provenzano to get more
17 information about the incident.

18 Q Did he inform you that he had already advised Charles
19 Pennell of his rights?

20 A Absolutely.

21 Q Okay. And then did you have a chance to question
22 Pennell?

23 A I did. I spoke with Mr. Pennell.

24 Q And what did -- what did he tell you?

25 A Mr. Pennell was extremely agitated but stated, the

JACKSON V. DENNO HEARING

1 little bit of information that I could get out of him, he
2 stated that he had been dropped off there at the incident
3 location by his niece because she wanted to get high and
4 he didn't want to and that they were trying to sell the
5 stereo equipment and that he was, you know, innocent and
6 hadn't done anything wrong.

7 Q Okay. And did he say anything about the victim
8 attacking him for no reason?

9 A He did, yeah. He was -- the victim -- that's exactly
10 what he stated.

11 Q Okay. And at that point obviously you had a chance to
12 talk to the victim as well in this case Mr. Wilson?

13 A Yes.

14 Q All right. And afterwards did you inform the -- I
15 guess the defendant, he was being arrested for these
16 charges?

17 A I did.

18 Q And he was -- you tell -- things we can't go into in
19 front of the jury, simple possession of marijuana.
20 There's also simple assault and this attempted carjacking.

21 A Yes.

22 Q Carjacking. And did he say anything else to you of any
23 import?

24 A I couldn't understand what he was saying. He was
25 screaming and using racial slurs at that point.

JACKSON V. DENNO HEARING

1 Q Directed towards Mr. Wilson?

2 A I assume because he was using the N word.

3 Q Okay, all right. Thank you. That's all the questions

4 I have in terms of this witness.

5 THE COURT: Any questions for the officer,

6 Mr. Suggs?

7 MR. SUGGS: Yes, Your Honor.

8 THE COURT: Yes, sir.

9 **CROSS-EXAMINATION**

10 BY MR. SUGGS:

11 Q Officer Robinson, you didn't read any Miranda warnings

12 to Mr. Pennell, did you?

13 A No, sir, I did not. He was -- he had already been read

14 his Miranda rights by Officer Provenzano less than just a

15 few minutes before.

16 Q You were present when that officer read those rights to

17 Mr. Pennell?

18 A No, sir, I was not. I think I was on the scene but I

19 was not standing by him.

20 Q You didn't hear the Miranda warnings being recited to

21 Mr. Pennell by the officer?

22 A No, sir, I did not.

23 Q All right. You just understood from the officer that

24 he had previously advised him of his constitutional

25 rights?

JACKSON V. DENNO HEARING

- 1 A Well, the officer had told me, I've already read
2 Mr. Pennell his Miranda rights ---
3 Q And that was ---
4 A ---specifically.
5 Q And that was prior to you questioning him?
6 A Yes, sir.
7 Q And that was prior to that officer questioning him as
8 well?
9 A I don't understand your question.
10 Q Do you know whether or not that officer questioned
11 Mr. Pennell before he read him his constitutional rights?
12 A I don't know that. I just know he was very specific
13 whenever he informed me he had mirandized Mr. Pennell.
14 Q You say that Mr. Pennell was cussing or was using, you
15 know, inappropriate language in front of you.
16 A Yes, sir.
17 Q You heard this?
18 A Yes, sir.
19 Q And he said what specifically?
20 A Do you want me to say the word?
21 Q Yes, ma'am.
22 A He was using the word nigger.
23 Q In what context?
24 A I don't know. No one was speaking to him. He was in
25 the back seat of the car by himself with the windows

JACKSON V. DENNO HEARING

1 rolled up, and he was screaming at, trying to scream
2 through the windows with -- when we were all speaking with
3 each other. The officers were talking to each other after
4 I had spoken with Mr. Pennell, and he was trying to get my
5 attention and screaming, you know, the word nigger.

6 Q Well, he wasn't -- he wasn't talking to anyone
7 specifically, was he?

8 A He was trying to get our attention, but we -- at that
9 point he was completely combative, and there was no way to
10 communicate with him at that point.

11 Q Okay. Well, where was the victim at this time?

12 A We were trying to get the victim away from the
13 defendant because he was standing by his truck and if I
14 had a picture of the parking lot I could show you the way
15 the car was positioned. It was further from me to you,
16 about closer from me to the end of the courtroom.

17 Q Did Mr. Wilson hear these statements or do you know?

18 A I feel sure that he did. Everyone in the vicinity
19 heard.

20 Q Did you ask him if he heard that?

21 A I would look at him and he would say, you know, I'm
22 fine, I'm fine. He was very calm, and you know.

23 Q I'm still trying -- I'm struggling with the N word
24 again. I understand -- I'm trying to understand what
25 context it was said.

JACKSON V. DENNO HEARING

1 **A** Like I said repeatedly ---

2 **Q** Did he address anyone in particular? Was he screaming
3 in the car with the windows rolled up?

4 **A** He was screaming in the car with the windows rolled up.
5 I mean, the officer had to roll the windows up because of
6 he was very violent.

7 **Q** Did he injure anybody?

8 **A** I don't -- no, sir.

9 **Q** Didn't damage the car?

10 **A** No, sir.

11 **Q** But you didn't read him his rights.

12 **A** No, sir, I did not.

13 **Q** And you weren't present when the officer claimed that
14 he read the rights?

15 **A** When the officer read the rights I was on the scene; I
16 was not standing by him.

17 **Q** You didn't hear him?

18 **A** No, sir.

19 **Q** That's all.

20 **MR. SUGGS:** Thank you, Judge.

21 **MR. JEPERTINGER:** That would be it on that issue
22 Your Honor.

23 **THE COURT:** Thank you very much, ma'am. You may
24 step down. Anything further on that issue?

25 **MR. JEPERTINGER:** Not on that issue, Your Honor.

1 THE COURT: Mr. Suggs.

2 MR. SUGGS: Yes, sir. Judge, I can't help but to
3 express, express some concern about what impact that may
4 have on the jury. Now I wasn't really to be honest
5 prepared to hear that because it's not listed in the
6 reports in any way, shape, or form that any sort of racial
7 epithets were used at any time. I don't see necessarily
8 how that particular comment, if made, has any bearing
9 whatsoever on the issue of guilt or innocence insofar as
10 the allegations made by the State that this man attempted
11 to steal Mr. Wilson's car. I think the -- and whether or
12 not he said, I don't know, I'm assuming that he did
13 because the officer testified that fact. We put up
14 nothing to the contrary. But what concerns me is the
15 impact that might have on our jury in that they might
16 consider that, that sort of comment to be justification,
17 if you will, to convict and look beyond the facts of the
18 case. And I know sometimes we have to play the cards that
19 we're dealt, Judge, and I understand that. Sometimes we
20 can't pick and choose what we want the jury to hear and
21 what we don't want them to hear when we have a statement
22 coming in satisfying the requirements of Miranda. But
23 nevertheless, I still think that if that was said, whether
24 it was said or not, it would be very prejudicial for the
25 jury to hear and it does have no bearing on the issue of

1 guilt or negligence.

2 **THE COURT:** I'm curious because we've done a
3 Jackson v. Denno hearing regarding a statement, but I'm
4 not aware that anybody introduced any statement other than
5 a guy in the back of a car screaming the N word and —

6 **MR. JEPERTINGER:** Your Honor, the statement was
7 that he put himself there. He put himself at the scene.

8 **MR. SUGGS:** I don't have a problem with that; I
9 agree to that.

10 **THE COURT:** That's not the issue. The issue
11 that's being raised is what relevance does that testimony
12 have to the carjacking.

13 **MR. JEPERTINGER:** Your Honor, obviously it has no
14 relevance to the particular, to the elements of the
15 offense. I agree with you on that. However, once again,
16 it goes to the context of the -- when you question, one of
17 the things that they're gonna be able to do is the officer
18 on scene will be able to check in terms of demeanor,
19 believability of people that are there. You have one
20 individual that's calm, screaming racial epithets for no
21 apparent reason, and another individual that's very calm.

22 **THE COURT:** Again, but we went through a Jackson
23 v. Denno hearing, and I'm assuming that Investigator
24 Robinson questioned the defendant but there was no
25 testimony as to the contents of that questioning.

1 MR. JEPERTINGER: He said nothing other than
2 started screaming at her. I think that was her testimony.

3 THE COURT: Then why did we have this hearing?
4 Wouldn't that be under some other ---

5 MR. JEPERTINGER: Well, Your Honor, let me say
6 this, Provenzano questioned him what happened, okay. He
7 gave him his Miranda warnings. He was under investigative
8 detention. I would agree with you if investigative
9 detention does not rise to the level of custodial arrest
10 this hearing was wasting your time. However, when a
11 person is investigatively detained, he's not free to
12 leave, I think he's under custody, therefore, I think
13 Miranda raises its head and at that point I think at a
14 minimal he has to give him his rights.

15 THE COURT: No, and again, I'm not -- I don't
16 argue, I mean, it's never wrong to give somebody their
17 rights, okay. It's wrong to not give them when they're
18 supposed to. But my point is, this testimony that you
19 seem to want to go into is not as a result of any
20 questioning. It's, I mean, these aren't statements that
21 are in response to questioning.

22 MR. JEPERTINGER: Well, the first statement was.
23 He asked him what happened. I'm talking about Provenzano.

24 THE COURT: Correct.

25 MR. JEPERTINGER: I'm trying ---

1 **THE COURT:** Correct.

2 **MR. SUGGS:** I'm fine with that.

3 **THE COURT:** But the statement where apparently
4 they had him in the back of the patrol car, the windows
5 were up and the officers were off to the side talking and
6 he's screaming this N word ---

7 **MR. JEPERTINGER:** Your Honor, we can clear that
8 up by she won't mention what he said in the back of the
9 patrol car. She can -- she can say his demeanor, he was
10 screaming, and I don't think we have a problem with that
11 and will control that.

12 **THE COURT:** Absolutely.

13 **MR. SUGGS:** Now obviously too ---

14 **THE COURT:** Absolutely.

15 **MR. JEPERTINGER:** ---he said things to the victim
16 witness in the case who will testify, which is not subject
17 to any of that, and those words were being said to him
18 directly, Your Honor. I think that's fair game.

19 **THE COURT:** I don't disagree to that as we get to
20 it; it may be an issue. But right now as you've
21 characterized it I don't think that to be an issue. What
22 I think Mr. Suggs is raising was the issue about the
23 screaming going on in the back of car and that context
24 being brought out.

25 **MR. SUGGS:** Yes, sir.

1 THE COURT: And I would agree with him regarding
2 that. However, that doesn't prevent, Mr. Suggs,
3 Investigator Robinson from testifying that — and I'm not
4 going to put words in her mouth but basically as to her
5 observations of his demeanor and —

6 MR. SUGGS: Yes, sir.

7 THE COURT: ---level of anxiety ---

8 MR. SUGGS: Anxiety.

9 THE COURT: ---aggravation or anger or whatever
10 it was.

11 MR. SUGGS: Yes, sir, and I would not argue
12 against that, Judge.

13 MR. JEPERTINGER: Your Honor, come to the
14 photographs.

15 THE COURT: Have you had a chance?

16 MR. SUGGS: Did you look at these?

17 MR. JEPERTINGER: And for whatever it's worth,
18 for the record I believe what he said, Provenzano, comes
19 in?

20 THE COURT: I think what Officer Provenzano —
21 let me say for the record I believe that the Miranda was
22 properly given.

23 MR. SUGGS: Yes, sir.

24 THE COURT: And I think based on the testimony
25 that the defendant understood it and so any response to

1 the questioning from Officer Provenzano would be
2 admissible.

3 MR. SUGGS: Yes, sir, and I would not argue,
4 Judge. That's the copy of the owner's manual or
5 something, TV set.

6 (Mr. Suggs and defendant confer.)

7 THE COURT: Well, do you object to it?

8 MR. SUGGS: No.

9 MR. JEPERTINGER: Okay. Then I —

10 THE COURT: Let me just so we're clear on the
11 record, Mr. Suggs, is there any objection to any of those
12 photographs?

13 MR. SUGGS: None.

14 THE COURT: All right. And we'll mark those as
15 Plaintiff's 1 through —

16 MR. JEPERTINGER: 1 through 15.

17 THE COURT: 1 through 15.

18 MR. SUGGS: I have some photos too, Judge. I
19 took these yesterday with my camera; and I didn't realize
20 it, the Hollywood Video has been closed down, and it's
21 empty and I think the printer cartridge on my printer is
22 fading so they're rather green. But they still — it's
23 four of them; I showed them to John. And I think they're
24 accurate.

25 THE COURT: Is there any objection to those,

1 Mr. Jepertinger?

2 MR. JEPERTINGER: One second.

3 THE COURT: Yes, sir.

4 MR. SUGGS: I took those maybe to be helpful just
5 to ---

6 THE COURT: For the scene.

7 MR. SUGGS: At the scene, yes, sir.

8 MR. JEPERTINGER: For what they're worth, we
9 would argue that if they come into evidence as defense
10 exhibits, Your Honor, that they don't show exactly where
11 this thing completely transpired, but we have no objection
12 to them coming in and we'll have to ask the investigator.

13 THE COURT: How many are there?

14 MR. SUGGS: Four.

15 THE COURT: So we'll have no objection.

16 MR. JEPERTINGER: To defense ---

17 THE COURT: I realize you're gonna question them
18 regarding ---

19 MR. JEPERTINGER: The relevancy, yeah.

20 THE COURT: We're -- yeah, uh-huh, but okay, so
21 Defense 1 through 4.

22 MR. JEPERTINGER: That's right.

23 THE COURT: Without objection. So we got any
24 other -- is there any other thing we should mark, any
25 other exhibits or anything?

1 MR. SUGGS: We don't have any, Judge.

2 MR. JEPERTINGER: Let me just check, Judge. All
3 right. Judge, I think that will be it.

4 THE COURT: Anything else before we bring the
5 jury out from the State?

6 MR. JEPERTINGER: Not from the State, Your Honor.

7 THE COURT: From the Defense?

8 MR. SUGGS: Judge, I don't believe so, Judge.

9 THE COURT: All right. Are either one of you
10 intending to use the podium where it is 'cause it's fine
11 if you are and we'll move it if you don't want it.

12 MR. SUGGS: Where are you going? Sit down.

13 (Speaking to Mr. Pennell.)

14 MR. SUGGS: I'm sorry, Judge.

15 THE COURT: That's okay. Just, do you want it
16 there or do you want to move it?

17 MR. SUGGS: I'm gonna excuse it, Judge. And I
18 think Mr. Etheridge is going to be leaving, and I think
19 this gentleman has to go to the bathroom.

20 THE COURT: All right. Let's go ahead and use
21 the restroom. Anybody else that needs to go go ahead and
22 then let's get started.

23 (WHEREUPON, a recess was taken from the proceedings.)

24 (WHEREUPON, State Exhibits Nos. 1 through 15 and Defendant
25 Exhibits Nos. 1 through 4 were marked for identification

1 and received into evidence.)

2 MR. JEPERTINGER: Judge, they have not been sworn
3 I understand.

4 THE COURT: That's correct. We'll get that taken
5 care of. Thank you, Mr. Jepertinger.

6 All right. We'll ask them to join us, Sammy.
7 (WHEREUPON, the jury was returned to the courtroom at
8 approximately 4:14 p.m., and the following proceedings
9 commenced in open court.)

10 THE COURT: All right. Just when you thought we
11 forgot about you and you were back, the forgotten tribe,
12 we call you out. Ladies and gentlemen, I want to
13 apologize to you initially. We had several matters that
14 we had to take up involving the other case that took
15 longer than anticipated. And then, while we had you out
16 and not to bounce you back and forth, we took up some
17 matters in this case that will help this case move on
18 quicker and won't cause you to have to go back and forth
19 to the jury room. We got -- the parties have agreed to
20 several exhibits which have come in and so we took care a
21 lot of matters that even though you were in the jury room
22 thinking that we're wasting the afternoon, we actually got
23 a lot done that's gonna make things go much smoother and
24 much quicker. So if you would please accept our apologies
25 for having you sit back in that long, but please

1 understand that we weren't just out here playing around.
2 We were getting some things done that will help us in the
3 long run.

4 Now we're ready to begin the trial of this case,
5 but I'm gonna keep my promise to you. I'm not gonna keep
6 you here late this evening so I anticipate that we'll
7 probably get to the point of allowing you to listen to the
8 attorneys as they present their opening remarks, and then
9 we'll probably be adjourning at that point and we'll
10 actually begin testimony in the morning. But before we
11 begin anything, I need to ask you if you would please give
12 Ms. O'Hara your attention as she places you under your
13 oath for your role as jurors in this trial.

14 THE DEPUTY CLERK OF COURT: If you would please
15 stand and raise your right hand to be sworn.

16 (WHEREUPON, the jury was sworn at 4:17 p.m.)

17 THE DEPUTY CLERK OF COURT: You may be seated.

18 THE COURT: Ladies and gentlemen, we're about to
19 begin the trial of the case of State South Carolina versus
20 Charles Berlin Pennell. Before we begin I want to tell
21 you that this trial is probably gonna be very different
22 from what you might expect. Most people's experience with
23 regards to real jury trials is rare. Most people do not
24 get the opportunity to sit in on a real jury trial. Most
25 people's experience regarding trials is what they've seen

1 on television or in the movies or have read in books. And
2 as we all know, those trials are always filled with high
3 drama, intense action, and rivetting circumstances. Now
4 while any one of those things may be true or may be, may
5 occur during the course of this trial, what I want you to
6 understand, ladies and gentlemen, is that this trial is
7 not for your entertainment. This trial is a fundamental
8 part of our democracy. It is a search for the truth in an
9 effort to make sure that justice is done between the
10 parties that appear before the Court. Searching for the
11 truth and making sure that justice is done is often slow,
12 sometimes deliberate and repetitive; but my point is, it's
13 very different than what you might expect from at least
14 what you've seen on television or in the movies or have
15 read in books. This courtroom is a place of honor that is
16 dedicated to the preservation and the protection of
17 citizens' rights through what many have called the
18 greatest justice system ever created. The attorneys
19 appearing before you are advocates for the parties that
20 they represent; but first and foremost, they are officers
21 of court sworn to uphold the integrity and the fairness of
22 our judicial system and to help you in your search for the
23 truth. You should expect them to be professional,
24 competent, and ethical in the representation of their
25 client's interest. Remember that you've just taken an

1 oath to try this case and to reach a fair and a just
2 verdict. So you are also expected to be professional,
3 reasonable, and ethical in the performance of your duties,
4 and I have no doubt that you'll do just that. I want to
5 thank you for your contribution during this trial to our
6 system of justice in this community.

7 Now what I'm gonna tell you is intended to serve
8 as an introduction to the trial of this case. These
9 remarks are not a charge on the law. I will, in fact,
10 charge you on the law applicable to this case at the end
11 of the trial before you retire to begin your
12 deliberations. This is merely an explanation of the
13 procedures that we will follow during the course of this
14 trial so that you may better understand the things that
15 are going on and what's happening. Now the defendant in
16 this case is charged by an indictment which has been filed
17 with this court and he's charged with the offense of
18 carjacking. The elements of that crime I will explain to
19 you later as I charge you on the law. The indictment, as
20 I told you earlier, is simply the charge by which a case
21 is brought into court and is not in any sense evidence of
22 the allegations that it contains. The State, therefore,
23 has the burden of proving each element of indictment
24 beyond a reasonable doubt because the defendant has
25 entered a not guilty plea to those allegations.

1 It will be your duty, ladies and gentlemen, to
2 decide whether or not the State has met that burden. Your
3 purpose as jurors is to find and to determine the facts in
4 this case. You are the sole judges of the facts. If at
5 any time I make a comment regarding the facts in this case
6 you must disregard those comments. You are to determine
7 the facts from the testimony that you hear and any other
8 evidence that may be introduced during the course of this
9 trial. It is up to you to determine the inferences which
10 you feel may be properly drawn from the evidence. It is
11 especially important that you perform your duty of
12 determining the facts diligently and conscientiously
13 because ordinarily there's no way to correct an erroneous
14 determination of facts by a jury.

15 Now on the other hand but with equal emphasis,
16 the same law that makes you the judges of the facts makes
17 me the judge of law. The law as given by this Court is
18 the only law that you may consider. You must accept and
19 follow it even though you may disagree with it. I'm not
20 allowed to tell you what the facts are in this case, and
21 you on the other hand, are not allowed to disagree with me
22 about what the law is or what you think it should be.
23 Your job is to take the law as I give it to you, apply it
24 to the facts as you find them to be from the testimony of
25 witnesses and any other evidence that is introduced during

1 the course of this trial. After doing that you will then
2 render a verdict in this case which speaks the truth and
3 is a just verdict under your solemn oath that you've taken
4 as jurors.

5 Now until I advise you to begin your
6 deliberations you must not discuss this case with anyone,
7 and that even includes amongst yourself or your fellow
8 jurors. And sometimes that confuses a jury because most
9 people think, well, I thought our job was to deliberate
10 and to decide this case. And that is your job, but you're
11 not to begin those deliberations until all of the evidence
12 is in. We used to have a judge here, Judge Harwell, who
13 we all loved and admired, and Judge Harwell used to say,
14 you don't begin baking a cake until you've added all the
15 ingredients or the cake doesn't turn out. You don't begin
16 your deliberations until you have all the evidence. So
17 until that time you're not to have any discussion about
18 the case even amongst yourselves.

19 Now it's important that you keep an open mind and
20 that you not decide any issue in this case until all of
21 evidence has been presented, the parties have had the
22 opportunity to address you with their closing remarks, and
23 that I have instructed you on the law in this case. It is
24 your solemn responsibility to determine the guilt or
25 innocence of the defendant, and your verdict must be based

1 solely on the evidence as it is presented during the
2 course of this trial and on the law that I give you at the
3 conclusion of the trial.

4 Now in just a moment Mr. Jepertinger will have an
5 opportunity to address you with what we call an opening
6 statement. In that statement he will explain to you what
7 the issues are in this case or at least what he believes
8 the issues in this case are. Once he finishes his opening
9 statement then Mr. Suggs on behalf of Mr. Pennell will
10 have an opportunity to make an opening statement as well.
11 Although he's not required to do that, what you need to
12 understand is this, what the attorneys may tell you in
13 their opening statements, ladies and gentlemen, is not
14 evidence. It is merely their contentions as to what they
15 believe the evidence will show. The evidence in this case
16 will be presented to you by witnesses who take an oath,
17 take the witness stand, and testify as well as any
18 exhibits which may come in during the course of the trial.
19 That's where the evidence will come from.

20 Now during the course of a trial from time to
21 time you may hear one of the attorneys say something along
22 these lines, excuse me Your Honor, we have a matter of law
23 we need to take up with the court; or judge, may we
24 approach the Bench. During these times I might find it
25 necessary to ask you to step into your jury room. The

1 reason, if I do that, the reason would simply be for this
2 purpose: As I told you earlier, I'm not to have any
3 influence over you about the facts in the case. Sometimes
4 when I address matters of law with the lawyers in ruling
5 on an issue or determining whether or not something is
6 admissible or not, it sometimes requires me to make
7 comments about the facts in connection with that ruling.
8 To protect you from being exposed to that, I may find it
9 necessary to ask you to step into your jury room so that I
10 don't interfere in any way with your role as the fact
11 finders. In determining what the true facts are in this
12 case you must decide whether or not the testimony of a
13 witness is believable. It's going to be my job to
14 determine as a matter of law whether certain testimony is
15 admissible or not. But once testimony is admitted into
16 this case, whether or not you believe it is solely up for
17 you to decide. In determining what — whether to believe
18 a witness you have the right to consider the interest of a
19 witness, the bias of any witness, the opportunity for the
20 witness to have seen the matters and the things about
21 which that witness testifies. You have the right to
22 observe a witness in the way they act on the witness
23 stand. You have the right, ladies and gentlemen, to
24 consider anything that is in this record that will help
25 you in evaluating the testimony of witnesses. That means

1 that it is your duty to pay close attention to the
2 witnesses, observe them, listen to them, pay attention to
3 the attorneys and to the Court. Please do not let your
4 thoughts wander but give strict attention to all of the
5 testimony and the evidence in this case so that at the end
6 of this trial after the attorneys have had an opportunity
7 to address you with their closing remarks and that the
8 Court has charged you on the law, you will then be in a
9 position to go into that jury room and then deliberate and
10 determine what the true facts are in this case.

11 Now prior to beginning in an order to preserve
12 everyone's rights, let me inquire first of the State, are
13 there any objections or exceptions to the Court's opening
14 remarks to the jury?

15 MR. JEPERTINGER: No, sir.

16 THE COURT: Anything from the Defense regarding
17 those remarks?

18 MR. SUGGS: Nothing, Your Honor.

19 THE COURT: All right. Thank you, gentlemen.
20 Now ladies and gentlemen, if you would please give both
21 Mr. Jepertinger and if Mr. Suggs addresses you, give them
22 both your undivided attention as they present to you their
23 opening remarks.

24 MR. JEPERTINGER: Thank you. If it please the
25 Court, Your Honor, Mr. Suggs. Ladies and gentlemen of the

1 jury, I thank you first. I know you didn't volunteer for
2 this service, but I do appreciate your participation in
3 this matter. Well, what do you do in life when the
4 unanticipated, the unplanned for, the uninvited, the
5 unnerving occurs to you when you are doing just a regular
6 chore. There is no field manual in life, not like in the
7 military, how to deal with stressful situations. You have
8 to react when those unplanned for events occur in your
9 life. On Monday, May 25th, 2009, Jonathan Wilson was
10 placed in that situation. Jonathan works for San-glo
11 Glass Company. At that time he'd been working there for
12 three years and still employed by them. It's this
13 gentleman in the blue shirt. Was driving up to Hollywood
14 Video. Hollywood video is no longer in business. They
15 were located on West Palmetto Street. It's a video store.
16 You rent DVDs. Now I don't know why they call them video
17 store, but it's DVDs basically. And he went up there at
18 around 10:30 with the expressed purpose of going to rent a
19 few movies that evening. He was a regular customer. He
20 was coming off Evans Street. He pulled up to the back
21 entrance. And he was pulling around to the front to go to
22 the front entrance; it was dark. And then low and behold
23 the unanticipated happened. There was stereo equipment
24 all strewn across the parking lot roadway, something that
25 you wouldn't expect to see in the parking lot of the

1 Hollywood Video store on Monday, May 25th, 2009. What did
2 he do? He would do what any normal person would do, what
3 any reasonable person would do. He got out of his vehicle
4 to move that equipment, to get it out of way. And at that
5 point another unanticipated, unplanned for, unintended
6 consequence occurred when he did that. Charles Berlin
7 Pernell, the defendant in this case who is seated with his
8 counsel, came up from the right side. And the first thing
9 he asked is if he could get a ride to Timmonsville.

10 Jonathan Wilson is gonna tell you something
11 didn't feel right. Told the man, I can't do that. At
12 that point Charles Berlin Pennell got upset, irate with
13 Jonathan. He started calling him racial epithets,
14 swearing, acting like he was out of his mind, talking to
15 him in a very harsh manner, something that Jonathan Wilson
16 didn't plan for, didn't expect, didn't anticipate at all.
17 And what did he do? Something very reasonable, he got in
18 his car. But he didn't get in his car to leave the area.
19 He drove around to the front of the store, the area that
20 is depicted on Defense Exhibit 1, which would have been
21 off Palmetto Street. And he parked his vehicle thinking
22 maybe that's it. It wasn't it.

23 Charles Berlin Pernell -- excuse me, Pennell,
24 came up again up to his vehicle. He was driving a 2005
25 Ford Explorer at the time. And he told Mr. Wilson, I'm

1 gonna take your car. At that point Pennell's basically in
2 the driver's side door. There is no room. There is no
3 getting out. There is no running. Something
4 unanticipated, unintended, something he didn't plan for
5 when he was going to rent movies that evening. Mr. Wilson
6 decided at that point, at that point, now there's no time
7 -- Mr. Wilson will tell you -- for clear, calm, collected
8 thinking that maybe I can think about this for ten minutes
9 as what I'm going to do. He had to make a decision right
10 then and there. The first thing he did was he pushes this
11 individual back; and unbeknownst to Charles Berlin
12 Pennell, Mr. Jonathan Wilson has a Taurus 9-millimeter in
13 the glove box. He reaches into this glove box. The gun
14 was not loaded at the time, but he had a clip. It was a
15 -- it was a handgun, a pistol, where the magazine fits up
16 into the handle. He has a magazine he slides it in. He
17 cocks it. And he'll tell you, at that point when Charles
18 Berlin Pennell sees that 9-millimeter he steps back.
19 He'll tell you, Mr. Jepertinger, ladies and gentlemen,
20 ladies and gentlemen of the jury, he didn't look scared.

21 Now folks, at that point he has to make another
22 decision. He didn't have 10, 15 minutes for cool, calm,
23 reflection. There was no time to get on the phone to call
24 his pastor, his wife to whom he'd been married for 14
25 years and with whom he has seven children. There was no

1 chance at that point to call dad or mom or get legal
2 advice or call the Florence Police Department. He had to
3 make a decision, and what was the decision he made? He
4 decided to spare Charles Berlin Pennell's life. He shot
5 the gun into the air hoping that would end the conflict.
6 It didn't.

7 Jonathan Wilson will tell you that at that point
8 Charles Berlin Pennell looks at him after that gun had
9 just been discharged right there in the parking lot of the
10 Hollywood Video store. He looks at him and says, shoot
11 me. Once again, Jonathan Wilson has to make a decision.
12 Does he take a man's life? What does he do? Somewhere
13 along that time Mr. Wilson also remembers that Mr. Pennell
14 reached into his pocket like he was gonna get something,
15 could have been before he shot or sometime after he shot
16 that first shot; but of course, he didn't shoot him. What
17 did he do? He will look you square in the eyes and tell
18 you, ladies and gentlemen of the jury, Mr. Jupertinger, I
19 got angry. And when I asked Jonathan Wilson what do you
20 mean you got angry? He'll tell us here like this, well, I
21 put the gun back and I proceeded to whip him.

22 I'm not a big fellow. You'll be able to see him
23 on the stand and make that determination yourself. But
24 he'll tell you, I kicked him in the guts and when that
25 took the wind out of him I punched him in the face, kicked

1 him again, and then he had to make another decision, what
2 do I do from here? Do I go in to the video store knowing
3 full well that they have just heard a shot go off and go
4 down the aisle and rent Chariots of Fire. What do I do?
5 He made a decision; maybe it was a poor decision. You
6 weigh on that issue yourselves, folks. He decided, I
7 better leave. So he got into that brown Ford Explorer,
8 the fight being taken out of Charles Berlin Pennell. And
9 Mr. Wilson who lives off of Fire Tower Road now, was
10 living off of Aiken Street. If you go down Evans Street
11 you would have turned right going downtown and turn right
12 by Advance Auto Parts. And he went on. But the thing was
13 bugging him. And he had to make another decision. What
14 do I do now? I don't want to get in trouble. I better go
15 back to Hollywood Video.

16 But he showed some savvy, I think, as he'll tell
17 you. He got into another vehicle. I believe it was his
18 wife's vehicle. I might be mistaken about that. But he
19 got into another vehicle. I believe it was an Expedition.
20 And he went, drove back, drove back to Hollywood Video
21 from Aiken Drive, and he went straight to the front door
22 of Hollywood Video. Now guess who's still there. Charles
23 Berlin Pennell. And he recognizes Jonathan Wilson. He
24 comes up again. Mr. Wilson gets out of the vehicle. At
25 this point Mr. Wilson has to make a decision. Now he

1 doesn't have 5 minutes, 10 minutes, 15 minutes to decide
2 what he's going to do. He has to make a decision right
3 then and there. The decision he makes is, I'm not going
4 to be a victim in this situation.

5 I would characterize it as saying round two
6 begins. He starts fighting Pennell again, and he whips
7 him again. At this point Mr. Wilson has to make a
8 decision, what do I do this time? Do I get back in my
9 vehicle and go to my home on Aiken Drive? What do I do?
10 I better get in that store and call for the law. Well, he
11 goes up to the door, and not surprisingly, the store
12 people have locked that door. Of course, they've already
13 heard a gunshot and the fracas probably. He has to make a
14 decision. He decides to go back home, and he drives back
15 home. What to do? Well, at this time he makes that
16 decision, I better call the store, I didn't start
17 anything, all I wanted to do was get some videos, get some
18 DVDs. When he calls the store the police are there. He
19 talks to the police officers. They tell him you to need
20 come back. And he goes back to the store, and eventually
21 he tells them everything that I have just told you. They
22 go back and eventually to his home and he turns in that
23 Taurus 9-millimeter to the police where they asked him for
24 it. Cooperated fully with the police.

25 He found himself in a situation that he'll tell

1 you all about. Now in this case, as in all criminal
2 cases, you will hear -- and you've heard preliminarily
3 from the judge. And I'm sure my dear friend Mr. Suggs who
4 I've known for over 20 years will get up and tell you that
5 in each and every case the government, the prosecutor,
6 Mr. Jepertinger, and if he's kind to me today he may call
7 me John -- has to prove this gentleman's guilt beyond a
8 reasonable doubt. Now folks, that is not a fanciful
9 doubt, that's not an imaginary doubt, nor is the State
10 ever required to prove guilt beyond a shadow of a doubt.
11 It's beyond a reasonable doubt.

12 And what is that doubt? It is a doubt which
13 would cause a reasonable person to hesitate to act. But
14 there should be no hesitation in this case. For when all
15 is said and done, this gentleman did the only thing he
16 could have done, the only thing that a reasonable person
17 would have done. He exercised restraint when he could.
18 He defended his property. He defended himself.

19 In this case Charles Berlin Pennell is charged
20 with a crime of carjacking. And the way the statute
21 reads, it says, a person is guilty of the felony of
22 carjacking who takes -- and here's the key language for
23 this matter -- or attempts to take a motor vehicle from
24 another person by force and violence or by intimidation
25 while the person is operating the vehicle or while the

1 person is in the vehicle. The evidence will show that
2 Charles Berlin Pennell tried to take that 2005 Ford
3 Explorer -- I'm going to take your car -- while this
4 gentleman was in it. And he made a decision, and we're
5 asking you to bring judgment upon the decision he made
6 today. I thank you for listening to me. And I'd
7 appreciate it if you pay close and careful attention to
8 the evidence presented in this case. Thank you.

9 THE COURT: Thank you, Mr. Jepertinger.

10 Mr. Suggs.

11 MR. SUGGS: My turn, Judge.

12 THE COURT: Your turn, sir.

13 MR. SUGGS: Thank you, Your Honor. May it please
14 the Court, Mr. Jepertinger.

15 MR. JEPERTINGER: Yes, sir.

16 MR. SUGGS: Ladies and gentlemen, I won't be as
17 long as Jepertinger, I promise. Looking at the clock and
18 it's almost 5:00. Most of us are usually used to going
19 home about this time, not actually just going to work
20 which is unfortunately what we're doing now. I'm hopeful,
21 though, that after my brief opening comments that maybe
22 the judge will have some leniency on all of us and let us
23 go home tonight and actually start this tomorrow. But
24 that remains to be seen. I don't take this case lightly,
25 absolutely don't take it lightly. I will tell you that I

1 don't really have much prepared, written prepared, to talk
2 with you in this opening statement. That's not unusual.
3 I'm not an expert -- I'm not trying to say I'm an expert
4 at doing this, but I have been doing it for over 20 years.
5 And I've tried many, many cases with Mr. Jepertinger and
6 he used to be a public defender like I was for 20 years
7 and not a prosecutor. I tried cases with him and I've
8 tried cases against him. And one thing that I always know
9 that when he gets up and has an opening statement he gives
10 me plenty of fire and things that I can say in my opening
11 so I really don't have to rehearse anything or write
12 anything down. I already know what to say based upon what
13 he says.

14 One thing that I know absolutely in this case is
15 this is not a carjacking case. It might be a lot of other
16 different things that you can call it, but it is
17 absolutely without a doubt not a carjacking case.
18 Carjacking -- and Mr. Jepertinger read the statute to you.
19 I'm gonna read it to you again because it's a short
20 statute. If it was long I wouldn't do it a second time.
21 A person is guilty of a felony of carjacking who takes or
22 attempts to take a motor vehicle from another person by
23 force and violence or by intimidation while the person is
24 operating the vehicle or while the person is in the
25 vehicle. Now to me, when I think of carjacking and this

1 is the way that I think the legislature was thinking about
2 carjacking when they came up with the statute, is I get
3 images in my head of somebody going to their car and
4 getting in the front seat and cranking it up and all of a
5 sudden there's somebody in the back seat with a gun or
6 not, take me somewhere. Or a taxi driver picking somebody
7 up and a fare produces a weapon and robs them and steals
8 their car. Or in many cases that I've handled where
9 someone is actually kidnapped and taken somewhere and
10 assaulted. To me that is what carjacking is all about,
11 and I believe in my mind that's what the legislature had
12 in its infinite smartness when they decided to come up
13 with a carjacking statute. This ain't anything like that.
14 If anything, I'm gonna tell you what it's about and
15 Mr. Jepertinger has told you pretty much chronologically
16 what happened. There are a few things I would say about
17 it, but for the most part it sounds to me like
18 Mr. Pennell, as foolish as he is, wanted to get a ride
19 from somebody. And when Mr. Wilson said I'm not going to
20 give you a ride, which I don't blame him, I wouldn't give
21 a stranger a ride either. He got upset, got mad. There
22 was a fisticuff, and Charles got his fanny kicked, not one
23 time but two times. And that's what this case is about.
24 It's about a fool named Charles Pennell trying to get a
25 ride from somebody who wouldn't give him one, and when he

1 couldn't take no for an answer, got upset and got his
2 fanny kicked. This is not a carjacking case that we think
3 about when, at least what I think about, when I think
4 about carjacking.

5 This is what I think the evidence will show, that
6 on the 25th of May of last year, not this year, last year,
7 Mr. Pennell was dropped off at the Hollywood Video. Y'all
8 saw some photos. I took those pictures last night. They
9 didn't turn out very well. I think there's something
10 wrong with the printer cartridge but be that as it may.
11 He got dropped off there; I'm not sure the reason why.
12 We'll probably find that out. And his belongings got
13 dropped off there too so he had no ride, and he had his
14 belongings with him so he wanted go from point A to point
15 B. Here comes Mr. Wilson, innocent man just riding up,
16 all of a sudden just happens to ride up. Charles wants a
17 ride; Mr. Wilson wouldn't give him a ride. I wouldn't
18 give him a ride either. Charles gets upset, starts
19 aggravating, starts kicking things and screaming and
20 hollering. And of course Mr. Wilson is frightened because
21 he didn't expect this kind of thing pulling up to drop off
22 some movies or pick up some movies. So I think what
23 happens, I think Mr. Pennell, I think Charles hit the man
24 and the man hit him back and beat him up. And then
25 Mr. Wilson pulls out a gun. I'm still not quite clear on

1 the catch of this. He goes to his glove box and gets a
2 gun and he racks it, and he puts the chamber with the
3 bullets in. He has time to rack it back. He has time to
4 fire it up in the air; and then after that's over, that's
5 done, in his own statement Mr. Wilson said he flees the
6 scene. He goes home. But for what reason I don't
7 understand. He switches cars and comes back. Now to me,
8 I mean, if I were worried about being carjacked I don't
9 think I'd go back to the scene. I think I'd pick up a
10 phone or call the police or I'd call Hollywood Video
11 instead of going back. But he goes back. This time he
12 didn't go back with his gun. He goes back in a different
13 car, encounters Mr. Pennell again. Mr. Pennell gets his
14 ass kicked again, excuse my language. He gets his fanny
15 kicked again. Then Mr. Wilson leaves a second time and
16 goes home, still not figuring out exactly what to do.
17 Then he calls Hollywood Video. Police are there by now.
18 The police are there by now. The officer talks to him,
19 you need to get yourself back up here. So he gets back in
20 his car, I think the same one that he had the second time.
21 And he goes back to Hollywood vehicle -- Hollywood Video a
22 third time in the second vehicle and then that's where
23 everything is kind of ironed out.

24 But that's pretty much the case in a nutshell.
25 I'm gonna be honest with you, ladies and gentlemen. I'm

1 worried about this case because it is so serious; and yet,
2 as the facts as I know them to be, do not, do not boil
3 down to a carjacking. They boil down to maybe something
4 else like an assault or plain stupidity on the part of
5 Mr. Pennell. And but it's not carjacking. Heck, Mr.
6 Pennell was two blocks down the street when the police
7 came up licking his wounds. He'd had enough. He'd never
8 been beaten up two times. He wasn't -- and he had no
9 weapon. He wasn't trying to steal anybody's car; he just
10 wanted a ride. And when he couldn't get a ride he got
11 upset and he showed his fanny and he paid the price.
12 That's what it's about. It's not carjacking. It's
13 something else, but it's not carjacking and that's pretty
14 much it in a nutshell. Thank you very much.

15 Thank you, Your Honor.

16 THE COURT: Thank you, Mr. Suggs.

17 All right, ladies and gentlemen, we are gonna
18 adjourn at this time. Hopefully you've gotten a little
19 bit of a taste of why I tell you when you come back
20 tomorrow you need to be well rested because when you're
21 using your mind and you're listening and you're having to
22 think through things, that can be tiring. And so it's
23 important that you get some rest this evening and come
24 back in the morning ready to go work and be fresh. I'm
25 gonna ask you, if you would, be back in the jury room at

1 9:30, if you would do that for me. Once we get everybody
2 assembled we'll then begin with testimony, okay. When you
3 leave this evening you're gonna be going home, and it's
4 very important that you not have any conversation with
5 anybody about this case. Now I can't emphasize that
6 enough. When I tell you this it may sound silly to you,
7 but when you go home you're gonna have family, friends,
8 loved ones, who have -- they're gonna be curious as to
9 whether or not you got selected to be on a jury. And you
10 can tell them that you were selected to be on a jury and
11 that you're serving on a jury. They're gonna want to know
12 more. They're gonna want to know what kind of case is it,
13 who does it involve, where did it happen. What you need
14 to do at that point is tell them in a polite way, I'm not
15 allowed to discuss the case at all, but if you'll be
16 patient I can tell you everything about the case when it's
17 over. You can tell them that. Please do not have any
18 conversation with them about it. Something as simple or
19 as innocent as, well, it involves a carjacking over at
20 Hollywood Video, whatever, something as innocent as that
21 could possibly elicit a response from that individual.
22 That could affect your ability to be fair and impartial.
23 So just, if you would please, guard and protect your
24 impartiality. When you come back tomorrow you should know
25 no more about this case than you know right now. So

1 please do that and please ask your friends, family, and
2 loved ones who may be curious, ask them to be patient and
3 you'll tell them all about it when it's over.

4 Go home this evening. Try to have a good meal,
5 try to get a good night's rest and forget this case.
6 Forget about it until 9:30 tomorrow when we come back and
7 reconvene, okay? So if everyone will remain seated I'm
8 gonna excuse you, ladies and gentlemen, ask you to please
9 be back here at 9:30 in the morning. Keep in mind we
10 don't have greatest parking facilities around here so try
11 to get here early so that you're not running late. Thank
12 you.

13 (WHEREUPON, the jury was removed from the
14 courtroom at 5:02 p.m., and the following proceedings
15 commenced in open court.)

16 MR. JEPERTINGER: Your Honor, two serious issues
17 I'll go with the not real serious, but the less serious
18 issue. Mr. Suggs and I noticed that you do not appoint a
19 foreman of jury, and I didn't know if you were going to do
20 it at the end of trial or what your practice is.

21 THE COURT: Yeah. I don't typically do it at the
22 very beginning. I don't wait till the end. What I'll do
23 is at some point tomorrow morning we'll take the mid
24 morning break and while we're on that break I will ask them
25 to elect a foreman. And I don't appoint them anyone. I

1 used to, and I got a lot of jurors that were asking not to
2 do it. So I felt like I probably need to let them make
3 the call so, but I will get that done. Thank you.

4 MR. JEPERTINGER: The other matter is the issue
5 of bond now. The jury has been sworn, and the State still
6 had concern about what transpired earlier in the day, Your
7 Honor. And we would ask that bond be revoked, Your
8 Honor. Thank you.

9 THE COURT: Mr. Suggs.

10 MR. SUGGS: Judge, I think that that was, that
11 incident this morning which we don't have all the details
12 but we have enough I think to know what went on, but I
13 think Mr. Pennell made the comment to the Court earlier he
14 did not realize that person was a juror. Of course, those
15 of us in the legal profession, judges and lawyers who do
16 this on a regular basis who know when court is in session
17 and who know when jurors are apt to be here, that's one
18 thing but folks like lay people like Pennell might not
19 make the connection between someone out in the hall or
20 someone out in the parking lot as being someone that's
21 specifically identified as a juror as opposed to maybe
22 just an employee or just someone here on some other
23 business. I think he said that he recognized this woman
24 as someone maybe he went to high school with it and was
25 just speaking to her for that purpose only. I think it

1 was innocent intent on his part. I don't think he did
2 that to influence or to confront a potential juror in any
3 way. I don't think he thought really that far ahead. I
4 might be giving too much credit, Judge, to be honest. And
5 I think the Court sufficiently warned him about the
6 consequences of that. And although he has been late as
7 the Court has seen, he has been here at the times when he
8 was supposed to be here and I would ask that bond not be
9 revoked.

10 THE COURT: All right. I'm gonna allow him to
11 remain on bond with this understanding, Mr. Pennell.

12 THE DEFENDANT: Yes, sir.

13 THE COURT: And I talked to you earlier and you
14 know what I'm talking about. Just, there's no way in a
15 public building like this that we can avoid running into
16 people. For example, tomorrow we don't have the ideal
17 situation here. All of us have to ride up on the
18 elevators and ride down on the elevators. And I can
19 protect the jury from riding up and down the elevators
20 with defendants or victims or whatever when they leave
21 this courtroom 'cause I've got deputies here that will
22 secure an elevator for them. But in the morning when they
23 come in I don't have any way to do that. They come in
24 just like all of us come in. So what I'm gonna tell you
25 is that you're to have no contact with jurors. If when

1 you get here in the morning you're coming up to Mr. Suggs'
2 office or coming up here to the Court, if you get on the
3 elevator and a member of the jury is getting on, don't say
4 anything, just step off. Don't ride up on the elevator.
5 Just don't have any contact.

6 THE DEFENDANT: Yes, sir.

7 THE COURT: If any is reported, you know what's
8 gonna happen. We're gonna revoke your bond and put you
9 out there at Effingham.

10 THE DEFENDANT: I don't want to do that.

11 THE COURT: So just keep that in mind. And you
12 need to -- we're gonna start court at 9:30. You be here
13 when Mr. Suggs tells you to be here.

14 THE DEFENDANT: She asked me was I on a jury and
15 that's how the conversation started.

16 MR. SUGGS: That's all right.

17 THE COURT: Well, I understand what you're saying
18 which is why I'm not revoking your bond. I understand it
19 was a misunderstanding.

20 THE DEFENDANT: I mis --

21 THE COURT: I mean, I'm just trying to emphasize
22 to you that in this building because of the way we're set
23 up sometimes you're gonna run into people even though you
24 don't intend to. It's gonna be your responsibility to
25 walk away, not theirs, okay?

1 THE DEFENDANT: Yes, sir.

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

3 MR. JEPERTINGER: Thank you so much. That will
4 be it for the evening.

5 (WHEREUPON, the proceedings were concluded for the day at
6 5:15 p.m. to be reconvened on October 12th, 2010.)

7 (WHEREUPON, State Exhibits Nos. 16 through 20 were marked
8 for identification only.)

9 MR. JEPERTINGER: Your Honor, Defense, we have
10 photographs 16 through 20 admitted into evidence, Your
11 Honor.

12 THE COURT: That's without objection, Mr. Suggs?

13 MR. SUGGS: That's correct, Your Honor.

14 (WHEREUPON, State Exhibits Nos. 16 through 20 were
15 admitted into evidence.)

16 MR. JEPERTINGER: Your Honor, also in terms of
17 continuing Rule 5 I told Mr. Suggs this morning that in my
18 conversations with Detective Iseman that when he stopped
19 Mr. Pennell he did not stop him at the old Naturally
20 Outdoors. It was the one further up on Palmetto Street
21 and he did —

22 THE COURT: The new location.

23 MR. JEPERTINGER: The new location. And he asked
24 him how did you get that blood on you; and he said, well,
25 I was involved with a fight. And he goes, well, that's

1 what I'm here for and brought him back at the scene but.
2 At that point, I mean, he had -- he was looking for him,
3 Your Honor, and it was a stop. He had a gun on him at
4 that time, I believe, just for officer safety. I mean,
5 the officer had the gun on Pennell.

6 THE COURT: Okay. You've got that information.

7 MR. SUGGS: Yes, sir. I'm find with that, Judge.

8 THE COURT: Anything else that we need to take up
9 before we bring the jury out?

10 MR. JEPERTINGER: Nothing further, Your Honor,
11 other than the foreman question that we brought up last
12 time.

13 THE COURT: Right.

14 MR. SUGGS: Nothing from Defense.

15 THE COURT: Okay. Sam, if you would ask the
16 members of the jury to join us.

17 (WHEREUPON, the jury was returned to the courtroom at
18 approximately 10:15 a.m., and the following proceedings
19 commenced in open court.)

20 THE COURT: Good morning, ladies and gentlemen, I
21 want to thank all of you for being here in a timely
22 fashion and then apologize for us not getting this case
23 started in a timely fashion. I was -- I had to take a
24 guilty plea on another case that Judge Nettles was doing
25 guilty pleas yesterday. This was one that Judge Nettles

1 had a conflict and wasn't able to do it so I had to do
2 that before we got started and we've done that and
3 completed that matter and so now we're ready to proceed.
4 If you recall yesterday, the attorneys addressed you with
5 regards to their opening statements and so now we're into
6 the phase of the trial where the State has the opportunity
7 to present whatever evidence it is that they intend to
8 present and so I would recognize Mr. Jepertinger on behalf
9 of the State with your first witness.

10 MR. JEPERTINGER: Thank you. Good morning, Your
11 Honor.

12 THE COURT: Good morning, sir, please the Court.

13 MR. JEPERTINGER: Mr. Suggs.

14 MR. SUGGS: Good morning.

15 MR. JEPERTINGER: Good morning. The State would
16 call Jonathan Wilson to the stand.

17 THE DEPUTY CLERK OF COURT: If you will, sir, go
18 to the witness stand. Place your left hand on the Bible.
19 Raise your right hand.

20 WHEREUPON,

21 **JONATHAN ANTWAN WILSON,**
22 having been duly sworn by the Deputy Clerk of Court,
23 testified as follows:

24 THE DEPUTY CLERK OF COURT: Please be seated
25 right there at the witness chair and state your full name

SW - J. WILSON -DIRECT

1 for the record.

2 **THE WITNESS:** Jonathan Antwan Wilson.

3 **DIRECT EXAMINATION**

4 **BY MR. JEPERTINGER:**

5 Q All right. Mr. Wilson, I'm gonna ask you to keep your
6 voice up as much as possible. You might want to pull that
7 microphone a little closer to you, closer to the
8 microphone. Okay. Mr. Wilson, how old are you?

9 A Thirty-five.

10 Q Okay. And where do you live currently?

11 A Now I moved over off of Sumter Street, but I've always
12 lived before that in Brookgreen.

13 Q Did you have an occasion when you talked to me that
14 living on Fire Tower Road?

15 A Yes.

16 Q Okay. And have you just moved to the Sumter Street
17 area?

18 A Yes, temporary.

19 Q All right. And are you married?

20 A Yes.

21 Q How long? First of all, tell us your wife's name?

22 A Avelina Wilson.

23 Q And how long have you and Avelina been married?

24 A Fifteen years.

25 Q All right. And do you have any children?

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1 A Yes.

2 Q How many kids do you have?

3 A Six.

4 Q All right. And where do you work?

5 A I work for San-glo Carolina.

6 Q Is that a glass company?

7 A Yes, it is.

8 Q And what are your responsibilities at San-glo Carolina?

9 A I go out to a lot of homes different incomes and do a
10 lot of shower doors and mirrors and any kind of -- I'm
11 sorry, I have a little trouble speaking -- but any kind of
12 glass work, residential and commercial.

13 Q All right. And I don't know if I asked you this, how
14 long have you worked San-glo glass?

15 A It's going on five years now.

16 Q All right. So at the time of the incident that we're
17 in here for court today, you were there for about
18 three-and-a-half years?

19 A Yes.

20 Q Okay. I'm gonna take you back if possible, do you
21 remember Monday, May 25th, 2009?

22 A Yes, I do.

23 Q Okay. Can you tell the jury what you were doing
24 approximately 10:30 that evening on May 25th, 2009, what
25 were your intentions?

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1 A I had left my house as I normally do.

2 Q Let me stop you right there. I know you live off
3 Sumter Street now. You had lived on Fire Tower Road when
4 I spoke with you.

5 A Yes.

6 Q Where were you living at that time?

7 A Off of -- off of Aiken Drive behind Advance Auto.

8 Q Were you living on Aiken Drive?

9 A Yes.

10 Q Okay. I'm sorry, you said off of. But you lived on
11 Aiken Drive?

12 A On Aiken Drive, yeah.

13 Q Okay. So was that near -- is that near Evans Street?

14 A Yes.

15 Q Okay. Tell the jury what your plans were and what you
16 did and what were you driving when you did what you did?

17 A I was driving a gold Ford Explorer, and I had left home
18 and I was going to rent, to rent some movies. And I had
19 pulled around the closest entrance to Evans Street which
20 is around the back side.

21 Q Okay. Which store were you going to rent movies from?

22 A To Hollywood Video. I'm a regular customer there.

23 Q All right. And I'm going to show you State's Exhibits
24 16, 17, 18, 19, and 20, all right? And these are -- what
25 are these photos representative of?

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1 A These are pictures of the parking lot of Hollywood
2 Video there.

3 Q And it's no longer open, is that correct, to your
4 understanding?

5 A No, sir.

6 Q Okay. Now, if you'd -- I'm gonna ask the witness if
7 it's okay with the court to come off the witness stand so
8 he can come in front of the jury and if he can explain to
9 the jurors what happened at the Hollywood Video.

10 THE COURT: All right, let me ask you, if you
11 would, Mr. Wilson, when you step down I would ask that you
12 be on the other side of Mr. Jupertinger so that your voice
13 will carry over here so that Ms. Ray can hear you. And
14 then also, since you're gonna be away from the microphone
15 keep your voice up please. But you certainly may step
16 down.

17 THE WITNESS: Okay.

18 BY MR. JEPERTINGER:

19 Q Now Mr. Wilson, she's gonna have to hear every word so
20 keep your voice up the best you can. We're gonna move
21 forward a little bit. I'm gonna show you State's Exhibit
22 17 and can you tell the ladies and gentlemen of the jury
23 what that shows.

24 A This is the closest entrance to Evans Street. Normally
25 the patrons coming from that side would be driving around

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1 the back and coming around to the front part.

2 Q Okay. And is that how you entered Hollywood Video on
3 May 25th?

4 A Yes, sir.

5 Q Okay. And I'm gonna show you State's Exhibit 16. Can
6 you tell the jurors what you see there.

7 A Right as I was coming around the back side here there
8 was a string of audio equipment across the parking lot.

9 Q Okay. When you say a string of audio equipment, I'm
10 gonna show you some other photographs. I'm gonna show you
11 State's Exhibit 2. Was that the equipment that, some of
12 the equipment that you saw there?

13 A Yes.

14 Q And I want you to look at State's Exhibit 3. Some more
15 of the equipment?

16 A Yes, sir.

17 Q All right. And State's Exhibit 5?

18 A Yes, sir.

19 Q Okay.

20 MR. JEPERTINGER: Instead of having to go through
21 all of these I'd ask that we could publish all these
22 photos to the jury, Your Honor.

23 THE COURT: Sure. They're all in evidence.

24 MR. JEPERTINGER: And while the jurors are
25 looking I think I can ask more questions?

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1 THE COURT: Sure.

2 BY MR. JEPERTINGER:

3 Q Now you're saying all that equipment that you -- that
4 are in State's Exhibit 1 through 15, was it just lined up
5 across the roadway?

6 A The majority of it was.

7 Q Okay. So when you pulled in with your Explorer and you
8 saw that, did you see anyone at that point in time?

9 A No.

10 Q Okay. What did you do?

11 A I opened my door and got out and used my foot to start
12 moving some of it over and I saw him coming from the right
13 side.

14 Q Okay. And when you say you saw him coming from the
15 right side, who are you referring to?

16 A Mr. Pennell.

17 Q Is the gentleman on trial in this case?

18 A Yes.

19 Q All right. Did you know Mr. Pennell in any way, shape,
20 or form?

21 A No, never met him.

22 Q All right. I'm gonna ask you to have a seat right
23 there and we'll get into a little testimony later.

24 A (Complies.)

25 Q When you saw him -- and he approached from the right

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1 side?

2 A Uh-huh.

3 Q As we see on State's Exhibit 16. Did he say anything
4 to you?

5 A He -- his first words were quit kicking my stuff.

6 Q Did you say anything in response to that?

7 A No.

8 Q Did he say anything else to you at that point?

9 A As he walked over to me he asked me could he give me
10 \$20 to take me to Timmons ville.

11 Q All right. And what did you -- what did you say or do
12 in response to that question about taking you over to
13 Timmons ville for 20-dollars?

14 A Because of just some bad experiences at that time and
15 of -- my conscious kind of told me just to not to do it so
16 I said, I'm sorry, but I can't do it.

17 Q All right. Did he have any response when you told him,
18 I can't do it?

19 A Yes, he got angry and started kicking stuff around.

20 Q Did he say anything while he was getting angry and
21 kicking stuff around at that point?

22 A He told me to suck his, suck his --

23 Q Penis?

24 A Yeah, yeah, in those same words.

25 Q Did he use a more vulgar word than penis?

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1 A Yeah, he used the word dick. And he told me at that
2 point he called me a nigger and just pretty much went on
3 just, just, just, just some really inflammatory words like
4 that.

5 Q What did you do in response to that? Did you expect
6 something like this, meeting someone like this at
7 Hollywood Video on May 25th? Did you anticipate this guy
8 being there?

9 A No, I've been there many times and never had any, any
10 problem.

11 Q So after he said that what did you do?

12 A I drove my car around to the front and parked.

13 Q Okay. Now I'm gonna show you State's Exhibit 18 and
14 19, and I don't think you have to get up. We'll walk
15 around here in a little bit maybe with the photographs;
16 but 18 is what, a front picture of the front of the store?

17 A Yes, this one is.

18 Q All right. And 19 is kind of a diagonal view of the
19 store also showing the front?

20 A Yes.

21 Q Okay. Can you tell the ladies and gentlemen of the
22 jury on either picture where you parked your car?

23 A Right here.

24 Q Right by those bushes?

25 A Yes.

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1 Q Okay. And that's on State's Exhibit 19. Now, a
2 question I have is after he said all those inflammatory
3 things to you and used that racial epithet and all that,
4 why didn't you just go home?

5 A Well, I -- personally I didn't think that he would go
6 any further.

7 Q Okay. So when you parked your Ford Explorer right by
8 the bushes, as we see on State Exhibit 19, what happened
9 then?

10 A As I was getting out of my vehicle he got in the
11 doorway.

12 Q Now when you say he got in the doorway, I'm gonna walk
13 up to you and pretend you're in your vehicle and you tell
14 me to stop in terms of distance of how far he was away
15 from you in terms of being in the doorway.

16 A Closer.

17 Q Any closer?

18 A He was about about there, yeah.

19 Q So I'd have to walk even further up to you?

20 A Yes.

21 Q And what was -- was he saying anything or doing
22 anything at that point other than walking up to you?

23 A Yeah, he came up and said, well, I'll take your car.

24 Q At that point when he said -- and he walked up to you
25 very, very close, and he said I'll take your car then,

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1 what were you feeling?

2 A At that point it really -- it shocked me so his
3 demeanor was as if he knew something I didn't know. And
4 my, my, my first feelings were that his boldness that he
5 had to have some kind of training or something or
6 something I didn't know about. And at that point I really
7 felt that I was in a shape now that I, you know, I could
8 really get hurt now.

9 Q Okay.

10 A Yeah.

11 Q Would it be safe to say that you were scared?

12 A Yeah, at first, yes.

13 Q All right. After he said I'm going to take your car
14 now and you had those feelings -- and I know that, is this
15 happening pretty quickly?

16 A Yes.

17 Q Okay. What do you do, Jonathan?

18 A I pushed him back and I reach over to my glove
19 compartment and I grabbed my pistol and put the clip in
20 it.

21 Q Now what type of pistol did you have?

22 A It's a Taurus .9 millimeter.

23 Q Okay. Now for the folks that may not own handguns,
24 this is a type of gun with a magazine that fits up into
25 the handle, correct?

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- 1 A Yes.
- 2 Q And in order to shoot it you have to rack it back?
- 3 A Yes.
- 4 Q Then you pull the trigger and it shoots, correct?
- 5 A Yes.
- 6 Q Tell the ladies and gentlemen, so you had that type of
- 7 gun -- that's the type of gun it is, correct?
- 8 A Yes.
- 9 Q So tell us what happened, what you did with that gun
- 10 when you got it out.
- 11 A When I pulled it out he initially stepped back; and
- 12 then as he, as he started back towards me I fired up in
- 13 the air.
- 14 Q So he walked ---
- 15 A Yes.
- 16 Q You pulled it out and did you put the magazine in and
- 17 rack it?
- 18 A Yes.
- 19 Q Okay. And he stepped back you say?
- 20 A Yes.
- 21 Q And after he stepped back he stepped forward again are
- 22 you saying?
- 23 A Yes.
- 24 Q And then that's when you shot it in the air?
- 25 A Yes.

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1 Q Well, why didn't you point it at him and shoot him?

2 A Because at that point that's something I've never done.

3 I mean, life is something when you take it you really
4 can't give it back. So I mean, it wasn't in me then to
5 shoot.

6 Q All right. After you shot the gun off, what happened?

7 A He realized I guess I didn't have the heart to shoot
8 and he said shoot me.

9 Q Well, when he said shoot me, what was his demeanor
10 like?

11 A He was very, very aggressive. I mean, he was -- as if
12 he wasn't by himself. I mean, he -- he was from what I
13 saw during that time he was kind of grisly, kind of just--
14 in his eyes, I mean, he was just didn't care.

15 Q All right. So he said, just shoot me. What is your
16 response after he said that to you?

17 A At that point I realized I wasn't gonna shoot him and
18 that he wasn't -- wasn't gonna leave.

19 Q So did you have to make a decision?

20 A Yeah, and I decided then I'm gonna fight.

21 Q What led you to that decision that you were gonna fight
22 instead of just closing the car door and turning on the
23 car and just getting out of there?

24 A Because as close as he was to me, I mean, I couldn't, I
25 mean, I just couldn't do it.

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1 Q All right, fair enough. And when you decided to fight
2 him what happened? Tell the jury what happened. And once
3 again, this is all happening right outside here in front
4 near the bushes?

5 A Uh-huh.

6 Q Okay.

7 A Yes.

8 Q What's going on? What happens then?

9 A At this point I just took my foot and I kicked him in
10 the stomach.

11 Q All right.

12 A At that point -- I had learned that from past
13 experiences to that I had to keep going to at least
14 diffuse the situation so. After I kicked him I punched
15 him somewhere around, around here, and then he fell
16 like -- I kicked him again. And at that point I got back
17 in my car and I drove off.

18 Q Okay. Now the question that the folks may have that
19 I'd like you to answer is, why did you drive off? Why
20 didn't you go into the store or to call for help?

21 A I was -- I was afraid because I had, for one, I had
22 fired a weapon, you know, in the city limits and -- I'm
23 sorry.

24 Q Hold on one second.

25 A And during that time, I mean, the situation wasn't

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1 getting any better.

2 Q Did you -- when you pulled out from there did you go up
3 on Palmetto Street, or did you go out the same way you
4 came, or how did you leave the store?

5 A I went around the front towards pig-- towards Piggly
6 Wiggly.

7 Q Which would be on David McLeod Boulevard I guess?

8 A Yes. Yes.

9 Q Okay. And at that point where did you go?

10 A I went home.

11 Q Okay. And approximately how far would you say you
12 lived from the Hollywood Video?

13 A I'm about five, maybe five, six minutes if that much.
14 It's about maybe four blocks down the road.

15 Q All right. When you got home was Avelina home?

16 A Yes.

17 Q Did you tell her what had just occurred?

18 A Yes, I called her and my father and told them what had
19 happened.

20 Q Was Avelina home or --

21 A Yes.

22 Q You said you called her. Was she home?

23 A No, I told her and then I called my dad.

24 Q Okay. And what was -- did they give you any advice
25 what you should do? Without telling you, I mean, without

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1 saying the words, but did you get advice to them, from
2 them?

3 A No, no, no. I just told them and got in my other car.

4 Q Now what was -- did you go back to Hollywood Video?

5 A Yes.

6 Q Okay. Now how long were you at home before you decided
7 to go back to Hollywood Video?

8 A Maybe not -- I mean, it was almost in just in and out.

9 Q Okay. What was, what was your thinking in going back
10 to Hollywood Video?

11 A My main thing is I wanted to let them know what had
12 happened, and there were two reasons for this. The first
13 reason was, there a few young girls that worked there and
14 they needed to know what had happened. And the other
15 thing was they needed to know why I shot my pistol back
16 there. And that's pretty much why.

17 Q All right. What type of vehicle did you take back to
18 Hollywood Video?

19 A Expedition. Black expe-- a black Expedition, four
20 wheel drive.

21 Q Now why did you switch vehicles from that gold Explorer
22 to black Expedition?

23 A I didn't really think that he recognized the second
24 vehicle.

25 Q Did you still feel that he was going to be out there?

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1 A I wasn't sure.

2 Q Okay. Would it be safe to characterize your decision
3 as a precaution?

4 A Yes.

5 Q All right. Now when you went back out to Hollywood
6 Video -- I'm gonna show you State's Exhibit 18, if this
7 would help explain your testimony to the jury of where you
8 came. Would that help?

9 A Yes, yes.

10 MR. JEPERTINGER: May I ask him to come off the
11 stand once again?

12 THE COURT: Yes, sir.

13 MR. JEPERTINGER: Thank you, Judge.

14 BY MR. JEPERTINGER:

15 Q All right. Remember, you stand over here. Please keep
16 your voice up for Ms. Ray. I'm gonna show you State's
17 Exhibit 18. Now can you tell the jury where you parked.

18 A Yes, right there.

19 Q All right. And what did you do when you got to
20 Hollywood Video that second time that evening?

21 A I went out to go in the front door, and that's when I
22 realized he was right here. And during that time I said
23 don't, don't, don't, don't, don't do it again, and as he
24 was coming, coming towards me, I realized that I couldn't
25 let him pin me up against my car because my door was

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1 already closed. So at this time I met him and I decided
2 then, you know, I was just gonna try to take him down and
3 I did.

4 Q All right. After you had the physical altercation with
5 Charles Pennell ---

6 A Yes.

7 Q ---what did you do then?

8 A I tried to go in the store but it was locked.

9 Q The front door was locked?

10 A Yes.

11 Q All right. Could you tell the people were in there?

12 A Yes, there were two girls in the front of it and I
13 don't know who all else was in there.

14 Q All right. Were there -- did it look like there were
15 any other customers out there at that time?

16 A I don't think so.

17 Q All right. Now after you checked the doors what did
18 you do?

19 A I got in my vehicle and went back home.

20 Q Was Pennell lieing on the ground at that point?

21 A During that time he -- he walked away. I mean, he kind
22 of retreated some and I guess he gave me a little time or
23 whatever. But I'm not sure, after he walked away which, I
24 mean, if he totally left the scene or not or if he just,
25 you know, left that area, I'm not sure.

SW - J. WILSON -DIRECT

1 Q Okay. Thank you. You can take the stand. I'd
2 appreciate it.

3 MR. JEPERTINGER: Thank you, Judge, for allowing
4 me to do that.

5 THE COURT: Yes, sir.

6 BY MR. JEPERTINGER:

7 Q Now you got in your vehicle and you drove. Where did
8 you drive to?

9 A I went home.

10 Q Back to your house on Aiken Drive?

11 A Uh-huh.

12 Q Okay. Was Avelina still present?

13 A Yes.

14 Q Did you tell her what happened to you again?

15 A Yes, and I had a little bit more, more time to talk to
16 her.

17 Q Okay. At that point did you make another decision
18 about what you should do in terms of this whole
19 altercation?

20 A Yes. I decided at that time it was just best, best to
21 call down there.

22 Q So you called Hollywood Video, correct?

23 A Yes.

24 Q And you spoke to one of the clerks?

25 A Yes.

SW - J. WILSON -DIRECT

1 Q Okay. And apparently the police were there at that
2 time, correct?

3 A Yes, yes.

4 Q And at that point you spoke to an officer; is that
5 correct?

6 A I originally ---

7 Q On the phone?

8 A Yes, yes, yes.

9 Q That's what I'm saying.

10 A Yes, yes.

11 Q And when you spoke to the officer were you given any
12 instructions by that officer?

13 A Just to come on back down to, come on back down to the
14 video store.

15 Q All right. So what did you do?

16 A I came down and then parked the car and talked to the
17 officer.

18 Q Okay. And do you remember any of the officers you
19 spoke with?

20 A Yes. One was Miss Robinson.

21 Q Okay.

22 A And Mr. -- I'm sorry, I --

23 Q Provenzano?

24 A Mr. Provenzano, yes.

25 Q Okay. Were you telling them what had occurred?

SW - J. WILSON -DIRECT

1 A Yes.

2 Q All right. And was Mr. Pennell there when you were
3 speaking with them when you first got down there?

4 A Yes, he was in the vehicle in the patrol car at that
5 time.

6 Q All right. And without saying what Mr. Pennell said,
7 what was his demeanor like? What was he acting like that
8 you observed?

9 A He was hitting on the windows and trying to spit on the
10 window and calling names. I'm not, I mean, just -- he
11 was, I mean, just -- I can't find the right word. But he
12 was just -- there was nothing that they could do with him
13 in that car the way he was acting in that side from having
14 the physical tussle with them in there. He was vulgar,
15 just, yeah.

16 Q Okay. After you spoke with the officers did they ask
17 you anything about the weapon you had discharged?

18 A Yeah.

19 Q All right. And at that point did they follow you to
20 your home?

21 A Yes.

22 Q Okay. And at your home what did you give the officers?

23 A I gave them the -- that Taurus, Taurus 9, the Taurus
24 gun.

25 Q Okay. The handgun?

SW - J. WILSON -DIRECT

1 A Yes.

2 Q Yes, sir. And afterwards did you speak with
3 Investigator Robinson after you had done that or where was
4 the last time you spoke to Officer Robinson about this
5 case?

6 A It was -- I think during that incident that was it.
7 Then after they got the handgun.

8 Q Did you have a chance to write a statement maybe one or
9 two days later?

10 A Yeah, yes.

11 Q And was that here at the City-County Complex or was it
12 at your house?

13 A At the -- I believe it was at the complex.

14 Q Okay. Police department?

15 A Yes.

16 Q Okay. Other than that you've spoken to me about this
17 case, correct?

18 A Yes.

19 Q All right. And is that all you can tell the ladies and
20 gentlemen of the jury about what occurred to you on the
21 evening hours of May 25th, 2009?

22 A That's about it except for the fact that, I mean, that
23 was a situation that I really wish that that hadn't
24 happened. And I mean, be -- I mean that's, what happened
25 that night could have cost either one of us our lives.

SW - J. WILSON - CROSS

1 And when I think about the fact that he had asked me to
2 take him to Timmons ville and he's offered me 20-dollars to
3 take him there and didn't have -- that then, I don't know
4 what his plans were if I had given him that ride or if I
5 had let my wife or someone else's wife had gone up there
6 and ran into Mr. Pennell. And that's it. I mean, it was
7 just, but it was happening. I couldn't believe that it --
8 that it was happening like it did. And that's it. That's
9 all I have to say.

10 Q Thank you so much. I appreciate it. I'm gonna put
11 these photographs back and those are all the questions I
12 have. Please answer any questions that Mr. Suggs may have
13 for you in regards to this matter.

14 **CROSS - EXAMINATION**

15 BY MR. SUGGS:

16 Q Good morning, Mr. Wilson. Good morning, ladies and
17 gentlemen.

18 A Good morning.

19 Q Just a few questions. A little nervous? You were but
20 not now?

21 A Yeah, I'm not now.

22 Q That's okay, I'm nervous too. We're all nervous, okay.

23 Does Mr. King still own San-glo?

24 A Tom King, yes.

25 Q Tom King?

SW - J. WILSON - CROSS

1 A Yes.

2 Q Now when this incident occurred last year on May 25th

3 —

4 A Yes.

5 Q —right after everything happened, when was the first
6 opportunity you had to talk with a police officer? Was
7 that on the telephone when you called the Hollywood Video?

8 A Yes.

9 Q Okay. And when you talked to that officer was that
10 Officer Robinson or Officer Provenzano?

11 A I can't remember which officer it was, but I know —

12 Q Was it a female or male?

13 A I believe it was a — I'm not sure. I think it was a
14 male I think.

15 Q It's okay. It's not a critical question whether it's
16 right or wrong. It doesn't matter. But that was the
17 first time that you talked to a police officer about this
18 incident was when you called on the phone?

19 A Yes.

20 Q Okay. Now when you went down to the Hollywood Video
21 after talking with the police officer —

22 A Uh-huh.

23 Q —he or she asked you to come back down; is that
24 right?

25 A Yes.

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1 Q Okay. And so you came back down?

2 A Yes.

3 Q And you talked with several officers or more than one?

4 Or one or several I mean?

5 A A couple of officers, yes.

6 Q Okay. So you talked to an officer on the phone and
7 then you came down and talked to that same officer and
8 some other officers as well?

9 A All I know is I talked to them on the phone, and I
10 talked to a couple of them when I got down. I'm not sure
11 exactly who they were at that time.

12 Q Okay. You talked to a male and a female officer?

13 A Yes, now -- yes, once I got there, yes, I did talk to
14 them.

15 Q And did they give you opportunities, officers give you
16 an opportunity to tell them everything that you knew about
17 this incident?

18 A Yes.

19 Q Okay. They didn't rush you to get you to give the
20 statement in a very quick fashion? In other words, they
21 gave you time to give a statement; is that right?

22 A Yes, yes.

23 Q Okay. And they were writing down with -- they were
24 taking notes while you were telling them what happened?

25 A I imagine. I'm not sure.

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1 Q Because this scenario kind of, was kind of drawn out,
2 wasn't it? I mean, you went to the Hollywood Video, you
3 had the encounter, then you left. Then you came back, you
4 had another encounter, then you left again, then you
5 called and you went back a third time. So there was quite
6 a lot of detail in this scenario. Would you agree with
7 that?

8 A Yes.

9 Q Okay. So you had a chance to tell the officers
10 everything that you needed to tell them, what you thought
11 was important?

12 A Yes.

13 Q Okay. And later, two days later on the 27th, you had
14 another opportunity to tell your story; is that correct?

15 A Yes, yes.

16 Q Okay. And you went down to the -- you went from your
17 home to here to the City County Complex; is that right?

18 A Yes. Yes.

19 Q Okay. And did you come down at the invitation of one
20 of the investigators? Did they call you on the phone and
21 say, Mr. Wilson, can you come down here and give us a
22 written statement or was that something that you
23 voluntarily wanted to do? You called them, said, I'd like
24 to give you a written statement, I'm gonna come down, such
25 and such a time. Do you understand the question?

SW - J. WILSON - CROSS

- 1 A Me, yes.
- 2 Q What's the answer?
- 3 A I was -- I was called down.
- 4 Q So it would be Michael Robinson --
- 5 A Yes.
- 6 Q --the female officer?
- 7 A Uh-huh.
- 8 Q Okay. That's a yes?
- 9 A Yes.
- 10 Q Okay. And so you went down -- you came down here on
- 11 the 27th and you prepared a written statement; is that
- 12 right?
- 13 A Yes.
- 14 Q Okay. And that was here at the complex?
- 15 A Yes.
- 16 Q On the 27th of May?
- 17 A Not sure about exact date but it was, yeah.
- 18 Q Okay. And when you wrote the statement down you were
- 19 given, I guess you were given -- it looks to me like some
- 20 police department forms, voluntary statement form?
- 21 A Yes.
- 22 Q And that's what you filled out; is that right?
- 23 A Yes, I mean, yeah.
- 24 Q You've seen the statement?
- 25 A Yes, yes.

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1 Q Okay. You did the statement?

2 A Uh-huh.

3 Q Is that right?

4 A Yes.

5 Q And it's a two page statement, correct?

6 A Yes.

7 Q Okay. And when you -- how long did it take you to do
8 that statement?

9 A Probably a few minutes.

10 Q Okay. Did anybody rush you to do that statement?

11 A No, no.

12 Q You had ample opportunity to tell the police again
13 exactly what had transpired that night?

14 A Yes.

15 Q And you had a couple of days really too to reflect upon
16 it and think about what you wanted to put down; is that
17 correct?

18 A I had time, yes. Yes.

19 Q Safe to say you thought about the incident some from
20 the time it happened till the time you did the statement
21 two days later?

22 A Naturally, yes.

23 Q Naturally. And so you tried to be very detailed about
24 it; is that correct?

25 A I just tried to -- yes, just, yes, yes.

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1 Q You didn't want to leave anything out that was
2 important?

3 A Well, I mean, I wanted to tell it to write down what I,
4 what had happened. I mean, that's to -- I can't find the
5 right word, but I mean.

6 Q You wanted to be accurate?

7 A Yes.

8 Q And you wanted to tell the truth?

9 A Yes.

10 Q And you wanted to make certain that everything you put
11 down was what happened and would help the police?

12 A Yes.

13 Q Okay, thank you. Let's talk about the pictures for a
14 minute. I don't want to talk about my pictures because
15 they're pretty terrible so we won't use those. We'll use
16 the ones that Mr. Jepertinger used. Now you left your
17 house to go to the Hollywood Video. And I don't know,
18 were you going to drop some movies off or were you picking
19 some movies up?

20 A Yes.

21 Q Okay. John said Chariots of Fire. You weren't going
22 to rent that, were you?

23 A No.

24 Q Do you remember what it was?

25 A Most times I go in and I look on the front of the--

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1 they normally have posters up.

2 Q Of new releases and stuff?

3 A Yeah, of what's gonna be in. And if there's any then I
4 get them.

5 Q We've got the movies on demand now; don't we? We don't
6 really need Hollywood Video anymore, do we?

7 A Yes.

8 Q But you were going to not drop off, but pick up?

9 A Yes.

10 Q Okay. Because I noticed you mentioned that when you --
11 when you came to the video store you came off of Evans
12 Street?

13 A Yes.

14 Q And let's see -- I think John said 17 and 16. Okay, so
15 this is 17. So you're coming off Evans Street so the
16 Piggly Wiggly is on this side and the video store is on
17 this side. Is that right?

18 A If you -- yeah, Piggly Wiggly is over here and the
19 video store is over here.

20 Q And then you've got the Atlanta Bread which is closed
21 and then the Game Stop and then the Great Clips and --

22 A Yeah.

23 Q So you pulled into that driveway and you were going --
24 you were actually going on 16.

25 A Uh-huh.

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1 Q You were -- you don't mind if I stay this close to you
2 do you?

3 A No.

4 Q It's okay? You were coming in from this side and you
5 were driving around the back side of -- well not, the back
6 side is here but the left side of the video store which
7 faces Second Loop. Faces Second Loop. Is that right?

8 A The back side is --

9 Q Well, the back side faces, I guess, David McLeod
10 Boulevard, in that area?

11 A Yeah, yeah, that paint shop.

12 Q Yes, the paint shop.

13 A Pittsburg Paints, yeah.

14 Q And then -- or Rosemary Paints or something.

15 A Yeah.

16 Q Rosemary Paint, okay.

17 A Yes.

18 Q And then when you come around, this side actually faces
19 the Naturally Outdoors and the other shops; is that right?

20 A Yeah, I think so.

21 Q I'm not trying to put words in your mouth. I'm just
22 trying to posture myself here.

23 A Yeah, like Naturally Outdoors and the bank or
24 something.

25 Q Okay, okay. Now when you came around -- most folks

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1 come around this way 'cause they want to get to the front
2 and drop off movies in that slot which on Number 20, I
3 guess, that's where that slot used to be.

4 A Yeah.

5 Q If they're driving around they want to be able to be,
6 have that on the driver's side. But you weren't doing
7 that, you were actually just going to park?

8 A Yes.

9 Q Okay. Not to drop off?

10 A No.

11 Q Okay. So, and when, when you pulled up and you were
12 already, you were already pulling up and this is the back
13 side of the store and you were already making the turn to
14 the left side of the store when you saw the stereo
15 equipment in the driveway?

16 A Yes.

17 Q So it wasn't in the back, it was on the side?

18 A Yes.

19 Q Okay, okay. So you got out to move it?

20 A Yes.

21 Q Okay. Now this is 10:30 at night, right?

22 A Around that time.

23 Q It was close to closing time; wasn't it?

24 A Yeah, I know. Yeah, it was close.

25 Q So you didn't really have enough time, not too much

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1 time to get in and get movies before they started wanting
2 to run people out of there probably; wouldn't you think?

3 A Yeah, yeah.

4 Q Okay, all right. So were there -- were there any --
5 can you tell me -- can we write on these, Judge? Is it
6 okay to ---

7 THE COURT: No, that's in evidence. I don't
8 think --

9 MR. SUGGS: I mean, can he put an X on where he
10 ---

11 THE COURT: Yeah, you can have him do that.
12 Mr. Jepertinger, you want to ---

13 MR. JEPERTINGER: I have no objection if he puts
14 an X on anything, Judge.

15 THE COURT: Okay, that's fine.

16 BY MR. SUGGS:

17 Q But I'm just trying to get a general idea of some
18 things.

19 A Okay.

20 Q Can you mark with an X if this -- on State's Exhibit
21 Number 16, if this is the best photo for that. Can you
22 mark with an X where you recall seeing the stereo
23 equipment.

24 A It was right about here, right there stretched across
25 just across the road.

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1 Q And when you say stretched, I like to use the word
2 strewn about. Was it in a pile or was it kind of like
3 lined up like you see at a garage sale or something like
4 that?

5 A Kind of thrown across.

6 Q Thrown across. I mean, how much of the parking lot did
7 it take up?

8 A It took up pretty -- it pretty much stretched across
9 the whole parking lot.

10 Q So you could not -- you could not, you could not get by
11 the equipment without getting out of your car?

12 A Without running over it.

13 Q Without running over it?

14 A Yeah.

15 Q So you couldn't, couldn't go around it. Was it that
16 stretched out?

17 A No, I mean, really remember -- I remember stopping
18 because I knew if I had -- if I had kept going I would run
19 over it so...

20 Q Well, kind of curious too in a way, I'm just guessing,
21 curious to see what it was perhaps too is another reason
22 for getting out?

23 A Naw, I pretty much knew it was a stereo system.

24 Q Okay. But you started to move it out of the way by
25 using your feet?

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1 A Yes.

2 Q You weren't kicking it, you wouldn't be roughing it,

3 —

4 A No.

5 Q You were just kind of sliding it; is that right?

6 A Yeah.

7 Q Okay. Now when you got out of your car to do that you
8 put your car in park?

9 A Yes.

10 Q And that was a gold Ford Explorer, gold Ford Explorer;
11 is that correct?

12 A Yes.

13 Q You put your car in park. Did you cut off the engine?

14 A No.

15 Q Just put it in park?

16 A Uh-huh.

17 Q Is that a yes?

18 A Yes.

19 Q Uh-huh and huh-uhs are okay when we're talking, but
20 when the court reporter types uh-huhs and huh-uhs up they
21 look a lot alike.

22 A Oh.

23 Q And it's hard to read the transcript. I don't know if
24 it's a yes or a no. I mean, we know what you're talking
25 about, but later on if the transcript has to be read we

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1 can't decipher it, okay?

2 A Okay.

3 Q Thank you. So you were moving the equipment away when
4 Mr. Pennell approached you?

5 A Yeah. And one other reason why I kind of wanted to
6 move it also is because I didn't want it to be finished,
7 torn up. And I knew that somebody was gonna come there
8 and just smash it.

9 Q Smash it?

10 A Yeah.

11 Q Just come around the corner?

12 A Yeah.

13 Q Did you move it out of the parking lot into the bushes
14 or did you —

15 A No.

16 Q It stayed in the parking lot but just out of your way?

17 A Out of the main, like I say, you have the parking lines
18 here.

19 Q Right.

20 A I kind of moved it kind of just, it's still in the
21 parking lot but out of the main drive, the main entry.

22 Q I understand. So if we look at 16 you would have moved
23 it within the lines of the —

24 A The parking space.

25 Q Where the people was parked instead of where people

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1 drive?

2 A Drive.

3 Q Got you, got you. And that took -- I mean, there's a
4 lot of photographs here. I haven't -- I think there are
5 10 or 15 or 20 or more but are we talking about a lot of
6 equipment? I mean, speakers and, let me see. Speakers
7 and -- I don't know much about stereo equipment but.
8 Maybe sub-woofers and maybe a receiver or something. I'm
9 not really sure but. Was it -- how long did it take you
10 to move all that out of the way? You said it was kind of
11 strewn or lined up and you were -- you weren't picking it
12 up. You were sliding it with your feet the whole time.

13 A Yes.

14 Q How long did that take you?

15 A I wasn't keeping, I mean, track of time. I mean, it
16 wasn't that long. I mean, just ---

17 Q Couple of minutes?

18 A Yeah, about -- about a few minutes, just ---

19 Q Less than five?

20 A Yeah, just to slide it over.

21 Q And during the process that's when Mr. Pennell
22 approached you?

23 A Yes.

24 Q While you were moving it with your feet?

25 A Uh-huh.

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- 1 Q And is that a yes?
- 2 A Oh, yes, sir, I'm sorry.
- 3 Q That's okay, I forget too. And then he sort of accused
- 4 you of kicking his stuff I believe was your testimony.
- 5 A Yeah.
- 6 Q But you weren't doing that?
- 7 A No.
- 8 Q You were just sliding it, okay. Thank you. And at
- 9 that time he asked you for a ride.
- 10 A Yes.
- 11 Q To Timmonsville.
- 12 A Yes. Yes, sir, I'm sorry.
- 13 Q Okay. Now in your statement you told the police, "I
- 14 saw and heard this man approaching me. He asked me if I
- 15 would take him to take his stuff somewhere for
- 16 20-dollars." I mean, I don't consider that a big
- 17 difference but he said Timmonsville —
- 18 A Yes.
- 19 Q —at the scene, but two days later you just put
- 20 somewhere —
- 21 A Yeah.
- 22 Q —on your statement; is that right?
- 23 A Yes.
- 24 Q For 20-dollars; is that right?
- 25 A Yes.

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1 Q And you refused to do that; is that correct?

2 A Yes.

3 Q And that's probably the right thing to do. I don't
4 know that anybody would challenge that, to refuse a ride
5 to a stranger. That's a smart thing to do. That's what
6 we teach our children; isn't it?

7 A Yes, yes.

8 Q Okay. So he was upset at being turned down about not
9 getting the ride, is that fair to say? He wasn't happy.

10 A Yeah.

11 Q And you were looking for some words earlier. I think
12 you said vulgar at one point. Were you trying to say
13 maybe he was agitated. I like to use that word agitated
14 'cause I see a lot of agitation in my profession. But do
15 you think he was agitated and upset?

16 A I understand a person being reasonably agitated or
17 disappointed.

18 Q Uh-huh.

19 A But this was, I mean, this was a little more than just
20 agitated.

21 Q Did he appear to be drinking or had he appeared to have
22 been drinking, not drinking at the time but unless he was.

23 But did he appear to be intoxicated?

24 A No, because he -- he wasn't -- he wasn't staggering. I
25 mean, you know, he walked straight.

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1 Q Okay.

2 A So I mean...

3 Q Okay. Did you smell the odor of alcoholic beverage
4 upon him? I mean, you -- I saw Mr. Jepertinger
5 practically towering over you a moment ago, and I would
6 assume that if someone were drinking and were that close
7 you would be able to smell the odor of alcohol on him?

8 A Well, but there's one problem I have. It's sinusitis
9 and certain times I can't, you know, I can't really smell
10 if it's, you know.

11 Q But so the answer to the question is, no, you did not
12 smell alcohol?

13 A Yeah, I don't remember smelling alcohol.

14 Q Okay, all right. So you refused to give him a ride.
15 He became more than agitated. Is that fair?

16 A Yes.

17 Q He told you to -- he said some vulgar things to you?

18 A Yes.

19 Q Is that right?

20 A Yes.

21 Q And at that point when all that was going on you were
22 still outside of your car, your -- was it Blazer, gold --
23 no, excuse me gold Ford Explorer. You're still outside
24 your Explorer when y'all were having this confrontation or
25 y'all were having this disagreement or he was being mean

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1 to you?

2 A Yeah, I'd been getting in my car.

3 Q So you were just -- I've had enough of this, I'm going
4 back to my car.

5 A Yeah, and that -- I run out the back side. I mean,
6 it's pretty dark around there, yeah.

7 Q Right, okay. But you were going to park back there;
8 weren't you?

9 A No.

10 Q You were going to park in the front?

11 A Yes.

12 Q Okay, okay. All right. So you'd had enough of that.
13 So had you finished moving the stereo equipment as far as
14 you wanted to, or were they still stuff laying in the way
15 or?

16 A It was enough for me to get my vehicle through.

17 Q So you were getting back in your car and your car was
18 still on?

19 A Yes, sir.

20 Q Keys were in the ignition?

21 A Yes.

22 Q Okay. Was the door open during this whole time? Was
23 it closed? In other words, when you got out to clean the
24 stuff up did you close the door or did you leave it open?

25 A During that time my door was -- I believe it was

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1 partially open.

2 Q Partially open?

3 A Yeah. But —

4 Q And so -- I'm sorry, did you finish?

5 A During that time he wasn't right at me, I mean, yeah.

6 Q So you went back to your car and the door was partially
7 open and you were preparing to get in the car when he
8 approached you closer?

9 A Actually, I drove my car like, like I said earlier,
10 around the front.

11 Q I'm sorry, I didn't write that down. So, okay, so
12 after all of this you said enough of this, I'm gonna get
13 back in my car. So you got back in your car and you
14 didn't leave the video store, you pulled around the front?

15 A Front, yeah.

16 Q And you parked in a parking spot.

17 A Uh-huh.

18 Q Is that a yes?

19 A Yes, I'm sorry.

20 Q And you -- just follow me, I'm just trying to
21 understand. Okay, you cut your car off?

22 A Yes.

23 Q You put it in park; you cut it off?

24 A Yes.

25 Q You pulled your keys out the ignition. You don't want

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- 1 to leave the keys in the car.
- 2 A I hadn't got in that far yet.
- 3 Q The car was ---
- 4 A Yeah, I was still in my car.
- 5 Q In your car, okay. The car was off.
- 6 A Uh-huh.
- 7 Q Yes.
- 8 A Yes, yes.
- 9 Q You were opening your door.
- 10 A Yes.
- 11 Q You were getting out?
- 12 A Yes.
- 13 Q You were out?
- 14 A No.
- 15 Q You weren't out?
- 16 A No.
- 17 Q Where were you?
- 18 A I was in the process of waiting on how you -- how you
- 19 turning around to get out of your car.
- 20 Q Uh-huh.
- 21 A And that's when he, he was in my doorway.
- 22 Q He was in your door. Your door was open?
- 23 A It was partially open, but he finished opening it and
- 24 got in my doorway.
- 25 Q So he opened your door for you?

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1 A Finished, yes.

2 Q But you were opening it?

3 A Yes.

4 Q And he grabbed the handle and opened it the rest of the
5 way.

6 A Just the actual, the edge of the door.

7 Q The edge of the door?

8 A Yeah.

9 Q Okay. Now do you remember telling the police officer
10 that -- do you remember telling Officer Robinson that
11 after you parked your car and you were in the process of
12 getting out you were standing on the outside of your car
13 when Mr. Pennell approached you that second time?

14 A I'm not sure. But I remember as I was turning to get
15 out of my vehicle, my vehicle, I'm not sure if I had my
16 foot down on, I mean, it's been a while. But I was
17 getting out of my vehicle, and that's when he got in my
18 doorway.

19 Q All right. So you're saying it's been a while. It's
20 been, let's see, May, June, July, August, September,
21 October. It's been 17 months.

22 A Uh-huh.

23 Q More or less?

24 A Yeah.

25 Q Right? Okay. Now so you feel like your recollection

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1 of these events is better on the day it happened and two
2 days later than they are 17 months later?

3 A I can't tell you exactly where my feet were, but I can
4 tell you that I was in my doorway.

5 Q All right. You were in —

6 A Yeah.

7 Q I think we're getting into semantics here, but I really
8 — it's very important for me to know your exact body
9 position.

10 A Yes.

11 Q And it's very important for this jury to know your
12 exact body position at the time you claim Mr. Pennell
13 approached you the second time.

14 A Yes.

15 Q Okay. So think very hard. Where were you — where was
16 your body when Mr. Pennell approached you the second time
17 after you had pulled up to the front of the store, you had
18 put the car in park, you had turned the car off, but yet
19 you say your keys were still in ignition? Where was your
20 body? Was it standing at the apex of the door as you told
21 the officer on the day this occurred, or were you still
22 sitting in the car, if you know?

23 A I'm not exactly sure, but I do know that my butt was
24 pretty much in the chair.

25 Q You were not standing?

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1 A I can't say; I'm not sure.

2 Q You're either standing or sitting, Mr. Wilson. I'm not
3 trying to beat you up; I'm just trying to understand. You
4 can't stand and sit at the same time.

5 THE COURT: He's reflected he doesn't remember.

6 MR. SUGGS: Yes, sir.

7 THE COURT: You can ask him 15 more times and I
8 don't think that he's gonna remember.

9 MR. SUGGS: All right.

10 BY MR. SUGGS:

11 Q So your answer is you don't remember if you were
12 standing or sitting?

13 A I can show you how I get out of my car.

14 Q Okay, that's helpful.

15 A Normally if I'm in my car and I'm about to get out,
16 (indicating) — well, I'm on —

17 Q Don't fall off.

18 A Normally it's like that.

19 Q Okay.

20 A And I'm not sure exactly when is there but I remember
21 looking over and seeing.

22 Q But I — and I'm sorry, Judge, I — just a couple of
23 questions on that point. Please don't—

24 THE COURT: That's okay.

25 MR. SUGGS: —be impatient with me.

1 THE COURT: When someone says they don't
2 remember and you continue to ask and they continue to say
3 I don't remember, I don't think the light is going to come
4 on.

5 MR. SUGGS: I understand, Judge. The gentleman
6 just now, if the Court will, if the court reporter will
7 reflect, was actually sitting in the chair but had his
8 feet on the ground. And you know, I don't think that's
9 possible if you're in a Blazer or an Explorer, whatever
10 car you are, sitting down and ---

11 MR. JEPERTINGER: I would object.

12 MR. SUGGS: ---your feet down on the ground at
13 the same time.

14 MR. JEPERTINGER: I object.

15 THE COURT: Now hold on. Two people can't be
16 talking at the same time. She can't take that down.

17 MR. SUGGS: All right, sir.

18 THE COURT: When you hear objection please stop
19 talking.

20 MR. SUGGS: Yes, sir.

21 THE COURT: Your objection is to his opinion.

22 MR. JEPERTINGER: That's correct.

23 THE COURT: And I sustain that.

24 MR. SUGGS: Yes, sir. All right, I'm going to
25 move on.

1 **THE COURT:** Okay.

2 **MR. SUGGS:** Thank you, Judge.

3 **THE COURT:** We'll take about ten minutes. Do me
4 a favor while you're back there. If you need more time
5 then ten minutes we'll take whatever time you need. While
6 we're on this break I'm gonna ask you, if you would, to
7 elect amongst yourselves a foreperson, okay. And let me
8 just tell you real quick about the role of a foreperson.
9 The foreperson of a jury, ladies and gentlemen, is
10 basically the communication between the jury panel and the
11 court. It's the for lack of better term, the liaison
12 between your, you as a jury and the Court. So if the jury
13 needs to communicate with the Court, the foreperson would
14 be the one who would write out the question and pass it to
15 the Court. Depending on what your question is I may have
16 just the foreperson come out and give my response, or I
17 may have the entire jury panel come out. It doesn't
18 matter. And that's one of the roles of the foreperson.

19 Another role of the foreperson is that when you
20 do begin your deliberations, because there's so many
21 people you need one person to say, okay, let's go ahead
22 and start. And I'll tell you that when you do deliberate
23 everyone must be present so that if someone needs to
24 excuse themselves to use the restroom the foreperson would
25 then say, okay, let's stop some talking about the case

1 until they return and then when that person returns, okay,
2 let's start back. The foreperson's vote carries no more
3 weight, no more authority, than anyone on the jury. Your
4 verdict must be unanimous so everyone's vote carries the
5 same weight. You're all equal in the jury room, okay.

6 But you do need somebody to start and stop the
7 deliberations, and then the foreperson also will fill out
8 the sentencing sheet, verdict form sheet, to reflect your
9 verdict whether your verdict is not guilty or whether it's
10 guilty. That would be handled by the foreperson, okay.

11 So keeping those tasks in mind, I'm gonna ask you
12 if you would, while you're back on this break to elect
13 amongst yourselves a foreperson for the jury. Whoever
14 that person is, when you come back out there are no
15 assigned seatings in the jury box except for the
16 foreperson who would occupy this seat right here and then
17 the alternate who would occupy that seat right there.
18 Other than that, the rest of you can just file in and sit
19 wherever you're comfortable, okay. So we're gonna go
20 ahead and take a break, ask you to elect a foreperson, and
21 then if you need anything while you're in there, drinks,
22 crackers, or anything just let Sammy know and we'll get
23 that for you, okay. So everyone else remain seated.
24 Ladies and gentlemen, go ahead and we'll take the break.

25 (WHEREUPON, the jury was removed from the

1 courtroom at 11:26 a.m., and the following proceedings
2 commenced in open court.)

3 THE COURT: When we got to this, Mr. Suggs, a
4 couple of jurors were kind of raising their hand like they
5 did want a break. I don't want to interrupt your cross,
6 but I didn't want them to be uncomfortable so we went
7 ahead and did that.

8 MR. SUGGS: I would rather them pay very close
9 attention to my stunning cross-examination, Judge.

10 THE COURT: Well, I do want them to pay close
11 attention to what you're doing so...

12 MR. SUGGS: Yes, sir.

13 THE COURT: We go ahead and do that.

14 Mr. Wilson, during the break you can step down
15 from the witness stand. The only thing, the only
16 restriction, you're not allowed -- you can talk to others,
17 but you're not allowed to talk about your testimony at
18 all, okay? And we'll take about ten minutes then and
19 we'll start back.

20 (WHEREUPON, a recess was taken from the proceedings.)

21 THE COURT: State ready to proceed?

22 MR. JEPERTINGER: Yes, sir.

23 THE COURT: Defense?

24 MR. SUGGS: Yes, sir.

25 THE COURT: All right. Sam, ask the jury to

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1 join us please. Get them -- tell them I need them to
2 write the name of the foreperson on a piece of paper and
3 pass it to me.

4 **THE BAILIFF:** Will do, sir.

5 (WHEREUPON, the jury was returned to the courtroom at
6 approximately 11:48 a.m., and the following proceedings
7 commenced in open court.)

8 **THE COURT:** All right, Mr. McKnight, thank you
9 for your willingness to serve as the foreperson of the
10 jury, the foreman of the jury. I appreciate that. I give
11 you my either congratulations or condolences, whichever
12 you accept, but I do appreciate your willingness to do
13 that. And ladies and gentlemen, if you recall, when we
14 took the break Mr. Suggs was in the process of his
15 cross-examination and so we'll pick up with Mr. Suggs'
16 cross-examination.

17 **Mr. Suggs.**

18 **MR. SUGGS:** Thank you, Judge.

19 **BY MR. SUGGS:**

20 **Q** Mr. Wilson, again, I apologize this is taking so long.

21 **A** Thanks.

22 **Q** Thank you. One of the questions I meant to ask you and
23 I think we've already passed that stage in the
24 questioning, but I'll just go back. I just want to make
25 sure I understand why Mr. Pennell was out there that night

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1 with the stereo equipment. You -- I believe you said on
2 direct that he told you that he had had a fight with a
3 friend, a girlfriend, someone?

4 A Yeah.

5 Q And that was what your understanding why he was there
6 more or less without a car?

7 A Yeah, he said that he'd had a fight with his
8 girlfriend.

9 Q Okay, thank you. And I apologize I didn't get to that
10 before. And when we left off I think you said that you
11 really could not remember when if you were standing or
12 sitting whenever Mr. Pennell approached you the second
13 time after you had parked your car. Is that right?

14 A Yes.

15 Q That's right?

16 A Yes.

17 Q Okay, thank you. Now you said on direct that he said
18 that he would take your car; is that right?

19 A Yes.

20 Q And did he have a weapon? Did he display a weapon of
21 any kind to you?

22 A No.

23 Q Did he make an attempt to grab your keys from your hand
24 or from the ignition?

25 A No.

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1 Q Okay. You said he grabbed the door jamb or the handle
2 or the jamb?

3 A Yeah.

4 Q Is that right?

5 A Yes.

6 Q Okay. And he said he would take your car?

7 A Yes.

8 Q His exact words?

9 A He said, well, I'll take your car.

10 Q Take your car. Did he strike you?

11 A No, I mean, no, no, no.

12 Q Did he push at you?

13 A All I know is at that point after he said that I pretty
14 much by pushing -- I pushed him back.

15 Q You pushed him --

16 A Yeah.

17 Q --away?

18 A Yes.

19 Q From your car door?

20 A Yeah, yes.

21 Q Okay. Did you tell the officer at the scene, Officer
22 Robinson, that he tried to get into your car by pushing
23 and striking you?

24 A I said that he struck at me.

25 Q He did not make contact with you?

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1 A Okay. He -- from what I can re-- from what I can
2 remember, I don't remember him actually, actually hitting
3 me. I don't -- well, I didn't have any, any bruises or
4 anything on me.

5 Q You weren't injured in any way in this altercation?

6 A No. And whether he -- I mean, got in or out I don't
7 know, but all I know is at that point I pushed him back.

8 Q You pushed him away?

9 A Yeah.

10 Q He didn't get in your car?

11 A No, I was -- I was on the driver's seat.

12 Q You were standing between him and your interior of your
13 car more or less?

14 A At a point after I had got the gun I was -- then I was
15 standing there.

16 Q But you were -- the whole time though, the whole time,
17 you were positioned at some point between him and the
18 inside of your car?

19 A I was in my car the whole time, yeah.

20 Q All right. You were not standing at the apex as you
21 told the officer? And let's go -- we'll pass that. We've
22 talked about that, okay. But you had time after you
23 pushed him to reach into your -- was it a glove box or a
24 console where you retrieved your 9-millimeter automatic?

25 A It's a glove box.

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1 Q So that's in front of the passenger seat?

2 A Yeah.

3 Q I mean, most cars nowadays especially Blazers, whatnot,
4 they have consoles; don't they?

5 A Yes.

6 Q Okay. So it wasn't—

7 MR. JEPERTINGER: Your Honor, I would object.
8 He's testifying once again in terms of what Blazers are
9 and this was a Ford Explorer in this instance. I would
10 object.

11 THE COURT: Referring to SUVs but go ahead and
12 ask the question.

13 MR. SUGGS: Yes, sir, Judge.

14 BY MR. SUGGS:

15 Q He's answered the question. The gun was in the glove
16 box.

17 A Yes.

18 Q And the glove box is what we customarily never keep
19 gloves in, but it's in front of the passenger seat?

20 A Yes.

21 Q All right. Is that where the clip was also?

22 A Yes.

23 Q All right. So you had time -- so your back was
24 actually turned to Mr. Pennell --

25 A Yes.

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1 Q ---when you had to reach into your car and get it?

2 A Yes, yes.

3 Q All right. And were you reaching across the console?

4 A Yes.

5 Q Okay. So do you remember if you were standing or
6 sitting?

7 A In order for me to get over this, I mean, I've got to
8 be pretty much -- like I said, my feet sit in the door way
9 and my hand over the glove box ---

10 Q All right. What's Mr. Pennell doing while you're
11 reaching in there and pulling your gun out of your glove
12 box, finding the clip, putting the clip in the gun, and
13 then racking it, racking I guess -- did you rack? You
14 must have racked a shot 'cause you did fire a shot?

15 A Yes.

16 Q You racked a bullet in the chamber. And when you
17 racked it were you in the car or were you outside the car?

18 A Well, there's two, two things I want to correct on
19 that.

20 Q Okay, all right.

21 A The first thing, I don't know what he was doing because
22 my mind was on getting my gun. And as I was, as I grabbed
23 my gun the clips were -- the clips were right pretty much
24 in. I believe it was -- well, I can't remember exactly
25 how it was but my clip is right there with my gun.

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1 Q In the same glove box?

2 A Yes. I mean, I don't, you know.

3 Q Okay. Well, that makes sense. So you were able to do
4 all that fairly quickly, is that what you're saying,
5 because they were there together?

6 A I mean, it's really a simple thing. I mean, you put
7 the clip in it and rack it back.

8 Q Right. Did you rack it inside the car?

9 A Yes, I did.

10 Q You did. Rack the inside -- and then at that point you
11 didn't fire the gun while you were in the car? You --

12 A No.

13 Q --were outside the car; is that right?

14 A Yeah.

15 Q You're not gonna--

16 A That's when I -- at that point I was outside.

17 Q There's no question about it in your mind?

18 A Yeah, yeah.

19 Q Okay. And then did you point the gun at Mr. Pennell?
20 Did you point it at him?

21 A No.

22 Q You pointed it in the air?

23 A Yes.

24 Q All right. And then you fired a shot?

25 A Yes.

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- 1 Q Okay. He never struck you?
- 2 A I don't, I don't think so, no.
- 3 Q Never punched you or pushed you?
- 4 A As I pushed him back, I mean, I -- at that point I
- 5 don't remember exactly everything that happened then
- 6 except that I pushed him back and went for my gun, yeah.
- 7 Q When you fired the gun in the air he backed away. Is
- 8 that what you wrote in your statement as far as you
- 9 remember?
- 10 A He took a step back.
- 11 Q Okay. And then he approached you again and is that
- 12 when you kicked him and knocked him down?
- 13 A That was after I fired my --
- 14 Q Yes, sir.
- 15 A Yes.
- 16 Q Yes, sir. You fired the weapon.
- 17 A Uh-huh.
- 18 Q He backed off. He came close to you again, all this
- 19 outside of the car, and that's when you kicked him and
- 20 knocked him down?
- 21 A Okay. He said -- at that point he's -- he came back,
- 22 back towards me.
- 23 Q Yes, sir.
- 24 A And said shoot me.
- 25 Q Okay. Okay.

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1 A And during this time I'm still in my doorway and that
2 that's, like I said, I decided at that point to ---

3 Q This is after you'd fired the gun?

4 A Yes.

5 Q Fired the gun while you were on the outside of the car
6 though; is that right?

7 A Outside of the car in my doorway, yes.

8 Q Okay. And then, then he approached you and that's when
9 you kicked him and knocked him down?

10 A Yes.

11 Q And you still have the gun in your hand at the time.

12 A No, I put the gun back.

13 Q You put the gun back in the car?

14 A Yes.

15 Q Okay. Did you put it back in the glove box?

16 A No, I just put it over on -- I put it on the other seat
17 'cause my -- at that the point my mind was on taking care
18 of my -- of taking care of myself without shooting him.
19 That was it.

20 Q You felt like you could defend yourself adequately
21 enough without the use of a firearm. Is that safe to say?

22 A I felt that at that point I really didn't have another
23 choice.

24 Q You didn't want to shoot the man.

25 A No.

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1 Q Okay. And we appreciate that. But you were able to
2 kick him and knock him down without further use of any
3 lethal instrumentalities?

4 A Yeah.

5 Q Okay, all right. And he did fall to the ground?

6 A Yes.

7 Q And when he was on the ground did you continue to hit
8 him to insure that he would not again get up and accost
9 you?

10 A There was about three, I mean, there was a kick in the
11 stomach.

12 Q Kick in the stomach.

13 A A punch, and then and I -- and as he was, I guess,
14 going down or whatever, I gave him another kick.

15 Q Okay. So you kicked him and then he fell down and then
16 when he was sort of maybe on his knees, maybe you were
17 afraid that he would get back up, you kicked him again or
18 you punched him again. I'm not blaming you for anything;
19 I'm just trying understand the sequence of events. Is
20 that okay? Does that sound right?

21 A Yeah.

22 Q Okay. So after he was laying on the pavement I would
23 guess, then you -- you didn't have the gun with you; the
24 gun was already back in the car.

25 A Yes.

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1 Q Okay. And you didn't have any other weapons of any
2 kind.

3 A Huh-uh.

4 Q Brass knuckles or dirks or knife.

5 A Huh-uh.

6 Q So you got back in your car and you left.

7 A Yes.

8 Q All right. You didn't want to go get your video at
9 that time. You felt like this was, I need to get out of
10 here.

11 A Yeah.

12 Q Okay. So you left the scene; is that correct?

13 A Yes.

14 Q Okay. And you went home?

15 A Yes.

16 Q Did you have a cell phone with you at the time?

17 A I think I did; I'm not sure.

18 Q Did you call home on your way home? Did you call the
19 police on your way home? Did you call the video store on
20 your way home the first time?

21 A I don't think so.

22 Q Okay. Talk to anybody?

23 A I talked to my wife and my dad.

24 Q On the phone or at home?

25 A At home.

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1 Q So didn't take you long to get home. You're living
2 right on Aiken so we're not talking five or six minutes,
3 right?

4 A Yeah.

5 Q So you just went straight home, didn't make any stops?

6 A Yes, yeah.

7 Q Went home, told your wife and your dad what had
8 happened?

9 A Yeah.

10 Q Is that right? Stayed home for just long enough to
11 tell them?

12 A Now that's when I was in the middle of getting into the
13 other vehicle.

14 Q I'm sorry?

15 A Okay. As I was talking to my wife, I mean, I'm -- I
16 was preparing to get in the other vehicle. I mean, there
17 was no long conversation or nothing.

18 Q So you were talking to her while you were in the
19 process of switching vehicles?

20 A Yes.

21 Q All right. So you got into -- you were in a gold Ford
22 Explorer initially?

23 A Yes.

24 Q And that belongs to you or your wife?

25 A Both of --

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1 Q Both of you?

2 A Uh-huh.

3 Q And then you left and went home and I'm -- and I'm a
4 little confused now because there was a change on the
5 indictment to indicate that you came back in a black Chevy
6 Blazer but you testified on direct that you came back in a
7 Ford Expedition.

8 A Yeah, the black --

9 Q Did I mishear that?

10 A No.

11 Q Okay. Was it a black Expedition?

12 A Yes.

13 Q Okay. Well, maybe that's the confusion. All right.
14 So you switch cars and you came back in the Expedition.

15 A Uh-huh.

16 Q Is that right?

17 A Yes.

18 Q Okay. Could you tell me why, and I usually don't ask
19 why questions too much, but why did you switch your car?

20 A The main thing, as I said earlier, I didn't think he,
21 he'd recognize the black truck.

22 Q So you did it as a precaution?

23 A Precaution, yes.

24 Q Just in case he was still there?

25 A Yes.

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- 1 Q And you didn't want him to recognize the gold vehicle?
- 2 A Yes.
- 3 Q All right. That begs the question again, why did you
- 4 go back?
- 5 A Well, one of the things is the people in the store,
- 6 they needed to know what was going on.
- 7 Q Sure.
- 8 A I mean, one thing is those that was in there and that's
- 9 not the only reason. One thing was those girls in there,
- 10 they needed to know what was going on. I mean, I'm a
- 11 regular customer.
- 12 Q Sure.
- 13 A And the other thing was they don't need to think that
- 14 there's somebody out there back there shooting, you know.
- 15 I wanted to let them know that, you know, what happened
- 16 back there.
- 17 Q Couldn't have done that by calling them on the phone
- 18 like you did the third time?
- 19 A Well, I really didn't think at that time to.
- 20 Q Well, you switch cars ---
- 21 A Uh-huh.
- 22 Q ---and went back. You weren't -- you obviously weren't
- 23 afraid of being carjacked if you went back the second
- 24 time.
- 25 A Yes.

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1 Q Is that right?

2 A I was a lot less afraid, I mean.

3 Q Less afraid.

4 A Yeah.

5 Q You felt like you had handled this man pretty well, and
6 if you were there more the same you would dish out?

7 A Not really. I just felt like from where I parked there
8 to the door, you know, I felt like, you know, I could get
9 there, talk to them. I mean, and that would have been it.
10 I mean, I didn't really think that we'd, you know.

11 Q Were -- when you went back the second time did you have
12 your gun then?

13 A No.

14 Q It was still in the gold Blazer?

15 A Yeah.

16 Q You left it the Blazer?

17 A Yeah.

18 Q You didn't take the weapon back with you of any kind?

19 A Huh-uh.

20 Q Were you still going to get your movie?

21 A No. I wanted to talk to the girls down that were in
22 the Blockbuster.

23 Q They wouldn't let you in?

24 A No.

25 Q They had the door locked.

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1 A Yes.

2 Q Had they let you in you would have told them what had
3 happened?

4 A Yes.

5 Q And maybe would have gotten your movie anyway?

6 A Well ---

7 MR. JEPERTINGER: Objection, Your Honor. I think
8 that's been asked. I mean, he keeps saying I'm not going
9 to get a movie. He just asked and answered about the
10 video.

11 MR. SUGGS: I think that's just a state of mind,
12 I believe Judge, you know, what, how he was feeling at the
13 time.

14 THE COURT: Overruled.

15 BY MR. SUGGS:

16 Q You'd still gotten the movie if you had the
17 opportunity, just out of my own edification.

18 A At that point, I mean, the movie was out of mind.

19 Q Last thing on your mind?

20 A Yeah, I mean, because when I went in I wanted to find
21 movies to enjoy myself.

22 Q Sure.

23 A At that point, I mean, getting a movie, I mean.

24 Q Okay. So the answer to that question would be no.

25 A No.

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1 Q Okay. So -- you didn't call the police either on your
2 way home the first time or on your way back to let them
3 know that you had fired a weapon in city limits?

4 A No.

5 Q Were you charged with firing a weapon in city limits?
6 Did police charge you with that offense at all?

7 A I'm not sure, I mean, that's -- no.

8 Q No?

9 A Not that I know of. I'm not sure.

10 Q You didn't have to go to court.

11 A No.

12 Q There was some information provided to me that the gold
13 Explorer didn't have a license tag. Would that be a
14 reason why you switched cars or not?

15 A No, they both should have had tags on them unless --
16 I'm not sure. I'm not sure.

17 Q All right. So you went back a second time. And tell
18 me, if you can, how much time passed between the time you
19 left the video store the first time after the first
20 encounter with Mr. Pennell before you came back in the
21 other, in the Expedition. How much time do you think had
22 passed, from parking lot to parking lot?

23 A I'd imagine just the time it takes to leave there and
24 go home and come back maybe.

25 Q 10, 12 minutes?

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- 1 A Maybe around there. I'm not sure.
- 2 Q Okay, just a guess. Close enough?
- 3 A Maybe, yeah, I'm not sure.
- 4 Q No longer than 15?
- 5 A Shouldn't be.
- 6 Q Okay, thank you. And when you pulled into the parking
- 7 lot the second time did you come in from the same
- 8 direction you did before, around the back, around the side
- 9 to the front?
- 10 A No, no, I don't think so, no.
- 11 Q Okay. Came in from the front?
- 12 A Yes.
- 13 Q From Palmetto Street?
- 14 A I believe I did.
- 15 Q All right. And then you pulled into the parking lot,
- 16 and at what point did you see Mr. Pennell? Did you see
- 17 him before you parked or after you parked?
- 18 A After, after I parked.
- 19 Q So when you pulled in you didn't see him?
- 20 A No.
- 21 Q You -- that's a no?
- 22 A Oh, no. No.
- 23 Q Didn't see him?
- 24 A No.
- 25 Q So you assume, I guess, that he had already gone?

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- 1 A Yes.
- 2 Q Okay. So you pulled in and you parked your car in the
- 3 front of the video store?
- 4 A Yes.
- 5 Q Okay. You put the car in park?
- 6 A Yes.
- 7 Q And you cut off the ignition?
- 8 A Yes.
- 9 Q You got out of the car?
- 10 A Yes.
- 11 Q You closed the car door?
- 12 A Yes.
- 13 Q Did you lock it?
- 14 A I believe I did.
- 15 Q Okay.
- 16 A Yeah.
- 17 Q So you're walking to the front of the video store to go
- 18 in with keys in your hand.
- 19 A My keys were in my pocket.
- 20 Q In your pocket, keys on you. And that's when
- 21 Mr. Pennell approached you again?
- 22 A Yes.
- 23 Q All right. And from which side did he come from? Did
- 24 he come from the back of the store, or was he in the front
- 25 of the store or you just didn't see him? From which

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- 1 direction, do you know?
- 2 A All I know is when I looked back over he was -- as I'm
- 3 walking in the front where he's over here.
- 4 Q As you're walking in he's on -- you're walking in like
- 5 I'm walking to the front of the store, he's on your left
- 6 or your right?
- 7 A He's on my left.
- 8 Q So he's on the Naturally Outdoors side?
- 9 A Yes.
- 10 Q Same side where the stereo equipment was, that you
- 11 moved?
- 12 A Yes.
- 13 Q All right. And he approached you again?
- 14 A Yes.
- 15 Q Okay. And did he strike you or push you or assault you
- 16 in any way? Did you automatically just not wait for
- 17 anything and just hit him? How, how did that go?
- 18 A He came towards me again.
- 19 Q Came towards you again. And you didn't want to --
- 20 A Yeah.
- 21 Q I'm sorry, I'm sorry.
- 22 A Yeah, yeah, he came towards me.
- 23 Q Okay. Did you have anything in your hands?
- 24 A Not that I can remember, no.
- 25 Q Okay. And so you told him not to do it again.

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1 A Yeah, yes, sir.

2 Q And that's when -- was he approaching you?

3 A Yes.

4 Q He was, okay. And so you kicked him as he, as he came
5 towards you?

6 A Yes.

7 Q Did he try to punch you or push you or hit you?

8 A Yes. I met him -- my foot's the longest thing on me.
9 That's what I got on him so.

10 Q Okay. Did he strike at you or did you just kick him?

11 A He, he pretty much just like he did -- pretty much he
12 was --

13 Q Was he crowding you, I guess that's the word I hear a
14 lot. Where someone doesn't push you or someone doesn't
15 punch you, but they kind of aggressively come towards you?

16 A No. His fists were like that.

17 Q Just like this. Did he swing at you, did he come at
18 you like this and you swing and pow, kicked him?

19 A No, he actually was, was in the middle of a punch.

20 Q Okay, all right. So you kicked him and in the stomach.

21 A Yes.

22 Q And knocked him down?

23 A Yes.

24 Q And he went down?

25 A Yes.

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- 1 Q And he's on the ground?
- 2 A Yes.
- 3 Q On the ground. And then are you trying to get into the
- 4 store at that time or were you trying to get in the store
- 5 before you had to kick him?
- 6 A Like I -- before I was headed towards the door.
- 7 Q To the door?
- 8 A And then I saw him that's when I -- that's when the
- 9 part that we just talked about happened.
- 10 Q That you kicked him?
- 11 A After that I went towards the store and tried to pull
- 12 the door.
- 13 Q So you had not gotten to the door yet --
- 14 A No.
- 15 Q --whenever you kicked him?
- 16 A No.
- 17 Q So after he was laying -- you kicked him, he was laid
- 18 out, you're going to the door to check to see if it's
- 19 open?
- 20 A And there were two things with him being laid out he
- 21 wasn't lay -- he never stayed down there.
- 22 Q Okay.
- 23 A I mean, he was ---
- 24 Q You kicked him and he didn't go down?
- 25 A I mean, he went down but he got back up and went off.

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1 Q Okay. All right, so I understand now. You kicked him.

2 You're out the car. You're walking towards the door.

3 A Yes.

4 Q He comes from the same direction his stereo stuff is.

5 A I imagine. I mean, that's the side he came, when I saw
6 him he came from.

7 Q You told him not to do it again.

8 A Yeah.

9 Q You turned to him and said, don't do it again. Then he
10 comes at you like this and he tries to swing at you, you
11 kick him.

12 A Uh-huh.

13 Q He goes down. He gets back up. He starts walking
14 away, and you go to the store to see if it's unlocked or
15 to let those people know what had happened. Is that an
16 accurate sequence of events? Did I leave out anything
17 that's important?

18 A Except there's a little bit -- except, as I said, when
19 I pulled up and when I saw him I said, you know, don't do
20 that again, you know, and in a warning voice.

21 Q Right.

22 A And that's when he still came towards me.

23 Q Right.

24 A And we went through what you just said.

25 Q You kicked him?

SW - J. WILSON - CROSS

1 A Yeah. And I mean, he -- he was aggressive towards me
2 the whole time. I mean, it wasn't -- I heard the way you
3 said it and it was kind of sarcastic kind of thing.

4 Q I didn't mean it that way, I'm sorry. I'm just trying
5 to understand the order of events. It'd be better if you
6 tell me exactly, that would be fine. I'm just trying to
7 save time. So he -- you kicked him and knocked him down
8 and then he kind of got up and walked off?

9 A He got up at that point and said I was just playing,
10 man?

11 Q He said he was just playing.

12 A Yeah.

13 Q And he didn't try -- he didn't threaten you at that
14 time, I'm gonna take your car?

15 A No.

16 Q Okay. And he didn't go for your car at that time or
17 try get your keys that were in your pocket. Anything like
18 that? Did he?

19 A No.

20 Q Okay. You just kicked him. He went on his way and you
21 went to see if the door was unlocked and kind of that's
22 the end of it as far as you're concerned.

23 A I met his punch with a kick.

24 Q Okay, yes, sir. Thank you. All right. You couldn't
25 get in, the store was either closed either after 11 or

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- 1 they weren't about to let anybody in which is probably a
2 good idea; don't you think?
- 3 A Yeah.
- 4 Q Okay. But you're a regular customer; aren't you?
- 5 A Yes.
- 6 Q You go there a lot?
- 7 A Yes.
- 8 Q And those folks in there know you; is that right?
- 9 A Yes.
- 10 Q Okay. And you know them?
- 11 A Yes.
- 12 Q And the fact there was two girls working there that
13 night?
- 14 A Two in the front, yes.
- 15 Q Do you know -- do you know who they are?
- 16 A I don't know them personally but I know their faces.
- 17 Q Okay. And you've talked to them before; is that right?
- 18 A Yes.
- 19 Q One's name is Julia Cribb; is that right?
- 20 A I imagine so, yeah.
- 21 Q I mean, if you know. If you don't know that's fine.
- 22 A Yeah.
- 23 Q Do you know her as Julia?
- 24 A Naw, no.
- 25 Q Or Ms. Cribb?

SW - J. WILSON - CROSS

- 1 A No.
- 2 Q You don't, okay. How about Vontravia Miller?
- 3 A No.
- 4 Q Don't know them.
- 5 A Not, not for —
- 6 Q You know the faces maybe?
- 7 A Yeah, faces.
- 8 Q Okay. And did you have chance to talk with any of
- 9 those girls that second time before you left again? You
- 10 tried open the door and they were like, you can't come in,
- 11 or, I mean, was it something like that?
- 12 A They just didn't open the door.
- 13 Q Could you see them in the store?
- 14 A Yeah, yeah.
- 15 Q You could?
- 16 A Yeah.
- 17 Q Could they see you as far as you knew?
- 18 A Yes, but the understanding that I can get from them is
- 19 they didn't know if I was running from somebody 'cause I'm
- 20 moving towards the door pretty fast. And from my
- 21 understanding is maybe they didn't want to let someone
- 22 else in there with me. I mean, 'cause I go in there on a
- 23 regular basis.
- 24 Q They know your face.
- 25 A Yeah.

SW - J. WILSON - CROSS

- 1 Q And you know their faces?
- 2 A Yes.
- 3 Q But they wouldn't let you in?
- 4 A Yes, sir.
- 5 Q Okay. Did you try to holler at them through the door?
- 6 A Not that I remember.
- 7 Q Did they holler at you?
- 8 A It wouldn't seem reasonable for them to do that, no.
- 9 Q Well, I'm thinking there was a gunshot in the parking
- 10 not more than 15 minutes before.
- 11 A Yeah.
- 12 Q I'm just trying to identify what, if you saw anything
- 13 about these girls that you could tell us.
- 14 A Except there was in — just in front of the store they
- 15 looked scared, that's all.
- 16 Q Were there any customers in the store that you could
- 17 see?
- 18 A Not that I remember, no.
- 19 Q Any cars in the parking lot?
- 20 A Not that I remember.
- 21 Q Kind of there isolated; wasn't it? Not too many people
- 22 there?
- 23 A Yeah.
- 24 Q You, Mr. Pennell, couple of clerks.
- 25 A Yeah.

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1 Q All right. Just a couple more questions. Did you ever
2 strike Mr. Pennell in the face or just the stomach?

3 A Like I said, the first time after I kicked him in the
4 stomach. I hit him somewhere towards here.

5 Q Was he bleeding at any time?

6 A I'm not sure. I mean, I've heard but at that time I
7 didn't...

8 Q Okay.

9 A Didn't recognize at that time?

10 Q Okay. So you got back in your black Expedition and you
11 went back home?

12 A The gold Explorer.

13 Q Well, I'm talking the second time.

14 A Second time.

15 Q The Explorer was the first time.

16 A Yes, yes.

17 Q All right. The second time was the black Expedition?

18 A Yes, sir.

19 Q All right. And you got back in your Expedition and you
20 left?

21 A Yes.

22 Q And you went home?

23 A Uh-huh.

24 Q Yes?

25 A Yes, after they wouldn't open the door.

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- 1 Q Sure. Okay, and you went straight home?
- 2 A Uh-huh.
- 3 Q Yes?
- 4 A Yes, yes.
- 5 Q And when you got home you -- at that point you called
- 6 the video store?
- 7 A Yes.
- 8 Q Now you called them first. You didn't call the police.
- 9 A Yes. I called the video store.
- 10 Q You didn't call 9-1-1. You called the video store?
- 11 A Yes.
- 12 Q Hollywood Video?
- 13 A Yes.
- 14 Q And you talked to a clerk there?
- 15 A Yes.
- 16 Q And she gave the phone obviously to one of the officers
- 17 who were already there?
- 18 A I believe so.
- 19 Q Does that sound reasonable?
- 20 A Yeah, I think so, yeah.
- 21 Q And you called from your home phone or your cell phone?
- 22 A Honestly I don't remember. It was -- I don't know
- 23 which phone I called from.
- 24 Q And what you told the officer on the phone was the same
- 25 thing that you told them at the scene?

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- 1 A Yes.
- 2 Q Maybe more ---
- 3 A Yes.
- 4 Q ---elaborate at the scene where you had more time?
- 5 A The same thing.
- 6 Q Okay. And then the officer told you, well, you need to
- 7 come back down here; is that right?
- 8 A Yeah, he said he ---
- 9 Q He or she?
- 10 A I believe it was he. I'm not sure.
- 11 Q Okay. And so you got back in your Expedition?
- 12 A Yes.
- 13 Q Or Explorer?
- 14 A The Expedition.
- 15 Q The black vehicle?
- 16 A Yes.
- 17 Q You went back?
- 18 A Yes.
- 19 Q Anybody go with you?
- 20 A No.
- 21 Q Wife didn't go, dad didn't go?
- 22 A No, no.
- 23 Q Okay. Take the gun with you?
- 24 A It was in the other vehicle.
- 25 Q Didn't take the gun with you?

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- 1 A No.
- 2 Q And then you talked with the officer?
- 3 A Yes.
- 4 Q And there was more than one officer there?
- 5 A Yes.
- 6 Q All right. And you talked with them for as long as you
- 7 felt comfortable?
- 8 A Well, until I had given my statement, I mean.
- 9 Q Okay. Did officers follow you back to your house?
- 10 A Yes.
- 11 Q That same night?
- 12 A Yes.
- 13 Q And they asked to search your home?
- 14 A Yes.
- 15 Q And you signed a consent form for your home to be
- 16 searched?
- 17 A Yes.
- 18 Q And they searched your home?
- 19 A Yes.
- 20 Q And did they ask you to turn over your firearm?
- 21 A Yes.
- 22 Q And did you do that?
- 23 A Yes.
- 24 Q Have you gotten it back?
- 25 A No.

1 Q That's all I have. Thank you, Mr. Wilson. I
2 appreciate your patience.

3 A Okay.

4 MR. JEPERTINGER: I have nothing on redirect.

5 THE COURT: Thank you, Mr. Wilson, you may step
6 down, sir.

7 Y'all come on up.

8 (WHEREUPON, counsel approached the Bench for an
9 off-the-record discussion.)

10 THE COURT: Ladies and gentlemen, it's 12:30 so
11 we're gonna -- sometimes we'll go -- usually we'll go till
12 about 1 and break, but I don't know, and I don't know if
13 this next witness would have us done by that time and I
14 don't want go too long. So we'll -- this is a good
15 breaking point. We'll break for lunch and be back --
16 let's see, it's 12:30, 1:30, ask you to be back in your
17 jury room ready to go at 2:00. Please have no
18 conversation about the case. Any time -- that instruction
19 is gonna be with you any time you're out of that jury box,
20 okay. Please have no conversation -- don't allow anyone
21 to talk to you. Enjoy your lunch and we'll see you back
22 here 2:00 please. Everyone else remain seated.

23 (WHEREUPON, the jury was removed from the
24 courtroom at 12:30 p.m., and the following proceedings
25 commenced in open court.)

1 THE COURT: All right. Is there anything we need
2 to take up before we adjourn for lunch?

3 MR. SUGGS: No, sir.

4 MR. JEPERTINGER: Same conditions on bond
5 obviously.

6 THE COURT: Sure. I was just gonna give the --
7 is the hall clear? Do they have an elevator for them?
8 Give him a minute to let the jury get on down and then
9 we'll get started.

10 (WHEREUPON, a lunch break was taken.)

11 THE COURT: All right, let me just address
12 something.

13 Mr. Pennell.

14 THE DEFENDANT: Yes, sir.

15 THE COURT: I don't know how to stress this any
16 more than I can stress it. And I know you didn't mean
17 anything by it, but there's a danger. When you are around
18 this building you can't be hollering stuff across the
19 parking lot to people because I know you were talking to
20 Mr. Wells.

21 THE DEFENDANT: Yes, sir.

22 THE COURT: But the problem is, there could have
23 been some of these jurors standing around, and they'd have
24 heard you and that might have hurt your case, hurt your
25 case, not hurt the State's case. That might have hurt

1 your case. Now this will be the last time I'm gonna
2 address this.

3 THE DEFENDANT: Yes, sir.

4 THE COURT: If I hear one more report that you've
5 opened your mouth around this courthouse, I'm revoking
6 your bond.

7 THE DEFENDANT: I understand.

8 THE COURT: It's for your safety, sir.

9 THE DEFENDANT: I understand, Judge.

10 THE COURT: All right.

11 THE DEFENDANT: I didn't ---

12 THE COURT: I know you didn't mean to. I know
13 you didn't mean any harm; but the thing is, if harm was
14 done whether you meant it or not it doesn't matter, does
15 it?

16 THE DEFENDANT: No, sir, you're right.

17 THE COURT: So the way you can avoid it is just
18 don't speak to anybody. It's just for a short period of
19 time. You know, you -- maybe you're a real friendly guy
20 and you like to talk to people. But for a short period of
21 time you just need to focus on talking to Mr. Suggs and no
22 one else.

23 THE DEFENDANT: Yes, sir.

24 THE COURT: All right. Okay.

25 MR. JEPERTINGER: Judge ---

1 THE COURT: State ready? I'm sorry.

2 MR. SUGGS: Judge, one thing has nothing to do
3 with the case really but the county is giving out flu
4 shorts today. I'm signed up to get the flu shot between 3
5 and 4:30. Is there any way I can pop out at some point
6 and get that?

7 THE COURT: We'll probably take a short break.
8 And it's over at the library?

9 MR. SUGGS: No, I think it's on the eight floor.
10 They usually have it in the council chambers I'm thinking
11 that's ---

12 THE COURT: They used to do it in the library.

13 MR. SUGGS: We have nothing else.

14 (Off-the-record discussion.)

15 THE COURT: All right, Sammy, ask the jury to
16 join us if you would please, sir.

17 (WHEREUPON, the jury was returned to the courtroom at
18 approximately 2:20 p.m., and the following proceedings
19 commenced in open court.) .

20 THE COURT: All right, ladies and gentlemen, I
21 hope everyone had a good break, lunch break, and we're
22 ready to start back. If you recall, when we took the
23 break Mr. Jupertinger was still on the State's case and so
24 I would recognize him for his next witness.

25 MR. JEPERTINGER: Thank you very much, Your

SW - J. ISEMAN - DIRECT

1 Honor. Good afternoon. Good afternoon, Mr. Suggs. The
2 State would call Detective Chase Iseman to the stand.

3 THE COURT: All right. Detective Iseman, if
4 you'd come around to be sworn, sir.

5 THE DEPUTY CLERK OF COURT: If you will, sir,
6 place your left hand on the Bible, raise your right hand.

7 WHEREUPON,

8 JONATHAN CHASE ISEMAN,
9 having been duly sworn by the Deputy Clerk of Court,
10 testified as follows:

11 THE DEPUTY CLERK OF COURT: Please be seated and
12 state your full name for the record.

13 THE WITNESS: Jonathan Chase Iseman.

14 **DIRECT EXAMINATION**

15 BY MR. JEPERTINGER:

16 Q Okay. Detective Iseman, you have not too long ago made
17 detective; is that correct?

18 A Yes, that's correct.

19 Q Okay. Prior to making detective what were your
20 responsibilities with the City Police Department?

21 A I was a patrol officer in the north region which is
22 Cherokee Road north of, all the way out the city limits.

23 Q All right. And how long have you been a patrol officer
24 with the City Police?

25 A At the time of this incident I guess about four,

SW - J. ISEMAN - DIRECT

1 four-and-a-half years.

2 Q All right. Obviously you were working on May 25th,
3 2009; is that correct?

4 A That's correct.

5 Q Okay. And I'm gonna use a police term. Did you
6 receive what is called a Bolo that evening over radio
7 dispatch?

8 A Yes. I was in the area of West Palmetto Street, and I
9 heard dispatch say over the radio that there was a call at
10 Hollywood Video, that there was a fight in progress and
11 that shots had been fired, and that someone was supposedly
12 down on the ground.

13 Q All right. And did the Bolo or Be-On-The-Lookout For
14 describe the type of individual that was supposed to be
15 supposedly down on the ground?

16 A Yes. We were told it was a white male wearing a orange
17 shirt.

18 Q All right. Now the Hollywood Video, let me ask you
19 this. Hollywood Video, which county is that located in?

20 A It's in Florence County.

21 Q All right. And when you received that dispatch what --
22 where were you and where did you proceed to go?

23 A Like I said, I was on West Palmetto Street a good ways
24 away from the incident location. There were several other
25 officers going. As I neared the location some other

SW - J. ISEMAN - DIRECT

1 officers had got on-scene and said that they didn't see
2 anybody in the parking lot. So at that time I just
3 started checking the surrounding area. And we were later
4 -- I was later advised over the radio one of the officers
5 said that the person was seen heading west on Palmetto
6 Street.

7 Q So did you proceed west on Palmetto Street?

8 A Yes.

9 Q Okay. And what did you -- what did you do when you
10 went west on Palmetto Street? Well, it kind of sounds
11 simplistic but what were you doing?

12 A Just riding looking for, you know, white male with an
13 orange shirt was the only description we had at the time.
14 As I was riding down Palmetto Street I observed
15 Mr. Pennell who was wearing an orange shirt. He was
16 walking through the parking lot of Naturally Outdoors.

17 Q Now just for everybody's, I guess, edification, we're
18 talking about the new Naturally Outdoors on West Palmetto
19 'cause there used to be one on Evans Street, correct?

20 A Yes, sir, that's correct, and this was at the new one
21 farther down Palmetto Street down past Bentree and Sonic
22 and Jefferies Creek, that area.

23 Q What would you say the approximate distance between
24 Hollywood Video and that new Naturally Outdoors would be?

25 A I'd say it's close to maybe a mile.

SW - J. ISEMAN - DIRECT

1 Q All right. What did you do when you saw Mr. Pennell
2 with the orange shirt on in the parking lot of Naturally
3 Outdoors?

4 A When I saw Mr. Pennell I advised the dispatch that I
5 was gonna possibly be out with the subject. As I got out
6 I told him -- he was walking towards me actually passed
7 him and pulled in the second driveway. I told him to stop
8 and he seemed real upset and amped up, and I told him to
9 stop. He kept coming so at that time with the type of
10 call and fire with shots being fired, not knowing what was
11 going on, I drew my department weapon and pointed it at
12 him and told him to get on the ground.

13 Q Was -- could you tell, had he been breathing heavily?

14 A Yeah, he, like I said, he seemed real excited. He was
15 kind of out of breath, real -- just dirty and disheveled
16 looking. He had some blood on his shirt and on his face.
17 And once I told him several times to get down on the
18 ground he finally complied and he got down on the ground.

19 Q Okay. And at that point what did you do?

20 A I handcuffed him, and once he was handcuffed I did a
21 quick check to make sure he didn't have any type of
22 weapons or anything like that on him.

23 Q Did you find any weapons on him?

24 A No, I didn't.

25 Q All right. And then what did you do?

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1 **A** I then was told by the officers on the scene -- I
2 relayed to them that I believe Mr. Pennell was gonna be
3 the subject involved. I put him in the back of my patrol
4 car and I drove him back down to Hollywood Video.

5 **Q** All right. And did you stay there or did you turn him
6 over to either Officer Provenzano or any other officer
7 there?

8 **A** When I first got there I stayed there initially for a
9 few moments. He was seated in the back of my car. They
10 were all busy talking to other folks at the scene and
11 contacted Investigator Robinson to come out. Once they
12 got freed up I turned Mr. Pennell over to Officer
13 Provenzano and I left shortly thereafter.

14 **Q** All right. Was that your only involvement in this
15 case?

16 **A** Yes, sir.

17 **Q** All right. Thank you. Please answer any questions
18 that the Defense attorney may have for you.

19 **THE COURT:** All right, Mr. Suggs.

20 **MR. SUGGS:** Yes, sir.

21 **CROSS-EXAMINATION**

22 **BY MR. SUGGS:**

23 **Q** Just a few questions, Officer. I'm sorry, I called you
24 officer. It's investigator, right? Detective ---

25 **A** We're still all officers.

SW - J. ISEMAN - CROSS

1 Q Okay. And you've been an investigator for how long?

2 A Close to a year now.

3 Q Year, okay. And so it was not long after this incident
4 that you were promoted?

5 A That's correct.

6 Q Okay, all right. And prior to that I think you said
7 you were a patrol officer for about four years.

8 A Yes, sir.

9 Q You'd received -- and I never heard that term before,
10 Bolo, B-O-L-O, but I know that means now Be-On-the-Lookout
11 For.

12 A Yes, sir.

13 Q I never heard that term. When you heard that, you
14 heard that shots had been fired; is that correct?

15 A Yes, sir.

16 Q Not a single shot but shots had been fired?

17 A Yes, sir.

18 Q Okay. And did you have an opportunity at any time to
19 talk to Mr. Wilson about this case?

20 A No, I didn't.

21 Q Okay. Did you even have a chance to be introduced to
22 him?

23 A I saw him over in the parking lot talking to the other
24 officers, but that was -- that was all. I never got a
25 chance to talk to him.

SW - J. ISEMAN - CROSS

1 Q Okay. So he never said anything to you during the
2 course of what — your investigation is limited as it
3 sounds like it was?

4 A Yes, sir, that's correct.

5 Q All right. So as far as your role is concerned you
6 responded to a call, you saw Mr. Pennell at the Naturally
7 Outdoors, you arrested him, and you took him back to
8 Hollywood Video. And that's pretty much the extent of
9 your involvement?

10 A Yes, sir, that is correct.

11 Q Okay, thank you. And when you saw Mr. Pennell, he was
12 walking through the parking lot of Naturally Outdoors or
13 was he laying down?

14 A He was actually walking through the parking lot.

15 Q Did he have his belongings with him, the stereo
16 equipment, or anything else?

17 A No, sir, he didn't have any of that with him.

18 Q Wasn't carrying anything?

19 A No, sir.

20 Q And when you encountered him you — this was probably,
21 I'm guessing, around 11:00 in the evening?

22 A I guess. It was probably somewhere around that time,
23 within a few minutes of the call coming out.

24 Q Okay. And I'm not sure of the lighting out there. Is
25 it well lit at night?

SW - J. ISEMAN - CROSS

- 1 A There's some lighting but not, not very well lit.
2 There is some lighting.
- 3 Q And you were looking for a white male with an orange
4 shirt and he fit the description as, I guess, as close as
5 could be?
- 6 A Yes, sir.
- 7 Q Okay. And so you pulled into the parking lot and you
8 got out of your patrol car?
- 9 A Yes, sir, that's correct.
- 10 Q And you addressed him at that time?
- 11 A Yes, sir.
- 12 Q And did you ask him to stop so that you could talk to
13 him?
- 14 A Yes, sir.
- 15 Q All right. And he did comply with your instructions?
- 16 A Yes, sir.
- 17 Q Did -- you said he had blood on him?
- 18 A Yes, sir.
- 19 Q Was it on his face, on his shirt, on --
- 20 A He had a little bit on his face and a little bit on his
21 shirt. It wasn't a large amount, but there was blood on
22 his face and his shirt.
- 23 Q All right. Had you heard over the radio that there had
24 been maybe a fight or something like that?
- 25 A Yes, sir, we had, like I said earlier, received a call

SW - J. ISEMAN - CROSS

1 as a fight with shots fired.

2 Q All right. And so when you saw the blood did you --
3 did that re-enforce in your mind that this was the
4 gentleman you were looking for because of the possibility
5 of a fight?

6 A Yes, sir.

7 Q All right. So that strengthened your decision to talk
8 with this gentleman?

9 A Yes, sir.

10 Q All right. Now did he appear to be intoxicated?

11 A I don't recall. I don't believe.

12 Q You were a patrol officer four years?

13 A Yes, sir.

14 Q And you've probably made some DUI arrests in your time?

15 A Yes, sir, that's correct.

16 Q And so are you able to tell when someone's -- you feel
17 like you're qualified to tell someone or to tell us if a
18 person is intoxicated or not?

19 A Yes, sir.

20 Q Did you feel that he was intoxicated or do you feel he
21 had been drinking?

22 A You know, like I said, I don't feel that he was
23 extremely intoxicated, but I don't remember exactly what
24 his level of impairment would have been. You know,
25 there's testing we do for that. At the time it was, you

SW - J. ISEMAN - CROSS

1 know, getting him detained to make sure he didn't have a
2 weapon. And like I said, that was pretty much the extent.
3 I never even really got to talk with Mr. Pennell. I just
4 took him back to the other officers.

5 Q There wouldn't have been much need for testing in that
6 regard anyway —

7 A No, sir.

8 Q ---because he wasn't driving.

9 A No, sir, that's correct.

10 Q Did you smell odor of alcoholic beverage on his person?

11 A I do not remember, sir.

12 Q Okay. Did you ask him — you asked him to get down on
13 the ground because you were concerned about the shots
14 being fired announcement.

15 A Yes, sir.

16 Q And you didn't know if he had a weapon.

17 A Yes, sir, that's correct.

18 Q And that's proper police training; isn't it?

19 A Yes, sir, that's correct.

20 Q That's what they teach you to do?

21 A Yes, sir.

22 Q All right. So you did what you were taught to do and
23 you asked him to lay, lay down on the ground---

24 A Yes, sir.

25 Q ---with on his stomach?

SW - J. ISEMAN - CROSS

1 A Yes, sir.

2 Q With his arms and legs spread?

3 A Yes, sir.

4 Q All right. And then you approached him and you got
5 down and you patted him down for any weapons?

6 A Well, I handcuffed him first.

7 Q You handcuffed him first, okay.

8 A Yes, sir.

9 Q And did you ask him while you were handcuffing him, do
10 you have any weapons on you?

11 A Yes, sir, I did.

12 Q And he responded in a negative fashion?

13 A That's correct.

14 Q Okay. And so, but you're not going to take somebody's
15 word for you, you want to handcuff them anyway.

16 A Yes, sir, that's correct.

17 Q That's what you're trained to do?

18 A Yes, sir.

19 Q Okay. So you handcuffed him and you patted him down.
20 And did you then ask him to stand up?

21 A Yes, sir, I helped him up.

22 Q And then you checked the front 'cause it's hard to
23 check the front when you're laying down so you had to
24 check the front as well?

25 A Yes, sir.

SW - J. ISEMAN - CROSS

1 Q And no weapons?

2 A No, sir.

3 Q All right. And he was compliant with your
4 instructions; is that right?

5 A Yes, sir.

6 Q Even though I think you said he seemed to be, or did
7 you say adrenaline rush or anything like that? I can't --

8 A Kind of amped up.

9 Q Amped up, that was it.

10 A You could tell he was kind of excited and I guess, you
11 know, a little wired up but ---

12 Q Maybe 'cause he'd been shot at or?

13 A That's possible.

14 Q Okay, all right. Did you ask him his name?

15 A Yes, sir.

16 Q And he told you he was Charles Pennell?

17 A Yes, sir, he told me.

18 Q And did -- were you able -- was he able to produce any
19 identification?

20 A He told me he had it in his pocket. I didn't even get
21 it out at the time. I just -- I left -- as long as he
22 didn't have any weapons I left what was in his pockets and
23 took him back to the other officers.

24 Q Okay. So he said he had it in his wallet but you
25 weren't going to go for that?

SW - J. ISEMAN - REDIRECT

1 A No, sir, I was going to let the officers handling the
2 case take care of that.

3 Q All right. And then you took him straight back to
4 Hollywood Video.

5 A Yes, sir.

6 Q And you turned him over to officer Michael Robinson?

7 A Provenzano.

8 Q Provenzano?

9 A Yes.

10 Q And then you didn't stay very long at all after that?

11 A No, sir.

12 Q You just said, well you know, here's, I think this is
13 your man, see you later.

14 A Yes, sir.

15 Q And went back on the job?

16 A Yes, sir.

17 Q Okay. That's all I have. Thank you, Officer, or
18 Detective.

19 THE COURT: Anything further?

20 REDIRECT EXAMINATION

21 BY MR. JEPERTINGER:

22 Q As a patrol officer you've received several calls in
23 terms of with dispatch, correct?

24 A Yes, sir, that's correct.

25 Q Is it common terminology with dispatch when they use

SW - J. PROVENZANO - DIRECT

1 the term shots fired, does that refer to anything other
2 than identification of a gun being used and not specifying
3 number of rounds fired?

4 A Yes, sir, it's correct. You know, we get a call with
5 shots fired sometimes may be one to numerous such as
6 dispatch tells us there's shots fired.

7 Q So they use the word plural shots for everything?

8 A Yes, sir, normally.

9 Q All right, thank you. That's all I have.

10 THE COURT: Thank you very much, sir. You may
11 step down.

12 MR. JEPERTINGER: Your Honor, the State will call
13 Officer Provenzano to the stand.

14 THE DEPUTY CLERK OF COURT: Be seated and state
15 your full name for the record.

16 WHEREUPON,

17 JOSEPH PROVENZANO,
18 having been duly sworn by the Deputy Clerk of Court,
19 testified as follows:

20 THE WITNESS: Joseph Provenzano.

21 **DIRECT EXAMINATION**

22 BY MR. JEPERTINGER:

23 Q All right. Officer Provenzano, how long have you been
24 employed with the Florence Police Department?

25 A A little over six years.

SW - J. PROVENZANO - DIRECT

1 Q And what are your duties with the Florence Police
2 Department?

3 A I'm a patrol officer and my primary duty is to patrol
4 my district and then respond to calls.

5 Q And your district would consist of?

6 A It's called Charlie District, would be the mall area,
7 Evans street, some of Evans Street, and Second Loop Road.

8 Q Okay. Back in May of 2009, specifically May 25th,
9 2009, approximately 10:30 p.m., was that part of your
10 district as well?

11 A At that time, yes.

12 Q The Hollywood Video area?

13 A Yes.

14 Q And Hollywood Video just -- was that located on West
15 Palmetto Street?

16 A West Palmetto Street.

17 Q Okay. And the general area is right across from Piggly
18 Wiggly and Redbone Alley?

19 A Yes, it's around the corner of West Palmetto and David
20 McLeod.

21 Q Okay, all right. Now when you -- how did you get to go
22 out to Hollywood Video? What was the -- did you receive a
23 dispatch?

24 A I actually received the call to respond to the
25 Hollywood Video in reference to a fight in progress and

SW - J. PROVENZANO - DIRECT

1 shots fired, ---

2 Q Okay.

3 A ---and possibly a subject down in the parking lot.

4 Q And once again, you got the term shots fired?

5 A Yes, sir.

6 Q And that is what Officer Iseman said can be one to
7 numerous shots?

8 A Correct.

9 Q That's just a word they use, correct?

10 A Correct.

11 Q And so when you got there what were you expecting to
12 find?

13 A I was expecting to find somebody lying in the parking
14 lot, but when I got to the store I did not find anybody in
15 the parking lot. I notified central that nobody was in
16 the parking lot and other officer proceeded to search
17 around the surrounding areas. I was first on scene so I
18 went ahead and searched the, around the perimeter of the
19 building to see if anybody had maybe went around the back
20 around one of the sides. Proceeded to go around the left
21 side of the building and searched with my flashlight into
22 the bushes and I noticed ---

23 Q Why would you do that?

24 A Most of the people will hide in the bushes if they're
25 trying to hide from the police.

SW - J. PROVENZANO - DIRECT

1 Q Go ahead.

2 A Immediately flashed my flashlight and I noticed some
3 stereo equipment that was lying in the bushes on the left
4 side of the building. I continued my search around,
5 didn't find anybody. And at that time the other officer
6 responded, my supervisor, and we secured that stereo
7 equipment.

8 Q Let me ask you, I'm gonna show you State's Exhibit 16
9 which would be the side of the building I guess. Did you
10 find any stereo equipment -- and using Mr. Suggs' words --
11 strewn across the parking lot at that time when you
12 started searching for it?

13 A No, I did not.

14 Q And --

15 A All of it was in the bushes.

16 Q Close to the building or away from the cam-- where the
17 camera would be?

18 A In the bushes.

19 Q In the bushes right by the building?

20 A Right by the building.

21 Q Okay. And at that point what did you do?

22 A Begin doing my investigation which consists of speaking
23 to the complainant, to the person who called in to
24 dispatch, and getting their statements.

25 Q In this case it would be the store personnel?

SW - J. PROVENZANO - DIRECT

1 A Store personnel, correct.

2 Q All right. And after you spoke with them what did you
3 do?

4 A At that time Officer Iseman notified us that he was out
5 with a subject at Naturally Outdoors, the new Naturally
6 Outdoors, that matched that description. He proceeded to
7 bring that subject back to Hollywood Video.

8 Q Okay. And that person that was brought back to
9 Hollywood Video was the defendant in this case?

10 A Correct.

11 Q All right. And what did you do once he got to
12 Hollywood Video there on West Palmetto Street?

13 A I went up to the vehicle, and I observed his demeanor.
14 He was very agitated. He was dirty looking. He was
15 just -- he was just talking out, just talking. And I
16 tried to see what was -- I noticed his shirt had a little
17 bit of blood on it. His face had a little bit of blood on
18 it. And through my investigation with talking to the
19 store employees and other investigative procedures, I
20 determined that that was the subject that was involved in
21 the altercation.

22 Q So what did you -- what did you do as a result of
23 coming to that conclusion?

24 A I immediately read him his Miranda rights.

25 Q Let's stop right then and there. You read him his

SW - J. PROVENZANO - DIRECT

1 Miranda rights. Did you read it off a piece of paper or
2 do you have a card that you read?

3 A I read it off a card.

4 Q Do you have the card with you?

5 A Yes, I do.

6 Q Can you tell the jury -- I know they've probably seen
7 it ten million times on television, but can you tell them
8 what you read him?

9 A It says suspect's Miranda warnings. It gives him his
10 opportunity to remain silent. Do you want me to read the
11 card?

12 Q Sure, go ahead.

13 A "You have the right to remain silent. Anything you say
14 can and will be used against you in a court of law. You
15 have the right to talk to an attorney, have him or her
16 present with you while you're being questioned. If you
17 cannot afford to hire an attorney one will be appointed to
18 represent you for any questioning if you want. You can
19 decide at any time to exercise these rights and not answer
20 any questions or make statements. Do you understand these
21 rights I've explained to you?"

22 Q And what was his response when you asked that question
23 to him?

24 A I asked him if he understood and he said, yes, and he
25 agreed to speak with me.

SW - J. PROVENZANO - DIRECT

1 Q Okay.

2 MR. SUGGS: Your Honor, may we approach.

3 THE COURT: Yes, sir.

4 (WHEREUPON, counsel approached the Bench for an
5 off-the-record discussion.)

6 THE COURT: We're going to take just a minute
7 here. We're not going to go anywhere. We all know we
8 must honor nature when she calls so. We'll start back in
9 just a moment.

10 (Pause.)

11 (Defendant walks into courtroom.)

12 THE COURT: All right, Mr. Jepertinger, you may
13 continue, sir.

14 MR. JEPERTINGER: Thank you, Your Honor.

15 BY MR. JEPERTINGER:

16 Q I think I just asked you if he understood the Miranda
17 rights as you had just given them to him.

18 A Yes.

19 Q And his response to you?

20 A That he understood and he agreed to speak with me.

21 Q All right, okay. Now what did he tell you happened?

22 A After a few minutes trying to calm him down, I got out
23 of him that he was walking to take some stereo equipment
24 back to Wal-Mart that he took out of his niece's car.

25 Q All right. And did he ask -- did he tell you, not ask

SW - J. PROVENZANO - DIRECT

1 you, did he tell you what he was going to do with that
2 stereo equipment that he was taking back to Wal-Mart?

3 A He just said he was taking it back to return it.

4 Q Okay. Just to jump ahead a little bit, you were
5 present when he was arrested; is that correct?

6 A Yes.

7 Q Okay. Did you ever find a receipt from Wal-Mart for
8 any of this stereo equipment on him?

9 A No, I found no receipt. He had no cash on him. The
10 only thing we had on him was some tools, some I.D., and a
11 few other odds and ends and stuff, but no receipt.

12 Q All right. And he said his niece had dropped him off
13 and not his girlfriend?

14 A He did not tell me that. He just said that he was
15 going back to Wal-Mart to return the stereo equipment.

16 Q Okay. And apparently he was not successful in that; is
17 that correct? Did you ask him about that?

18 A Yes, but he was so agitated and wired that I couldn't
19 get too much more out of him.

20 Q Okay. And at that point did he say anything else about
21 Mr. Wilson or anything that —

22 A Only thing he said is that Mr. Wilson or — Mr. Wilson,
23 he was walking through the parking lot to take the
24 equipment back. He said Mr. Wilson pulled up, jumped out
25 of his car, fired one shot into the air, and then that's

SW - J. PROVENZANO - DIRECT

1 when he left.

2 Q All right. Did he explain anything about how he got
3 the blood on him or any blood on his shirt?

4 A Not to me.

5 Q Okay. Did he say anything about Mr. Wilson fighting
6 him?

7 A Not to me.

8 Q All right. And you were talking to him all this time,
9 correct, and —

10 A Yeah, I was trying to calm him down to try to get some
11 kind of statement out of him.

12 Q Okay.

13 A And that's when Investigator Robinson arrived on scene
14 and when she took over the investigation.

15 Q Okay. And would she have started talking to him at
16 that point?

17 A Yes, I went to talk to her and let her — informed her
18 of the situation.

19 Q Okay. And did you advise her that you had given him
20 his Miranda rights?

21 A Yes, I did.

22 Q Okay. Now while she was dealing with him and taking
23 over the investigation at that point, what did you do?

24 A When the store employees said Mr. Wilson had called the
25 store so I went and spoke with Mr. Wilson over the phone.

SW - J. PROVENZANO - DIRECT

1 Mr. Wilson -- I explained to Mr. Wilson, asked him if he
2 was involved in the altercation. He said yes. I
3 immediately told him he needed to return to the store.

4 Q When --

5 A Then he said he --

6 Q I'm sorry to cut you off, go ahead.

7 A And he said he would do so.

8 Q When you were speaking to him over the phone what was
9 his demeanor like over the telephone?

10 A Very calm, collected. He understood what I said. I
11 understood what he said, and he said that he would
12 immediately return to the store.

13 Q And in your opinion did he immediately return to the
14 store?

15 A Yes, he did.

16 Q All right. And when he arrived to the store did you
17 have a chance to talk to Mr. Wilson?

18 A Yes, I did.

19 Q Okay. And did you observe whether Mr. Pennell saw
20 Mr. Wilson when he arrived?

21 A Yes. Mr. Pennell noticed us. Mr. Wilson arrived. And
22 that is when Mr. Wilson -- or excuse me, Mr. Pennell, he
23 got even more angry and began to curse into the -- out of
24 the vehicle to Mr. Wilson.

25 Q All right. Okay. And at that point what did you do?

SW - J. PROVENZANO - DIRECT

1 A I had to try diffuse the situation so I went over to
2 Mr. Pennell, told him to calm down. I eventually had to
3 roll up all my windows so he wouldn't be able to confront
4 Mr. Wilson anymore. I separated them and took Mr. Wilson
5 to another part around the store.

6 Q And when you say separate him was he trying to do
7 anything toward Mr. Pennell at that point?

8 A No, not Mr. Wilson, no.

9 Q Okay. And do you feel you diffused the situation at
10 that point?

11 A As much as possible.

12 Q Okay. Did you then ask Mr. Wilson about the gun
13 involved in this case?

14 A Yes, I asked him if he -- about the shot being fired.
15 He said that he was the one that shot, did the shooting.

16 Q Okay. And did he explain to you what --

17 A He explained what happened, gave me a statement.

18 Q And do you have your incident report with you today?

19 A Yes, I do.

20 Q And this is what -- what did the victim tell you
21 occurred?

22 A I'm trying to find it. The -- this time victim
23 returned and I spoke with him. He stated that he was
24 pulling into the back entrance of the Hollywood Video and
25 he noticed something in the roadway. He stated that -- he

SW - J. PROVENZANO - DIRECT

1 stated that he got out of his vehicle and was going to
2 move it out of the way. He stated that at this time the
3 suspect approached him, asked him if he would give him --
4 if he would take him somewhere for 20-dollars. The victim
5 stated that he told the suspect no. The suspect said --
6 is it okay to read it?

7 Q Well, we're adults here but it's vulgar, I'm sorry,
8 ladies and gentlemen of the jury.

9 A Said, fuck you, mother fucker, suck my dick. The
10 victim stated that the suspect attempted to get in his
11 vehicle, and he tried to get the suspect out and that they
12 got into a scuffle. He reached into his center console
13 and held his ---

14 Q Gun?

15 A His gun in the air. He said that he was scared and you
16 don't know what the suspect had on him. The victim stated
17 that he fired one gunshot in the air. He stated that
18 he -- and the suspect said, go ahead, shoot me, end it
19 all. Victim stated that he got into his vehicle and left.

20 Q Okay. So that was what you heard from the victim on
21 that night?

22 A Yes.

23 Q And his demeanor once again?

24 A Very calm.

25 Q All right. And at that point you got the gun from him,

SW - J. PROVENZANO - CROSS

1 I mean, at his house later?

2 A At his house, yeah.

3 Q And did he offer any resistance in turning over that
4 weapon to you?

5 A No.

6 Q All right. And you -- the purpose in retrieving that
7 gun was to take it into evidence for purposes ---

8 A Yes.

9 Q ---of trial in case we needed it?

10 A Yes.

11 Q Okay. He was not charged with any crime, correct?

12 A No.

13 Q Okay. And the decision to charge Mr. Pennell with
14 carjacking in this case was something that did you discuss
15 with Investigator Robinson?

16 A Yes.

17 Q Or was that her decision?

18 A We discussed it. We decided to do that.

19 Q Okay, all right. Thank you so much. Please answer any
20 questions that the Defense attorney may have for you.

21 THE COURT: Mr. Suggs.

22 CROSS - EXAMINATION

23 BY MR. SUGGS:

24 Q Mr. Provenzano.

25 A Yes, sir.

SW - J. PROVENZANO - CROSS

1 Q Italian?

2 A Yes, sir.

3 Q Okay, me too. Not the Suggs, Alsandrania (ph), my
4 mother's maiden name.

5 A Me too.

6 Q How about that? All right. A couple of questions, I'm
7 sorry. You've been a patrolman for six years?

8 A A little over six years.

9 Q And for six years you've done this exact kind of work?

10 A Yes, sir, patrol.

11 Q Okay. So investigating events like this is common
12 place?

13 A Yes, I do the basic investigation.

14 Q Okay. It's something that you do right, you do the
15 best of your ability?

16 A Yes.

17 Q Okay. And when you -- when you investigate cases like
18 this on a daily basis you try to be as detailed as
19 possible in your reports?

20 A Yes.

21 Q Because you don't want -- you want to be, when you find
22 yourself in a situation like this, you want other people
23 to be able to rely on what your reports say?

24 A Yes.

25 Q That's fair; isn't it?

SW - J. PROVENZANO - CROSS

- 1 A Yes, sir.
- 2 Q Okay. And in this case you did exactly that?
- 3 A Best of my ability, yes, sir.
- 4 Q Okay. Didn't leave out anything important?
- 5 A Only what was told to me by statements.
- 6 Q What was told to you?
- 7 A As far as?
- 8 Q I mean, you put in everything that was told to you?
- 9 A Yes, I did.
- 10 Q That you thought was important?
- 11 A Yes.
- 12 Q Okay, okay, okay. I wanted to ask this, this question
- 13 is kind of off-the-wall question but, did -- were these
- 14 shell casings found in the parking lot?
- 15 A No, I searched the area. I did not find any.
- 16 Q So we've already established that shots being fired
- 17 could be one shot or multiple shots?
- 18 A Yes.
- 19 Q It just depends on, I guess, the vernacular. But no
- 20 shell casings were found in the parking lot?
- 21 A No, I did not find any.
- 22 Q Okay. Did you look?
- 23 A Yes.
- 24 Q Okay. I'm sorry, I wanted to make sure. And you found
- 25 the stereo equipment.

SW - J. PROVENZANO - CROSS

- 1 A Yes, I found the stereo equipment in the bushes.
- 2 Q In the bushes?
- 3 A In the bushes.
- 4 Q On the left side of the store?
- 5 A When you're facing the building it would be on the left
- 6 side.
- 7 Q Okay, thank you. All right. And you talked with --
- 8 when you got the call you immediately responded to
- 9 Hollywood Video; is that right?
- 10 A I did.
- 11 Q Okay. Investigator Iseman went to -- he went somewhere
- 12 else and then joined you later, but you were already
- 13 there.
- 14 A I was already there.
- 15 Q Got you, okay.
- 16 A That was my district. I was the first one on scene.
- 17 Q You were the first person on -- first officer on scene?
- 18 A Yes.
- 19 Q Okay. And when you got there, I guess, would it be
- 20 about 11:00 or shortly after?
- 21 A Roughly.
- 22 Q And then when you arrived there the -- there weren't
- 23 any customers there?
- 24 A No.
- 25 Q And the store was locked.

SW - J. PROVENZANO - CROSS

1 A The store was locked.

2 Q And there were employees still in the store?

3 A Yes, sir, there were still two employees in the store.

4 Q Two ladies?

5 A Yes, sir.

6 Q And you had a chance to talk with them?

7 A Yes.

8 Q About what they knew.

9 A Yes, sir.

10 Q And in terms of Mr. Pennell getting kicked in the
11 stomach by Mr. Wilson, that was pretty much confirmed in
12 your investigation; is that right?

13 A Yes, sir.

14 Q Okay. And nothing in your investigation indicated that
15 Mr. Pennell tried to get in to Mr. Wilson's car other than
16 what Mr. Wilson told you; is that right?

17 A Yes.

18 Q Okay. So I guess my question is, there were no
19 witnesses with regard to the allegation that Mr. Pennell
20 tried to carjack Mr. Wilson's car?

21 A No.

22 Q Is that right?

23 A That's correct.

24 Q Okay. And when you were there at the Hollywood Video
25 talking with employees you were inside the store?

SW - J. PROVENZANO - CROSS

1 A Yes, they let me in.

2 Q All right. And the call that ultimately connected you
3 to Mr. Wilson was a call placed by Mr. Wilson to the phone
4 of the Hollywood Video store? He called the video store
5 phone?

6 A I don't understand your question.

7 Q Okay. When you were talking with the employees of the,
8 of Hollywood Video?

9 A Uh-huh.

10 Q Who you say saw nothing but Mr. Pennell getting kicked.
11 You received a call. Or Hollywood Video received a call
12 from Mr. Wilson?

13 A The Hollywood Video.

14 Q Okay. But it came in through the Hollywood Video
15 telephone line?

16 A Yeah.

17 Q So he was calling the store?

18 A He was calling the store.

19 Q And one of the --

20 A Employees answered, yes.

21 Q --employees answered saying Hollywood Video, and
22 that's when Mr. Wilson --

23 A Yes.

24 Q --yada, yada, you need to talk with the police,
25 here's the -- something like that?

SW - J. PROVENZANO - CROSS

1 A Yes, sir.

2 Q So they handed the phone to you?

3 A Yes, sir.

4 Q Okay, all right. And so you talked to Mr. Wilson. You
5 told him he needed to come back down?

6 A Yes, sir.

7 Q Okay. Was that your first contact with him?

8 A Yes, at the time it was.

9 Q Okay. And you had not had contact with Mr. Pennell at
10 that time yet?

11 A No, I was already spoke to Mr. Pennell earlier.

12 Q Mr. Pennell had already been brought over?

13 A Investigator Robinson was already on scene and was
14 already speaking to Mr. Pennell as well.

15 Q So you had talked to Mr. Pennell and the other officer
16 had arrived on the scene before you went inside and
17 received the phone call from Mr. Wilson?

18 A Yes.

19 Q All right, okay, very good. Thank you. You talked
20 with Mr. Wilson for how long over the telephone? Did you
21 just tell him just come down, or did he give you details
22 before he came in?

23 A No details. I asked him if he was involved in the
24 altercation. He stated, yes. And that's why I
25 immediately told him to come back to the store.

SW - J. PROVENZANO - CROSS

1 Q Did you ask him if he had fired a gun?

2 A No, not on the phone.

3 Q Okay. And he came -- he came over and you talked to
4 him in person?

5 A Yes, sir.

6 Q Did he tell you why he switched cars?

7 A No, sir, he did not tell me that.

8 Q Did you know that he had done that?

9 A Not at the time, sir. I was only going by the
10 statements of the two employees of what kind of vehicle
11 was there.

12 Q Okay. So you did not know that he had been there two
13 times?

14 A No, sir.

15 Q You were under impression he'd only been there the one
16 time?

17 A Yes, sir.

18 Q All right. And then you found out -- did you find out
19 talking with Mr. Wilson that he had been back there a
20 second time, that he had actually returned to the scene?

21 A I did not go that far. I just got my basic statement
22 from him for my report. Investigator Robinson did most of
23 the in-depth investigating.

24 Q So you had no idea that he had come back twice?

25 A No, I did not.

SW - J. PROVENZANO - CROSS

1 Q Or actually three times?

2 A No, I did not.

3 Q All right. So you would have had no reason to ask him
4 about any car switching?

5 A No, sir.

6 Q If you had known that he had been back a second time in
7 a different car would you have asked him why he did that?

8 A If I would have known I would have asked him.

9 Q Would you consider that an important question?

10 A Yes, sir.

11 Q Now when you talked to Mr. Wilson he pretty much
12 started from the beginning to tell you what happened that
13 night?

14 A The basics.

15 Q Is that right?

16 A Yes.

17 Q But obviously he didn't tell you everything but he told
18 you ---

19 A He told me ---

20 Q ---what you needed to know?

21 A Yes, sir.

22 Q All right. And he told you that Mr. Pennell approached
23 him in the parking lot and asked if he would take him
24 somewhere for 20-dollars?

25 A Yes, sir, that's what he told me.

SW - J. PROVENZANO - CROSS

- 1 Q He didn't mention anything about Timmons ville ---
- 2 A No, sir.
- 3 Q I might be splitting hairs, but he didn't say anything
- 4 about Timmons ville, did he?
- 5 A No, sir.
- 6 Q And this was after Mr. Wilson was moving the stereo
- 7 equipment out of the road?
- 8 A That Mr. -- I don't know what you ---
- 9 Q That Mr. Pennell approached him while ---
- 10 A Yes, yes.
- 11 Q Actually maybe while he was moving the stereo
- 12 equipment?
- 13 A He just said -- he said he was moving the stereo
- 14 equipment and Mr. Pennell approached him.
- 15 Q Okay. And asked him to give me a ride somewhere for
- 16 \$20.
- 17 A Yes, sir.
- 18 Q And Mr. Wilson said no?
- 19 A Yes.
- 20 Q And that's when Mr. Pennell showed his fanny and
- 21 started using vulgar language.
- 22 A Correct, that's what he told me.
- 23 Q All right. Now you state in -- and I'm --
- 24 Mr. Jeper tinger said you had your report and I'm not going
- 25 to put that in evidence or try to do that but I just want

SW - J. PROVENZANO - CROSS

1 to talk with you about what you -- is that okay?

2 A That's fine, sir.

3 Q All right. In your report you say that Mr. Wilson
4 stated that the suspect, being Mr. Pennell, attempted to
5 get into his vehicle.

6 A That's what he told me.

7 Q Did he tell you -- and that he tried, Mr. Wilson tried
8 to get the suspect out?

9 A That's what he told me.

10 Q Did he tell you how and what way he was trying to do
11 that?

12 A He motioned like that to say he was trying to get him
13 out of my car.

14 Q Did he say that Mr. Pennell was in his car?

15 A No, he did not tell me he was in the car.

16 Q Did he say that Mr. Pennell was reaching for his car
17 keys?

18 A No.

19 Q Did he say that Mr. Pennell was reaching for his
20 steering wheel or his ignition in some way?

21 A No.

22 Q Did he say he was trying to seat himself in
23 Mr. Wilson's car --

24 A No, did not tell me that.

25 Q --to get behind the wheel?

SW - J. PROVENZANO - CROSS

- 1 A No, sir.
- 2 Q Did he say that he -- did Mr. Wilson say he was trying
- 3 to strike him or punch him or in some way disarm
- 4 Mr. Wilson to get --
- 5 A No, sir.
- 6 Q --authority over his car?
- 7 A No, sir.
- 8 Q But he said he was trying to get Mr. Pennell out of his
- 9 car?
- 10 A That's what he told me, sir.
- 11 Q He stated, Mr. Wilson stated, they got into a scuffle.
- 12 A Yes, correct.
- 13 Q And when you say scuffle, what do you mean?
- 14 A Scuffle could mean you either intertwine or you
- 15 exchange some kind of pushing or shoving.
- 16 Q I mean, did he elaborate? Scuffle, is that your word
- 17 or is that Mr. Wilson's word?
- 18 A That's my word.
- 19 Q And that's based on what Mr. Wilson told you?
- 20 A Yes.
- 21 Q And you interpreted that as a scuffle?
- 22 A Yes, sir.
- 23 Q And what did he tell you that would make you say it was
- 24 a scuffle?
- 25 A That he fought -- got Mr. Pennell out of his vehicle.

SW - J. PROVENZANO - CROSS

1 Q Okay. And Mr. Wilson reached into his center console.

2 Is that what he told you?

3 A Yes, sir, at the time.

4 Q He told you that he got his gun from the center
5 console?

6 A That's what he told me.

7 Q Not the glove box?

8 A No, sir.

9 Q And then he, Mr. Wilson didn't tell you anything about
10 pulling out a -- what is bullets called in the --

11 magazine. And he didn't say anything about taking a
12 magazine out the console, loading it, racking it back?

13 A No, he did not tell me that.

14 Q He said he took the gun out the console and fired it in
15 the air?

16 A Yes, sir.

17 Q And did he tell you whether he was inside the car or
18 outside the car when he did that?

19 A He -- no, sir, he just said he fired one shot in the
20 air.

21 Q And was Mr. Pennell in the car at the time the gun was
22 fired, or do you know?

23 A I do not.

24 Q If he were in the car when the gun was fired that would
25 be important; wouldn't it?

SW - J. PROVENZANO - CROSS

1 A Yes, sir.

2 Q And that would be included in your report?

3 A Yes, sir.

4 Q And then Mr. Wilson said Mr. Pennell said, go ahead,
5 shoot me, end it all.

6 A Yes, sir.

7 Q And then you have the -- Mr. Wilson stated he got into
8 his vehicle and left.

9 A That's what he told me.

10 Q That's what he told you, okay. Was Mr. Wilson injured
11 in any way? Did he tell you he was injured?

12 A No.

13 Q He wasn't injured. Was Mr. Wilson arrested for firing
14 a gun in the city limits?

15 A No, sir.

16 Q But he admitted to you he had done that?

17 A Yes, sir.

18 Q He did tell you that, didn't he, that when he got home
19 that he did come back but you didn't know he'd come back
20 in a different car; is that right?

21 A No, I didn't know he came back the second time. As far
22 as my investigation led at the time --

23 Q Well, in your report you say that Mr. Wilson stated
24 when he got home he realized that the two employees were
25 there with the suspect so he returned to Hollywood Video.

SW - J. PROVENZANO - CROSS

1 Isn't that what you had?

2 A Yes.

3 Q All right. So you did know that he'd gone back a
4 second time?

5 A Yes, sir.

6 Q You see what I'm referring to?

7 MR. JEPERTINGER: You want to show him?

8 BY MR. SUGGS:

9 Q You see where it says center console. Right in the
10 middle of the page dead in the middle center console.

11 A Yes.

12 Q Okay, I'm sorry. Go down one, two, three lines.

13 A Okay. Yes, sir.

14 Q All right so, and I know it's been -- and I'm not
15 trying to trick you or anything. I know it's been 17
16 months. But you're saying now that he did tell you that
17 he went back a second time?

18 A Yes, sir.

19 Q To the Hollywood Video. After altercation with Pennell
20 he left, went home. That's after he fired the gun he
21 left, went home, then he came back.

22 A Yes, sir.

23 Q But you don't have anything in there about switching
24 cars?

25 A No, he didn't tell me he switched cars.

SW - J. PROVENZANO - CROSS

1 Q Okay. But you know now that he came back a second
2 time.

3 A Yes, sir.

4 Q And did you question him about coming back a second
5 time in light of what had happened the first time with the

6 —

7 A Yeah, I asked him why —

8 Q —altercation and the firing the gun and everything?

9 A I asked him why he left the first time. He came -- why
10 he came back he said he was for the employees' safety.

11 Q Did he say why he didn't just call there instead of —

12 A No, he did not tell me that.

13 Q —to ask you why -- why he didn't just call the police
14 after the gunshot?

15 A No, no.

16 Q Didn't ask him that?

17 A No, I asked him if why he didn't call the police he
18 said he just never didn't think about it.

19 Q Didn't think about it, okay. Now he came back and he
20 parked in the first handicapped parking lane. This is
21 when he came back in the other car. You see that?

22 A Yes, sir.

23 Q And Pennell began to approach him again. It's line of
24 two thou—

25 A Yes, sir.

SW - J. PROVENZANO - CROSS

1 Q And tried to fight him. He stated that he kicked him
2 in the stomach a few times and the suspect backed away.

3 A Yes, sir.

4 Q All right. And that's pretty much -- that's pretty
5 much it; isn't it?

6 A Yes, sir, as far as my investigation.

7 Q Okay. Thank you, Officer. I appreciate it.

8 MR. SUGGS: Thank you, Your Honor.

9 MR. JEPERTINGER: I think that's all I have for
10 this officer, Judge.

11 THE COURT: Thank you, sir. You may step down.

12 MR. JEPERTINGER: Your Honor, at this time the
13 State would call Investigator Michael Robinson to the
14 stand.

15 THE COURT: All right. Investigator Robinson, if
16 you'd come around to be sworn.

17 THE DEPUTY CLERK OF COURT: Place your left hand
18 on the Bible, raise your right hand.

19 WHEREUPON,

20 **MICHAEL ROBINSON,**
21 having been duly sworn by the Deputy Clerk of Court,
22 testified as follows:

23 THE DEPUTY CLERK OF COURT: Please be seated.
24 State your full name for the record.

25 THE WITNESS: Michael Robinson.

SW - M. ROBINSON - DIRECT

DIRECT EXAMINATION

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BY MR. JEPERTINGER:

Q Investigator Robinson, how long have you worked with the Florence Police Department?

A I've been employed by the city of Florence Police Department since November of 1999.

Q And did you start off as an investigator or how did you start off?

A No, sir, I started off as a patrol officer working routine patrol in the patrol division.

Q How long did you do that?

A I did that until 2002.

Q Okay. And what did you do with the City Police?

A In 2008 I was reassigned to the accreditation division where we rewrote the policy and procedures manual for the City of Florence, and I did that for approximately a year-and-a-half.

Q Okay. And since that time after finished with your accreditation process at the City of Florence what did you do?

A In 2004 I was assigned to the criminal investigations division.

Q So from 2004 to two thousand-- present, you've been an investigator?

A Yes, sir, I'm currently and have been continuously

SW - M. ROBINSON - DIRECT

1 since that time.

2 Q And were you what's called the on-call investigator
3 that evening of May 25th, 2009?

4 A Yes, sir, I was.

5 Q Can you tell everybody what an -- and I know it sounds
6 kind of simple, but what an on-call investigator does as
7 opposed to just a regular investigator or...

8 A We also refer to it as a duty investigator, D-U-T-Y.
9 The duty investigator, there's always someone assigned as
10 duty that the individual will work afternoon shift from
11 3:00 in the afternoon till 11:00 at night. After 11:00 at
12 night we are allowed to go home, but we're subject to
13 call-out, and so we're called throughout the night. And
14 we'll respond when needed or when requested by the patrol
15 division, and then we report back to work at 8:30 that
16 following morning.

17 Q Okay. And this was not the first time that you were
18 the on-call investigator or duty investigator, was it?

19 A No, sir, we have on-call weekends. Usually we pull a
20 weekend once every other month and at least once a week so
21 in 2009 I had done that for many years.

22 Q Right. And the number of calls that you received in
23 terms of investigation ---

24 A Exponential.

25 Q Exponential, past the hundreds?

SW - M. ROBINSON - DIRECT

1 A Absolutely.

2 Q Okay. You were called to respond to Hollywood Video on
3 West Palmetto Street on May 25th, 2009?

4 A Yes, sir, I was.

5 Q Okay. As duty investigator?

6 A Yes, sir.

7 Q And when you got there what did you find when you
8 arrived on scene?

9 A Well, I was still working so I wasn't at home whenever
10 I received a call. But I was working and so I was out. I
11 responded from the complex. And when I arrived the --
12 Mr. Pennell was on the scene with other officers including
13 Officer Provenzano.

14 Q All right. And tell the ladies and gentlemen of the
15 jury basically when you get on a scene like that what's
16 the first thing you do?

17 A The first thing I want to do is talk to the officers.
18 That's always important. I want to speak to all officers
19 on the scene who possibly have any information. I spoke
20 with now Investigator Iseman where he located Mr. Pennell
21 and spoke to Officer Provenzano. After I speak with the
22 officers and I have the information before me, then I'll
23 speak to the complainant, who called this report in, who
24 you know, who has potential information so that's what I
25 did secondly.

SW - M. ROBINSON - DIRECT

1 Q Okay. And in this case you would have -- would you
2 have been informed by Provenzano that he had given Pennell
3 his Miranda warnings?

4 A Originally I did not because I wasn't ready to speak
5 with Mr. Pennell at the time. I was just getting, finding
6 out information, the immediate response. There was nobody
7 there when I got here. I went and spoke with the
8 employees. I had information from Officer Provenzano.
9 And then I spoke with Investigator Iseman, who at the time
10 was Officer Iseman. Informed me that he had identified
11 Mr. Pennell and located him at Naturally Outdoors and
12 brought him back to the scene. Then I went inside and
13 spoke with the two store employees.

14 Q And after speaking with them were you confident that
15 you had a possible suspect in this case?

16 A I absolutely did. Although patrol is very adequate and
17 very professional in what we do, it's always a rule of
18 thumb to follow behind so I -- basically I was verifying
19 everything that both Investigator Iseman and Officer
20 Provenzano had told me prior. At that time I felt
21 reasonably confident that Mr. Pennell was one of the
22 parties involved in their altercation. I then spoke with
23 officer...

24 Q Okay. After you speak to the, in this case the
25 Hollywood Video employees, and you have conversation with

SW - M. ROBINSON - DIRECT

1 your officers, do you inspect the area or what do you do?

2 Tell us what you do next.

3 A We did do a search of the area, but before I did a
4 search of the area I actually wanted to speak to
5 Mr. Pennell. I approached Officer Provenzano who stated,
6 you know, I had -- he was the one who offered the
7 information. I Mirandized Mr. Pennell. I read him his
8 Miranda rights, and he agreed to be questioned. And at
9 that time I think he stated he had also spoken with
10 Mr. Wilson from Hollywood Video from inside the business
11 and he had stated he was on his way back to the location.
12 I then spoke with Mr. Pennell.

13 Q Okay. And speaking to Mr. Pennell how would you
14 characterize his demeanor when you were speaking with him?

15 A Extremely aggressive in every way imaginable.
16 Unkempt. Just totally aggressive to the point that I
17 ended the interview. I could not elicit any further
18 information other than just violently screaming.

19 Q And when you say screaming was he screaming?

20 A Absolutely he was screaming.

21 Q Did -- what did -- did you stop talking to him at that
22 point or?

23 A I did because I couldn't -- it was just -- it wasn't --
24 it didn't serve a purpose at that point.

25 Q So did you move on to something else at that point?

SW - M. ROBINSON - DIRECT

1 A I did.

2 Q Okay. Tell the ladies and gentlemen of the jury what
3 you did.

4 A Well, I knew that per Officer Provenzano he had found
5 stereo equipment beside the building at Hollywood Video,
6 and so I looked behind Officer Provenzano in that area to
7 see if there was anything else, and there was none. There
8 was nothing else.

9 Q Okay.

10 A By that time Mr. Wilson had arrived on the scene.

11 Q Okay. And I think Mr. Suggs brought this up in
12 cross-examination of Officer Provenzano about shell
13 casings.

14 A Yes, sir.

15 Q Now for those individuals that don't own a gun or
16 handgun, if you have a revolver where you shoot a revolver
17 the casing remains in the gun itself.

18 A In the cylinder, yes, sir.

19 Q Okay. But on a Taurus 9-millimeter, when you shoot it
20 a shell casing, as the bullet goes out —

21 A Ejection port.

22 Q —a shell casing is ejected, correct?

23 A Yes, there's an ejection port.

24 Q So if a shot is fired a shell casing will be coming
25 out; is that correct?

SW - M. ROBINSON - DIRECT

1 A Yes, sir, that's correct.

2 Q All right. Now did you do a search for that shell
3 casing?

4 A Absolutely we did. After we spoke with Mr. Wilson,
5 after I had spoken with Mr. Wilson we did do a search of
6 the area. There was a brushy area. There were no shell
7 casings found in the parking lot, and we could not
8 identify any shell casings in the brushy area.

9 Q Well, I'm gonna show you State's Exhibit 19. Is that
10 what the area looked like at the time more or less in
11 terms of landscaping?

12 A Yes, sir.

13 Q All right. And is that the area, the general area,
14 that you were checking for shell casings?

15 A Yes, sir, it is.

16 Q Now if a shot is fired in front of the door you don't
17 expect that shell casing to be 90 feet away?

18 A No, sir.

19 Q Okay. It would be in the general vicinity?

20 A Yes, sir, it would.

21 Q Okay.

22 A Unless a car tire hit while leaving, things like that
23 that — that is common, happens when a vehicle passes by
24 an area where shots have been fired. Sometimes the
25 thicker tread in the tires will pick up those casings.

SW - M. ROBINSON - DIRECT

1 It's important for scene security, but you know, it's
2 possible that a car tire would -- a tire would pick it up
3 or whether it would be in the bushes. I couldn't find it.

4 Q And it was night time?

5 A It was nighttime, yes, sir.

6 Q Did you go back the next day to look for it?

7 A I did not.

8 Q Okay. What is the reasoning to try to look for a shell
9 casing?

10 A To attempt to identify the weapon. If we don't have a
11 weapon we definitely want a shell casing.

12 Q Later that evening when you spoke with Mr. Wilson did
13 you procure a weapon?

14 A We did procure a weapon at his residence the same
15 evening.

16 Q Were you satisfied that that was the weapon after your
17 conversations with Mr. Wilson that did -- would have
18 discharged a shell casing?

19 A Yes, sir, I was satisfied.

20 Q Okay. And after you had spoken with the employees were
21 you satisfied that a shot had been fired?

22 A Yes, sir, I was.

23 Q Okay, all right. So you looked for that. You -- and
24 without success finding a shell casing, you looked at the
25 stereo equipment. What did you do then?

SW - M. ROBINSON - DIRECT

1 A Well, I had spoken to Mr. Pennell and he had made a
2 couple of statements.

3 Q You tried to speak to him again?

4 A No, sir, it was when I spoke to him the first time that
5 he made a couple of statements. There was -- we had to
6 basically, you know, get him out of the scene he was so
7 violent. He was uncontrollable.

8 Q Okay. Did he tell you anything worth --

9 A He said that the victim had attacked him for no reason.
10 And at the time I didn't know who was the victim and who
11 was the suspect, you understand, so I was treating
12 everybody equally. He had stated that the other guy had
13 attacked him; and I can't remember, you know, what
14 language he used, but I definitely understood that it was
15 the individual who he had a confrontation with. So he was
16 the victim now. I made myself a mental report. But at
17 the time I didn't, you know, I didn't have a clear
18 understanding of everything. I wanted all the facts
19 before any decision was rendered.

20 Q What else did he tell you?

21 A He said that the victim had attacked him for no reason,
22 and he stated that his niece had dropped him off at the
23 incident location because he asked her to. He stated he
24 was returning the items to Wal-Mart when his niece decided
25 to get high. He stated he did not want to get high and so

SW - M. ROBINSON - DIRECT

1 he asked to get out of the car. And then ---

2 Q Did -- and at that point did you assume that he had
3 taken the stereo equipment with him? I mean, he got the
4 stereo equipment out of the car. Was that your
5 understanding?

6 A Yes, sir.

7 Q Okay. And did you ever find a Wal-Mart receipt in any
8 of his property or belongings when you're dealing with
9 him, or did he ever show you a Wal-Mart receipt?

10 A There was no Wal-Mart receipt in his possession or in
11 his belongings.

12 Q Did he ever make it clear to you why he wanted to be
13 dropped off at Hollywood Video of all places?

14 A Not Hollywood Video. He only indicated that his niece
15 wanted to get high, and he didn't want to so he asked her
16 to drop him off at that location.

17 Q All right. At that point -- and this was when you
18 first spoke with him, correct?

19 A Yes, sir.

20 Q And after that would you -- would that -- would it be
21 correct to say that it was unfruitful speaking with him?

22 A It was too dangerous of a situation to even roll down a
23 window or open up the back door of the police car or even
24 have any further contact. We -- there are circumstances
25 when people break out windows. And you know, Mr. Pennell

SW - M. ROBINSON - DIRECT

1 was banging on the windows or trying to stand on windows
2 and screaming, and it was an unsafe situation for anybody
3 at the scene for us to engage Mr. Pennell again.

4 Q Okay. So that was initially, then you looked and saw
5 the stereo and then looked for the shell casing. What did
6 you do then?

7 A After I spoke with the complainants, the actual people
8 who called 9-1-1, then I met with Mr. Wilson.

9 Q How did he present himself to you?

10 A He was shaking, and he was stuttering. As -- he does
11 have a speech impediment. He does have a stutter. He was
12 stuttering and shaking. I could tell he was -- he
13 appeared to me to be afraid. It was -- he was afraid.

14 Q And did he relay anything to you that evening,
15 May 25th?

16 A He did. He is the one who indicated that he was
17 pulling around the back of the business. Do you want me
18 to read to you what he told me?

19 Q Not necessarily, but I mean, did he -- was it some of
20 the same facts that were here that he elicited in court,
21 the same things he told you, correct?

22 A Throughout this investigation Mr. Wilson has always
23 appeared to be very forthcoming and very direct in his
24 statements and that has never wavered.

25 Q Now were you aware of the Ford Explorer, Expedition,

SW - M. ROBINSON - DIRECT

1 that he took two vehicles to Hollywood Video that evening?

2 A Mr. Wilson explained that to both myself and to Officer
3 Provenzano.

4 Q The officers didn't -- no one knew that till he told
5 you?

6 A Until he told us, that's correct.

7 Q Okay. And did y'all discuss the procurement of the gun
8 that had been discharged that evening?

9 A Yes, sir. While speaking with Mr. Wilson I asked him
10 where the gun was currently, and that's when he said the
11 gun was at his residence. And I asked him if we could
12 follow him to his residence to obtain the weapon and he
13 said absolutely.

14 Q And at that point did you -- you went over to his home
15 on Aiken Drive?

16 A Yes, sir, we did. We responded and followed him.
17 Actually, he drove his vehicle and we followed behind him.
18 And we entered his residence. Before we entered his
19 residence we actually gave a consent to search. It's just
20 a form that we complete. It's a fill-in-the-blank form
21 that says, you know, you voluntarily consent that the
22 residence or whatever property, vehicle, whatever, you
23 fill in the blank for it to be searched. Mr. Wilson
24 signed that form agreeing for us to go in his residence.
25 His wife was there at the time. His father was on the

SW - M. ROBINSON - DIRECT

1 phone with him at the time. And he said, you know, my
2 house is your house, go wherever you need, whatever you
3 want to do, you know, please.

4 Q Did -- when -- it's kind of been brought up in some
5 cross-examination, did you have a chance to look at both
6 vehicles?

7 A I did, yes. We went through and saw both vehicles.

8 Q Did you see any bullet holes in any of the ceilings of
9 the vehicle?

10 A No, sir, there was no bullet hole in either of his
11 vehicles.

12 Q And he freely turned the gun over to y'all?

13 A Absolutely he did.

14 Q Okay. Now at that point you spoke with him did you
15 make a determination based on your experience who the
16 aggressor was in this situation?

17 A Absolutely I did. I made that determination at the
18 scene when Mr. Pennell was charged.

19 Q And you -- why did you determine to charge him with the
20 crime of carjacking?

21 A Because when I had spoken with Mr. Wilson he had
22 indicated that initially Mr. Pennell had tried to take his
23 automobile and had said as much directly to him. It is a
24 fight that ensued. It made sense.

25 Q All right. You met with Mr. Wilson again, I believe,

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1 two days later here at the City County Complex?

2 A Yes, sir, I did.

3 Q And what was the purpose of meeting Mr. Wilson again
4 here at the City County Complex two days after the
5 incident?

6 A I wanted to sit down with Mr. Wilson and formalize --
7 have him do a formalized statement. It's a written
8 statement. It's very common to have an employee at the
9 business as well give written statements. It's just a
10 common forum for him to express his, you know, what he
11 knows to be the events that occurred on the 25th.

12 Q Did you tell him what to write?

13 A No, sir.

14 Q Did you tell him to include absolutely everything, or
15 was it more to be a synopsis?

16 A I asked him to tell me as much as he could remember at
17 the time, you know, tell me what happened. And that's
18 what he did. When people give statements I don't help
19 them. I think it's bad business to help somebody give a
20 statement. Their impression of what the events occurred
21 needs to be what they know even when they -- it needs to
22 be information that's coming from them, and they should
23 have no guidance or assistance from any other entity.

24 Q After he wrote that statement were you still confident
25 that charging Mr. Charles Berlin Pernell with carjacking

SW - M. ROBINSON - DIRECT

1 was the appropriate thing to do?

2 A Absolutely I was. Mr. Wilson's statements, he's always
3 been compelling for the truth.

4 Q All right. You also talked to the store personnel.
5 Did you have them come into your office, or did you just
6 do it at the scene?

7 A They gave statements at the scene. Sometimes we use
8 statement forms to help focus maybe witnesses who are not
9 used to being involved in incidents like this. If they
10 have pen, piece of paper in front of them and they can --
11 that's -- I use page three. It's just a blank, you know,
12 form with the Florence Police Department letterhead on
13 top, and I had both of them write statements actually at
14 the scene.

15 Q Okay. Now you met with me in this case, correct?

16 A Yes, sir.

17 Q Okay. And I believe you're the one, or you had someone
18 to take these photographs in this case, correct?

19 A Yes, sir, I did.

20 Q And it would be the photographs, I believe, 15
21 photographs of the stereo equipment, correct?

22 A Yes, sir, I took photographs of the stereo system. I
23 had a crime scene technician take photographs of the
24 Hollywood Video.

25 Q All right. Is there anything else that you have done

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1 other than provide the Solicitor's Office with copies of
2 all the documentation in this case?

3 A I can't think of anything else.

4 Q All right. Thank you very much, Investigator Robinson.
5 Please answer any questions that the defense attorney may
6 have.

7 A Thank you.

8 THE COURT: All right, Mr. Suggs.

9 **CROSS - EXAMINATION**

10 BY MR. SUGGS:

11 Q Hello there.

12 A Hello.

13 Q Again. How are you?

14 A I'm well, sir, thank you.

15 Q Good. Just a few questions. I know -- I've known you
16 for probably as long as you've been with the police
17 department. Next month will be ten years.

18 A Eleven.

19 Q Eleven? That's right, eleven years. And it's safe to
20 say that this is not the first time that you've appeared
21 in court to testify.

22 A No, sir, it's not.

23 Q I mean, I can tell. I mean, I know from personal
24 experience and I can tell too because of your demeanor.
25 You present very well.

SW - M. ROBINSON - CROSS

1 A Thank you.

2 Q And I know that this is part of your job; is that
3 right?

4 A Yes, sir.

5 Q And so you're expected to testify in court frequently.

6 A When needed.

7 Q When needed. And it's safe to say that you were the
8 chief investigating officer on this particular case.

9 A In our division, in our department we only have one
10 chief, and that's Anson Shells. But we are -- we refer to
11 it as lead investigator.

12 Q Okay.

13 A I was the lead investigator.

14 Q Semantics, but you're in charge of this case?

15 A You're correct, yes, sir.

16 Q Is that right?

17 A Yes, sir.

18 Q And as part of your duties as an investigating officer
19 and particularly as the lead investigating officer is to
20 prepare a written report?

21 A Absolutely.

22 Q And I'm not -- I'm sort of familiar with how that
23 works. But your subordinates, and I guess the folks that
24 they're submitting reports to you and then you do a
25 report, and all that is submitted on up, is that right, to

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1 —

2 A When requested.

3 Q ---the chain of command---

4 A Yes, sir.

5 Q ---when needed. Is that right?

6 A Yes, sir.

7 Q Okay. And your report, I note your report is dated
8 July the 1st of 2009, clearly more than a month after the
9 incident occurred; is that right?

10 A It is dated July the 1st, 2009, yes, sir.

11 Q It says, "Date entered, slashed, changed July 1st,
12 2009." Is that right?

13 A Yes, sir, it is.

14 Q All right. So that would be the date — it was not
15 changed in any way, it was just —

16 A No, sir.

17 Q —entered on that date?

18 A Yes, sir.

19 Q And I notice that the other officers' reports, Officer
20 Provenzano and officer — I'm not sure if Iseman did a
21 report or not but — those reports are dated much earlier?

22 A Yes, sir.

23 Q Do you review the reports of the officers that are
24 below you on a particular case before you, in fact, put
25 together your own report?

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1 **A** Before I write my supplemental report?

2 **Q** And I don't mean that in a nefarious way. I just mean
3 is it common place for you to review other officers'
4 reports before you submit yours?

5 **A** How I write my supplemental reports, and this is the
6 way I was trained to write my supplemental reports is I
7 walk around with a legal pad. And I walk around with a
8 legal pad usually eight hours a day. I always have a
9 legal pad on me. And whenever I pick up a case file I
10 begin with the date and I start writing notes. Any
11 cases -- at any given point I can handle 30, 40 cases in a
12 day. I made contact with this victim, I spoke with this
13 one, I set up an appointment with this suspect. In order
14 to keep them separated -- and I go through a lot of legal
15 pads -- I identify each individual person and each comment
16 on a separate sheet of paper and then I staple that to the
17 original police report. And so as I'm working a case I
18 have a timeline every day of what I did, how I did it.
19 Sometimes they're very thick depending on the type of
20 investigation and the number of days that I investigated a
21 particular incident. Sometimes they're only a page or
22 two. This particular incident I was taking notes on a
23 legal pad, and I stapled that to the back of the police
24 report and that's how I write my supplemental reports.
25 It's from the notes that I have made over a period of a

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1 couple of hours up to weeks and months. Oh, recently I
2 had a case that was investigated for four years and so I
3 had four years worth of notes that were periodically
4 writing supplemental reports. So it all depends.

5 Q Okay. When you say supplemental report are you saying
6 that you did an initial report and then you came back
7 later and did a supplemental, or are you saying that your
8 report is supplemental to the other officers' reports?

9 A Yes, sir, that's correct. My report is supplemental to
10 the officer's report.

11 Q It would be your first report, but it would be a
12 supplement to some other officer's report?

13 A To the -- we work on the case numbers and so I can look
14 up that case number and that will connect me to everything
15 written of a particular investigation. So my report is a
16 supplemental to the initial first responding officer which
17 would be your uniform patrol.

18 Q All right. And to answer my original question
19 sometimes your report does come, since it's supplemental,
20 will come after other officers' reports have been
21 submitted and reviewed?

22 A Yes, sir.

23 Q And your supplemental report which is also your
24 original report, is sort of two page report; is that
25 right? It's a page and then it's maybe a line or two up

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1 here. It's more like one page but it's ---

2 A It all depends on how much information is provided, how
3 much information I have.

4 Q I'm talking about this case.

5 A Oh, my supplemental report was one page, yes, sir.

6 Q Plus this little bit of -- well, they're both ---

7 A I don't think that was mine.

8 Q Say page one. They both say page one.

9 A Yes, sir, that is not my supplemental report. If
10 you'll look at the top it may give you a different badge
11 number or a different name.

12 Q P. Benjamin?

13 A Princess Benjamin is our victims advocate.

14 Q Okay, all right.

15 A And she's where I would attach any supplemental report
16 of any information she provided on my ---

17 Q Thank you for clearing that up, I'm sorry. So yours is
18 just one page?

19 A Yes, sir.

20 Q Okay. That narrows it down a lot, okay. All right.
21 I'm gonna jump around a little bit because I want to cover
22 everything, but I don't want to keep you too long or the
23 jury. In your report you were initially responding to
24 Hollywood Video in reference to an assault; is that right?

25 A Yes, sir.

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1 Q All right. Didn't have any information about any
2 alleged carjacking at that time. That was initially when
3 you responded, you were responding because of reports of
4 an assault; is that right?

5 A There was an assault type incident which could be --
6 assaults can range from an unwanted touch to an injury, to
7 a gunshot injury. An assault is an assault, and I was
8 responding to Hollywood Video for that purpose.

9 Q And when you got there Mr. Pennell was already there in
10 the back of Officer Provenzano's vehicle?

11 A Yes, he was.

12 Q All right. And you met with the officers at the scene,
13 that would have been Provenzano. Was Iseman still there
14 or?

15 A I think Investigator Iseman still was there, yes, sir.
16 He was Officer Iseman at the time.

17 Q And you also spoke with two employees of Hollywood
18 Video at the time?

19 A Yes, sir, I did.

20 Q Two females?

21 A Two female employees.

22 Q And they gave written statements concerning what they
23 saw?

24 A They did. I spoke with them and then I had them write
25 a statement and I gave them the form to write the

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1 statement with.

2 Q All right. You also state in your report that you
3 received taped statements as well. Did you get the taped
4 statements from the witnesses at Hollywood Video?

5 A If I could, the sentence before that says I first spoke
6 with the employee of the business and had them give
7 written statements concerning their observations and then
8 the statement after that says, she taped statements for
9 further. And that's merely typographical. Nowadays we --
10 it's mostly digital. We do digital statements and so
11 mostly they're auto taped; but at this point in time, they
12 were written statements and the sentence before that
13 indicates that.

14 Q All right. So there were no taped statements as your
15 report seems to allude to?

16 A Correct, there are no taped statements. We -- they
17 were written statements at the time of the incident
18 immediately, done immediately at the same evening of the
19 incident of.

20 Q I'm fine, thank you. I appreciate that. Getting right
21 to the gist of it, officer, excuse me, Investigator
22 Robinson, you spoke with -- you spoke with Mr. Wilson at
23 the video store?

24 A Yes, sir, I did. Both at the video store and his
25 residence.

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1 Q Okay. You first spoke with him at the video store?

2 A Yes, sir.

3 Q When he made the call to the video store to report this
4 you weren't present at that time, were you?

5 A I was not inside the video store. I'm not exactly sure
6 when that call was taken place, but Officer Provenzano
7 with his initial investigations was keeping me informed.
8 He then came outside and said, I have spoken with the
9 second party involved in this incident and they are on
10 their way.

11 Q But you never spoke to Mr. Wilson over the telephone?

12 A No, sir, I did not.

13 Q First time you spoke with him was when he arrived at
14 the scene?

15 A Yes, sir, it was.

16 Q All right. At that point since you were the lead
17 investigating officer did you more or less were you the
18 first one to talk to him when he arrived on the scene?
19 I'm referring to Mr. Wilson?

20 A Mr. Wilson? I think I was speaking to Mr. Pennell when
21 Mr. Wilson arrived on scene, and so I'm not sure if he had
22 communication with other officers before me.

23 Q That's fair enough.

24 A I would -- I would think that Officer Provenzano would
25 go meet with him as soon as he saw another individual pull

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1 up, especially another individual involved in the
2 altercation.

3 Q Especially since he had talked to him on the phone
4 previously?

5 A Absolutely.

6 Q That makes sense. All right, now when you talked to
7 Mr. Wilson he advised you that he pulled into the parking
8 lot and he stopped to move items which were in the middle
9 of the driveway; is that right? That's what you -- I'm
10 just looking at your report. You see the second
11 photograph?

12 A Yes, sir, the victim stopped to move items from the --

13 Q Move items from the middle of the driveway. Is that
14 what it says?

15 A Yes, sir.

16 Q All right. And then it says when the victim -- excuse
17 me, when the suspect approached him and asked for a ride
18 the victim refused; is that correct?

19 A Well, there's a comma behind it --

20 Q Well I know, young lady, and I -- just bear with me,
21 okay.

22 A Okay.

23 Q Is that what it says; is that correct?

24 A The victim.

25 Q The victim refused.

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1 A Victim refused.

2 Q And then you have here the suspect -- that's referring
3 to Mr. Pennell, correct?

4 A The suspect would be referring to Mr. Pennell.

5 Q Tried to get into the victim's vehicle, that being
6 Mr. Wilson; is that correct?

7 A Yes, sir.

8 Q By pushing and striking the victim, that being
9 Mr. Wilson, correct?

10 A Yes, sir.

11 Q Who was standing in the apex of his door. Is that what
12 that says?

13 A Yes, sir.

14 Q Now I'm no road scholar, but I had to look in the
15 dictionary because I didn't know what apex meant.

16 A It's a common law enforcement term.

17 Q Okay. Help me out. Am I right in assuming that the
18 apex of a door might be if the door of car is open and
19 you're standing -- I know apex means top of things like
20 the zenith. Would the apex be the point where the, I
21 guess where the door and the doorjamb meet at an angle,
22 top part of the door, is that it?

23 A When you open up your door all the way. And it says
24 apex is a common law enforcement term. We refer to apex
25 of the door. It's where the actual frame of the

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1 automobile and any door location in a car. It's where the
2 actual frame meets the actual door piece. It's where the
3 hinges are that operate the vehicle; that's the apex. It
4 actually makes a V. You think of standing in the apex of
5 the door you're looking into that V.

6 Q Okay.

7 A That's the apex.

8 Q I don't think we need to draw a picture. I think
9 that's clear. So if it, we're talking about a V or the
10 top part of a triangle then the apex would be the top part
11 of the triangle as far as you can get without falling over
12 the door?

13 A Absolutely, yes, sir.

14 Q Okay. So the -- what Mr. Wilson told you was he was
15 standing in the apex of door; is that correct?

16 A That's what my notes reflect. He was standing--

17 Q He didn't say --

18 A --in the apex.

19 Q I'm sorry. He didn't say he was sitting in his car?

20 A My notes reflect that the victim stated he was standing
21 in the apex.

22 Q All right. So, okay. And he told you that Mr. Pennell
23 pushed and struck him?

24 A The next sentence is --

25 Q I'm going -- I'm backwards, I'm sorry.

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1 A You're going backward.

2 Q I'm sorry, yeah. I'm still on that part.

3 A Okay.

4 Q Tried to get into the victim's vehicle by pushing and
5 striking the victim.

6 A And striking the victim?

7 Q He told you that.

8 A Yes, sir.

9 Q Did you observe any injuries on Mr. Wilson at all or
10 did he complain of any injuries?

11 A Mr. Wilson did not complain of any injuries. I did ask
12 him and he did not indicate that he was injured in any
13 way.

14 Q All right. And then he told you that he grabbed his
15 gun from the glove compartment?

16 A Yes, sir, he stated he grabbed his gun from the glove
17 compartment.

18 Q And not the center console?

19 A He did not indicate the center console. He indicated
20 the glove compartment.

21 Q And then he shot up in the air because he was afraid of
22 the suspect?

23 A That's correct. That's—

24 Q Okay. He then told you that he fled the area. Is that
25 what he told you?

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1 **A** He stated he fled the area. I'm sure -- but fled is
2 another law enforcement term. I'm sure that fled is not
3 in quotations. It's what I interpreted him to say. He
4 probably said I left the area, but in law enforcement we
5 use the word fled.

6 **Q** Your training would say that somebody leaves the scene
7 of a possible crime they are fleeing as opposed to
8 leaving? Is that just semantics again?

9 **A** It's semantics, yes, sir.

10 **Q** Okay, all right. So he told you -- may not have told
11 you that but that's what you put down, that he fled the
12 area but returned driving his wife's vehicle.

13 **A** Yes, sir.

14 **Q** So what color vehic-- what kind of vehicle was in he
15 initially?

16 **A** He's in his gold Explorer.

17 **Q** And he came back in what kind of vehicle?

18 **A** In a black, large black SUV.

19 **Q** An Expedition or Blazer?

20 **A** It was an Expedition, not a Blazer.

21 **Q** Okay. And he told you that he came back because he
22 wanted to warn the staff in the store of the incident?

23 **A** Yes, sir.

24 **Q** All right. Did he tell you why he switched cars?

25 **A** I don't really remember him giving me a reason of why

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1 he switched cars. I can't tell you, you know, that I
2 remember him saying for one reason or another.

3 Q But you're in law enforcement so that is an important
4 question to ask; isn't it?

5 A Absolutely. And I think that, you know, that had I
6 been under his -- had I been in his circumstances I
7 probably would have done the same.

8 Q Change vehicles?

9 A Absolutely.

10 Q And you would have come back to the scene even though
11 you were afraid that you had been -- just been attempted
12 carjacked and you would still come back.

13 A As a ten year law enforcement officer I didn't indicate
14 that I would necessarily come back. I think that the
15 whole outcome of this would have been different had it
16 been me but...

17 Q Probably shot him?

18 A I can't say that. I wasn't -- I wasn't in that
19 position and I'm thankful that I wasn't in that position.
20 Sorry that anybody had to be.

21 Q Sure. And he came back, the point is he came back in
22 another vehicle all together; is that right?

23 A Yes, sir.

24 Q And he didn't come back armed? He didn't have a weapon
25 in the vehicle when he came back the second time?

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1 A No, sir, he did not. There was no indication that he
2 had a weapon.

3 Q All right. And he didn't tell you that he called the
4 store or the police department, 9-1-1, after the firing of
5 the gun incident —

6 A No, sir.

7 Q —immediately after?

8 A No, sir.

9 Q All right.

10 A He stated he called the store.

11 Q After the — after the — after he came back the first
12 time or second time?

13 A After he came back the second time.

14 Q Okay, all right. Now when he came back the second time
15 Mr. Pennell approached him again by coming up to his
16 vehicle and yelling. Is that what Mr. Wilson told you?

17 A By coming up to his vehicle — are you reading that?

18 Q Coming up to his vehicle and yelling.

19 A Yes, sir.

20 Q All right. And the — Mr. Wilson stated he then struck
21 Mr. Pennell to keep himself from being injured?

22 A Yes, sir.

23 Q All right.

24 A It was clear Mr. Wilson was in fear.

25 Q So that's why he came back I'm sure. Hum?

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1 A What he indicated to me was the reason he came back was
2 for the employees he knew. He, you know, he knew that
3 there were girls that worked in there and he was
4 concerned.

5 Q Yeah, but he not concerned enough to call 911 or the
6 store, rather than just coming back in person, correct?

7 A I wasn't -- I don't know what he was thinking.

8 Q Don't know what's going through his head?

9 A No, sir, I don't.

10 Q All right. And your conversations with the witnesses
11 at Hollywood Video confirm that Mr. Pennell was struck
12 and/or kicked by Mr. Wilson; is that right?

13 A That's correct.

14 Q All right. And no indication from those witnesses that
15 they saw Mr. Pennell try to enter Mr. Wilson's car?

16 A I think that incident -- they did not indicate they saw
17 anything of that nature.

18 Q Mr. Pennell, when you had an opportunity to talk with
19 him you said he was, he was violent and uncontrollable?

20 A He absolutely was.

21 Q But he was in handcuffs; is that right?

22 A Yes, sir.

23 Q And he was in the back of the patrol car at the time?

24 A Yes, sir.

25 Q So he was in -- he was in custody; is that right?

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1 A At the time he was in investigative detention.

2 Q Well, he couldn't leave.

3 A He could not leave, no, sir.

4 Q Okay. You had him in handcuffs, were placed behind the
5 back; is that right?

6 A Yes, sir, they were.

7 Q So he was handcuffed, sitting in the car, when he was
8 exhibited that agitation and aggravation?

9 A Absolutely he did, and it's -- a lot of times, you
10 know, individuals can lay down in the seat, kick out
11 windows. Again, as I disclosed earlier, they still have
12 full range of movement with their feet. If we have to --

13 Q He didn't -- we're not talking about Mr. Pennell
14 kicking --

15 A He did not--

16 Q --out any windows, are we?

17 A No, sir. He did not do that, no, sir.

18 Q Okay, I thought you were trying to tell the jury that
19 he was kicking windows.

20 A No, sir, absolutely not.

21 Q Okay.

22 A We just want to make sure that didn't happen.

23 Q He wasn't acting out physically, violently,
24 aggressively. He was acting out verbally, aggressively?

25 A With the spitting, that would be the only thing that I

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1 can indicate, but it did not touch anyone at the scene.

2 Q Okay. And he told you that his niece had dropped him
3 off there because he had asked her to do that and that
4 she -- I'm paraphrasing -- and that she wanted to get high
5 and he did not want to get high. Is that the gist of what
6 he told you with regard to that issue?

7 A Yes, sir, it is.

8 Q And he asked to get out of the car?

9 A Yes, sir.

10 Q So he was pretty much, I mean, for lack of a better
11 term, more or less stranded out 11:00 at night Hollywood
12 Video with his stereo equipment and no ride; is that
13 right?

14 A If those statements were true then, yes, that would be.

15 Q Well, you didn't -- he didn't have a vehicle, did he?

16 A He did not have a vehicle.

17 Q He didn't have any -- he wasn't arrested for stealing
18 any equipment or -- I notice Mr. Jeperfinger is trying to
19 make some hay with this having no receipt but for the
20 stereo equipment, but he wasn't arrested for any kind of
21 theft of a stereo equipment, was he?

22 A At this time we had never been able to identify the
23 actual owners of the stereo question other than
24 Mr. Pennell had that in his possession at the time.

25 Q So he wasn't charged with theft? He wasn't charged

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1 with theft?

2 A No, sir.

3 Q He was charged with assault?

4 A He was charged with attempted carjacking.

5 Q Well, yes, ma'am, but he was charged with assault as
6 well?

7 A Yes, sir, he was.

8 Q The shell casing -- I know it probably doesn't make too
9 much difference, but you didn't find any shell casings at
10 the scene; is that right?

11 A Unfortunately we did not.

12 Q And you said something about a car driving by may have
13 picked it up in its treads or something.

14 A I can only speculate.

15 Q Speculate.

16 A I can only speculate what typically, you know, can
17 possibly happen, what we've seen in ten years in this
18 business with the city of Florence, what I've seen in the
19 past 11 years.

20 Q One of the things that you said in your direct
21 examination is that Mr. Wilson you were impressed with his
22 with his veracity and his credibility and his, you
23 commented on the fact that you thought he was being very
24 truthful about what happened that night; is that right?

25 A I think I used the word compelling.

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1 Q Compelling. I think you also used the word never
2 wavered in his statements to you.

3 A That's correct.

4 Q Okay. So what he told you that night and what you
5 subsequently placed in your report, you would consider
6 that to be the gospel as told to you by Jonathan Wilson?

7 A What I would consider that to be the actual incident
8 gospel that's a little -- I don't understand what that,
9 how you mean it but.

10 Q You -- well, you say unwavering, never wavered?

11 A Yes.

12 Q You felt very -- you said compelling. I consider that
13 to all be very high up on the level of truthfulness.

14 A Absolutely I believed Mr. Wilson and in an entirety.
15 He was very compelling from start to finish of his honesty
16 and willingness to work with law enforcement.

17 Q All right. And he never at any time then told you that
18 Mr. Pennell tried to take his car while he was inside the
19 car?

20 A While he was inside the car?

21 Q Inside the car?

22 A Well, standing in the apex of his door is where he's
23 indicated that he was whenever the incident occurred when
24 Mr. Pennell tried to take his car.

25 Q Well, if he was standing at the apex of his car, try

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1 to go along with me if you can without being too
2 controversial, but if you're standing at the apex of your
3 car you're standing — you're outside of your car and not
4 inside of your car, would you agree with that?

5 A I absolutely would, and I guess maybe we're with
6 semantics again. Inside your car is when in possession of
7 your vehicle. Standing in the apex of your door for me is
8 possession.

9 Q Well, we're not talking about possession; we're talking
10 about in or out.

11 A Okay. He was — he was standing in the apex of his
12 door. The only way to get into the apex in a standing
13 position is to be physically outside the threshold of the
14 driver's seat.

15 Q Physically outside the vehicle?

16 A Yes, sir.

17 Q Thank you, nothing further.

18 MR. SUGGS: Thank you, Your Honor.

19 **REDIRECT EXAMINATION**

20 BY MR. JEPERTINGER:

21 Q All right. Let me ask you this, in all this time has
22 any niece ever called you to say that she dropped Charles
23 Berlin Pennell off at Hollywood Video that day?

24 A Absolutely not.

25 Q And in this whole situation that occurred back on May

SW - M. ROBINSON - REDIRECT

1 25th, what constituted carjacking for you was the first
2 incident which led up to the gunshot being fired, correct?

3 A Absolutely.

4 Q The second part of him coming back to the store had
5 nothing to do with carjacking, correct?

6 A No, sir, it did not.

7 Q It's just context of the whole story that evening; --

8 A Yes, sir.

9 Q --is that correct? Thank you very much, Investigator
10 Robinson, that's all I have.

11 THE COURT: All right, thank you ma'am. You may
12 step down.

13 We're going to take a break at this time, ladies
14 and gentlemen.

15 (WHEREUPON, counsel approached the Bench for an
16 off-the-record discussion.)

17 THE COURT: Give me one second, Ladies and
18 gentlemen.

19 Mr. Jepertinger.

20 MR. JEPERTINGER: That would be the State's case.

21 THE COURT: All right. I wasn't sure when I told
22 you we were going to take break whether or not the State
23 had anymore witnesses, and then I looked up and looked
24 across there and I saw that there were no witnesses left
25 so I assumed that that probably was the case so.

1 Ladies and gentlemen, we are at the close of the
2 State's case and it's at this time that I need to take up
3 some matters of law with the attorneys which works out
4 great because I intended for us to take a break at this
5 time anyway so. If you would retire to your jury room let
6 me ask you to please not have any conversation about the
7 case. If you need anything while you're back there please
8 let Sammy know, drinks, crackers, whatever, and we'll
9 start back in about 10, 15 minutes.

10 (WHEREUPON, the jury was removed from the
11 courtroom at 4:00 p.m., and the following proceedings
12 commenced in open court.)

13 THE COURT: All right, if y'all would, if you
14 don't mind, let's take a short break and then I'll
15 entertain any motions at the close of the State's case.

16 Scott, any objections to being excused?

17 MR. SUGGS: Not at all.

18 THE COURT: All right.

19 (WHEREUPON, a recess was taken from the proceedings.)

20 THE COURT: I'm gonna bring this jury out and
21 excuse them. Well, any objection to that?

22 MR. JEPERTINGER: Not from State.

23 MR. SUGGS: No, sir. Then well take up matters
24 we need to to take up.

25 Sam, ask them to step out if you would please.

1 **THE BAILIFF:** Yes, sir.

2 **THE COURT:** Thank you.

3 (WHEREUPON, the jury was returned to the courtroom at
4 approximately 4:46 p.m., and the following proceedings
5 commenced in open court.)

6 **THE COURT:** All right. Ladies and gentlemen, as
7 you recall when we took the break the State has rested
8 their case and I've been taking up matters of law. We're
9 going to adjourn court at this time, and then I'm gonna
10 have you back here at 9:30 in the morning and then we're
11 headed to the home stretch, okay. Please tell your family
12 and friends and loved ones to be patient one more day,
13 that you can talk to them tomorrow when you return home
14 because I am anticipating that you'll have this case
15 tomorrow and be able to make your decision so that by
16 tomorrow evening you'll be able to talk about it. But
17 you're still under that, quote, gag order at this point
18 that you're not allowed to talk about the case, and we'll
19 come back and finish it up tomorrow, okay?

20 So if everyone else will remain seated. Ladies
21 and gentlemen, please, if you would be back in the morning
22 we'll get started at that time.

23 (WHEREUPON, the jury was removed from the
24 courtroom at 4:48 p.m., and the following proceedings
25 commenced in open court.)

1 **THE COURT:** All right. At this time I'll take up
2 any motions at the close of the State's case.

3 **MR. SUGGS:** Yes, sir, Judge. Thank you, Your
4 Honor. At this time the Defense would move for a directed
5 verdict, Judge, on the -- count one, the sole count of the
6 indictment, Judge, which is carjacking. Judge, under the
7 law as the Court is aware, carjacking, the relevant
8 portion of the statute is, requires that the person or the
9 victim in this case be operating the vehicle or while the
10 victim is in the vehicle. First of all, Judge, we had to
11 separate from the facts the different events because there
12 were actually two confrontations; and from the evidence
13 that's been presented and from what I gather from the
14 State's case, the only charge of carjacking that we are
15 facing is the initial confrontation between Mr. Wilson and
16 Mr. Pennell. I know that the -- that Mr. Wilson came back
17 a second time, but from the testimony there was no issue
18 or no evidence that Mr. Pennell tried to take the vehicle
19 on the second occasion. It was more -- there was a
20 confrontation, but I believe the evidence will show that
21 Mr. Pennell threatened to take the car on the first
22 confrontation and not the second so I think we've
23 eliminated the second part of the confrontation of the
24 event all together. The second confrontation is gone so
25 not before the Court in terms of the carjacking offense.

1 After looking at that, Judge, I had to look at
2 the statute because it makes a difference between being in
3 the vehicle and operating the vehicle. And we all know
4 what it means to be in a vehicle; that's pretty clear.
5 Operating a vehicle is a different -- it's a different
6 term. Obviously the legislature intended the two to be
7 separate and distinct otherwise you would just say in a
8 vehicle. You wouldn't say in a vehicle or operating a
9 vehicle. The closest definition that I could find, Judge,
10 was back many, many years ago. I think it's State versus
11 Graves -- it's a DUI case -- where a person was charged
12 with driving under the influence while they were in the
13 car. The car was not moving but the car engine was on.
14 And back in those days the DUI statute was written so you
15 would be guilty if you were driving, not operating, but
16 operating came later. But the court went into a
17 distinction about driving versus operating, and the
18 definition that I was able to glean from the case was that
19 operating meant putting in the motives of operation of the
20 car, starting the engine, that sort of thing. So when I
21 look at this statute I see that the person has -- the
22 victim has to be in the vehicle or the person has to be
23 operating the vehicle. Now I believe the testimony on
24 both occasions was, from the victim, was that at the time
25 he was approached by Mr. Pennell, when Mr. Pennell tried

1 to take the car the engine was off. The car was not in
2 operation; the car was in park. The car was parked; the
3 ignition was off. Keys were still in the ignition at the
4 time, but the vehicle was not in operation. So then we're
5 left just with the issue of whether Mr. Wilson was in the
6 car and whether he was in the car at the time that
7 Mr. Pennell threatened to take the car. For now, Judge, I
8 understand the testimony from the witness. He could not
9 remember if he was in the car or standing outside of the
10 car at the time this crucial, crucial timing of this
11 confrontation took place, which we have to look at timing
12 in this. When did -- if Mr. Pennell threatened to take
13 the car, when he did and where the victim was situated at
14 the time. If the car is off, if the car is in park, the
15 motor is off, it's not in operation. And Mr. Wilson is
16 not in the car but standing on the outside of the car,
17 then I think granting a directed verdict in this case is
18 absolutely appropriate because the statute says that the
19 car has to be in operation or the victim has to be in it
20 at the time the threat is made or the attempt is made.

21 The officer, Officer Robinson, testified that
22 the-- Mr. Wilson told her he was standing at the apex.

23 THE COURT: That was the offense. That was the
24 second time I think.

25 MR. SUGGS: That was the second time -- that was

1 the first time. That was the first time after Mr. Pennell
2 had the stereo equipment in the road, after Mr. Wilson
3 moved it. Mr. Wilson got back into his car and pulled up
4 to the front and parked. This is when the confrontation,
5 the actual threat he said was made. It wasn't made when
6 the stereo equipment was strewn about. The only
7 conversation that took place there was, can you give me a
8 ride, I'll give you 20-dollars; no, I'm not gonna do that,
9 and then the cussing but no threat. The threat to take
10 the car according to the victim did not occur until after
11 he got back in his car, pulled up to the front, put it in
12 park, cut off the engine, and he could not remember if he
13 was sitting or standing when Mr. Pennell approached him at
14 that time and asked for -- and said he would take the car
15 and said he reached for the doorjamb. The officer
16 testified Mr. Wilson told her he was standing at the apex
17 of the car door when this event occurred. Mr. Wilson
18 could not remember if he was standing or sitting at that
19 time. Now when Mr. Wilson fired the gun and left and came
20 back a second time, nothing in the second confrontation at
21 all even rises to the level of any sort of carjacking
22 threat. That -- Mr. Wilson was already out of his car at
23 that time walking to the door when Mr. Pennell approached
24 and had the keys in his pocket, the car was off, walking
25 to the door, and kicked Mr. Pennell when he said Mr.

1 Pennell came up to him with his fist, kicked him and then
2 Mr. Pennell said I'm just playing and walked away. Then
3 Mr. Wilson went to the door and tried and it was locked.
4 So in that second time there was absolutely no threats
5 made about getting the car. And if there were, clearly,
6 clearly Mr. Wilson was hurrying out of the car with the
7 car off already so we're just talking about the first
8 time. Officer said Wilson told her he was out of the car
9 at the apex of the door, standing at the apex of the door.
10 Mr. Wilson couldn't remember. Sitting or standing, he
11 just didn't know.

12 Judge, I know that probably in your mind and
13 probably correct, would be a question of fact rather than
14 a question of law, something that the jury should decide
15 rather than the Court rule upon; but I think it's very
16 telling, Judge, that this is absolutely not a carjacking
17 case. I do not think that the State has actually shown
18 all the elements of this offense beyond a reasonable
19 doubt. It is not a carjacking case, Judge, based upon the
20 facts, based upon the law, and therefore I would ask for a
21 directed verdict.

22 THE COURT: All right, sir. Mr. Jepertinger.

23 MR. JEPERTINGER: Yes, sir. Obviously, under the
24 rules of evidence, Your Honor, at this stage we look at
25 things in a light most favorable to the State. I agree

1 with counsel to this extent, I don't think the second
2 incident involved carjacking, Your Honor. However, the
3 first incident, if you recall, Mr. Suggs characterized me
4 cowering over Mr. Wilson when I approached him and asked
5 him how close he was when he said I was going -- I'm going
6 to take your car. And the question is where were you, I'm
7 sitting in my car. And he kept -- he approached and he
8 was in the doorway, Your Honor. Then if you recall on
9 cross-examination Mr. Suggs made a point, when you're
10 sitting there your feet couldn't reach the ground with an
11 SUV. I objected at that point because I thought that was
12 he was trying to offer his own opinion at that point;
13 however, Mr. Wilson testified that he was sitting there
14 and there was a question whether his feet could reach the
15 ground or not, Your Honor. So I don't think there was
16 testimony elicited whether he could remember or not
17 remember. Obviously he didn't shoot the gun off in the
18 roof of the car. He was outside when he shot the gun off,
19 Your Honor, but that was not the point when the carjacking
20 took place. I think that's a question of fact, Your
21 Honor, and I think they're not entitled to a directed
22 verdict.

23 THE COURT: I recall 'cause that was when you
24 were cross-examining Mr. Wilson he actually got up out of
25 the witness stand and went to that chair, brought it over

1 and kind of demonstrated his position. So, and I --
2 gentlemen, you both have hit it on the head. This is a
3 question of fact that is appropriate for the jury. The
4 Court is not to weigh the evidence; it's simply to
5 recognize the existence of it. And there is evidence in
6 the record of whereby a jury could possibly find, and I
7 think it's a fact question that the jury needs to resolve.
8 I'm gonna respectfully deny the motion.

9 MR. SUGGS: Thank you, Judge.

10 THE COURT: Anything further?

11 MR. SUGGS: Yes, sir. We -- Mr. Pennell and I
12 talked about him taking the stand in his own defense. I
13 am not going to advise him that that -- that he should do
14 that. In fact, I would advise him not to take the stand.
15 I do not think that would be appropriate at this time. I
16 don't think it would be a wise decision at this time.
17 I've counseled him not to take the stand in his own
18 defense. I would, Judge, ask though that we -- that we
19 visit his prior record so that if he does decide that's
20 what he wants to do he knows what potentially could be
21 used to impeach his credibility and his believability, his
22 veracity as a witness. And he understands that he would
23 be impeached as any other witness could be with record,
24 evidence of his prior record.

25 THE COURT: Mr. Jepertinger, are you prepared to

1 go over that?

2 MR. JEPERTINGER: Yes, sir, and what I made, Your
3 Honor, he has a long record, however, I limited it to the
4 ten year time frame, Your Honor, and things that the State
5 would seek to impeach on should he testify.

6 THE COURT: All right.

7 MR. JEPERTINGER: In 2005 court date
8 September 13th, 2005, he pled guilty to aggravated assault
9 and battery or assault and battery high and aggravated
10 nature, Your Honor, sentenced to one year. Your Honor, I
11 think that's clearly ---

12 THE COURT: That would be.

13 MR. SUGGS: That's a misdemeanor, right? That
14 would be classified as a misdemeanor at that time.

15 THE COURT: It may be ---

16 MR. SUGGS: Still might be.

17 THE COURT: It may have been but it's an offense
18 that carries more than a year.

19 MR. SUGGS: More than a year, yes, sir.

20 MR. JEPERTINGER: Your Honor, in September 13th,
21 2005, the same date, Your Honor, he also pled to a failure
22 to stop for a blue light. Obviously that crime carries up
23 to three years, Your Honor.

24 THE COURT: I agree.

25 MR. JEPERTINGER: Okay. Then Your Honor, on the

1 same date, Your Honor, he also pled to a strong armed
2 robbery, was sentenced to ten years suspended to jail for
3 14 months and court costs and probation for five years and
4 that was —

5 THE COURT: That would be open to impeachment.

6 MR. JEPERTINGER: Yes, sir. On January 31st,
7 2004, he pled guilty to shoplifting; and even though this
8 was a magistrate court shoplifting, it is a crime that
9 involves dishonesty, Your Honor. I think under Rule 609
10 that I can impeach in terms of no matter what the penalty
11 is if his crime dealing with dishonesty.

12 MR. SUGGS: If the Court feels that that is
13 appropriate impeachment offense.

14 THE COURT: Okay, all right. Anything else?

15 MR. JEPERTINGER: Receiving stolen goods back on
16 March 3rd, 2004. Same argument, Your Honor.

17 THE COURT: That was a magistrate level?

18 MR. JEPERTINGER: It just says sentence unknown.

19 THE COURT: All right. Anything else?

20 MR. JEPERTINGER: That would be all the State
21 would be seeking impeachment on, Your Honor. He has some
22 older record but we're not going to go into that.

23 THE COURT: All right, sir. And just so we're
24 clear, and I know you're both very experienced attorneys
25 and so we know what we're talking about here. These

1 things that the Court rules on would be used for
2 impeachment purposes only. You could not go into any of
3 the details of those crimes, and you could not go into the
4 sentences received or anything of that nature.

5 MR. JEPERTINGER: We understand.

6 THE COURT: Just the fact that they were
7 convictions.

8 MR. JEPERTINGER: Yes, sir.

9 MR. SUGGS: And the Court would restrict
10 Mr. Jepertinger to stating to Mr. Pennell before the jury
11 that he was convicted of in terms of a strong armed
12 robbery, a felony, or —

13 MR. JEPERTINGER: Your Honor, I'm just going to
14 say the crime.

15 MR. SUGGS: The crime itself.

16 THE COURT: Yeah, I don't think it's — I think
17 he could ask something along these lines, am I correct
18 that you were convicted of a strong armed robbery in 2005,
19 failure to stop for a blue light in 2005.

20 MR. SUGGS: Yes, sir.

21 THE COURT: Assault and battery of a high and
22 aggravated nature. And I am -- shoplifting and receiving
23 stolen goods are crimes of dishonesty, and I think the
24 rule allows for those to be used for impeachment purposes
25 if it's something that — I think they've done away with

1 the ---

2 MR. JEPERTINGER: Moral turpitude.

3 THE COURT: ---moral turpitude and they just
4 basically use the phrase dishonesty.

5 MR. JEPERTINGER: That's correct.

6 THE COURT: And so I would allow -- I would allow
7 the ABHAN, failure to stop, the strong armed, and
8 shoplifting and receiving stolen goods, that you could
9 inquire into those convictions but no details regarding
10 those matters.

11 MR. SUGGS: I understand that the magistrate
12 level offenses are considered by Mr. Jepertinger to be,
13 and by the Court as well and by most everybody, to be
14 crimes of dishonesty and those are not subject to any sort
15 of balancing act prejudicial value versus probative value.
16 But the other offenses which do carry more than a year,
17 the blue light, the aggravated assault, the common law
18 robbery, I'm not sure about that one, whether or not they
19 involve crimes of dishonesty or not. I know the first two
20 don't; I'm not sure about the third. Those are subject to
21 a balancing act by the Court if they don't involve crimes
22 of dishonesty. And so I think the Court has to rule that
23 the probative value of admitting those outweighs any
24 prejudicial effect to Mr. Pennell, rather than just cart
25 blanch admitting them because they carry more weight.

1 THE COURT: All right.

2 MR. SUGGS: Just to make the record clear, Judge.

3 THE COURT: Well, we have a -- there's certainly
4 relevance here, and we have a case here where there is
5 some allegations of assault involved in this matter. I
6 think the common law robbery charge would probably fit
7 under the dishonesty.

8 MR. JEPERTINGER: It does, Your Honor.

9 MR. SUGGS: Probably so. Probably so, Judge.

10 THE COURT: So we're talking about the failure to
11 stop.

12 MR. SUGGS: Yes, sir.

13 THE COURT: And the assault and battery of a high
14 and aggravated nature.

15 MR. SUGGS: That's right. That's right.

16 THE COURT: And I'm gonna allow it. I find that
17 the probative value is not outweighed by the prejudicial
18 effect, that it is probative, and I would allow the State
19 to go into that.

20 MR. SUGGS: All right, Judge.

21 THE COURT: Again, strictly for impeachment
22 purposes.

23 Now Mr. Pennell, let me address you if I may,
24 sir. And I'm not really looking for you to give me an
25 answer right now, okay?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: I'm just giving you some information
3 to think about and so that information that you can talk
4 to Mr. Suggs about. Every person who's a defendant in a
5 criminal trial has the right to testify in their own
6 defense, or they also have the constitutional right to
7 remain silent and to not testify. Let me address that
8 right first 'cause that's a right that's familiar to most
9 people. We all understand that we have the right to
10 remain silent. What I want you to understand is if you
11 did decide to not testify I would, when I instruct the
12 jury on the law -- as a matter of fact, all right, let me
13 pull something up here so I can tell you exactly. If you
14 choose to exercise your constitutional right to remain
15 silent I would instruct the jury on the law, and this is
16 exactly what I would tell them. I would tell the jury: I
17 instruct you, ladies and gentlemen of the jury, and I
18 emphasize, the fact that the defendant did not testify is
19 not a factor to be considered by you in any way in your
20 deliberations or in your consideration on the question of
21 guilt or innocence of the defendant. It must not be
22 considered by you in any manner whatsoever. A defendant
23 has the constitutional right to remain silent, and the
24 assertion of that right must not be considered by you in
25 your deliberations. I repeat, under your oath you are to

1 draw no conclusion whatsoever from the fact that the
2 defendant in this case did not testify. The fact that
3 this defendant did not testify should not even be
4 discussed in the jury room. The burden of proof, as I
5 have stated to you, is on the State. The defendant is not
6 required to prove his innocence. The burden of proof
7 remains on the State to prove guilt beyond a reasonable
8 doubt. So if you chose to remain and not testify, I would
9 give the jury that instruction. You understand that?

10 THE DEFENDANT: Yes, sir, I do.

11 THE COURT: All right. Now, the other side of
12 that coin is if you decided you were going to testify, you
13 also have that right, which you need to understand,
14 however, is that if you decide to testify and take the
15 stand that you will also, just like every witness, you
16 will be placed under oath and you will then take the
17 stand. You'll answer questions from Mr. Suggs but then
18 Mr. Jepertinger will have the opportunity to what we call
19 cross-examine you, just as Mr. Suggs had the opportunity
20 to cross-examine the State's witnesses. And in that
21 cross-examination you'll be required to answer his
22 questions.

23 We've gone over your prior criminal history. You
24 have a prior conviction for assault and battery of a high
25 and aggravated nature, failure to stop for a blue light,

1 strong armed robbery, shoplifting, and receiving stolen
2 goods. Now Mr. Jeperfinger would have the right to ask
3 you if you have been convicted of those offenses. But you
4 understand, Mr. Pennell, that's all he's allowed to do.
5 He's not allowed to ask you what sentence you received on
6 those charges. He's not allowed to ask you any details
7 about those charges. You understand that?

8 THE DEFENDANT: Yes, sir, I do.

9 THE COURT: Okay. But you do understand that you
10 would be required to answer his questions just as any
11 other witness answers questions?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: All right, sir. Now what I'm gonna
14 do, Mr. Suggs, I'm assuming and maybe I shouldn't assume
15 anything -- y'all may have already discussed this. Are
16 you going to need time to see me to discuss this with
17 Mr. Pennell before you give the Court your answer as to
18 whether or not he's going to testify --

19 MR. SUGGS: Yes, sir.

20 THE COURT: -- or put up a case?

21 MR. SUGGS: Yes, sir.

22 THE COURT: All right. Now other than, would
23 there be any other witnesses other than Mr. Pennell?

24 MR. SUGGS: I'll have to check. I have to check
25 with my investigator. I have not seen him today. Judge,

1 I would have to guess probably not, but I need to double
2 check.

3 THE COURT: Well, here's what I'm gonna do. I'm
4 gonna ask you, if you would, for you and Mr. Pennell to
5 discuss this evening what the Defense intends to do
6 tomorrow and then you can let us know before we get
7 started.

8 MR. SUGGS: In the morning?

9 THE COURT: Yeah, in the morning before we get
10 started.

11 MR. SUGGS: Yes, sir.

12 THE COURT: And then we'll go from there.

13 MR. SUGGS: 11:00, Judge?

14 THE COURT: No. Judge Nettles kind of changed it
15 up a little bit. He wants us to go ahead and start first
16 thing in the morning.

17 MR. SUGGS: Okay.

18 THE COURT: He's going to pull the jury on that
19 next case.

20 MR. SUGGS: I believe he did say 9:30.

21 THE COURT: Yeah. So we're going to start 9:30.
22 I've got some attorneys conning in at 9:00 on a status
23 conference, but that shouldn't take very long. So if
24 y'all would be available around 9:15 or something to kind
25 of let me know where we're at.

1 MR. SUGGS: Yes, sir.

2 THE COURT: Now let me mention this as far as a
3 jury charge, we've got a charge that we kind of put
4 together.

5 MR. SUGGS: May we sit, Judge?

6 THE COURT: I'm sorry, please do. Is there
7 anyone that has any specific requests to charge?

8 MR. SUGGS: Yes, sir.

9 THE COURT: You do?

10 MR. SUGGS: Yes, sir.

11 THE COURT: When can you get those to us?

12 MR. SUGGS: Well, I can get those by tomorrow
13 morning. Judge, really the only, other than the standard
14 charges which I'm familiar with that -- and I've tried
15 many cases with you, Judge, and I know your charges. I
16 think it would be important to give the jury a charge on
17 the definition of operating based upon the distinction
18 that I argued in my motion for directed verdict. We all
19 know what being in a vehicle is but maybe operating a
20 vehicle might not be that clear, and I think it might be
21 important.

22 THE COURT: You say you got some case law that
23 gives us that?

24 MR. SUGGS: I've got -- yes, sir, I've got --
25 it's an old case. It's State versus -- State versus

1 Graves, and you know, the dissent is judge, it's Judge
2 Ness's dissent where he says he considers the terms
3 synonymous, but the actual opinion does make a distinction
4 and operating is to be considered.

5 THE COURT: Do you have that cite there in front
6 of you?

7 MR. SUGGS: Yes, sir, I do.

8 THE COURT: Give us that cite.

9 MR. SUGGS: It's 269 South Carolina 356.

10 THE COURT: 259?

11 MR. SUGGS: 269.

12 THE COURT: 269 South Carolina 356.

13 MR. SUGGS: Yes, sir, 1977 case. And I don't
14 know, there's probably some other cases.

15 MR. JEPERTINGER: Yeah, and I —

16 MR. SUGGS: I'll look too, Judge, but that's the
17 one I have to start with.

18 MR. JEPERTINGER: Excuse me, Judge, I would like
19 some time just to research that as— just that aspect to
20 see if there's anything more.

21 THE COURT: I do have a charge 'cause I think
22 it's relevant obviously in this case. I've got a charge,
23 the definition of attempted.

24 MR. JEPERTINGER: Sure.

25 THE COURT: And I think that's appropriate in

1 this case. I'll charge the carjacking statute but then
2 I'll also charge the definition of attempted or what it
3 means. But you'll see all that before I do it.

4 MR. SUGGS: Okay, Judge, and that reminds me too
5 of that prompts me on that other issue about the verdict
6 form.

7 THE COURT: The verdict form.

8 MR. SUGGS: And my position remains the same that
9 I feel like carjacking is the offense. Attempt is
10 basically an element of the offense. I think if we put on
11 the verdict form the -- one of the elements of offense --

12 THE COURT: I don't think it's an element of the
13 offense. I mean, it's not a material element of the
14 offense because it's not an element at all if it's a
15 completed offense.

16 MR. SUGGS: Yes, sir, but the statute says
17 carjacking.

18 THE COURT: Correct.

19 MR. SUGGS: So it's carjacking in the heading.
20 It doesn't say attempt to carjacking until you read the
21 verbiage.

22 THE COURT: Right. But my point, what I'm saying
23 is when you say it's an element of the offense -- let's
24 change this scenario. Let's say that Mr. Wilson, that
25 there's allegations that it wasn't an attempt, that

1 actually the allegation is that Mr. Pennell actually
2 yanked him out of the car, got in his car and left, you
3 wouldn't charge attempt in that case. That's not an
4 element of the offense.

5 MR. SUGGS: No, sir.

6 THE COURT: It's a whole different offense,
7 attempted carjacking.

8 MR. SUGGS: I guess what I'm getting at, Judge,
9 is when the verdict form is presented to the jury it's
10 going to have the offense named and then it's going to
11 have guilty or not guilty. I mean, there's only one
12 indictment; it's not that complicated. It's going to say
13 not guilty or not guilty, or not guilty and guilty,
14 whatever order the Court puts it in. But the language is
15 gonna say, I don't want it to say carjacking. I don't
16 want it to say attempt carjacking guilty or not guilty. I
17 want it to say carjacking because that's what the statute
18 is, carjacking.

19 MR. JEPERTINGER: Your Honor, I think you know,
20 the name of — as it's listed it's called felony of
21 carjacking. And to a certain extent the legislator in my
22 opinion made a mistake where they included the encolored
23 (sic) offense of attempt with the substantive offense of
24 taking, the completed offense, of taking the car.
25 However, be that as it may, if you look at it it's called

1 felony carjacking and it says a person guilty of felony of
2 carjacking who takes or attempts. So the nomenclature,
3 and I'll agree with Mr. Suggs on this, that he's guilty of
4 felony of carjacking but carjacking includes both the
5 completed and the, or incomplete offense.

6 THE COURT: Well so, I mean, so it doesn't mat--
7 let's say on the verdict form I put: We, the jury, find
8 the defendant either not guilty of carjacking or guilty of
9 carjacking, and in your argument you can just explain to
10 the jury 'cause I'm going to -- I'm going to have the
11 language of the statute in the charge.

12 MR. JEPERTINGER: Right.

13 MR. SUGGS: Yes, sir.

14 THE COURT: And so the State can argue, ladies
15 and gentlemen, if he attempted to do he's guilty of
16 carjacking.

17 MR. JEPERTINGER: Right, and that will be part of
18 your charge as well.

19 THE COURT: That will be part of the charge.

20 MR. SUGGS: And the Court can even say not just
21 carjacking, but the felony of carjacking because that's
22 what the statute says. It says the felony of carjacking.
23 You can say that; I couldn't argue with that.

24 MR. JEPERTINGER: I would ---

25 THE COURT: I wouldn't say that unless you

1 insisted on it but.

2 MR. JEPERTINGER: I just think carjacking is
3 sufficient ---

4 THE COURT: I think carjacking ---

5 MR. JEPERTINGER: ---as long as, I think the
6 bottom line is so they don't wind up being confused in
7 terms of what we're dealing with here, Your Honor, and I
8 think the statute ---

9 THE COURT: That brings me back to my comment
10 early on that when you argue you, I mean, if you're gonna
11 argue the law you got to argue it properly.

12 MR. SUGGS: Yes, sir.

13 THE COURT: Which means it would preclude you
14 from arguing that he never took the car so you can't find
15 him guilty of carjacking.

16 MR. SUGGS: No, sir, I would not do that. I
17 would not do that, no, sir. I would not do that.

18 THE COURT: Right. All right. Scott, if you
19 would, anything that you would want us to consider
20 tomorrow would you get that to us, say, around before nine
21 'cause we're gonna have to consider that and of course get
22 anything to John.

23 John, if you come up with anything get it to
24 Scott if you would.

25 MR. JEPERTINGER: Sure, absolutely. I'll be

1 happy to do that.

2 MR. SUGGS: If I run late can I fax it or email
3 it?

4 THE COURT: Yeah, yeah, sure. I'm gonna get your
5 email, whatever you email to Randy Lynn so that email
6 address is trussolc@sccourts.org. It's just t-russo law
7 clerk and SC courts.org.

8 MR. SUGGS: Yes, sir.

9 THE COURT: And in fact, I'd prefer if you have
10 something that you email it to us because then from that
11 we can cut and paste and put it in there quickly instead
12 of re-typing it.

13 MR. SUGGS: I'll do my best on that, Judge.

14 MR. JEPERTINGER: It may be late tonight.

15 THE COURT: You got excellent staff personnel at
16 your office that I'm sure you can call upon at any hour of
17 the day —

18 MR. SUGGS: I will.

19 THE COURT: —to do that for you.

20 MR. SUGGS: It's nice to think so, but not in
21 reality I don't think.

22 THE COURT: We'll let — but I do want y'all
23 available as soon as I can get done with these civil guys
24 so that we can go over the charge so that we can start as
25 close to 9:30 as we can.

1 MR. SUGGS: Yes, sir.
2 (WHEREUPON, the proceedings were concluded for the day to
3 be reconvened on October 13, 2010.)

4 THE COURT: All right. Mr. Suggs, have you and
5 Mr. Pennell had an opportunity to discuss the Defense's
6 case and the position that you're going to be taking
7 today?

8 MR. SUGGS: We have, Your Honor.

9 THE COURT: All right. And do you intend to --
10 well, let me ask first regarding any witnesses. Do you
11 intend to call any other any witnesses other than possibly
12 Mr. Pennell?

13 MR. SUGGS: We do not, Judge.

14 THE COURT: And with regards to Mr. Pennell's
15 decision to testify or to not testify have y'all discussed
16 that?

17 MR. SUGGS: We have, Your Honor.

18 THE COURT: And what's that decision?

19 MR. SUGGS: He has decided he will not testify.

20 THE COURT: All right. Mr. Pennell, is that
21 correct, sir?

22 THE DEFENDANT: Yes, sir, it is.

23 THE COURT: And you've discussed that with
24 Mr. Suggs.

25 THE DEFENDANT: Yes, I have.

1 THE COURT: All right. And let me ask you, sir,
2 just to verify, you understand that you do have the right
3 to testify if you chose to do that. You understand that?

4 THE DEFENDANT: Yes, sir, I do.

5 THE COURT: Okay. And you also equally have the
6 constitutional right to remain silent and that's what
7 you've intended to do; is that correct?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: And you understand I will let the
10 jury know that they cannot hold that against you in any
11 way?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: All right, sir. Well, thank you.
14 You may have a seat, Mr. Pennell.

15 All right, let me if I may, gentlemen, since that
16 is the close of the evidence, rather than bring the jury
17 out, allow Mr. Suggs to close on the record then have to
18 send them back out to take up any motions at the close of
19 all the evidence, is there any objection to us going ahead
20 and taking up those motions at this time and then when the
21 jury comes out we'll just get going?

22 MR. JEPERTINGER: Not from the State.

23 THE COURT: Okay.

24 MR. SUGGS: Nor from the Defense.

25 THE COURT: All right. Then Mr. Suggs then I'll

1 be happy to entertain any motions at the close of the
2 evidence, sir.

3 MR. SUGGS: Judge, just briefly, we would renew
4 our motion made after the conclusion of the State's case
5 in chief for directed verdict on behalf of Mr. Pennell
6 count of carjacking based upon arguments previously made.

7 THE COURT: All right, sir. And I'm going to
8 respectfully deny that, and as we talked about earlier I
9 think it's a fact question for the jury to resolve.

10 MR. SUGGS: Yes, sir. Thank you, Judge, for
11 allowing me to make that motion.

12 THE COURT: Now if — Scott, what we'll do is,
13 when I bring the jury out I'll let them know that, remind
14 that the State has rested, then I'll recognize you for
15 Defense, allow you to rest on the record, and then I'll
16 just move them right into that we're gonna take up closing
17 arguments.

18 MR. SUGGS: Yes, sir, Judge. Thank you, Judge.

19 THE COURT: All right. Is there anything else we
20 need to take up before we bring the jury out,
21 Mr. Jepertinger?

22 MR. JEPERTINGER: Nothing from the State, Your
23 Honor.

24 THE COURT: Mr. Suggs.

25 MR. SUGGS: Yes, sir, other than to alert the

1 Court that I moved the tripod out here and may use it some
2 during closing argument.

3 THE COURT: Absolutely. And for both of you,
4 feel free to move about the court. Move that podium any
5 place you need it. Anything you need just feel free to
6 flow and do whatever it is you need to do.

7 MR. SUGGS: Okay. Thank you, Judge.

8 THE COURT: All right. Sam, if you'd ask the
9 jurors to join us please.

10 (WHEREUPON, the jury was returned to the courtroom at
11 approximately 10:00 a.m., and the following proceedings
12 commenced in open court.)

13 THE COURT: All right, ladies and gentlemen,
14 welcome back. I hope everyone had a good evening and are
15 ready to resume your work. If you recall from yesterday
16 the State had concluded their case, and they had rested
17 and I excused you at that point so that I could take up
18 matters of law with the lawyers, which I'm required to do
19 at the close of the State's case. So now we're ready to
20 proceed and would recognize Mr. Suggs on behalf of the
21 Defense.

22 Mr. Suggs.

23 MR. SUGGS: Thank you, Your Honor. At this time
24 the Defense would not put up any evidence, Judge, and
25 would rest.

1 **THE COURT:** All right, sir. Ladies and
2 gentlemen, the Defense has rested their case and so we are
3 now at the stage in the trial process where the attorneys
4 are gonna have another opportunity to address you in a
5 somewhat similar fashion with what we call closing
6 arguments or final summation. You heard them in their
7 opening statements. And I will tell you the same thing I
8 told you about opening statements I will tell you about
9 their closing arguments. What the lawyers tell you
10 through their closing arguments is not evidence in this
11 case. It is their opportunity to argue to you what they
12 believe the evidence has shown, but the evidence in this
13 case that you're gonna have in order to decide this case
14 is all in. It is the testimony that came in through the
15 witnesses who are before the Court, and it is the exhibits
16 which are in evidence. These exhibits will be back in
17 your jury room with you. You will have them with you when
18 you -- when it comes time for you to deliberate.

19 So at this time I'm gonna recognize the
20 attorneys, ask that you give them your close and undivided
21 attention and hear them as they present their final
22 summation. Once they've concluded their arguments to you,
23 ladies and gentlemen, I will then charge you on the law
24 that is applicable to this case, and then after that you
25 will then be in a position to retire to your jury room and

1 deliberate. All right, ladies and gentlemen, again,
2 please give the lawyers your undivided attention as they
3 address you with their final remarks.

4 Mr. Suggs.

5 MR. SUGGS: Thank you, Your Honor. May it please
6 the Court.

7 THE COURT: Yes, sir.

8 MR. SUGGS: Good morning, Judge.

9 THE COURT: Good morning, sir.

10 MR. SUGGS: Mr. Jepertinger.

11 MR. JEPERTINGER: Yes, sir. Scott, good morning.

12 MR. SUGGS: Good morning, ladies and gentlemen.

13 My wife picked it out, bless her heart. I didn't have the
14 heart to put it back in the closet. I want to apologize
15 too, first of all, for the last couple of days of having
16 to sit here and listen to me painstakingly cross-examine
17 these witnesses. I looked over here at several points at
18 the jury while I was doing my cross-examine, and I noticed
19 that everybody was paying very, very close attention
20 despite how dull and tedious the cross-examination was.
21 And I know a lot of you probably were thinking, now what
22 is this lawyer doing, what difference does it make that a
23 person is in a car or outside a car or whether he was
24 struck or this or that. I mean, what difference does that
25 make, to what purpose, to what end, is this lawyer

1 constantly asking these questions. And I know it's
2 important for two reasons. One, because if it was not
3 important we'd ask these questions several people would
4 have responded and told me to cease and desist. The judge
5 probably would have said what is the relevance of this
6 question. Mr. Jepertinger is a good lawyer. He's been
7 practicing longer than I have, over 20 years, and he would
8 say, Judge, I object, these questions are simply not
9 relevant. But none of that happened so that tells me that
10 these questions are relevant and they are important to
11 know the answers to. The second reason is because this
12 case really hinges on the statute more than anything else.
13 And in order for us to understand the statute we have to
14 understand the facts. And the purpose of my lengthy
15 questioning was to eliminate all doubt in your mind about
16 what the facts were that night. Whenever I came across a
17 response from a witness that wasn't clear about an answer
18 to my question, my questions were very specific, very
19 direct. But when I asked one and I got an answer I
20 thought was wavering or waffling, I asked it again in a
21 different way and I kept doing that for a purpose; I
22 wanted to get the answer. And that was the answer that
23 you have a right to rely on as a jury because it is your
24 job to understand what the facts are.

25 The judge has his responsibility as well. The

1 judge's responsibility is to instruct you on the law. He
2 will tell you what the law is. You can't change that even
3 if you don't like it you can't change it. You have to
4 follow the law that the Judge gives you. He can't change
5 it either. He has to give you the law that's given to him
6 by the legislature. But whenever he gives you the law you
7 have to take the facts as you understand them to be and
8 apply those facts to the law that the judge gives you.
9 From there you will come to your conclusion or your
10 verdict deciding whether Mr. Pennell was innocent or
11 guilty of the crime of carjacking.

12 Now the carjacking statute is, in my opinion,
13 it's not very artfully written. It's a felony. The
14 statute says it's a felony, but it's very short. It's
15 only a few lines long, and it puzzles me because you can
16 look in the statute at some other offenses that are not
17 even, you know, not felonies, but there might be a page or
18 two long where the legislature actually spent time
19 thinking about how to write the statute. But this is what
20 we're -- this is the hand we're dealt. This is the
21 statute and the language in the statute that we have to
22 deal with. This is what we have to look at today. We
23 can't add; we can't take away. We have to look at it as a
24 whole.

25 The carjacking statute states that in order for

1 the State to prove carjacking to you beyond a reasonable
2 doubt, they must prove that the defendant, Mr. Pennell,
3 took or attempted to take a motor vehicle from another
4 person by force and violence or by intimidation while the
5 person was operating a vehicle or while the person is in
6 the vehicle. That's the way the carjacking statute reads.
7 And you'll get that. When the time comes the judge is
8 going to read you the statute again, and he'll read it to
9 you as many times as you want him to. Now I told you in
10 my opening argument what I thought my interpretation of
11 carjacking is, and it may be different from yours and
12 that's okay. I'm not the smartest person in the world
13 even though if you ask my wife she'll tell you that I
14 think I'm the smartest person in the world, but I'm not.
15 What you believe to be carjacking and what I believe to be
16 carjacking may, in fact, be the same. I hope that's the
17 case.

18 To me carjacking would be a scenario where you're
19 in your car, you're in a business, you come out of the
20 business, or you come out of your home, you get in your
21 car and you crank it up, and somebody is waiting, laying
22 in wait for in the back seat. And all of a sudden --

23 MR. JEPERTINGER: Your Honor, I would -- I
24 respect Mr. Suggs, but I would object to what his opinion
25 of the legislative language of the statute is, Your Honor.

1 I think what we're doing is offering an attorney's opinion
2 of what the statute is, Your Honor, and ---

3 THE COURT: Well, he can argue the law and I'm
4 gonna charge the law.

5 MR. JEPERTINGER: But I don't think he's entitled
6 to argue what he thinks in his opinion what the law is,
7 Your Honor, when it's clear on the face of the statute
8 which he just read.

9 THE COURT: Well, you cannot argue what you think
10 was in the minds of the legislature. You have to argue
11 the plain language of the statute.

12 MR. JEPERTINGER: Right.

13 THE COURT: So...

14 MR. SUGGS: Yes, sir. And I'm simply, I mean,
15 this is argument, it's not evidence.

16 THE COURT: I understand.

17 MR. SUGGS: I've always been able to -- be very,
18 you know, free with, you know, my opinions about what I
19 think. And I told the jury, Judge, that they're free to
20 disagree with me as they may very well but ---

21 THE COURT: All right.

22 MR. SUGGS: I think I'm allowed some latitude.

23 THE COURT: I'm gonna overrule, but you can't
24 assert what you believe was in the minds of the
25 legislature when they ---

1 MR. SUGGS: No, sir. And I didn't do that, no,
2 sir. I didn't do that and I won't. Thank you, Judge.

3 But that's what I think carjacking -- that's my
4 opinion. I envision that to be carjacking in my mind. Or
5 someone who is in a car and someone jumps in the car and
6 pulls a weapon of some kind and orders them to drive
7 somewhere, and maybe later on they may or may not be
8 robbed or assaulted in some way. That's my feeling.
9 That's my honest feeling about what carjacking is, not the
10 facts that were told to you over the last two days. And I
11 told you then that I thought that the actions of
12 Mr. Pennell, if you believe the testimony, constitute
13 something, constitute some wrongdoing. But does it
14 constitute carjacking? Does it rise to that level? And
15 that was the point that I've been trying to make
16 throughout this trial. I want you to take a good hard
17 look at the facts of this case to see that, to see if the
18 event that occurred on May 25th, 2009, meets your
19 definition or meets the statutory definition and your
20 interpretation of the statute.

21 I don't want you to cloud your mind with
22 testimony that might not be relevant to that central issue
23 such as, Mr. Pennell was charged with assault after the
24 event occurred. He was not charged with theft of any
25 stereo equipment. Mr. Pennell was beat up, not once but

1 twice by Mr. Wilson who was very capable and very able to
2 handle Mr. Pennell physically. Don't consider that
3 Mr. Wilson shot a gun in the air in the city limits. He
4 wasn't charged with discharging a firearm in the city
5 limits. Don't concern yourself with that. You might not
6 want to concern yourself with the fact that Mr. Wilson
7 left the scene after the first time and went home, but
8 then came back in another vehicle switching vehicles,
9 which I still don't think that was quite answer to my
10 satisfaction but I don't know that it really bears on the
11 issue of guilt or innocence as to my client. Don't
12 consider too much that Mr. Wilson was not injured at all
13 during this confrontation; that Mr. Pennell was not armed
14 in any way; that the gun Mr. Wilson had was either
15 retrieved from the glove box or from the center console;
16 That the witnesses who were at Hollywood Video, they did
17 not testify but the evidence shows that would they have
18 testified they would not have seen Mr. Pennell trying to
19 take this car from Mr. Washington, from Mr. Wilson. But
20 all would just say instead, they saw Mr. Wilson beating up
21 Mr. Pennell.

22 Don't consider we couldn't find the shell casing.
23 I don't think that's too relevant to the issue. Don't
24 consider too much that Mr. Pennell was actually abandoned
25 in the parking lot because his girlfriend or his niece or

1 his sister or some relative wanted to get high. He did
2 not want to get high and he got put out, or he voluntarily
3 said, I want to get out. Left stranded 11:00 at night
4 with his belongings. I'm sure that would have upset most
5 people too. I don't know that any of that stuff, even
6 though you might think about it really crucial to the
7 issue of guilt or innocence, and that's what you really
8 need to focus on. So let's do that.

9 The first thing I want to do -- and can I move
10 this now, Judge?

11 THE COURT: Yes, sir.

12 MR. SUGGS: Now the first thing I want to do is
13 talk to you about, you know, there were two separate
14 events, and I want to get those cleared up first. You
15 remember Mr. Wilson went to the Hollywood Video in a gold
16 Ford Explorer and that's when the first confrontation
17 occurred with Mr. Pennell. That's when he fired the gun
18 you remember. Then after that, after he kicked
19 Mr. Pennell, Mr. Wilson left, but then he came back a
20 second time and then there was another brief confrontation
21 with Mr. Pennell. Mr. Wilson beat him up once again and
22 then left the second time only to come back the third time
23 when the police were there so it was just the two. So
24 let's talk about those two first. And I think the State
25 will agree that when you have to consider the charge of

1 carjacking you are simply to consider applying that law
2 just to the facts of the first scenario. So we have,
3 number one, we have the gold -- I want to make sure. I
4 think it's a gold Explorer. And then number two was the
5 black Expedition. This is really important here 'cause I
6 want to make sure that there's no misunderstanding. The
7 second time, as you will recall, Mr. Wilson returned. He
8 pulled up. He did not see Mr. Pennell when he pulled up
9 into the parking lot; y'all remember that. He pulled in;
10 he stopped. He put his car in park; he cut off the
11 engine. He got out of his car. He had his keys in his
12 pocket. He was walking to the front door. That's when he
13 observed Mr. Pennell coming from his left side. He's
14 already out of his car, okay. The car is shut off; it's
15 not running. Mr. Pennell comes up to him sort of
16 aggressively like this. I think I remember him saying
17 Mr. Pennell came up like this. Mr. Wilson was not armed
18 at that time. He had already left his gun at home. He
19 kicks Mr. Pennell and maybe throws another punch or
20 another kick; I don't remember. I just do know that
21 Mr. Pennell said I was just playing, or something like
22 that. And then he starts walking on off while Mr. Wilson
23 goes to the front door and tries to open it but the door
24 is locked, and the ladies', the girls there won't let him
25 in. So he gets back into his car and goes home.

1 So the second event is not even relevant or
2 doesn't even apply to your consideration in the jury room
3 you have to consider the carjacking and the facts.
4 Doesn't apply at all. Really only talking about this
5 event, okay? Now, you remember what happened there? This
6 is the first time. Here comes Mr. Wilson. He's coming
7 around the back side, coming around the back side of the
8 Hollywood Video, okay. He's coming off of Evans. He's --
9 on State's Exhibit 16 he's coming off of Evans around the
10 back. He turns left. He comes around and he sees the
11 stereo equipment in the way. This is the first time. So
12 he gets out of his car, puts the car in park. The car is
13 running, puts the car in park; it's not moving. He gets
14 out. He starts to slide the stereo equipment out of the
15 way because he wants to make sure nobody runs it over so
16 he slides it out as far as he thinks is safe. Mr. Pennell
17 comes up at that time -- you remember? -- and says, can
18 you give me a ride, can you give me a ride somewhere or
19 can you give me a ride to Timmons ville. I think the
20 testimony is a little confusing about that. That probably
21 doesn't matter either. Can you give me a ride for
22 20-dollars. Mr. Wilson says no, you know, I'm not going
23 to do that. And I don't blame him; I wouldn't do it. I'm
24 not giving a ride -- I wouldn't pick up hitchhikers. I
25 don't pick up hitchhikers on the side of the road.

1 Obviously if I saw a stranded child or something I would
2 pick the child up, but I wouldn't pick up somebody 11:00
3 at night in a parking lot. So he said no. That gets
4 Mr. Pennell agitated and angry. He says something vulgar.
5 He says something nasty according to Mr. Wilson.
6 Mr. Wilson kind of ignores it, gets back in his car, pulls
7 around to the front and parks, or pulls around somewhere
8 and parks. He's parked.

9 So parks his car, puts the car in park. He cuts
10 off the engine, but he says the keys are still in the
11 ignition. But the car is off; you remember that. Now he
12 says that he was getting out of his car when Mr. Pennell
13 approached him and said, I will take your car. I don't
14 think I heard anybody say anything else other than that, I
15 will take your car. There was no evidence — Mr. Wilson
16 said he grabbed, not the door handle but the doorjamb of
17 the car, 'cause the door was open. You can't grab the
18 doorjamb unless the car is open — the door is open. You
19 can't grab it if the door was closed. Grab the handle,
20 but he didn't say he grabbed the handle. Grabbed the
21 doorjamb. The door was open. This is something you
22 really need to think about.

23 The car was off so the car was not in operation.
24 Operation of a vehicle is going to be charged to you.
25 It's very important. A person is considered to operate a

1 vehicle when in the vehicle, when in the vehicle, when in
2 the vehicle. He intentionally does any act or makes use
3 of any mechanical or electric agency which alone or in
4 sequence will set in motion the mode and power of that
5 vehicle. The motion is not an essential element of
6 operating an automobile; that's fine. Park when you park.
7 That's what that's saying. But the car has to be on or
8 the car is not operating. The car has to be on.
9 Mr. Wilson said the car was off. Keys were in the
10 ignition but the car was off.

11 Now another thing about that is going back to the
12 carjacking statute once again. The State must prove
13 beyond a reasonable doubt that the defendant took or
14 attempted to take a motor vehicle from another person by
15 force and violence or by intimidation while the person was
16 operating a vehicle, it's not operating, or while the
17 person was in the vehicle. So the statute says if the car
18 is off but you're in it, and providing the other elements
19 of the offense are satisfied, you can have a carjacking.
20 Now was Mr. Wilson in the car? Now that was the question
21 that I spent a lot of time trying to get an answer to. He
22 doesn't remember whether he was in or out. Even the
23 ruling from the Court, Mr. Suggs, he doesn't know if he's
24 in or out. The answer to that question is not going to
25 change no matter how many times you ask it. It's not

1 going to make a difference. He does not remember whether
2 he was in or out. Right there he said, I don't know, I
3 don't know, I don't know if I was in or out. He told the
4 officer he was out, Officer Robinson, Michael Robinson,
5 not the chief investigator but the lead investigator of
6 the case. She testified he told her I was standing at the
7 apex of my door, I was standing. If you're in a car you
8 are not standing. You are not standing in a car unless
9 you're standing on the seat, and your head is at the moon
10 and I'm not trying to be sarcastic. Or you're standing in
11 the seat and you have a convertible. If you're in a
12 Explorer and you're standing at the apex of your door you
13 are outside of your vehicle; you are not inside.

14 Apex, I had to look it up; I wasn't really sure.
15 Car, wheels, front seat, back seat, front seat, car door,
16 steering wheel, seat. Standing at the apex right there.
17 Standing there at the apex of my door when Mr. Pennell had
18 the doorjamb, I would take your car. Now the statute also
19 requires -- and Mr. Jepertinger will, I'm sure, will
20 hammer this home and I don't have a problem with that.
21 You know, this is not a completed act. You know, it's not
22 a situation where Mr. Pennell's driving off with this
23 man's car so we're not talking about a completed act.
24 Mr. Jepertinger will tell you that the statute says
25 attempt is just as good as the completed act. But do we

1 even have an attempt? There was no, no threat really
2 delivered other than I will take your car. There was no
3 threat that give me your car or I'll do this. Or, here's
4 a gun or here's a knife and I'm going to use it on you if
5 you don't give me your car. Or coming up to him and just
6 beating him suddenly and pushing him and throwing him down
7 and getting in his car and drives away. What sort of
8 force or violence or intimidation do you see here? What
9 level of that satisfies you to the point that you feel
10 that that element of the offense is satisfied.

11 And I understand what Mr. Wilson is saying and,
12 you know, I feel bad that he had to be put in that
13 position. And then he said in the last part of his
14 testimony, well, what if it had been my wife or it had
15 been my daughter. I understand. I understand, but it
16 wasn't. We're talking about Mr. Pennell and Mr. Wilson,
17 two men. What level of force and intimidation would a
18 reasonable man consider beyond that which is tolerable
19 that would satisfy the elements of that offense. Threats,
20 violence, intimidation. Would that intimidate a
21 reasonable man without more, without a weapon, without
22 more threats, without some overt action on the part of
23 Mr. Pennell. In fact, there was some confusion about
24 whether even Mr. Pennell even laid a hand on Mr. Wilson.
25 The reports say, from the police say, that Mr. Wilson said

1 that he tried to get in my car by punching me or hitting
2 me, but Mr. Wilson said that he didn't punch me or hit me.
3 He might have gone back to do it, but he didn't hit me, I
4 pushed him, I pushed him away. Don't think about that.
5 There was nothing there except Mr. Wilson delivering a
6 good old fashioned kick in the stomach that put Pennell
7 down like a bag of cement. But here, the -- he got beat
8 up again there too, Mr. Pennell, but that was proceeded
9 simply by Mr. Wilson pushing him away. Mr. Jepertinger
10 was way up here on the witness like this, and you know, if
11 he's this close Pennell is not gonna hit him 'cause he
12 can't hit him. Wilson is pushing him away, get away from
13 my car. And then after he's away from the car that's when
14 he kicks him. He's far away from the apex of his car. At
15 that point he's clear out three or four feet away
16 probably. Okay? So focus on that. Focus on those
17 things, whether focus on the fact that the car was not in
18 operation at any time during any of these events.
19 Mr. Wilson was out of his car at all times when this
20 occurred. And the level or the lack thereof, of any
21 serious force, violence, or intimidation on the part of
22 Mr. Pennell which would rise to the level of satisfying
23 that statute.

24 If you think about all of those that I have
25 mentioned to you, I think, I believe that you will agree

1 that, again, this is something but it's not carjacking;
2 it's something else. It's okay to feel sorry for
3 Mr. Wilson having to be put in a situation where he felt
4 he had to pull a gun and fire it up in the air. I think
5 all of us could feel sympathy for the man; I do. And I
6 think it's okay to feel that Charles Pennell should have
7 minded his own business, and he's a stupid fool for trying
8 to do what he did, for even approaching someone in a
9 parking hospital at 11:00. I don't like for anybody to
10 come up to me at 11:00 in a parking lot. If I'm in a
11 parking lot, desolate parking lot, no cars, no people, I
12 don't want anybody coming up to me. I don't care for
13 whatever reason. They don't come up to me. You're not
14 gonna ask me for directions, not gonna ask me for money.
15 Just stay away from me, don't come near me. And you can
16 be mad at Mr. Pennell for doing that, and you can be mad
17 for the ways, asinine behavior, his behavior, but it is
18 not the felony of carjacking. Don't punish him by finding
19 him guilty of the felony of carjacking when that is not
20 what the facts of this case say.

21 Now I'm almost finished. I will just say a
22 couple more things, and I'm gonna sit down.
23 Mr. Jeperfinger will probably talk for two hours, but I
24 won't interrupt him. I promise. So he can say whatever
25 he wants to say. The one thing that I remember that's

1 kind of key to this case we've already covered it a little
2 bit but I just want to mention it one more time. When
3 we're talking about the difference between operating a
4 vehicle and being in the vehicle. We all know, I think
5 everybody is agreeing, that no time during this event was
6 the car in operation at the relevant time. I think the
7 issue is gonna be in or out, in or out, in or out. The
8 lead investigating officer said, I talked to Mr. Wilson,
9 he was forthright, he was truthful, he was compelling, he
10 was unwavering, I believed everything that he said. And
11 that's fine. She's been an investigative officer for 11
12 years. I think when you're a police officer for that long
13 I think you develop certain skills of being able to know
14 when somebody is telling you the truth and when somebody
15 is giving you a BS job. So she knows who to believe and
16 what not to believe. She believes Mr. Wilson, and that's
17 fine. Mr. Wilson told her he was standing at the apex of
18 his door when Mr. Pennell approached him at that relevant
19 time. So now what are we gonna say? We don't believe
20 Mr. Wilson and what he told her or are we going to believe
21 Mr. Wilson when he said I can't remember if I was sitting
22 or standing. Either way, either way, you have to go with
23 standing. She said he said it. She said he doesn't
24 remember. No one said he was in the car. Okay?

25 Very important because in addition to the facts

1 and the law, the judge is also going to tell you some
2 other things in this charge called burden of proof and
3 reasonable doubt, okay? Burden of proof. The State of
4 South Carolina through Mr. Jepertinger, through his
5 office, has the burden of proving guilt as to each element
6 of this offense beyond a reasonable doubt. And when I say
7 elements, we've talked about it: Force, violence,
8 intimidation, operation of vehicle, in vehicle, out of
9 vehicle. The State has the burden of proving to you
10 beyond a reasonable doubt that all of these elements are
11 met. If it fails as to one element, just one, you must
12 return a verdict of not guilty. That is your job. That
13 is the oath that you took.

14 The judge is also going to instruct you on
15 reasonable doubt. I'm not going to get too much in it.
16 He knows more about reasonable doubt than I do. And one
17 of the things I do know about reasonable doubt is that
18 this case is loaded with it. It is jam packed full of
19 reasonable doubt. Reasonable doubt as to be read to you
20 by the Court, is the kind of doubt that would cause a
21 reasonable person to hesitate to act. If you have that
22 sort of doubt when you're in the jury room deliberating,
23 when you're applying these facts to the law and taking
24 into consideration everything that's said, if you have
25 that reasonable doubt, you must find Mr. Pennell not

1 guilty of the charge of carjacking. That is your
2 job; that is your oath. And it has to be unanimous. We
3 can't have the people saying I think he's guilty, the
4 other half saying I think he's not guilty. All of y'all
5 have to agree, one as to the other. That's called a
6 unanimous verdict. The verdict has to be unanimous.

7 Again, I don't want to beat a dead horse. I
8 probably already have; I don't mean to. Sometimes I don't
9 know when to shut up but, you know, in my heart and I
10 absolutely believe -- I believe without a shadow of a
11 doubt that Mr. Pennell is not guilty of carjacking. He's
12 guilty of being an ass. He got his butt kicked twice,
13 which he probably deserved. And I think any one of us on
14 the jury probably would kick his butt too, and I feel bad
15 for Mr. Wilson have to be in that situation. And this
16 case is a lot of things but it is not a carjacking. It
17 can't be. It cannot be a carjacking. Thank you for
18 listening to me. I appreciate it.

19 Thank you, Judge.

20 THE COURT: Thank you, Mr. Suggs.

21 Mr. Jepertinger.

22 MR. JEPERTINGER: If it please the Court.

23 THE COURT: Yes, sir.

24 MR. JEPERTINGER: Mr. Suggs. Mr. Suggs is
25 accusing me of being a windbag. I'm not going to try to

1 fulfill that promise if I don't have to. He's not a bad
2 fellow, and he'd probably give me his shirt off his back.
3 Hopefully not that one. That's okay. That's okay.

4 My brother-in-law lives on Pinnacle Mountain Road
5 up in Hendersonville, North Carolina. About this time of
6 year it's apple picking time. Right down the road you go
7 down Pinnacle Mount Road you go to a place called Sky View
8 Orchard. I love apples. I love mountain apples. Anyhow,
9 I love apples and I like galas and fujis and all those
10 types. I'm not too crazy about Arkansas blacks or romes
11 or any of those. You know, you go up there, and if
12 there's no fruit on the tree I have a hard time
13 distinguishing between what type of fruit that tree can
14 produce. Just like you don't know what type of apple tree
15 it is until you see the fruit, human beings are the same
16 way. Character is revealed during the stressful times.
17 I'm gonna tell you, Jonathan Wilson demonstrated, not
18 based on personal opinion 'cause I -- he's a victim in a
19 case, but he demonstrated tremendous personal character.
20 Remember the last thing that Jonathan Wilson told you was
21 this, that was a situation that I really wished hadn't
22 happened, what happened that night could have cost either
23 one of us our lives. When I think he offered or if my
24 wife or someone else's wife had run into Mr. Pennell I
25 couldn't believe it had happened like it did.

1 Now it is somewhat amazing to me how two persons
2 who have known each other for over 20 years can look at
3 the same facts and come to completely different
4 conclusions in terms of the evidence in this case. First
5 of all, in terms of the law, you've heard it. I'm gonna
6 read it one more time. I hope you indulge me. A person
7 is guilty of the felony of carjacking who takes -- we know
8 he didn't take the vehicle; that's not an issue in this
9 case. That point we're complete agreement in. Or he
10 attempted to take. Folks, he attempted to take the
11 vehicle. Now we wouldn't be here if/when Mr. Wilson was
12 pulling around, moved the furniture out, the guy came up.
13 Called him every filthy name in the book, hateful racial
14 epithet, vulgar sexual reference, if that would have been
15 it and Wilson would have pulled up in front of the thing
16 and the guy from this position on the side of the building
17 would have said, hey man, I'm gonna take your car, Wilson
18 probably would have done this, gone into the store
19 purchased his DVD, rented his DVD I should say, and gone
20 home. But that didn't happen. And you know why that
21 didn't happen? Charles Pennell didn't allow that to
22 happen. He made a B line straight from where that stereo
23 equipment was. By the way, why in the world, first of
24 all, he tells Wilson at the scene when he asked for a
25 ride, my girlfriend and I had an argument, can you take me

1 to Timmons ville for 20 bucks — which he didn't have on
2 him by the way. Then he tells the police my niece dropped
3 me off so she could go get high. Why would he have all
4 that stereo equipment lined up across the road? Only one
5 reason, and he wasn't driving into Hollywood Video that
6 way is going to have to stop and deal with Charles Pennell
7 who's lying in wait just like a spider in a web.

8 What else does Pennell tell officers there? And
9 I just want to bring this up because I think you have to
10 consider what he's saying. I published these photos to
11 you so you can look at it. He's saying he returned all
12 this stuff. This stuff is junk. How do I know it's junk?
13 Look at it, it's tore up. He doesn't have a receipt. It
14 looks like it's been used for 15, 20 years. And he's
15 returning it to Wal-Mart. Come on. What happened? I
16 tell you what happened, exactly what that man told you
17 happened. After being called those filthy names the man
18 walks up to the vehicle. And I kept getting closer. I
19 kept getting closer because of the wood here on the stand.
20 He says, closer, I'm gonna take your car.
21 Cross-examination. He's got his hand on the door. Now
22 Mr. Suggs, man, he wants him out of that vehicle; doesn't
23 he? Well, he wasn't in the vehicle. He got out. He told
24 the officer he was in the apex of the door. He wasn't in
25 the vehicle when the things were said when he was sitting

1 there. Well, let me ask you this, if he wasn't in the
2 vehicle, if he's outside the vehicle after he kicks him,
3 how does the gun get in his hand before he shoots it off?
4 If you're gonna believe that, he would have had by
5 telekinesis to make that gun come out of the vehicle into
6 his hand. How did he get the gun if he's not in the
7 vehicle? He had to be in the vehicle. His arm had to be
8 in the vehicle. His torso had to be in the vehicle
9 because Mr. Suggs asked him where did you put the clip in?
10 While he was in the car was he still being intimidated by
11 this guy? You remember what he said? I pushed him away,
12 went to get my gun. And at first look, he said he
13 stopped. But then what did he do? He kept coming. Oh,
14 you know, if that were a woman I'm afraid, if that were a
15 woman she would feel it but guys wouldn't feel that way.
16 I'm gonna tell you one person that'd probably feel that
17 way, Scott Suggs would feel that way. Any reasonable
18 person would feel that way after he said I'm gonna take
19 your car. And let me tell you, he shoots it up in the air
20 no, at that point he got out of the vehicle. We know he
21 got out of the vehicle because he kicked him. He put the
22 gun back in the vehicle. He didn't shoot in the car. He
23 got out of the vehicle. Shoot me, end it all.

24 Now, he was in that vehicle. Mr. Wilson was in
25 his vehicle. That was the only way he could get his gun.

1 Was he under the threat? Was he intimidated?

2 I don't want to strain this too much in terms of
3 this interpretation, but I also disagree with him somewhat
4 in terms of the term operation of a vehicle. A person is
5 considered to operate a vehicle when in the vehicle. He
6 intentionally does an act or makes use of any mechanical.
7 I say key is mechanical. And says or electrical agency
8 would, say a mechanical agency, a key, which alone or in
9 sequence will set in motion. How do you start a car? You
10 put the key in the ignition. Well, where was the key
11 during this whole scenario? Mr. Suggs told you; didn't
12 he? It was in the ignition. Technically under the law
13 that would have been a sequence to set in motion and
14 Mr. Wilson decided to turn the car on; the next step I
15 guess. That was the first step of the sequence. That car
16 -- and I would argue that he's still operating that
17 vehicle. He would have stopped operating when he took --
18 when the key is out of the ignition. But guess who didn't
19 allow him to do that, Charles Berlin Pennell.

20 Now I disagree with my good friend a little bit
21 in terms of this second incident. No, technically it
22 would not support the elements of carjacking which we know
23 is an attempt in this case, correct? But I would say it
24 is significant in this aspect. Let's talk about the
25 apples. We're talking about character being revealed.

1 When he got home, when he got over Aiken and talked to
2 Avelina, the mother of all those kids he has, and he said,
3 man, I -- very short conversation, you got to get back
4 there, you got to straighten things out. The reason
5 that's significant, he's -- the guys out there, I want to
6 make sure these store people are okay, I just want to let
7 them know, you know, that what happened. That reveals his
8 character. He shows back up. There's an old saying, the
9 guilty flee where none pursue. He didn't have a -- he
10 wasn't fleeing. Yes, technically he left the area but he
11 came back. Then he had that run-in with him again. The
12 store doors were locked. I can understand that. He went
13 back home, what did he do? Hollywood Video? Let me tell
14 you what happened while the cops are here. Cooperative.
15 cooperative through the whole matter.

16 What did Mr. Pennell do with his -- remember, he
17 had all this wonderful stereo equipment that he was gonna
18 return to Wal-Mart. He put it in the bushes. Wonder why?
19 Maybe he knew the police were coming. He started walking.
20 Did he return to Hollywood Video? How did he get back to
21 Hollywood Video? They had to track him down about a mile
22 away walking through the parking lot of Naturally
23 Outdoors. When he got back, when he got back was -- what
24 was his demeanor like? Was he cool, calm, collected? Did
25 he present himself as a victim 'cause remember what he

1 told when he told Provenzano initially. Parking lot, got
2 pulled up, and shot a gun in the air. And then proceeded,
3 I guess, to beat me. That just doesn't pass the straight
4 face test with this guy. The evidence doesn't show that.
5 You know, I -- talking to Investigator Robinson I said,
6 who knows, you know, and who knows what's going through
7 Pennell's mind. Maybe he was walking back to
8 Timmons ville. He was on 76. But he sure didn't give a
9 rip about this stereo equipment. He didn't even take one
10 of these little components.

11 Folks, you know, I -- you know the question is
12 ultimately whether this is a carjacking under the statute.
13 Yeah, there are probably a lot more grievous type of
14 carjackings if you can have them. You know, I'd hate to
15 think somebody sitting in the back seat of my car, you
16 know, with a knife or a machete or gun and said, you know,
17 we're -- you know, come with me, you know, or you know,
18 I'm taking your car. I'd hate to have that situation
19 happen. But you got to put yourself, if you can, in the
20 shoes of a reasonable person based on the circumstances
21 and facts that were occurring at that point in time. I'm
22 gonna take your car. Having said what he said, he
23 referred to it as boldness. I think one of the officers
24 said he's wired. Right in the door. That is conduct
25 beyond mere preparation. That's a specific intent to do

1 something, to take this man's car by intimidation. God
2 bless Mr. Wilson. He was not going to be a victim, a
3 casualty. Not based on how I feel, not based on how
4 Mr. Wilson feels, not based on how Mr. Suggs feels about
5 this issue. The fact of the matter is, there has been
6 evidence elicited from that stand that said he attempted
7 to carjack Mr. Jonathan Wilson on May 25th, 2009.

8 You have taken an oath to well and truly try this
9 case, to have the State, which is me in this case, prove
10 this man's guilt beyond a reasonable doubt, that doubt
11 that would cause a reasonable person to hesitate to act.
12 There is no hesitation in my mind. There's no hesitation
13 because the evidence says there's no hesitation. He was
14 in the vehicle. Mr. Suggs tried to get him out of the
15 vehicle but his arm's in the vehicle. His body is in the
16 vehicle getting that gun. There is no hesitation. The
17 man is guilty of carjacking. He attempted to take his
18 vehicle. I appreciate your time. I'm not trying to yell
19 at anyone, but folks, the evidence says this man is
20 guilty. And I appreciate your confidence in the testimony
21 of Jonathan Wilson and the officers in this case. I
22 appreciate your time and I trust that you will do the
23 right thing. Thank you.

24 THE COURT: Thank you, Mr. Jepertinger.

25 Ladies and gentlemen, during the course of the

1 trial it's been appropriate for me to be up at the Bench
2 out of the way while the lawyers do their work. Their job
3 is to present to you the evidence in the case, and it is
4 your job as the triers of the facts to make a decision on
5 what the true facts are in this case. So during their
6 presentation to you of the evidence it's been appropriate
7 for me to be out of the way, but we have now reached the
8 portion of this trial where you and I are in this
9 together, you as the judges of the facts and me as the
10 judge of the law. And so, it's only appropriate I think
11 that I come down and be with you to give you the law that
12 applies to the facts to this case.

13 Now ladies and gentlemen, I am going to read my
14 charge to you verbatim so that I don't leave anything out
15 or misquote anything. Also, this notebook and the charge
16 that I'm going to give you on the law will also go back
17 with you into the jury room. You'll have it in the back
18 with you. But I'm going to read it to you now and ask
19 that you give me your undivided attention. Mr. Foreman,
20 and members of the jury, you have heard the evidence and
21 the arguments of both parties, and I will now explain to
22 you the law which applies to this action. The indictment
23 charges the defendant with carjacking. I remind you that
24 the fact that the defendant was arrested, charged, and
25 indicted in this case is not evidence in this case and

1 cannot be considered by you as evidence of guilt in this
2 case. Nor does it create any presumption or inference of
3 guilt. This document, the indictment, is simply the
4 formal written instrument this contains the charge made
5 against the defendant. It is the formal document by which
6 this case is brought into court.

7 The defendant has pled not guilty to this
8 indictment and that plea puts the burden on the State to
9 prove the defendant guilty. A person charged with
10 committing a criminal offense in South Carolina is never
11 required to prove himself innocent. I charge you that it
12 is an important rule of law that the defendant in a
13 criminal trial, no matter what the seriousness of the
14 charge may be, will always be presumed to be innocent of
15 the crime for which the indictment is issued unless guilt
16 has been proven by evidence satisfying you of that guilt
17 beyond a reasonable doubt. This presumption of innocence
18 does not end when you begin your deliberations, but it
19 accompanies the defendant throughout the trial until you
20 reach a verdict of guilt based on evidence satisfying you
21 of guilt beyond a reasonable doubt. The presumption of
22 innocence is like a robe of righteousness placed about the
23 shoulders of the defendant which remains with the
24 defendant until it has been stripped from defendant by
25 evidence satisfying you of the defendant's guilt beyond a

1 reasonable doubt. The presumption of innocence is not a
2 mere legal theory. It is not just a legal phrase. It is
3 a substantial right to which every defendant is entitled
4 unless you, the jury, are satisfied from the evidence of
5 the defendant's guilt beyond a reasonable doubt.

6 So what is a reasonable doubt in the law? A
7 reasonable doubt is the kind of doubt that would cause a
8 reasonable person to hesitate to act. The State has the
9 burden of proving the defendant guilty beyond a reasonable
10 doubt. Some of you may have served as jurors in civil
11 cases where you were told that it is only necessary to
12 prove that a fact is more likely true than not true such
13 as by the greater weight or the preponderance of the
14 evidence. In criminal cases the State's proof must be
15 more powerful than that. It must be beyond a reasonable
16 doubt. Proof beyond a reasonable doubt is proof that
17 leaves you firmly convinced of the defendant's guilt.
18 There are very few things in this world that we know with
19 absolute certainty, and in criminal cases the law does not
20 require proof that overcomes every possible doubt. If,
21 based on your consideration of the evidence you are firmly
22 convinced that the defendant is guilty of the crime
23 charged, you must find the defendant guilty. If on the
24 other hand, you think there's a real possibility that the
25 defendant is not guilty, then you must give the defendant

1 the benefit of that doubt and find him not guilty.

2 I remind you that during this trial you and I
3 have certain duties to perform. As the trial judge it is
4 my responsibility to preside over the trial of this case,
5 and I also have the duty to rule on the admissibility of
6 the evidence offered during this trial. You are to
7 consider only the competent evidence that is before you.
8 If there was any testimony ordered stricken from the
9 record in this case during this trial you must disregard
10 that testimony. You are only to consider the testimony
11 which has been presented from the witness stand and any
12 exhibits which may have been made a part of the record in
13 this case, as well as any stipulations of counsel. I have
14 the additional duty to charge you the law that is
15 applicable to this case. As the presiding judge I am the
16 sole judge of the law of this case, and it is your duty as
17 jurors to accept and apply the law as I now state it to
18 you. If you already have an idea as to what the law is or
19 what you think the law should be and it does not agree
20 with what I now tell you the law is, you must abandon your
21 idea because you are sworn to accept the law and to apply
22 the law exactly as I state it to you.

23 In every case tried in this court before a jury,
24 the jury becomes the sole and the exclusive judge of the
25 facts in this case. A trial judge cannot intimate, state,

1 comment on, or make any statement to a trial jury about
2 the facts in a case. Since you, the jury, are the sole
3 judge of the facts in this case you are not to infer from
4 what I have said during the progress of this trial in
5 ruling on the admissibility of evidence or otherwise, or
6 anything that I say now during the course of this
7 instruction to you, that I have any opinion about this
8 case. The law does not allow me to have an opinion about
9 the facts in this case. It is a matter solely for you,
10 the jury, to determine.

11 As jurors, it is your duty to determine the
12 effect, value, weight, and truth of the evidence presented
13 during this trial. So necessarily, you must determine the
14 credibility of the witnesses who testified in this case.
15 Credibility, ladies and gentlemen, simply means
16 believability. It becomes your duty as jurors to analyze
17 and to evaluate the evidence and determine which evidence
18 convinces you of its truth. In determining the
19 believability of the witnesses who have testified in this
20 case, you may believe one witness over several or several
21 over one. You may believe a part of a witness' testimony
22 and reject the remaining part of that testimony. You may
23 believe the testimony of a witness in its entirety or
24 reject it in its entirety. You may consider whether a
25 witness has exhibited to you any interest or bias or any

1 other motive in this case. You may also consider the
2 appearance and the manner of a witness while they were on
3 the witness stand.

4 Now I instruct you and I emphasize that the fact
5 that the defendant did not testify is not a factor for
6 you -- not a factor to be considered by you in any way in
7 your deliberation and in your consideration on the
8 question of guilt or innocence of the defendant. It must
9 not be considered by you in any manner whatsoever. A
10 defendant has the constitutional right to remain silent,
11 and the assertion of this right must not be considered by
12 you in your deliberations. I repeat, under your oath you
13 are not to draw any conclusions whatsoever from the fact
14 that the defendant in this case did not testify. The fact
15 that this defendant did not testify should not even be
16 discussed in the jury room. The burden of proof, as I've
17 stated to you, is on the State. The defendant is not
18 required to prove his innocence. The burden of proof
19 remains on the State to prove guilt beyond a reasonable
20 doubt.

21 Now the defendant is charged in this case with
22 carjacking. In order to prove carjacking the State must
23 prove beyond a reasonable doubt that the defendant took,
24 or attempted to take, a motor vehicle from another person
25 by force and violence or by intimidation while the person

1 was operating the vehicle or while the person was in the
2 vehicle. A person is considered to operate a vehicle when
3 in the vehicle he intentionally does any act or makes use
4 of any mechanical or electrical agency which alone or in
5 sequence will set in motion the motive power of that
6 vehicle. Motion is not an essential element of operating
7 a motor vehicle.

8 Now an attempt is an effort to accomplish a crime
9 which does not succeed. An attempt includes a specific
10 intent to do a particular criminal act along with an act
11 falling short of the intended act. The State must show
12 more than mere preparation and intent. There must be some
13 overt act committed in the effort to commit the crime.
14 Intent means intending the result which actually occurs,
15 not accidentally or involuntary. Intent may be shown by
16 acts and conduct of the defendant and other circumstances
17 from which you may naturally and reasonably infer intent.

18 Now Mr. Foreman, and ladies and gentlemen of the
19 jury, as you retire to begin your deliberations I want to
20 wish -- I want to express to you the hope that each of you
21 will be mindful of the importance of your responsibility.
22 You are not called upon to serve as jurors very often, and
23 the proper performance of the duty requires each of you to
24 reach the height of freeing your mind of all improper
25 influences. You and I are acting for the community, and

1 that is why we must see to it that this trial is fair and
2 that the verdict is just. You observe that the presiding
3 officer of this court is always addressed as Your Honor.
4 Well, the reason for that is not because of the person
5 wearing this robe, but that this Court is entrusted with
6 the honor of this community, the honor of this state, and
7 the honor of this country in seeking that every case tried
8 here receives fair and impartial justice. Do not get the
9 idea that I am trying to intimate to you how I might think
10 you should decide this case 'cause I've already told you
11 you under the laws of the State of South Carolina you, the
12 jury, are the sole judge of all questions of fact. It
13 would be highly improper for me to influence you in the
14 performance of that duty. But as the presiding officer of
15 this court, I am vitally concerned that whatever your
16 verdict that you find will be a result of your going into
17 the jury room, confining your consideration to the
18 evidence that was presented during the course of this
19 trial, and the law that you have heard in this courtroom
20 weighing it fairly, and impartially as I have every
21 confidence you'll do.

22 Everyone is entitled to justice in this case,
23 both the State and the Defendant. All are entitled to
24 justice, nothing more, nothing less. Your verdict in this
25 case cannot be based on sympathy, compassion, prejudice,

1 or emotion, or some other consideration that's not found
2 in the evidence. The Court is of the confirmed opinion
3 that whatever verdict you reach will represent truth and
4 justice for all parties involved. Remember, ladies and
5 gentlemen, that your verdict must be unanimous. All of
6 you must agree on the same verdict.

7 Now Mr. McKnight, in the front of this notebook
8 you'll find a verdict form in this case. It's a very
9 simple form. It's just simply, we the jury, find the
10 defendant Charles Berlin Pennell either not guilty or
11 guilty of the crime of carjacking, so it's not a complex
12 verdict form. But when the jury has reached a unanimous
13 verdict if you will mark the appropriate selection for the
14 jury's -- reflects the jury's verdict and then sign it as
15 the foreman. Once you have reached a verdict if you'll
16 just then knock on the door and let the bailiff know
17 you've reached a verdict, and then we'll bring you out and
18 we'll receive your verdict at that time, okay?

19 Now ladies and gentlemen, I'm gonna ask you to do
20 me a favor. I'm gonna send you back into your jury room.
21 If you need anything while you're back there let Sam know.
22 He'll get you whatever you need. I'm gonna ask you,
23 Mr. McKnight, to not start deliberations yet. I'm gonna
24 send you back there. I'm gonna talk with the lawyers to
25 make sure I haven't left anything out. If I've omitted

1 something that I need to share with you I'll bring you
2 back out and I'll fill you in on that. If everything is
3 fine, if the charge is good, then we'll gather these
4 exhibits. When you receive the exhibits and the notebook
5 that will be your cue to begin your deliberations, okay?
6 So if you would please retire to your jury room just a
7 moment while I confer with the lawyers.

8 (WHEREUPON, the jury was removed from the
9 courtroom at 11:25 a.m., and the following proceedings
10 commenced in open court.)

11 THE COURT: All right. Are there any exceptions
12 or objections by the State?

13 MR. JEPERTINGER: No, sir.

14 THE COURT: Anything from Defense?

15 MR. SUGGS: We have none, Your Honor.

16 THE COURT: Would y'all mind going through
17 making sure that everything is up here with Frances
18 that...

19 THE COURT: Sammy, if you will take that back.
20 Tell them they can begin their deliberations and ask the
21 alternate to step out.

22 (Jury began its deliberations at 11:24 a.m.)

23 THE COURT: Ask Mr. Turner, the alternate, to
24 step out.

25 (Alternate returned to the courtroom.)

1 **THE COURT:** Mr. Turner, I want to thank you for
2 your service. It appears that everybody is healthy and
3 can serve.

4 (Alternate was excused.)

5 **THE COURT:** We'll be at ease.

6 (Court was in recess while jury deliberated.)

7 **THE COURT:** It's my understanding, ladies and
8 gentlemen, that the jury has reached a verdict so we'll
9 have them come out. I tell everybody this every trial,
10 and that is, that I don't know what the jury's verdict is.
11 I sit here like you do. But there's one thing I do know,,
12 and that is, that they deserve to have their verdict
13 received in a professional manner so. And it's never the
14 case that everybody is happy about the verdict. Somebody
15 is gonna be happy; somebody is not gonna be happy. So I
16 would ask you to maintain a level of professionalism
17 whether you -- I'm not asking anybody to agree with the
18 jury's verdict; I'm just asking you to accept it in a
19 professional manner.

20 Is the State ready to receive the verdict?

21 **MR. JEPERTINGER:** Absolutely, Your Honor.

22 **THE COURT:** Defense ready?

23 **MR. SUGGS:** Yes, sir.

24 **THE COURT:** Please ask the jury to join us.

25 (WHEREUPON, the jury was returned to the courtroom at

1 approximately 11:52 a.m., and the following proceedings
2 commenced in open court.)

3 THE COURT: All right. Mr. McKnight, has the
4 jury reached a unanimous verdict, sir?

5 THE FOREMAN: Yes, Your Honor, we have.

6 THE COURT: If you would please pass that to
7 Ms. O'Hara. Thank you very much.

8 (Form tendered to the Court.)

9 THE COURT: All right. Ms. O'Hara, if you would
10 please publish the verdict.

11 THE DEPUTY CLERK OF COURT: State of South
12 Carolina versus Charles Berlin Pennell. Carjacking, we
13 the jury, find defendant Charles Berlin Pennell guilty of
14 carjacking. Signed, foreperson, Timothy McKnight, dated
15 October 13th, 2010. Members of the jury, if this is your
16 verdict please raise your right hand.

17 (All jurors complied by raising their hand.)

18 THE DEPUTY CLERK OF COURT: That's everyone,
19 Judge.

20 THE COURT: All right. Ladies and gentlemen, I
21 want to thank you for your service. We -- you have earned
22 an exemption for the next several years. If you receive a
23 notice in circuit court here for jury duty in the next
24 couple of years you have earned an exemption if you wish
25 to exercise that and request not to serve. I want to

1 stress, you know, that that is just an exemption. It
2 doesn't mean you're not allowed to serve. So I hope you
3 would consider serving again if you get that notice in the
4 next recent months. Jury service is, as I said on Monday
5 it's not convenient for you but it is a service that you
6 give to your community and it is -- it's vitally
7 important. Some people have said that serving on a jury
8 or the service that you give when you serve on a jury is
9 second only to service in the military as far as the
10 service to your country. And I think there's probably a
11 lot of truth to that. We can't operate without your help
12 and so I want to thank you for your service this week.

13 I don't think there's anything else that I need
14 from you this week; and so having said that, I want to
15 thank you again and you're free to go. You do not have to
16 call that number back. You don't have to report back.
17 You're done for the week. So if everyone will remain
18 seated, ladies and gentlemen -- oh, let me tell you this.
19 In just a moment I'm gonna proceed to the sentencing
20 phase. I'm gonna go ahead and excuse you. If you want to
21 be present for that, you certainly have that right.
22 You're the ones that worked this case. You are free to
23 go. You are also free if you want to come back in and
24 have a seat in the audience you can do that. In about
25 probably the next five minutes we're gonna proceed to the

1 sentencing phase so if you have an interest in that,
2 you're certainly welcome to come back in and observe that.
3 But if you're ready to leave, then you're certainly
4 allowed to do that as well, okay?

5 (WHEREUPON, the jury was removed from the
6 courtroom at 11:57 a.m., and the following proceedings
7 commenced in open court.)

8 THE COURT: All right, at this time I'll take up
9 any motions at the conclusion of the case.

10 MR. SUGGS: Thank you, Judge. May it please the
11 Court.

12 THE COURT: Yes, sir.

13 MR. SUGGS: Your Honor, if I could have ten days
14 for the posttrial motions I would be grateful. I have to
15 really actually think about it, Judge, because I don't
16 recall at any point during the trial where I even voiced
17 an objection to anything. So I don't know that there
18 would actually be any sort of motions that I could -- that
19 would be germane enough to present. I have to think about
20 it, Judge. I have to think about it.

21 THE COURT: Sure.

22 MR. SUGGS: It was a very clean trial. I don't
23 think there was anything that came into evidence which
24 would have been inadmissible. Certainly if it had I would
25 have objected to it at that time. So I'm just going to

1 just ask the Court's indulgence on that.

2 THE COURT: Sure. And I'll be more than happy to
3 give you that, Mr. Suggs.

4 MR. SUGGS: Thank you, Judge.

5 THE COURT: All right. If you'd ask Mr. Pennell
6 to come around, sir.

7 MR. JEPERTINGER: Mr. Wilson, you can come up
8 here too if want.

9 THE COURT: And Solicitor, I'll certainly hear
10 from the State regarding any aggravation or sentencing
11 issues and I'd ask that you place the defendant's prior
12 record on the record and then if Mr. Wilson has anything
13 I'll be happy to hear from him as well.

14 MR. JEPERTINGER: Absolutely, Your Honor.

15 THE COURT: And then of course, Mr. Suggs, I'll
16 hear from anything that Defense has in just a moment.

17 MR. SUGGS: Thank you, Judge.

18 MR. JEPERTINGER: Your Honor, initially when we
19 had colloquy outside the presence of the jury should
20 Mr. Pennell had taken the stand I was limited, I felt, to
21 go back only ten years in terms of his criminal history.
22 But I want to proceed with his complete record for the
23 Court, Your Honor. It looks like back in 1983 he had a
24 robbery class B. I believe that was in Indiana, Your
25 Honor, the date of -- he was convicted on 7/14/1983,

1 received a six year sentence, Your Honor. Your Honor,
2 next in 1987 he had a burglary second degree and grand
3 larceny, three counts. He received -- convicted ten years
4 confinement, was concurrent.

5 THE COURT: He has a burglary?

6 MR. JEPERTINGER: Yeah, burglary and three counts
7 of grand larceny. That was in '87. And then back in 1995
8 it was a manufacturing, possession of controlled substance
9 schedule I through III with the intent, first offense.
10 And normally those things are normally marijuana when it's
11 listed schedules I through III, Your Honor. And he was
12 convicted, sentenced to jail five years and five thousand
13 dollar fine suspended to five hundred dollar fine, court
14 costs, and probation two years and public service 80
15 hours. And the court date on that was March 15th, 1995.
16 On March 22nd, 1995, he had a resisting arrest. He was
17 convicted one year suspended during probation. He had a
18 trespassing in 1995, convicted, 300-dollars or 30 days.
19 He had a shoplifting, value one thousand dollars or less
20 for which he received a fine or 30 days. That was
21 March 11th, 1996. And a simple assault, same situation,
22 fine or 30 days. It looks like he was also convicted for
23 harassing communication for which he received six months,
24 Your Honor. Then in 2000 he had a driving under influence
25 first offense on February 28th, 2000. He also had in May

1 of 2000 a simple possession of marijuana second or
2 subsequent offense for which he was convicted, 373-dollars
3 or 30 days. Then he had in February 18th, 2000, he had
4 possession 28-grams or less of marijuana, took it as a
5 first offense. Convicted, 400-dollars or 30 days. He had
6 a public drunk in 2001, five hundred dollars or 30 days,
7 suspended upon payment. And a resisting arrest, Your
8 Honor in 2001 for which he received one thousand dollars
9 and 30 days suspended to five hundred dollars.

10 He had a assault and battery of high and
11 aggravated nature. He was sentenced to one year in jail
12 in September of 2005. He had a driving under the
13 influence first offense looks like back in 2003, a driving
14 under suspension, and a failure to stop for blue light.
15 That was in 2005, Your Honor. 90 days and court costs on
16 that. He had a strong armed robbery, looks like at the
17 same time as that blue light conviction, Your Honor. The
18 strong armed robbery, he was convicted, sentenced to jail
19 for ten years, suspended jail for 14 months and court
20 costs and probation for five years. In 2004 he had a --
21 backtrack a little bit. He had a shoplifting, convicted
22 one hundred dollars or two days. He had a receiving
23 stolen goods back in March 3rd, 2004. He had a breach of
24 peace in 2007 for which he had a fine of 400-dollars. He
25 had a simple possession of marijuana in 2008, 565-dollars

1 or 30 days. He had a malicious injury personal property,
2 13 days in jail in 2008. And a public disorderly conduct
3 also November of 2008 for which he received a 40-dollar
4 fine, jail ten days.

5 And Your Honor, that brings us to the present. I
6 did not get his disposition as the Court is well aware and
7 would not allow me to present to the jury that when he was
8 caught in this offense he had marijuana on him. It was
9 one gram of marijuana, Your Honor. And I don't -- I know
10 he's arrested for it. I don't know the disposition, but
11 Your Honor, the State's position is he has been a
12 recidivist, Your Honor, for 27 years, and it's time --
13 it's time to stop. And the only way that this man can
14 stop is for a lengthy prison sentence, Your Honor. I will
15 allow Mr. Wilson to say whatever he has to say, and that's
16 all I have.

17 THE COURT: All right, sir. Mr. Wilson, if
18 there's anything you wish to address the Court I'll be
19 happy to hear from you. You're not required to, sir, but
20 I certainly will give you that opportunity and would be
21 glad to hear from you if you have anything you want to
22 address the Court with.

23 THE VICTIM: No, sir.

24 THE COURT: All right, sir. I do -- I'm sorry
25 you had this experience. I do want to thank you for your

1 cooperation with law enforcement and assisting them and
2 helping them in the prosecution of this case, sir.

3 THE VICTIM: Thank you.

4 THE COURT: I'm just doing some checking, guys,
5 just want to verify something. Mr. Suggs and Mr.
6 Jepertinger, I'm just looking at the sentencing sheet now.
7 Again, I'm looking at my little cheat sheet here which I
8 don't know that I have as current, but I notice on the
9 sentencing here lists that the carjacking conviction is
10 violent and most serious. I have that only being violent
11 and most serious if the conviction involves great bodily
12 harm.

13 MR. JEPERTINGER: If we can look at 17-25-45.

14 THE COURT: Okay. I don't know if that
15 supplement is current. Mr. Suggs, you know the position
16 on that? All it says here for most serious.

17 MR. SUGGS: Yes, sir, Judge, I think it's
18 probably -- unless that subsection applies I don't think
19 it would be most serious. It may still be serious without
20 that subsection, but there was no bodily injury resulting.
21 It probably would be serious and not most serious, but it
22 still may be violent regardless of the subsection but I
23 think we should check.

24 THE COURT: All right. This subsection does list
25 it as a most serious offense.

1 MR. SUGGS: I know under the Department of
2 Correction rules that 99 percent of the time the
3 sentencing sheet is going to control what the Department
4 of Corrections, how they classify the offense, regardless
5 of whether it's right or wrong. I think we need to be
6 absolutely certain of before we check the box.

7 THE COURT: I mean, that statute clearly lists it
8 as a most serious offense.

9 MR. SUGGS: If there is no bodily injury
10 involved?

11 MR. JEPERTINGER: It just says ---

12 THE COURT: All it does is it lists section
13 16-3-1075 carjack and then it lists carjacking.

14 MR. SUGGS: No subsections referenced?

15 THE COURT: No subsections.

16 MR. SUGGS: Okay.

17 THE COURT: I'll be happy to hear from you, Mr.
18 Suggs.

19 MR. SUGGS: Thank you, Judge. Under that
20 scenario, you know, I believe Mr. Pennell would need to be
21 advised that in the future that any other action which
22 would be classified as most serious conviction in that
23 regard would mean life---

24 THE COURT: Could result.

25 MR. SUGGS: ---in the penitentiary without

1 possibility of parole.

2 THE COURT: Correct.

3 MR. SUGGS: As it stands now, Judge, that's not a
4 factor, but it could be a factor sort of indirectly
5 depending on the Court's sentence. The gentleman is --
6 he's 47 years old, Judge. He's had quite a rough life. I
7 think he's probably -- he probably looks older in years
8 than he is. Judge, his health is not that good. We know
9 what the penalty is for carjacking. It carries up to 20
10 years in the penitentiary. I think the statute reads
11 maybe 0 to 20, but I know that there's -- there can be --
12 any time can be -- he can be sentenced to any time up to
13 20 years.

14 THE COURT: I think it says not more than 20.

15 MR. SUGGS: Yes, sir, yes, sir. And I think -- I
16 believe that the Court could suspend the sentence if the
17 Court wanted to. Judge, this is a class C felony because
18 it does carry 20 years as a maximum penalty. Under that
19 scenario it is, in fact, nonparoleable. Any class A,
20 class B, or class C felonies are considered nonparoleable
21 offenses which means whatever time the Court imposes as
22 far as sentence in this case Mr. Pennell will have to do,
23 we may as well say a hundred percent. If the Court -- the
24 legislature says, law says 85 percent ten year sentence
25 he'd get eight-and-a-half years. 20 year sentence he'd

1 get 17 years. He'll have to serve all of that before
2 being released and there is no parole on those offenses if
3 he's -- if and when he's released he does have to undergo
4 a two year community supervision under the law which they
5 don't call it parole, but that's basically what it is. So
6 I want the Court to be aware that any sentence imposed
7 like to temper that with the knowledge -- and I know the
8 Court does know this -- that he would have to pretty much
9 serve the sentence day for day.

10 Judge, it is a violent offense, which has no --
11 too much of a bearing here. If he were sentenced today
12 for a violent offense which were parolable and he had a
13 previous violent offense in his background, then that
14 would make it nonparoleable simply by virtue of the fact
15 there were two violent offenses. But I don't think we're
16 dealing with that today either because we're talking about
17 a violent offense but offense which is nonparoleable on
18 its face. Judge, I'm convinced that as I argued to the
19 jury that this case deserves to be treated as something.
20 Some punishment has to be meted out by the Court for his
21 conduct and for putting Mr. Wilson in a position where he
22 felt he had to use lethal force in order to prevent
23 possible harm to himself. That's a judgment call that he
24 had to make, and it's hard to substitute ourselves and put
25 ourselves in his position. What would we have done? We

1 would have done the same thing. We would have reacted the
2 same way. But I truly don't believe this rises to the
3 level of carjacking even though the jury has disagreed
4 with us.

5 I would ask the Court though to consider not
6 imposing the maximum sentence in this case and taking into
7 consideration what I've said and the fact that the offense
8 is nonparoleable, whatever the time is meted out.

9 THE COURT: All right, sir. Mr. Pennell,
10 anything you wish to tell the Court, sir?

11 THE DEFENDANT: Yes, sir, I do. Your Honor, even
12 though the jury found me guilty I had no intention in the
13 world of stealing Mr. Washington's vehicle.

14 MR. SUGGS: Wilson.

15 THE DEFENDANT: Mr. Wilson's vehicle. It never
16 even crossed my mind to take it. You know, I had been
17 drinking. I went to set out that afternoon. I got off
18 work at my dad's furniture store. I went by Lowe's and
19 got plumbing parts for the house and went to my house to
20 get appliances that I had bought to take them back and
21 exchange them. And then once I get to one of the stores,
22 Sam's, it was closed. I get to Wal-Mart and don't want to
23 take the radio back until a clerk from electronics is
24 there. And I'm drinking the whole time, and I'm not
25 getting anything accomplished and I'd done taken off work.

1 I was just aggravated, but you know, I didn't plan on
2 stealing anything. And I had me a wonderful job, you
3 know. I had four thousand dollars at First Reliance Bank
4 right across the street saved up because that's all I was
5 doing at the time was working. And my niece brought up
6 the thing about wanting to go do cocaine and I kind of
7 like went to griping. So I'm like, well you can just let
8 me out the car now. And that's how I got stuck in that
9 parking lot. But I didn't have no intention of stealing
10 nothing from anybody.

11 THE COURT: All right.

12 THE DEFENDANT: I've got, Judge Russo, I've got
13 two small children, and you know, I support them. I take
14 care of them. I mean, they depend on me pretty good, you
15 know. I make them a lot more comfortable. And I don't
16 know, I just, you know, I know I been in trouble before in
17 the past but it's been over like long periods of time. It
18 ain't just like, you know, I'm older now and I'm starting
19 to, you know, get thinking about, you know, what I'm doing
20 and mistakes I'm making and just kind of like wising up.
21 Plus even alcohol alone, that's the only time I've ever
22 been in trouble, I been drinking. That's the only time
23 I've ever been in any trouble.

24 THE COURT: Thank you, Sir.

25 THE DEFENDANT: You're welcome.

1 THE COURT: Well, let me just say this, and I
2 don't know what your intention was. I hear what you tell
3 me. I do believe this. I believe the jury got it right.
4 When you look at the statute I think your conduct that
5 evening -- no one can enter into the mind of somebody. We
6 can only judge that based on actions and things said. But
7 the statute provides that if you attempt to take someone's
8 vehicle by threats or intimidation, that that under South
9 Carolina law is carjacking, and the evidence that the jury
10 had completely supports that. So I think the jury got it
11 right. I don't know -- obviously I don't know you,
12 Mr. Pennell; I don't know Mr. Wilson. So you know, I
13 can't make judgments on individuals. I do know Mr. Wilson
14 seems to be a level headed, somewhat passive individual,
15 and something happened that night that caused him to have
16 enough fear and concern that he actually pulled out a
17 weapon to defend himself. I'm not gonna say he was
18 justified in doing that, but he may have been 'cause I
19 wasn't there; I don't know. But it seems fairly
20 irrational for someone to go to the extent of pulling out
21 a gun and inserting a clip, chambering around and firing
22 that weapon if there wasn't some, at least, perceived
23 serious threat that he was getting his car stolen and
24 taken. And I don't get the feeling, I don't get the
25 impression that Mr. Wilson is irrational. So again, I

1 can't sit here and say what the truth is. I can just sit
2 here, as the jury does, and listen to the evidence, listen
3 to what's presented, and then give it my best judgment
4 based on what's been presented before me. But there's no
5 doubt in my mind at all that whatever really occurred the
6 evidence that was presented rose to the level of
7 carjacking. And I understand Mr. Suggs' position and his
8 argument. We tend to think of carjacking as someone
9 sticking a gun in our face and taking our car, but that's
10 not carjacking. I mean, it is, but that's not all it is.
11 It's just like the statute and the law with regards to
12 operating a motor vehicle. A layperson, the general
13 public considers operating a motor vehicle to actually be
14 driving the car. But we found today that our law in South
15 Carolina operating to be something less than that, to
16 actually be, it can be considered operating your motor
17 vehicle if you get in your car and stick your key in the
18 ignition. Under the law that's considered operating a
19 motor vehicle. So clearly, this was a carjacking that
20 occurred on this evening.

21 I share Mr. Jepertinger's concern that you have
22 been in and out of prison for a large portion of your
23 adult life, and I don't know when you're gonna stop making
24 these foolish decisions. But your conduct is not
25 acceptable. You place people in fear, and I'm taking into

1 consideration everything that I know about this case which
2 is what I've heard this week. The legislature gives us
3 some guidance when it comes to sentences. For example, in
4 this case the range is 30 to 20, and I think there's a
5 reason they give us a range. For example, if this was one
6 of those cases where you stuck a gun in his face and took
7 his car, I would think this case would then fall more on
8 that 20 year maximum range. However, the other side of
9 that range is a situation where you got somebody with a
10 little to no prior record who does pretty much what you
11 did and just no weapon, no use of a weapon, but
12 intimidation in taking and then not taking it.

13 You have a significant prior record so and that's
14 what I'm taking into consideration when I look at
15 sentencing. And I don't -- I'm not gonna give you the
16 maximum because I don't believe, although I think it would
17 be supported with your prior history. But those -- these
18 are the things that I've taken into consideration. On
19 indictment 2009-GS-21-1532, the sentence of the Court is
20 that you be committed to the State Department of
21 Corrections for a period of ten years. Be given credit
22 for any time that you have served. Good luck to you, sir.

23
24 * * * END OF REQUESTED TRANSCRIPT OF RECORD * * *
25

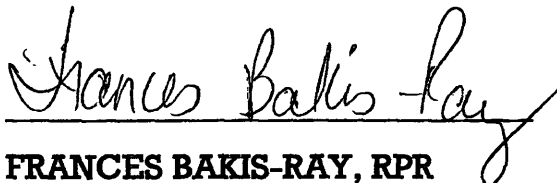
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

I, **FRANCES BAKIS-RAY**, Registered Professional Reporter (RPR), court reporter for the State of South Carolina, Twelfth Judicial Circuit, do hereby certify that the foregoing proceeding is a stenographic report and was transcribed through computer-aided transcription; that the foregoing transcript contains a true record of the proceedings.

I further certify that I am neither counsel for, nor related to nor employed by any of the parties connected to the action, nor am I financially interested in the action.

Witness my hand at Florence, South Carolina,
this 1st day of June, 2011.



FRANCES BAKIS-RAY, RPR
My Commission Expires: 9-13-2014

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF FlorenceCharles Pennell #231231

Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2013-CP-211949

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legible, handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention EVANS Corr Inst 610 HWY 9 W Bennettsville S.C. 29312
2. Name and location of Court which imposed sentence GS 180 N Inby St Florence 2950
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2009 - GS - 21-1532
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Oct 13 2010 10 yrs - 85%
 - (b) _____

CERTIFIED: A TRUE COPY
 Clerk of Court
 FLORENCE COUNTY, S.C.

2013 JUL 24 PM 2:12
 CORNIE REEL-SHEARER
 CLERK OF COURT
 FLORENCE COUNTY, S.C.

FILED

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes _____
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Appeals Court _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Denied appeal _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. 6-26-13 _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. NA _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective Assistance of Counsel
 (b) Statutory and Constitutional Violations - Due Process
 (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10): See Attachment + Motion to Amend

- (a) ~~Ineffective Assistance of Counsel~~
 (b) ~~Statutory and Constitutional Violations - Due Process~~
 (c) _____

12. Prior to this application have you filed with respect to this conviction: Sentence Reconsider

- (a) any petition in a State Court under South Carolina Law? Direct Appeal
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
 (d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. NA
 ii. _____
 iii. _____
 iv. _____

(b) the name and location of the Court in which each was filed:

- i. NA
 ii. _____
 iii. _____
 iv. _____

(c) the disposition thereof:

- i. NA
 ii. _____
 iii. _____

- iv. _____
- (d) the date of each such disposition:
- i. NA
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. NA
- ii. _____
- iii. _____
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- yes
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. Failure to grant A Direct Verdict
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. S.C. appeals Court
- 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) Not appealable in State Court haven't been to Federal Court
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? ~~YES~~ UNKNOWN
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Scott Suggs 506 W. EVANS ST PO DRAWER 591 FLO SC 29503
- ii. John Ethridge EVANS ST FLO SC 29501
- iii. Robert Dudek Independent defence COLA SC 29211
- (b) the proceedings at which each such attorney represented you:
- i. Trial
- ii. Trial
- iii. appeal
19. State clearly the relief you seek in filing this application:
Vacate Sentence - New Trial
20. Are you now under sentence from any other court that you have not challenged?
No

STATE OF SOUTH CAROLINA)

VERIFICATION

County of)

I, _____, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Charles Pennell

SWORN to and subscribed before me this 23rd
day of July, 2013.

[Signature] (L.S.)
Notary Public

My Commission Expires: Feb. 9th, 2020

FILED

2013 JUL 24 PM 2:12
CONNIE REEL-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

VERIFIED TRUE COPY
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, , hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Charles Pennell
Applicant

SWORN or affirmed to and subscribed before me this

23rd day of July, 2013.

Chris A. Hagan
Notary Public

My Commission Expires: Feb. 9th, 2020

FILED
2013 JUL 24 PM 2:12
CONNIE REEL-SHEARIN
CLERK OF COURT
FLORENCE COUNTY, SC

CERTIFIED: A TRUE COPY
Connie Reel-Shearin
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

Attachment to Pg 2 question 10 Post Conviction Relief

- 1 Applicant WAS DENIED EFFECTIVE ASSISTANCE of Counsel Violation of The Sixth Amendment To The UNITED STATES Constitution AND Article I, Section 14 of The South Carolina Constitution
- 2 Counsel failed to subpoena witnesses for defendant which would have clearly changed out come of trial
- 3 No legal research or Factual testing done by Attorney ON my behalf.
- 4 Retained Counsel never defended me Attorney Ethridge apologized to Court for being in & out of Court but never returned through trial
- 5 Attorney J. Suggs STATED to the Court he had nothing prepared.
- 6 No Competency hearing motions filed though Defendant WAS treated for Post Traumatic Depression & other mental illness
- 7 Attorney never objected to Contradictory Statements made by Det M Robinson or Provizano

8. Trial Attorney & Court were bias in letting J Wilson Testify, Wilson had Criminal History for Abham, Court Allowed Pennell's Abham's grounds for Impeachment but not Wilson.

9. Attorney Never objected to Wilson's Testimony Contradicting him self & his Statements Subjecting himself To perjury

10. Attorney Never question Det Robinson Bias to why J Wilson was never read his rights & how She filed in Statements She recovered 9mm weapon J Wilson used To "Defend" him self with! Showing Bias & prejudice

1. Testimony WAS Allowed in front Jury which only Inflamed Jury on racial slurs which weren't Evidence

2. Attorneys Allowed Photo evidence After trial began with out Discussing with Defendant

3. No Interview of J Wilson WAS Conducted by Defence Attorneys

4. No Investigation of Evidence or Arguments

Florence County
Charles Pennell / 23/231

Court of Common Pleas

v
State of South Carolina

Petitioner respectfully request A motion to Amend.

Post Conviction is being filed with out Legal help, From an institution with limited resources.

x Charles Pennell

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

) IN THE COURT OF COMMON PLEAS
) FOR THE TWELFTH JUDICIAL CIRCUIT

Charles Pennell, #231231,

) Case No. 2013-CP-21-1949
)

Applicant,

)

v.

)

RETURN

State of South Carolina,

)

Respondent.

)

)

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed July 24, 2013, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. In September 2009, the Florence County Grand Jury indicted Applicant for attempted carjacking (2009-GS-21-1532). B. Scott Suggs, Esquire, represented Applicant. On October 11, 2010, Applicant proceeded to trial before the Honorable Thomas A. Russo and a jury. The jury found Applicant guilty as indicted. Judge Russo sentenced Applicant to ten (10) years imprisonment.

Applicant filed a timely notice of appeal and Robert M. Dudek, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on June 26, 2013. State v. Pennell, Op. No. 2013-UP-285 (S.C. Ct. App. filed June 26, 2013). The remittitur was returned to the circuit court on July 12, 2013.

II.

In his Application, Applicant alleges he is being held in custody unlawfully for the following

reasons:

1. "Ineffective Assistance of Counsel"
2. "Statutory and Constitutional Violations – Due Process"

In an attachment to the application, Applicant provided the following additional grounds:

1. "Applicant was denied Effective Assistance of Counsel Violation of the sixth amendment of the United States Constitution and Article I, Section 14 of the South Carolina Constitution"
2. "Counsel failed to subpoena witnesses for defendant which would have clearly changed outcome of trial"
3. "No Legal research or factual testing done by Attorney on my behalf"
4. "Retained counsel never Defended me Attorney Ethridge apologized to Court for being in and out of court but never returned through trial"
5. "Attorney S. Suggs stated to the Court he had nothing prepared"
6. "No Competency hearing motion filed though Defendant was treated for Post Traumatic Depression & other mental illness"
7. "Attorney never objected to contradictory statements made by Det M Robinson or Provinzano"
8. "Trial Attorney & Court were bias in letting J Wilson Testify, Wilson had Criminal History for Abuse, Court allowed Pennell's Abuse grounds for Impeachment but not Wilson"
9. "Attorney never objected to Wilsons testimony contradicting him self & his statements subjecting himself to perjury"
10. "Attorney never question Det Robinson as to why J Wilson was never read his rights & how she [filed] in statements she recovered 9mm weapon J Wilson used to 'Defend' him self with! Showing Bias & prejudice"
11. "Testimony was allowed in front Jury which only Inflamed Jury on racial slurs which weren't Evidence"
12. "Attorneys allowed Photo evidence After trial began with out Discussing with Defendant"
13. "No Interview of J Wilson was conducted by Defence Attorneys"
14. "No Investigation of Evidence or arguments from Prosecution 'stereo' shell casings [...]"

Any claims not specifically enumerated in the Application or amendments thereto will be opposed by Respondent at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRPC.

Attached to this Return and incorporated herein are the records of the Florence County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and Applicant's appellate records. Any records not attached will be forwarded upon receipt. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent submits Applicant's allegation of ineffective assistance of trial counsel is without merit. In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant

must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove trial counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant further alleges due process violations. However, Applicant fails to set forth with specificity any facts supporting his claim that he was denied due process of law. The Uniform Post-Conviction Procedure Act requires that the applicant must "... specifically set forth the grounds upon which the application is based." S.C. Code § 17-27-50 (2003). In a post-conviction relief application, the applicant must make at least a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965) ("It is, therefore, incumbent upon the applicant to make at least a *prima facie* showing entitling him to relief." (citing Babb v. State, 240 S.C. 235, 125 S.E.2d 467 (1962);

Crosby v. State, 241 S.C. 40, 126 S.E.2d 843 (1962); Tillman v. Manning, 241 S.C. 221, 127 S.E.2d 721 (1962); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965))).

Since Applicant has failed to make even a *prima facie* showing, Respondent would submit this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. Respondent moves pursuant to Rule 12(b)(6) to dismiss this allegation because it is so vague it is impossible for Respondent to respond.

V.

Respondent denies each and every allegation not hereinbefore expressly admitted, qualified, or explained.

VI.

WHEREFORE, having made its return, Respondent requests an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

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By: 
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May 2, 2014

STATE OF SOUTH CAROLINA)

COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS

2013-CP-21-1949

CHARLES PENNELL, #231231)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

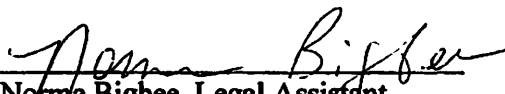
STATE OF SOUTH CAROLINA,)

Respondent.)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Tristan M. Shaffer, Esquire
120 Gantt St.
Lexington, SC 29072

DATED this 2ND day of May, 2014.


 Norma Bigbee, Legal Assistant

State of South Carolina	)	In the Circuit Court
	)	
County of Florence	)	2013-CP-21-1949

CHARLES PENNELL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Transcript of Record
	)	
THE STATE,	)	
	)	
Defendant.	)	
	)	
	)	

Florence, South Carolina
March 16, 2017

B E F O R E:

The Honorable Paul M. Burch

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

Mr. Tristan M. Shaffer, Esquire
Attorney for Plaintiff

Ms. Lindsey A. McCallister, Esquire
Attorney for Defendant

Lisa Carter
Circuit Court Reporter

I N D E X

WITNESSESPAGE

Charles Pennell:

Direct Examination by Mr. Shaffer 10

Cross Examination by Ms. McCallister 26

Redirect Examination by Mr. Shaffer 34

Scott Suggs:

Direct Examination by Ms. McCallister 36

Cross Examination by Mr. Shaffer 46

John Etheridge:

Direct Examination by Ms. McCallister 54

Cross-Examination by Mr. Shaffer 56

EXHIBITS

(NO EXHIBITS WERE INTRODUCED DURING HEARING)

1 MS. McCALLISTER: Your Honor, this is Charles
2 Pennell versus the State of South Carolina, 2013-CP-21-
3 1949. We're here today on Mr. Pennell's application for
4 post-conviction relief which was filed on June 24, 2013.
5 He is confined in the South Carolina Department of
6 Corrections. He was indicted at the September of 2009 term
7 of the Florence County Grand Jury for carjacking. He was
8 represented on those charges by Scott Suggs. On October
9 11, 2010 he proceeded to trial before Judge Russo and was
10 found guilty as indicted and Judge Russo sentenced him to
11 ten (10) years imprisonment. He did file a timely notice
12 of appeal and an appeal was perfected by the Office of
13 Appellant Defense. Also included the Court of Appeals
14 affirmed his conviction on June 23rd or June 26, 2013. He
15 is present in the courtroom today and he is represented by
16 Tristan Shaffer.

17 THE COURT: Mr. Shaffer?

18 MR. SHAFFER: Thank you, Your Honor. Before we begin
19 I'm going to actually move for a continuance on this case
20 so that I can get in order to get him evaluated for
21 criminal responsibility. Mr. Pennell is, was previously
22 evaluated in another case and found competent, I mean,
23 found that he did have the capacity to conform his conduct
24 in 2005. However, obviously, this is a different case, a
25 different time period, but he does have a history of mental

1 illness which includes delusional disorder, schizophrenia,
2 and posttraumatic stress disorder and several other issues
3 related to mental health. So, Your Honor, he provided me
4 with some paperwork indicating this and I think that the
5 facts of the case also may very well warrant an evaluation
6 as well. It's sort of a strange case, Your Honor, and I
7 can sum it up if you'd like. But the fact is I think his,
8 attorneys weren't aware of the fact that he had mental
9 health issues that were talked about during the trial. He
10 was never evaluated.

11 THE COURT: It's a little unusual, this case -- did
12 you say 2007?

13 MS. McCALLISTER: Your Honor, he was indicted in
14 2009 ---

15 THE COURT: Oh.

16 MS. McCALLISTER: --- the trial was in 2010 and this
17 PCR has been pending since 2013.

18 THE COURT: Yeah, this case is getting some age on
19 it. I don't see the feasibility of having a competency
20 examination this late, I mean, this many years after the
21 actual -- when does he max out?

22 MR. SHAFFER: He maxes out I think in two years, Your
23 Honor, which is another issue on his case. I've talked to
24 him about it. I've actually advised him about the issues
25 with going forward and that he could very well could get

1 ten more years of time on his case if he went back, won his
2 PCR and then was convicted. Done everything I can to
3 advise him of that. Let him know about it. He has chosen
4 that he would like to go forward regardless of that. I
5 think that his exact words were, I want the full twenty.
6 That's ---

7 THE COURT: Say that again?

8 MR. SHAFFER: I think -- that's what he said to me,
9 Your Honor, that he basically wants to go back in face the
10 full twenty or nothing because he doesn't think he did
11 anything wrong. It's a really strange case, Your Honor.
12 To give you a little bit of facts about this situation,
13 basically, he goes up -- he's in the parking lot of the
14 Hollywood Video. A guy pulls up. Allegedly he asked the
15 guy for a ride and then the guy says, no. Allegedly he
16 gets violent at that point and start screaming. The victim
17 pulls out a gun and fires a shot in the air and then beats
18 on my client some and then leaves. Goes to his house.
19 Gets his car. Drives back to the Hollywood Video in a
20 different car. Gets out of the car then beats on my client
21 some more. Then leaves again. Goes back to his house.
22 And then is called back up there for the police and then
23 the police show up. This is, I mean, those are the facts
24 that the State actually presented. So it's a very unusual
25 case, Your Honor. I mean, I understand that he doesn't

1 want the conviction for carjacking. I don't necessarily
2 think it's a good idea because of the timeframe it would
3 take to get an appeal even if we were successful here
4 today. He likely be out by that point but, Your Honor, it's
5 his case and not mine. I can't make the choice for him.

6 THE COURT: True. But the feasibility of asking
7 the experts to go in and tried to determine his mental
8 status seven years ago and as a harder time as we're
9 getting competency evaluations done now and the waiting and
10 the constant turmoil the court is having to go through to
11 get those orders enforced, it could be a long time.

12 MR. SHAFFER: I understand, Your Honor, and I have
13 run into the problem myself in the past. I figured it was
14 probably best -- he's indicating that he doesn't want a
15 competency evaluation done. But with that being said I
16 need to cover my bases and do that, at least, asked for,
17 Your Honor, and, you know, if the court believes that it
18 would be necessary to do that to determine that issue
19 whether or not counsel should have asked for one then, then
20 I believe, you know, I'll leave it to the court's
21 discretion.

22 THE COURT: What is your position now about his
23 competency to go forward with this hearing?

24 MR. SHAFFER: I actually -- Your Honor, I think that
25 my client has visible mental ill issues. But with that

1 being said I think he understands what's going on in his
2 case. That's from my dealings with him, he understand
3 what's going on with the case and I think that he would
4 probably indicate that he understands what's going on with
5 the case. He's an intelligent man, Your Honor.

6 THE COURT: Okay. Let me hear from the State and
7 then we'll go from there.

8 MS. McCALLISTER: Your Honor, the issue that the
9 State has with this is that this case has been pending
10 since 2013. This is -- there has been almost four years
11 for Mr. Shaffer to have gotten the competency evaluation if
12 he felt like that was, you know, important to his case and
13 this is the first time that I'm aware of that the issue has
14 been raised. He's saying I believe that his client just
15 gave him this paper today even though he's been
16 representing him for several years now. So we would object
17 to a continuance on that basis, Your Honor.

18 THE COURT: I'm going to ask you to step back to
19 the jury room and talk with him about what we just
20 discussed because it's going to take a long time.

21 MR. SHAFFER: Yes, Your Honor, I will.

22 THE COURT: You know, no matter what I put on paper
23 they pretty well do whatever they want to over there. I
24 expect him to be put at the back of the list. But, anyway,
25 take a minute or two and y'all try to hash out that.

1 MR. SHAFFER: Yes, Your Honor.

2 (Whereupon, the court took a brief recess)

3 THE COURT: Yes, sir?

4 MR. SHAFFER: Thank you, Your Honor, we're going to
5 withdraw that motion for a competency evaluation. I've
6 spoke with my client. My client is aware of the situation
7 he's in. He just wants to say he's innocent and he didn't
8 do any of this and wants another trial to prove that he's
9 innocent. And, Your Honor, he doesn't want an evaluation.
10 He doesn't think that's necessary. I understand. I think
11 there will be an uphill battle even if we got a favorable
12 evaluation, it would still be a an up hill battle to show
13 something. So I agree with his position.

14 THE COURT: Okay.

15 MS. McCALLISTER: Then I'll let Mr. Shaffer proceed
16 with his case.

17 MR. SHAFFER: Thank you. The applicant is going to
18 call Charles Pennell.

19 THE COURT: Mr. Pennell if you'll come around and
20 be sworn please.

21 MR. SHAFFER: Your Honor, would you allow me to give
22 him a copy of his transcript?

23 THE COURT: Sure.

24 THE CLERK: Sir, if you'll raise your right hand as
25 best as you can. Do you swear to tell the truth, the whole

C. Pennell- Direct Examination by Mr. Shaffer

10

1 truth, and nothing but the truth so help you God?

2 MR. PENNELL: Yes, ma'am.

3 CHARLES PENNELL, first being
4 duly sworn, testified as follows:

5 **Direct Examination by Mr. Shaffer:**

6 Q. Good morning, Mr. Pennell. Before we begin I'm going
7 to take care of a little housekeeping matter. You're
8 currently serving a ten year sentence, correct?

9 A. Yes, sir.

10 Q. For carjacking?

11 A. Yes, sir.

12 Q. And you are aware that if you are successful with your
13 PCR that what's going to happen is you could very well
14 possibly be facing additional time, is that correct?

15 A. Yes, sir.

16 Q. Okay. Do you still want to go forward knowing that?

17 A. I do.

18 Q. Now, tell us a little bit about the charges against
19 you and I'm not saying what happened right now.

20 A. Right.

21 Q. I'm asking you to explain to the court very briefly
22 what the State claimed happened?

23 A. Um, they claimed that I approach Mr. Wilson and tried
24 to take his automobile, threatening to take it. But there
25 were several different stories that they had but one of

1 their stories was, I threatened to take his vehicle while
2 he was standing beside the vehicle. Others of what their
3 stories was, um, I pushed him -- I pushed and shoved him to
4 get into his vehicle while he was standing beside the
5 vehicle. The other was that, that we had words. He pulled
6 around to the front of the Hollywood video and was still in
7 his vehicle and I cowered over top of him threatening to
8 take his, verbally saying that I would take his vehicle
9 which led him to being in the middle of the city limits
10 wouldn't justified him shooting a pistol in public is why
11 he said I try to carjack him, basically.

12 Q. Were you arrested at the scene?

13 A. No. I was arrested about a mile down the road.

14 Q. Okay. But you were arrested the same night, correct?

15 A. Yes, sir.

16 Q. Okay. And after you were arrested, did you hire an
17 attorney?

18 A. Yes, I did.

19 Q. Who did you hire?

20 A. I hired John Etheridge.

21 Q. How did you become to hire Mr. Etheridge?

22 A. I hired -- I had gone -- well, I think my mother had
23 hired him before to represent us. We have a child in our
24 family with cerebral palsy and that's how I became familiar
25 with John.

1 Q. Okay.

2 A. And he always had a pretty good track record. Pretty
3 good rapport in the courts.

4 Q. Did you -- you had confidence in Mr. Etheridge?

5 A. Yes, I did.

6 Q. Okay. Did you hire Mr. Suggs to represent you?

7 A. No, I didn't.

8 Q. How did Mr. Suggs come to represent you?

9 A. He just showed up at the court with, on the eleventh
10 floor one day and had asked me a few questions about the
11 incident that happened. And then I think it might've been
12 the next day or something was the day before trial, he, I,
13 and Mr. Etheridge all came into the court together. We all
14

15 Q. Okay. So you met Mr. Suggs the day before trial, is
16 that correct?

17 A. Yeah. By me not knowing -- I known who he was because
18 my father had hired him before to represent him on or no,
19 somebody had tried to sue my father and we had to go get
20 statements at his office to the incident. So I had met him
21 then.

22 Q. Okay.

23 A. That was years before this.

24 Q. Did he ever represent you prior to this?

25 A. No, sir.

1 Q. Okay. So you met with him the day before trial,
2 correct?

3 A. Right.

4 Q. Now, when Mr. Etheridge was representing you or
5 whenever you had hired him, did you ever talk about the
6 case with Mr. Etheridge?

7 A. Yeah. We didn't go into it really well. I just sort
8 of give him my version of the story.

9 Q. Okay. And what version of the story are you saying
10 you gave him? Go ahead and tell us.

11 A. The version that I give him was, I worked at Carolina
12 Furniture, my father owns Treasure City building. I worked
13 there delivering furniture and setting up furniture. Well,
14 I had bought a stereo and a TV from Sam's Club and I bought
15 the stereo from Walmart and the stereo didn't perform like
16 I wanted it to so I wanted to go exchange it for a nicer
17 stereo. Whenever I -- I took off work early and that cost
18 me about \$15.00 an hour, you know, for taking off work. So
19 I get to Walmart, I get to Sam's Club over the TV and Sam's
20 had closed early. They closed earlier, I guess, than the
21 rest of the stores about eight or something. So then I
22 went to Walmart to exchange the stereo for the one that I
23 wanted, a nicer model of the same kind stereo because it
24 had a USB port on the front that I could plug an iPod or
25 MP3 into and I can stream video and everything through the

1 stereo. Well it wasn't as nice as I thought so I was going
2 to get a better model. Well whenever I got to Walmart they
3 didn't want to take back, exchange the stereo. And I had
4 the receipt. It's all in the box and everything and the
5 guy was like, you need to wait for someone from electronics
6 to be in here. Well I'm an alcoholic and I've got
7 schizophrenia so right now, you know, I'm just a little
8 bit, I'm pretty ill, you know. So we leave out from
9 Walmart. I've got an attitude. And my niece and I are
10 riding down Palmetto Street going just a couple of miles to
11 Whitehall where I live and so she went, you know, griping
12 and complaining, this and that and the other about Florence
13 because you listen to the beach. Florence did, this, that,
14 and the other. She was -- she likes to do cocaine, this,
15 that and the other, and was kind of like being dependent on
16 me to help her to find it. So I'm like, you know, I got
17 into an argument with her. I'm like, well, you could just
18 let me out the car right here thinking that she would pull
19 over and just let me out on Palmetto Street. Instead, she
20 decided to pull into Hollywood Video. Well, then my bad,
21 twisted thinking, I'm thinking, well, I can go to the other
22 Walmart with this stereo, somebody will take it back
23 because all the policies on the wall state it. So at that
24 time I'm over on the curb on the phone talking to, calling
25 one of my buddies or something like that and the fella

1 pulls into the parking lot and kicks the box. And I have
2 words and say stuff to him and nothing about wanting a ride
3 or taking his vehicle. I'm just arguing with him over
4 kicking my stereo. So he reaches into the truck, gets a
5 pistol out, and fires it in the air. So I said, well, you
6 know something I wouldn't care if you killed me right now.
7 And, you know, I don't really feel like that but, just
8 being drunk and the alcoholic mind or what. And then so
9 the guy jumps back into the truck with his pistol, goes a
10 couple blocks down the street home. Gets a nicer vehicle,
11 hides the handgun. Comes back and jumps out and assaults
12 me again. Now, the two women inside the video store they
13 see all of this happen. And, but, you know, and I told
14 John that. So they didn't subpoena them to the video, I
15 mean, you know, to court or anything. But, I mean, I had
16 their written statements saying they watched the man
17 assault me. He came back in a vehicle with no tags on it -
18 --

19 Q. That was in the discovery, right?

20 A. Yeah. And I asked Mr. Etheridge, you know, can we
21 subpoena them, you know, I need statements and -- but, Mr.
22 Suggs, I had asked that and he said we can't find them.

23 Q. Okay. Now, so you, basically, -- did you ever tell
24 Mr. Etheridge or Mr. Suggs that you had asked for a ride?

25 A. No. I wasn't trying to bribe the guy or by a ride

1 from him or anything like that he said I ---

2 Q. Okay. But you got into a -- you told them you got
3 into a fight with him, is that correct?

4 A. Yep. We had a confrontation. He assaulted me. He
5 hit me. I never hit him.

6 Q. Now, do you have any discussions with either of your
7 attorneys about what should be argued in court?

8 A. Um, pretty much, pretty much I was lost because I've
9 never been in a jury trial before. They pretty much told
10 me to sit over there and shut up, I've got this.

11 Q. Okay.

12 A. And this is not carjacking.

13 Q. Okay. And why do you say it was not carjacking?

14 A. Well, because the fella's original statement was that
15 he was standing beside his vehicle whenever I tried to push
16 him to get in it and the statute for carjacking is, he has
17 to be inside the vehicle and be made to get out for a
18 carjacking to take place.

19 Q. And your attorneys told you that, right?

20 A. Yes, sir.

21 Q. Okay. Now, um, when you started the trial Mr. Suggs
22 was there, correct?

23 A. Yes, sir.

24 Q. Did you ever tell Mr. Suggs that you wanted him to
25 represent you instead of Mr. Etheridge?

1 A. No. I was pretty much lost to what was going on. I
2 felt like Mr. Suggs was being like an investigator or doing
3 maybe some footwork for John.

4 Q. Okay. And did you think that Mr. Etheridge was going
5 to appear at trial to represent you?

6 A. Yeah. I was wholeheartedly thought that was going to
7 happen.

8 Q. Okay. Prior to, prior to the day of trial, how many
9 times did you meet with Mr. Etheridge concerning your case?

10 A. Um, we never really discuss the case. I saw him about
11 maybe, maybe about three maybe four times taking a couple
12 of hundred dollars, whatever like monies that I'd get out
13 of my check by his office.

14 Q. Okay. You said you never really discuss the case but
15 you did tell him your side of it, right ---

16 A. Yeah. Right.

17 Q. --- is what you just testified to. Did you ever have
18 that same discussion with Mr. Suggs about what your side of
19 it was?

20 A. We went into it really briefly back behind the court,
21 like, for about ten or fifteen minutes, maybe.

22 Q. And when was that?

23 A. Like the day or so before the trial.

24 Q. When did you know that Mr. Suggs was going to help out
25 with your trial or before the trial began?

C. Pennell- Direct Examination by Mr. Shaffer

18

1 A. Well, I really didn't know, you know, why Mr. Suggs
2 was there. I just felt like maybe he and John were working
3 together but I didn't know that I was going to be
4 represented by Mr. Suggs at all until they said it that
5 day, said that they were both going to be on my trial. So
6 I thought ---

7 Q. Okay.

8 A. --- you know, I was getting double ammunition to go in
9 there with.

10 Q. Now, did Mr. -- did you think -- now, Mr. Etheridge
11 was there when the trial originally began, right? Did you
12 think he was going to come back for the rest of the trial?

13 MS. McCALLISTER: Objection, Your Honor, he's
14 leading.

15 A. I never knew that Mr. Etheridge was going to leave the
16 court.

17 Q. Okay.

18 A. I never knew Mr. Etheridge was going to leave the
19 courtroom until he told the judge, he said, he asked the
20 judge would he make some excuses for him that he would be
21 in and out of the court. He had pressing matters somewhere
22 else.

23 Q. Okay. And ---

24 A. That was the day that they picked the jury and he
25 never showed back up. But he told the judge that he would

1 be in and out to make excuses for him and he never came
2 back.

3 Q. Okay. Did Mr. Suggs ever tell you that he was the
4 only attorney that was going to represent you?

5 A. Never.

6 Q. You had raised an issue in your PCR application about
7 the investigators discussing, making or talking about
8 hearsay or giving hearsay statements, correct? Do you
9 recall that? Do you recall alleging that your attorney
10 should have objected to hearsay that the investigators
11 gave?

12 A. Right.

13 Q. Okay.

14 A. Um, I don't know, I'm a little bit lost.

15 Q. Okay. You -- what was the alleged victim's name in
16 your case?

17 A. Was Jonathan Wilson.

18 Q. Okay. And now one of the law enforcement officers
19 name was Fabenzo (sic), correct?

20 A. Yes, sir.

21 Q. Now, you said, specifically, that the trial attorney
22 and the, or excuse me -- now, the statements that were
23 given and I apologize, you actually phrase this,
24 contradictory statements.

25 A. Yeah. Okay.

C. Pennell- Direct Examination by Mr. Shaffer

20

1 Q. Okay. What contradictory statements are you talking
2 about that Fabenzo (sic) said?

3 A. Oh, he would contradict himself. At one point, he
4 would say -- the attorney Suggs caught him in court saying
5 that, that the victim had never told him that he had left
6 in a vehicle and came back. Then later on in the trial Mr.
7 Pirsano (sic) said well, that's whenever the victim had
8 left and came back and stuff. And then Mr. Suggs had
9 confronted him on it, he said, well, you said that you
10 didn't know that at the time. And instead of, say like,
11 impeaching his testimony or what, he just let it fly. He
12 let him just sit on the stand. And, ah ---

13 Q. So he never pointed that out, that's the point ---

14 A. He never pointed it out.

15 Q. And those statements were statements that the victim
16 told the officer, correct?

17 A. Yes, sir.

18 Q. Okay. Now, you also raised the allegation about the
19 evidence of the stereo and shell casing getting into
20 evidence, what was your understanding of that argument?
21 You said that your attorney, basically, should have -- that
22 there was never an investigation of -- no investigation of
23 evidence or arguments of the prosecution about the stereo
24 and shell casing?

25 A. Well, where I was going with that is the stereo I had

1 just bought it from Walmart that week. I cashed -- you
2 know, they give out stimulus checks that year and I took my
3 stimulus check and went to Walmart and bought the stereo.
4 Well, Jepertinger he forged evidence. He lied to the jury.
5 He told the jury that the stereo was fifteen to twenty
6 years old. I had got it out of the garbage, that it was
7 junk. That I would like to convince them, misinform the
8 jury that I would like to make them believe that I cared
9 about this precious stereo when it was, in fact, garbage.
10 But I really just bought it.

11 Q. So you thought that your attorney should have
12 introduced the financial record showing that you had
13 purchased the stereo, is that ---

14 A. Oh, yeah. Well, they should've had the stereo in
15 court as evidence so we could refuted that it's not a
16 twenty year old stereo. It was brand new.

17 Q. Okay.

18 A. I mean, it was still in the box I purchased it in.
19 There was no way that Mr. Jepertinger could have thought it
20 was twenty years old.

21 Q. All right. Do you have a copy of your application up
22 there?

23 A. Yes, sir.

24 Q. I'm looking at the allegations specifically related to
25 the racial slur. Tell us a little bit about that racial

1 slur?

2 A. I said something foul to, if you can call him an
3 alleged victim, I said something ill to him and, I mean, I
4 don't care to repeat it in the court. I had made a bad
5 statement to him. And he wrote down that what I had said.
6 It's all in his statements that was. Well, during the day
7 of the courtroom I picked a jury. I wanted a mix jury.
8 Half black, half white. Part for men and women. Just a
9 variety or what. But I had a fifty percent maybe even
10 better of a black jury and all like that. Then all of a
11 sudden come the day of the trial the fella start saying
12 that I called him the "N" word during our argument. And
13 then through the whole trial even though Judge Russo said
14 he didn't want things like that being thrown into and flame
15 the jury, the whole, all three days of trial they made me
16 look like a racist.

17 Q. Okay. And Mr. Jepertinger actually brought that up
18 during his opening statement ---

19 A. Yeah. And nowhere was it ever in a statement before
20 the victim alleged it on the stand.

21 Q. Did he -- did you -- did your attorney object to the
22 fact that he brought that up?

23 A. No. He never objected to anything.

24 Q. Okay. Do you think he should have objected to the
25 fact that he brought that up?

1 A. Yes, sir.

2 Q. And you said that you had actually said something foul
3 and that it was in the victim's original statement?

4 A. Right. What I had actually said.

5 Q. And I'm asking you is this correct and I'm looking at
6 page 205, lines 9 through 13, um, and it said, um, F'you,
7 mother f'er, suck my dick, right?

8 A. Yes, sir. Is that what you actually say?

9 A. Yes, sir.

10 Q. Okay. Did you actually use a racial slur?

11 A. No.

12 Q. But there was evidence introduced at trial that you
13 did use a racial slur, correct?

14 A. Yeah.

15 Q. Okay. And Mr. Jepertinger said use the racial slur,
16 correct?

17 A. Yes.

18 Q. Your attorney did not object to that?

19 A. Not at all.

20 Q. Okay.

21 A. If I may say something?

22 Q. Yes, sir.

23 A. During the whole three days of trial ---

24 MS. McCALLISTER: Your Honor, objection. Is he
25 responding to a question?

C. Pennell- Direct Examination by Mr. Shaffer

24

1 A. Well, it's over things that were said that should have
2 been objected to.

3 MR. SHAFFER: All right.

4 MS. McCALLISTER: I think Mr. Shaffer needs to ask
5 that question.

6 MR. SHAFFER: I'll ---

7 A. Okay.

8 MR. SHAFFER: I'll ask the question.

9 Q. Now, you believe that your attorney should have
10 objected to several things at trial. Specifically, tell us
11 what's related to your allegations, okay, I'm asking you
12 only about stuff that you put in there because, obviously,
13 you did a, you did your PCR application, tell us what in
14 that PCR application do you think that your attorney should
15 have objected to that you wrote in your application or what
16 in the trial transcript that you wrote in your application?

17 A. Well, it's pretty extensive, I mean, the way that it
18 went on for the three days. But I felt like he should've
19 objected to them continuously whenever I didn't bring my
20 character into question at all. But Jepertinger was
21 steadily saying, "look at him over there like a spider in a
22 web laying", you know, and just attacking my character and
23 bolstering the character of the victim saying, "boy, what a
24 spider was waiting to pounce on him, he didn't have a
25 chance to call his preacher, you know, or his wife of

1 fourteen years," just bolstering the character of the
2 victim while slaying my character when we never brought
3 into play. I felt like that should've been objected to.
4 Other things like that, I don't know, my mind, you know, is
5 just a little bit ---

6 Q. It's okay. You did testify at trial, correct?

7 A. No, I didn't.

8 Q. Why didn't you testify at trial?

9 A. I was advised that it would be a bad idea.

10 Q. And who advised you of that?

11 A. Mr. Suggs.

12 Q. Okay. Based off of talking to Mr. Suggs, what did you
13 think would be a bad ideal about you testifying at trial?

14 A. Well, the reason how they made it to me it seemed like
15 it would be a bad idea was even though that myself and the
16 victim both had previous history, had assault battery
17 charge, they told me that if I try to testify that they
18 would be impeached by testimony and bring up my history and
19 this, that, and the other, over the assaults and stuff that
20 would break down my credibility in which they let, they
21 didn't bring it in to question that the victim had the same
22 charges. But they didn't question his credibility or try
23 to, you know, threaten him with impeaching his testimony.
24 Q. Okay. Now, do you think that Mr. Suggs was prepared
25 for your case, to try your case?

C. Pennell- Cross-Examination by Ms. McCallister

26

1 A. His opening statement he said he wasn't prepared. He
2 said his self he had nothing prepared.

3 Q. And is that on page 84, line 1 and 2?

4 A. Yes, sir. And it goes on to say that -- yes, sir.

5 Q. At 84, 1 and 2, it, basically, says that he doesn't
6 really have much prepared, right?

7 A. Yes, sir.

8 Q. Had you known that Mr. Etheridge wasn't coming back,
9 would you have objected to Mr. Suggs representing you at
10 trial?

11 A. Yes, I would.

12 Q. And did you ever tell Mr. Suggs, in any way, that you
13 were okay with him representing you only without Mr.
14 Etheridge there?

15 A. Nah. I never stated that.

16 MR. SHAFFER: I don't have any further questions.

17 A. Can I talked to you for just a minute? Can you
18 approach.

19 MR. SHAFFER: No. I can't talk to you. She has to
20 ask you questions.

21 **Cross-Examination by Ms. McCallister:**

22 Q. Mr. Pennell, your testimony I believe was that you
23 only talked to Mr. Suggs about your case one time?

24 A. Yeah. A couple minutes like before, the day or so
25 before the trial.

1 Q. Just a couple minutes before trial?

2 A. Yes, ma'am.

3 Q. Okay. Did you ever -- what did you talk about in that
4 conversation?

5 A. I just kinda told him my side of the story.

6 Q. Okay. And is it your testimony that at that point you
7 thought that you were being represented by Mr. Etheridge?

8 A. I thought Mr. Etheridge was representing me. I just
9 felt like Mr. Suggs was kind of like helping him out.

10 Q. Okay. So you were aware that they were working
11 together?

12 A. No, ma'am. I didn't know. I thought they were in two
13 separate law firms.

14 Q. Okay. But you thought that he was, didn't you just
15 say you thought ---

16 A. Like maybe doing some foot work or investigation work
17 for him.

18 Q. Okay. But you thought he was helping him on the case?

19 A. Yes, ma'am.

20 Q. Okay. So at least, in your case, they were working
21 together and that was your understanding, is that correct?

22 A. Right. We had no discussion of it.

23 Q. Okay.

24 A. He just showed up to assist John.

25 Q. Okay.

C. Pennell- Cross-Examination by Ms. McCallister

28

1 A. Was all I was aware of.

2 Q. So you never met with Mr. Suggs at his office or at
3 Mr. Etheridge's office or anything like that?

4 A. No, ma'am.

5 Q. Well, when he just showed up, why didn't you tell the
6 court that this wasn't your attorney?

7 A. Well they were both together in the court.

8 Q. Well I thought you said Mr. Etheridge left and didn't
9 come back?

10 A. Right. That was during the jury, picking the jury, I
11 believe.

12 Q. Okay. So, at that point, you realize you were left
13 with Mr. Suggs who you thought was not your attorney, is
14 that your testimony?

15 A. Right. John statement was that he would be in and
16 out.

17 Q. Okay. So ---

18 A. I did know I was going to be stranded.

19 Q. Okay. At some point, though, the trial is proceeding
20 and Mr. Etheridge hasn't come back, is that correct?

21 A. Yes, ma'am.

22 Q. And at that time, you did tell the judge during a
23 break or anything like that, that, hey, where's my
24 attorney, I don't know this guy or you didn't say anything
25 like that?

1 A. I was pretty much in the position like I am now, I was
2 scared to death I just, you know, they said, look this is
3 not a carjacking, just sit over there and shut up. They
4 got this. So I went with it. I'm not, you know, I was
5 lost.

6 Q. Okay. I think you said something about you had some
7 witnesses that you wanted to be subpoenaed?

8 A. Yes, ma'am.

9 Q. Who did you tell that to?

10 A. Whenever -- during the, um, -- when we were in court
11 -- during court I had looked over and saw the statements
12 that were written by the two girls, Julia Cribb and a Miss.
13 Vontravia Miller (sic), and both of their statements were
14 about how the victim came into the parking lot and
15 assaulted me and that they had seen all this and I had
16 asked Mr. Suggs ---

17 Q. Who ask Mr. Suggs ---

18 A. --- I ask him ---

19 Q. I trying to get, who you ask to subpoenaed those
20 witnesses?

21 A. That's who was there, was Suggs.

22 Q. You asked Mr. Suggs why weren't they subpoenaed?

23 A. Yeah. Why aren't they here.

24 Q. Okay.

25 A. And he said that they couldn't find them.

C. Pennell- Cross-Examination by Ms. McCallister

30

1 Q. And this was during the trial ---

2 A. Yes, ma'am.

3 Q. --- you ask this? You didn't asked for them to be
4 subpoenaed at any point before trial?

5 A. I never knew that they, that they were -- I never seen
6 their statements to know that they had information on what
7 ---

8 Q. Okay. Fair enough.

9 A. --- the incident.

10 Q. Okay. Now, you complained about Mr. Suggs saying that
11 he had nothing prepared?

12 A. Yes, ma'am.

13 Q. Have you had a chance to look at your transcript?

14 A. Yes, ma'am.

15 Q. Okay. Is it fair to say that he says, "I didn't have
16 a written," he says, "he didn't have a written statement --
17 -

18 A. Right.

19 Q. ---"prepared for opening," is that a fair
20 characterization?

21 A. If I can do it the exact ---

22 MR. SHAFFER: Objection.

23 A. --- it says, it says, "I will ---

24 MR. SHAFFER: As to the ---

25 THE COURT: Hold up just a minute.

1 MR. SHAFFER: I'm objecting to him being able to
2 characterize what's in the transcript. I think it's an
3 opinion of what he interprets it to say.

4 MS. MCCALLISTER: Okay. I'll rephrase that.

5 THE COURT: Okay.

6 Q. In his opening statement, does Mr. Suggs say that he
7 did not have a written opening prepared?

8 A. That with others, yeah, that with other stuff.

9 Q. That was other stuff?

10 A. No. That along with other stuff. He said he didn't
11 have, he don't have much prepared or written or otherwise.

12 Q. Okay. Did you understand that to mean in terms of an
13 opening statement?

14 A. Well, at that time I didn't have any idea until I got,
15 until I was incarcerated and I went and I studied the law.

16 Q. Okay. So you weren't sure if he was talking about he
17 just didn't have a written opening or if he meant he didn't
18 know what was going on in the trial at all?

19 A. Well, looking back I pretty much know he didn't have
20 anything prepared because he didn't, he didn't introduce
21 any of the victim's statements that were all contradictory.
22 He did introduce none of those into evidence. He didn't
23 even question the victim as to why he had reloaded the
24 clips on his pistol because they were both full ---

25 Q. Okay.

C. Pennell- Cross-Examination by Ms. McCallister

32

1 A. I mean, questions that should have been important.

2 Q. Okay. I think you're getting a little far-fetched ---

3 A. Yes, ma'am.

4 Q. --- of what I'm asking. I'm just trying to ascertain,
5 you sat in this trial, correct?

6 A. Yes, ma'am.

7 Q. And you heard Mr. Suggs give his opening statement?

8 A. Yes, ma'am.

9 Q. This statement that your complaining about that you're
10 saying that he made where he said, "I didn't have anything
11 prepared."

12 A. Right.

13 Q. He made that statement during his opening, correct?

14 A. Yes, ma'am.

15 Q. And he said, "I don't have a written opening statement
16 prepared", is that correct?

17 A. He said, "I don't have much prepared."

18 Q. Okay. "Written prepared"?

19 A. "Written prepared."

20 Q. Okay.

21 MS. McCALLISTER: I'll just call Your Honor's
22 attention to the opening statement. I think it starts on
23 page 83 of the transcript.

24 THE COURT: I need a packet.

25 MS. McCALLISTER: Oh, I'm so sorry.

1 A. If I could go on she just reading what she wants to be
2 heard out of this, Your Honor, instead of the whole
3 statement.

4 THE COURT: Okay. You can explain your answer.

5 A. Okay. He goes on to say about written prepared and
6 then he goes on to say that, "I've tried many cases with
7 Mr. Jepertinger. I used to be a public defender like he
8 was for twenty years, not a prosecutor." "I've tried cases
9 with him, against him." "I always know when he gets up and
10 has an opening statement he gives me plenty of fire
11 things," so he more or less is going off of the cuff of
12 what Mr. Jepertinger giving firepower to talk about.

13 Q. Okay.

14 A. So I took it he had nothing prepared.

15 Q. Okay. You interpreted that as nothing prepared?

16 A. Well, is black-and-white.

17 Q. Okay.

18 A. About interpretation.

19 Q. Okay. The issue of the evidence about the stereo.

20 A. Yes, ma'am.

21 Q. Do you recall whether pictures of the stereo equipment
22 were ever introduced?

23 A. Yes.

24 Q. Okay. And you agree with me that they were?

25 A. Yes.

C. Pennell- Redirect Examination by Mr. Shaffer

34

1 Q. But you one of the actual stereo, itself, to be there?

2 A. Well, looking back ---

3 Q. Is that the your complaint?

4 A. --- I would've liked to have had it.

5 Q. Okay.

6 MS. McCALLISTER: That's all from me, Your Honor.

7 Thank you.

8 A. I would like to say something, judge, to go along with
9 the ineffective assistance of counsel, if I could?

10 MS. McCALLISTER: Your Honor, I would object. He
11 has not been asked a question.

12 MR. SHAFFER: Your Honor, I guess I would ask for a
13 little bit of lead way to find out whether or not it's
14 related to one of the questions that she asked.

15 THE COURT: All right. I'll certainly give you the
16 cross examination, initial crosses over. So it would be
17 permissible for you to chat with him.

18 MR. SHAFFER: Thank you, Your Honor.

19 **Redirect Examination by Mr. Shaffer:**

20 Q. Now, Mr. Pennell tell us if -- tell us whether you had
21 any, anything to expand on the questions that Ms.
22 McCallister asked you just a few minutes ago?

23 A. Yes. It has to do with the preparedness of attorney
24 Suggs or, you know, the competence and everything, I mean,
25 not the competence but being effective. I feel like if the

1 original statements by like the victim, if the four
2 different statements that the victim gave, but the original
3 was I was standing beside my vehicle and Mr. Suggs said at
4 one point you said the gun and he says, "it's right here
5 and I'm not going to introduce this into evidence." But it
6 was very important that, that did get into evidence because
7 it was the statement of the victim, "I was standing beside
8 my car when Mr. Pennell tried to approached me." Now, I
9 feel like that would have been very important but instead
10 he was bickering about whether the gun come from the
11 console or the glove compartment.

12 Q. And you think that would've been beneficial ---

13 A. Well, I mean ---

14 Q. --- for your directed verdict argument?

15 A. --- shouldn't the victim statements ---

16 A. --- or contradictory statement be introduced into
17 evidence?

18 MR. SHAFFER: No further questions, Your Honor.

19 MS. McCALLISTER: No re-cross, Your Honor.

20 THE COURT: You may step down. Thank you.

21 A. Thank you, Your Honor.

22 THE COURT: You're welcome.

23 MR. SHAFFER: I have nothing else, Your Honor.

24 MS. McCALLISTER: I'd call Mr. Suggs, Your Honor.

25 THE COURT: Come around and be sworn please, Mr.

S. Suggs- Direct Examination by Ms. McCallister

36

1 Suggs. Let's take the hot seat.

2 MR. SUGGS: Yes, sir, judge.

3 THE CLERK: Do you swear or affirm that the
4 testimony you give in this case will be the truth, the
5 whole truth and nothing but the truth so help you God?

6 MR. SUGGS: I do.

7 THE CLERK: Thank you.

8 SCOTT SUGGS, first being
9 duly sworn, testified as follows:

10 **Direct Examination by Ms. McCallister:**

11 Q. Mr. Suggs, at the time of this trial in 2010, how long
12 have you been practicing law?

13 A. Twenty-one years.

14 Q. And in that time how much of your practice was focused
15 on criminal matters?

16 A. More than half.

17 Q. More than half, okay. How did you come to be involved
18 in this case?

19 A. Mr. Pennell originally consulted with John R.
20 Etheridge, Jr. of the Gardener Law Firm and Mr. Etheridge
21 contacted me and asked me if I would be willing to assist
22 him in Mr. Pennell's representation.

23 Q. Okay.

24 A. Mr. Etheridge and I have been practicing law together
25 for twenty of my twenty-seven years. We don't have an

1 official partnership but we have a lot of clients in common
2 and we do assist one another just about every day.

3 Q. All right. And so before you came to this trial with
4 Mr. Pennell, had you met with him?

5 A. Yes, ma'am.

6 Q. How many times had you met with him?

7 A. I don't recall but I met with him requisite number of
8 times where I felt comfortable with the facts.

9 Q. Did you meet with him more than once?

10 A. I'm certain I did.

11 Q. Okay.

12 A. And I believe Mr. Pennell was out on bond at the time
13 so, you know, I have an open door policy and my office.
14 Anytime a client stops by I try to make arrangements to
15 work them in if I'm available.

16 Q. Do you recall Mr. Pennell coming by your office?

17 A. He may have come by. I wouldn't see any reason why he
18 wouldn't come by.

19 Q. Okay. Did you -- when you met with him at those
20 meetings, did you explain to him that you were working on
21 this case with Mr. Etheridge?

22 A. Absolutely. He understood exactly what the
23 relationship was.

24 Q. Okay. And did he understand that you would be
25 essentially taken the case to trial?

1 A. He did.

2 Q. Okay. What did you do to prepare for the trial? Do
3 you recall your preparations?

4 A. No. I don't recall exactly everything that I did but
5 certainly spoke with Mr. Pennell and I know I went out to
6 the scene. I think I took some pictures of the, of the
7 video store in the parking lot. I mean, I pass by it every
8 day. I talked to the solicitor. I may have talked to some
9 witnesses. And I read all the information. I researched
10 the law as it applied to his charges whether or not the
11 facts as set forth by the State. Satisfied all the
12 elements of the offenses he was charged with.

13 Q. Okay. And did you develop, kind of, a strategy for
14 trial or a defense?

15 A. I always try to get a theme and a theory going for
16 every trial, yes, ma'am.

17 Q. Okay. Can you explain what that was in this case?

18 A. Well, just briefly looking at the transcript this
19 morning and then speaking with you, I do remember looking
20 at the carjacking statute and determining what the elements
21 of that offense were and comparing those to the facts that,
22 that were, that the State was alleging. So I always take
23 the facts that the State alleges not what the defendant
24 says but what the State says first. Compare those facts to
25 the elements of the offense to see if they match. And on

1 carjacking I didn't, I didn't think that they matched in
2 this case. I think there was some dispute or some
3 examination of the facts as far as where the occupant of
4 the vehicle was, whether he or she was in the car or
5 whether the car was operating or not. Don't remember
6 exactly but it's along that theme.

7 Q. Okay. Do you recall -- do you recall him ever asking
8 you about subpoenaing witnesses?

9 A. I don't. But, ma'am, I try a lot of cases and I like
10 trying cases and I don't like to lose. When I try case I
11 like to win. And it doesn't matter to me whether my
12 client is guilty or not I like to win. So I do my homework
13 and if you told me he had witnesses I absolutely would've
14 followed up on that. And if I couldn't find them I
15 would've told him that. If I talked with the witnesses and
16 they would be absolutely no help to him then that would be
17 the reason why they didn't show up or weren't subpoenaed.
18 But, no, witnesses, I always look for witnesses.

19 Q. Okay. Do you recall -- do you recall the testimony of
20 the police officers in this case?

21 A. Not right off, no.

22 Q. Do you recall any issues regarding racial slurs that
23 was raised?

24 A. I really don't until that was brought up earlier. I
25 don't remember that but, um, if you will tell me exactly

S. Suggs- Direct Examination by Ms. McCallister

40

1 what you're talking about I'll do my best to help you.

2 Q. Do you recall having a Jackson v. Denno hearing?

3 A. No, I don't recall. But we have those quite
4 frequently.

5 Q. And in Jackson v. Denno was that done in the presence
6 of the jury?

7 A. No, it is not.

8 Q. So if one of the officers used a racial slur during a
9 Jackson v Denno hearing, is that something you would've
10 objected to?

11 A. During the hearing?

12 Q. During the Jackson v Denno?

13 A. Well, I mean, -- well, it would depend on the context.

14 Q. Okay. If it was -- if the officer's testimony was
15 that, that was a word that the defendant had used, your
16 client, would you have objected to that?

17 A. Well, you're asking me if during, during the actual
18 hearing outside the presence of the jury, the law
19 enforcement officer said that Mr. Pennell used a racial
20 slur?

21 Q. Yes.

22 A. Um, I probably would have but I'm not sure, I'm not
23 sure how I would have been able to keep that out. I mean,
24 if a witness testifies that someone said something no
25 matter how harsh it is, I mean, I don't know what grounds I

1 would argue to keep a statement like that out. Certainly I
2 wouldn't want a jury to be inflamed in any way and I'd like
3 it not to be heard by the jury, but it would depend on how
4 it was said and how it was used and he used it. But
5 certainly I'm gonna be on watch with that. Absolutely.

6 Q. But just off the top of your head, you can't think of
7 a legal objection that you could've made?

8 A. No. I can't think of a legal objection that you can
9 make to a victim saying that the defendant said something
10 specific to them or, you know, obviously, if the victim
11 told the officer that I'm certainly going to object on
12 hearsay grounds. But, you know, inside of a Jackson v.
13 Denno hearing, you really don't have to worry so much about
14 those objections because the jury is not listening to that.

15 Q. Okay.

16 A. The judge wants everything out on the table so he or
17 she can make a proper ruling.

18 Q. Okay. So if you didn't object there may have been a
19 reason why you didn't object given the nature of the
20 hearing?

21 A. There's always a reason to objecting or not objecting.

22 Q. Okay. Thank you. And you don't recall with any more
23 specificity that, that incident or that testimony hearing,
24 the Jackson v. Denno?

25 A. I really don't. No.

S. Suggs- Direct Examination by Ms. McCallister

42

1 Q. Okay. Do you recall whether in the testimony of the
2 officers that there were contradictory statements that were
3 made, do you recall that?

4 A. I don't recall specifically.

5 Q. Okay.

6 A. But in every trial there's always contradictions in
7 what people say.

8 Q. Okay.

9 A. I mean, that's something a defense lawyers live for.

10 Q. Okay. Do you know anything about why the stereo
11 itself wasn't presented as evidence?

12 A. No. I mean, I don't see how that's relevant to, I
13 mean, the issue is whether he carjacked the man not whether
14 the stereo was new or old.

15 Q. Okay. So in your opinion that particular issue was
16 not something that you found relevant in building your
17 case?

18 A. No. I'm not going to waste the court's time with
19 irrelevant evidence.

20 Q. I think you heard the testimony earlier about your
21 opening statement ---

22 A. Yes, ma'am.

23 Q. --- and the issue about whether you had anything
24 prepared, do you recall making that statement during your
25 opening?

1 A. I don't but I read it in the transcript and I just
2 meant that I don't, I don't operate from notes when I'm
3 doing an opening statement. When I do a closing statement
4 I may have general notes but I don't, I don't refer to
5 those. I just don't think it's effective. I've seen a lot
6 of lawyers that tried to try cases and they try to ask
7 questions of witnesses by looking at their questions on
8 legal pad or they try to argue opening and closing by
9 constantly referring to their notes and I just, I never did
10 think that was an effective way to present a case. It's --
11 it's -- when you try a case you want to be, you want to be
12 open and you want to have your argument flow. You don't
13 want to have to keep going back and looking at something
14 written. I just never could make myself do that.

15 Q. Okay. So you prepared for this trial even if you
16 didn't have a written opening statement?

17 A. I didn't have anything written down as opening, no, I
18 just going from my knowledge of the case and what I'm
19 trying to, you know, what I'm trying to show to the jury
20 without burning myself with notes.

21 Q. Okay. Did you feel you had enough time to prepare the
22 case for trial as a whole?

23 A. I mean, I think so. Unless I -- unless I moved for a
24 continuance and I don't know if I did or not and the only
25 reason that I would do that or one of the reasons why I

1 would do that is if I didn't have enough time to prepare
2 but, absent that, I was ready.

3 Q. Okay. You don't recall anything specific that you,
4 about feeling like you weren't prepared?

5 A. No, I mean, if I'm going forward and I don't make a
6 motion to continue then I'm fairly confident of my
7 preparedness.

8 Q. Okay. Do you recall the issue of impeachment of the
9 witness and Mr. Pennell with a certain charge, the ABHAN
10 charge, do you recall that incident?

11 A. Impeaching the victim?

12 Q. The victim, yes. I believe, I believe Mr. Pennell's
13 has raised that there were similar, he had similar charges
14 and the victim had similar charges and it was allowed to be
15 used for the victim, but not for him, do you recall
16 anything about that issue?

17 A. A little bit, but I think if the court didn't allow me
18 to impeach the victim with, with a crime that would, that
19 would be appropriately, would be under the statute that you
20 could, then, there had to be a reason for it. Maybe the
21 victim went to PTI or whether the victim had the charge
22 expunged in some way. You know, obviously, if the victim
23 had a prior record and it fit all of the requirements of
24 the statue case law to be introduced for impeachment
25 purposes, then, if it was not allowed there had to have

1 been a legal reason for it.

2 Q. Okay. You don't recall anything specific about
3 dealing that issue?

4 A. No. And I just know Judge Russo, he's very good
5 about, about being fair and if he didn't allow it, there
6 had to be a reason for it.

7 Q. Okay. And did your client testifies?

8 A. I don't think so.

9 Q. Do you recall having discussions with him about that?

10 A. I always do.

11 Q. Okay. And whose decision would that be to testify or
12 not to testify?

13 A. It would be the clients. But if I felt that it would
14 be a mistake I'm certainly not going to hide that fact to
15 the client. If the client ask me for guidance, I'm going
16 to tell them, you know, I don't think you should testify.

17 Q. Okay.

18 A. And in a criminal cases, you know, it's more often
19 than not. It's, you know, the rule rather than the
20 exception that clients will testify.

21 Q. Do you remember specifically having a conversation
22 with Mr. Pennell about it?

23 A. I don't remember, specifically, but always talk to my
24 clients about testifying. Their right to testify. Their
25 right to remain silent and the consequences of testifying.

S. Suggs- Cross-Examination by Mr. Shaffer

46

1 Q. Okay.

2 MS. McCALLISTER: I beg the court's indulgence one
3 second, Your Honor.

4 THE COURT: Okay.

5 Q. You ever recall cross-examining any of the State's
6 witnesses, do you recall that ---

7 A. Recall ---

8 Q. --- that, specifically, of a memory?

9 A. Oh, I'm sure a crossed examine all of them.

10 Q. But you don't remember, specifically, what your cross
11 was?

12 A. To which witness?

13 Q. In terms of the victim?

14 A. I know our cross examined the victim but I don't
15 remember the substance. No, ma'am, I'm sorry.

16 Q. Okay.

17 MS. McCALLISTER: Thank you, Your Honor. That's all
18 I have.

19 **Cross-Examination by Mr. Shaffer:**

20 Q. Mr. Suggs, you said that you had an open door policy,
21 correct?

22 A. I do. Yes, sir.

23 Q. Now, can you point to any written document that would
24 indicate that you informed Mr. Pennell that there was an
25 open door policy?

1 A. No, sir.

2 Q. Okay. Do you have any letters to Mr. Pennell? Did
3 you write anything to him?

4 A. If I did, I don't have those.

5 Q. Okay. Do you -- did you ever have a written agreement
6 or anything like that with him?

7 A. I think Mr. Etheridge may have had a written agreement
8 with Mr. Pennell. But if my memory serves, Mr. Pennell
9 didn't pay anything except \$50.00 and that was it.

10 Q. How much ---

11 MR. PENNELL: Sir ---

12 MR. SHAFFER: Shhh!

13 MR. PENNELL: I'm sorry.

14 Q. So the only paid y'all about \$50.00?

15 A. He paid Mr. Etheridge, \$50.00. Johnny gave me twenty,
16 oh no, he gave me the whole fifty. Twenty-five I gave to
17 John Jepertinger because his son was selling cookies at
18 school. And the other \$25.00 I donated to my favorite
19 charity.

20 Q. Fair enough. So you didn't get paid to try this case,
21 then?

22 A. No, sir, I did not. Mr. Pennell said he had \$13,000
23 in his savings account and he would pay me with that, but
24 never saw a dime of it.

25 Q. Okay. Now, you said that you had a theme for the case

1 and the theme was that the facts don't conform with the
2 evidence, is that correct?

3 A. Yes, sir. I didn't think it was a carjacking case
4 from the facts. Yes, sir.

5 Q. Okay.

6 A. I mean, I had some idea in my mind of what carjacking
7 should be and I just didn't think this was a carjacking. I
8 just thought this was a case of an older drunk man looking
9 for a ride from someone and he was aggravated because he
10 got abandon at a shopping center with a load of groceries
11 and a load of stereo equipment and didn't have a way home
12 and he was fed up and he said the wrong thing to the wrong
13 person, but I didn't think it was carjacking.

14 Q. Now, you mentioned and I'm directing you -- do you
15 have a copy of the transcript?

16 A. No, sir, not in front of me.

17 Q. If you would open this up to page 55.

18 A. I'm sorry, what page?

19 Q. Fifty-five.

20 A. Okay.

21 Q. If you would look at 55 this is line 2, excuse line
22 12, um, I apologize, line 2.

23 A. Line 2?

24 Q. Yes, sir. Um, ---

25 A. Okay.

1 Q. I think this is what the, um, the Attorney General's
2 office was saying the Jackson v. Denno hearing, in the
3 Jackson v. Denno hearing, right?

4 A. It says that at the top of the page.

5 Q. Okay. And, basically, they said that he was using the
6 "N" word and do you know if they were talking about my
7 client?

8 A. I'm sorry, what's the question?

9 Q. Do you know if they were talking about my client,
10 alleged statement by my client?

11 A. That he made the statement?

12 Q. Yeah.

13 A. I assume so.

14 Q. Okay. And if you go to 57, on 57 it said, that Mr.
15 Pennell was screaming out the "N" word, basically, right?
16 I'm talking about the first paragraph there, right?

17 A. Yeah, the officers says, it looks like it -- was
18 testifying that Mr. Pennell was using the "N" word while he
19 was screaming. Yes, I see that.

20 Q. And now that was at the Jackson v. Denno hearing,
21 right?

22 A. I think so, yes.

23 Q. So Ms. McCallister ended up or had ask you about
24 whether or not there was any reason to object, obviously,
25 the Jackson v. Denno hearing is not in front of the jury,

1 right?

2 A. Right. So there's no need to make any objections, you
3 know, as far as something like that to be concerned, I
4 wouldn't think.

5 Q. Would that, would that have been objectionable if it
6 had been brought out in front of the jury?

7 A. Well, it depends, I mean, nobody wants to hear that
8 word. It's an ugly, horrible word. I mean, nobody wants
9 to hear it and nobody wants to speak it except a few
10 people. But, I mean, I can see how it would inflame a
11 jury. But if a witness is testifying in front of a jury
12 that Mr. Pennell said this particular word, I don't know
13 what objection I could use for the court to say, okay,
14 witness, you can't, you can't say what -- you can't say
15 that Mr. Pennell used the "N" word. You can't say that.
16 I'm going to redact that statement. You can say whatever
17 you want to say, you can say racial epithet or whatever but
18 you can't say the "N" word, I don't know, unless I, you
19 know, I might've tried to do that. But I don't know why a
20 judge would say I had a right to have a witness cleanup
21 somebody statement.

22 Q. Okay.

23 A. I mean....

24 Q. But you said that would inflame a jury, right?

25 A. I think it would inflame anybody.

1 Q. You wouldn't want the jury to hear that, right?

2 A. No, sir.

3 Q. Okay. Now, I'm directing your attention to page 77
4 and I'm talking about lines 10 through 15. Can you start
5 at line 10 and read through to the end of line 16?

6 A. Starting where?

7 Q. Line 10.

8 A. "Jonathan Wilson is gonna to tell you something,
9 didn't feel right. Told the man. I can't do that. At
10 that point Charles Pennell got upset, irate with Jonathan.
11 He started calling him racial epithet, swearing acting like
12 he was out of his mind. Talking to him in a very harsh
13 manner. Something that Jonathan Wilson didn't plan for.
14 Didn't expect it. Anticipate it at all. And what did he
15 do? Something very reasonable. He got in his car. But he
16 didn't get in this car to leave the area. He drove around
17 to the front of the store," ---

18 Q. And that's enough.

19 A. Okay.

20 Q. Okay. So what does this appear to be in the
21 transcript?

22 A. I don't know, is it in opening?

23 Q. And I'll direct your attention, I guess, page 75 of
24 line 24, does that appear to be from there all the way to
25 the part that you just read, does that appear to be Mr.

1 Jepertinger's opening?

2 A. It says, it says opening remarks. So I think that is
3 Jepertinger's opening.

4 Q. Okay. Do you think that the fact that the solicitor
5 would've said that the alleged victim is going to get up
6 here and say that Mr. Pennell and use racial epithets that,
7 that would be inflammatory to the jury?

8 A. Well, I'm sure it probably could be. But if you could
9 prove that and if he said it.

10 Q. You don't see a reason to object to it?

11 A. No, sir.

12 Q. Okay. And you didn't object to it, correct, that you
13 recall?

14 A. If it's not in the transcript I didn't object to it.

15 Q. Okay.

16 MR. SHAFFER: Court's indulgence. No further
17 questions.

18 MS. McCALLISTER: I have nothing further, Your
19 Honor.

20 MR. SUGGS: Thanks, judge.

21 MS. McCALLISTER: Your Honor, may I, I beg the
22 court's indulgence one moment. Your Honor, I would like to
23 call Mr. Etheridge. I believe we talked about doing that
24 via telephone. Could you give me a few minutes to make
25 that happen?

1 THE COURT: Sure.

2 MS. McCALLISTER: Thank you.

3 (Whereupon, the court took a short recess)

4 (Whereupon, Mr. Etheridge was questioned by via phone)

5 THE COURT: All right. Are we ready?

6 MS. McCALLISTER: Yes, Your Honor.

7 THE COURT: Good morning, Mr. Etheridge.

8 MR. ETHERIDGE: Good morning.

9 THE COURT: Paul Burch.

10 MR. ETHERIDGE: Hello, judge, how are you doing?

11 THE COURT: Good. We're going to resume the trial
12 now.

13 MR. ETHERIDGE: Okay. I want to thank everybody. I
14 appreciate their courtesy. I had a fall and my mobility is
15 just terrible right now. But I appreciate everybody's
16 courtesy. I'm ready.

17 THE COURT: Yes, sir.

18 MS. McCALLISTER: Your Honor, the State calls Mr.
19 Etheridge. I'm not sure how you want to swear him.

20 THE COURT: Mr. Etheridge, Madam clerk is going to
21 put you under oath.

22 MR. ETHERIDGE: Okay.

23 THE CLERK: Do you swear to tell the truth, the
24 whole truth, and nothing but the truth so help you God?

25 MR. ETHERIDGE: I do.

John Etheridge- Direct Examination by Ms. McCallister 54

1 THE CLERK: Thank you. If you'll state your full
2 name for the record?

3 MR. ETHERIDGE: John R. Etheridge, Jr.

4 JOHN ETHERIDGE, first being
5 duly sworn, testified as follows:

6 **Direct Examination by Ms. McCallister:**

7 Q. Mr. Etheridge, do you recall your representation of
8 Mr. Pennell?

9 A. Yes, ma'am.

10 Q. Okay. Can you tell us a little bit about how that
11 came about?

12 A. I had represented Charles or knew him from other
13 situations and he came to my office on this particular
14 occasion but I knew him before then.

15 Q. Okay. And how did it work to getting Mr. Suggs
16 involved, when did that happen and how did that come about?

17 A. Okay. It appears and I've got my file and I'm looking
18 at it, okay. It appears that fairly early on I was
19 involved with Scott and a lot of different cases with me at
20 that time. And if you would bear with me just one second,
21 it looks like that he became involved on August 31, 2010.

22 Q. Okay.

23 A. And Mr. Pennell would've known it then because I
24 inform him.

25 Q. Okay. And so you are saying by August 31, 2010, Mr.

1 Pennell would have known that Mr. Suggs was now involved in
2 his representation?

3 A. Yes, ma'am.

4 Q. Okay. Do you have anything in your file or do you
5 recall any conversations with Mr. Pennell telling him that
6 Mr. Suggs would be handling his trial?

7 A. I don't recall independently that but I know that he
8 knew it and we told them that. For that I am confident and
9 positive.

10 Q. Okay. You know approximately when you would have told
11 him that?

12 A. I don't.

13 Q. Okay.

14 A. I would assume right after that letter we just
15 referred to.

16 Q. Okay. And do you recall -- do you recall any meetings
17 you had with the three of you, all three together?

18 A. I don't recall whether we had any three meetings
19 together other than I remember talking to Charles at the
20 courthouse with Scott being present.

21 Q. Okay. And so did you essentially -- I mean, how does
22 it work between you and Scott, did you just kinda turn the
23 case over to him?

24 A. I turn this particular case over to Scott.

25 Q. Okay.

1 A. And we had worked together on a lot of files.

2 Q. Okay. And when you turn the case over to Scott, did
3 you notify Mr. Pennell?

4 A. Yes.

5 Q. Okay.

6 A. Yes, ma'am.

7 MS. McCALLISTER: Thank you. That's all the
8 questions I have.

9 **Cross-Examination by Mr. Shaffer:**

10 Q. Mr. Etheridge?

11 A. Yes, sir.

12 Q. My name is Tristan Shaffer. And the attorney for Mr.
13 Pennell for his PCR.

14 A. Sure. How are you today?

15 Q. I'm doing well. How are you doing, sir?

16 A. I'm fine.

17 Q. Now, very briefly, you were present initially whenever
18 Mr. Pennell's trial was about to start, correct?

19 A. That is correct.

20 Q. Okay. And you told the court that you would be in and
21 out, right?

22 A. That is, I don't remember saying that exact word but
23 something like that, I would assume, yes, sir.

24 Q. Do you recall being in there at any point during the
25 actual trial of the case other than that initial moment at

1 the beginning?

2 A. Yes. I came back a couple of times and observed from
3 the little area where there is a window. I can't -- I
4 don't know what you call it exactly, but I don't think I
5 actually appeared back in front of the court other than to
6 check on how things I thought were going.

7 Q. Okay. And do you have any sort of documentation for
8 anything related to, between you and Mr. Pennell about Mr.
9 Suggs being involved in the case?

10 A. Other than the date I said earlier and whatever that
11 date was, August, I think, is when we would've, when he
12 would've known Scott, Mr. Suggs was involved.

13 Q. Okay. And is that in a letter or

14 A. It was a letter from Scott to me with a copy to
15 Charles and I think Charles, thereafter, called me and ask
16 me about him and I explained my relationship with Mr.
17 Suggs.

18 Q. Okay.

19 MR. SHAFFER: No further questions. Thank you.

20 MS. McCALLISTER: That's all, Your Honor. Thank
21 you.

22 THE COURT: Thank you, Mr. Etheridge.

23 MR. ETHERIDGE: Thank you. Again, one more time, thank
24 for the courtesy. I really appreciate that, okay.

25 THE COURT: Yes, sir. I hope you are feeling

1 better and on the road to recovery.

2 MR. ETHERIDGE: I'm on the way, I hope. Thank you,
3 judge. Y'all have a good day.

4 THE CLERK: Thank you.

5 MR. ETHERIDGE: Can I just hand up or what do I need to
6 do?

7 THE CLERK: Yes, sir, you can just hang up.

8 MR. ETHERIDGE: Thank you, y'all. Bye-bye!

9 MS. MCCALLISTER: That's the State's case, Your
10 Honor.

11 THE COURT: Anything else?

12 MR. SHAFFER: Just a brief argument, Your Honor.

13 There obviously hasn't been any letter introduced to the
14 court about that, about who was representing him. But
15 aside from that issue which I think is a major issue,
16 because I think he has a right to, if he's paying for
17 counsel of his choice. But, Your Honor, on another issue
18 related to the racial slur issue there was, obviously, in
19 that opening statement Mr. Jepertinger indicated to the
20 jury that my client had made that. Mr. Suggs testified
21 that it would've been prejudicial. It would've inflamed,
22 prejudice of the jury for him to say that. But Mr. Suggs
23 indicated that there were no basis to make an objection.
24 I, Your Honor, disagree with that. I think he could have
25 made it under certainly under 403. I also didn't think

1 that it was particularly relevant under 401. So I think
2 there were ways to keep it out, you could even say that
3 it's four -- well it certainly would be 403, Your Honor, as
4 unduly prejudicial. So I think that there were ways to
5 keep it out. He had notice of it. It came up during the
6 Jackson v. Denno hearing. It wasn't objected to properly
7 for the opening statements so I think that, that is
8 deficient performance. And he testified and he actually
9 even agreed that it would be prejudicial. So I think it's
10 deficient performance not to make it objection under 403 or
11 401, Your Honor. Thank you.

12 THE COURT: Thank you, sir.

13 MS. McCALLISTER: Your Honor, obviously, the State
14 would disagree with that. Mr. Suggs testified that he felt
15 there was no legal basis to make that objection. What the
16 solicitor said in his opening statement, you know, there
17 may be an objection later on down the line if you can't
18 prove that. But I think the transcript is clear that the
19 victim got on the stand and said exactly what the solicitor
20 said he was going to say and I think, Your Honor, I can
21 give you some transcript cites. I think the issues
22 discussed in the Jackson v. Denno hearing, page 59 through
23 62, Mr. Suggs does make some objections to the use of, of
24 some racial slurs and the court does make a ruling on that.
25 So he did object to that. And I think the statement by the

1 victim that corresponds with the opening statement is on
2 page 104 of the transcript so I'll just call your attention
3 to those passages. I think he did object and I think that
4 he handled that issue properly and he actually got a
5 favorable ruling on that issue, Your Honor. Thank you.

6 THE COURT: Yes, sir?

7 MR. SHAFFER: Your Honor, if he objected during the
8 Jackson v. Denno hearing that's great and, obviously, the
9 judge had commented on it. With that being said, he didn't
10 make a proper objection during the trial and he should have
11 objected contemporaneously during the trial. Otherwise,
12 it's not preserved but with you, Your Honor, it's not
13 preserved. That wasn't a final ruling with the judge
14 saying that he didn't want that coming in. It was
15 prejudicial. He should have made the objection whenever it
16 actually came into trial, Your Honor, and I point to the
17 court's attention that page 77, line 13, whenever it came
18 up. And page 104, line 1 through 4, obviously, Your Honor,
19 it came in, in front of the jury. They never said anything
20 about it. So I think that, that was, that trial counsel
21 should've objected to those times contemporaneously then.

22 THE COURT: Okay. I've got to read this
23 transcript. It's rather lengthy. So I'm going to take
24 some time this afternoon and go over that. All right.
25 Thanks.

1 MS. McCALLISTER: Thank you, Your Honor.

2 THE COURT: I'll get directions out on this as soon
3 as I can.

4 (CONCLUSION OF THE HEARING ON MARCH 16, 2017)

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CERTIFICATE

I, the undersigned Lisa S. Carter, Official Court Reporter for the Fourth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete excerpt of transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Twelfth Circuit Court for Florence County, South Carolina, on the 16th day of March 16, 2017.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.

Lisa Carter

Lisa S. Carter

Circuit Court Reporter

November 7, 2018

FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE 2018 JAN 18 PM 2:57) THE TWELFTH JUDICIAL CIRCUIT
Charles Pennell, #231231,) Case No. 2013-CP-21-1949
DORIS POLLOCK SHARRA
CCCP 2 GS

Applicant,

FLORENCE COUNTY, SC

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

Presiding Judge:	Paul M. Burch, Jr.
Applicant's Attorney:	Tristan Shaffer, Esquire
Respondent's Attorney:	Lindsey A. McCallister, Esquire
Date of Hearing:	March 16, 2017
Court Reporter:	Lisa S. Carter

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed July 24, 2013. The Respondent made its Return on May 2, 2014. An evidentiary hearing into the matter was convened on March 16, 2017, at the Florence County Courthouse. Tristan Shaffer, Esquire, represented Applicant. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. John Etheridge, Esquire, and B. Scott Suggs, Esquire, also testified. The Court had before it the trial transcript, the Florence County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, Applicant's application, Respondent's return, and Applicant's appellate records.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. In September 2009, the Florence County Grand Jury indicted Applicant for attempted carjacking (2009-GS-21-1532). B.

CERTIFIED: A TRUE COPY

CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

Scott Suggs, Esquire, and John Etheridge, Esquire, represented Applicant. On October 11, 2010, Applicant proceeded to trial before the Honorable Thomas A. Russo and a jury. The jury found Applicant guilty as indicted. Judge Russo sentenced Applicant to ten years' imprisonment.

Applicant filed a timely notice of appeal, and Robert M. Dudek, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on June 26, 2013. State v. Pennell, Op. No. 2013-UP-285 (S.C. Ct. App. filed June 26, 2013). The remittitur was returned to the circuit court on July 12, 2013.

ALLEGATIONS

In his Application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
2. "Statutory and Constitutional Violations – Due Process"

In an attachment to the application, Applicant provided the following additional grounds:

1. "Applicant was denied effective assistance of counsel [in] violation of the sixth amendment of the United States Constitution and Article I, Section 14 of the South Carolina Constitution"
2. "Counsel failed to subpoena witnesses for defendant which would have clearly changed outcome of trial"
3. "No legal research or factual testing done by Attorney on my behalf"
4. "Retained counsel never defended me; Attorney Etheridge apologized to Court for being in and out of court but never returned through trial"
5. "Attorney S. Suggs stated to the Court he had nothing prepared"
6. "No competency hearing motion filed though Defendant was treated for Post Traumatic Depression & other mental illness"
7. "Attorney never objected to contradictory statements made by Det M Robinson or Provinzano"
8. "Trial Attorney & Court were bias in letting J Wilson testify, Wilson had criminal history for ABHAN, Court allowed Pennell's ABHAN grounds for impeachment but not Wilson"
9. "Attorney never objected to Wilson's testimony contradicting himself & his statements subjecting himself to perjury"
10. "Attorney never question Det Robinson as to why J Wilson was never read his rights & how she [filed] in statements she recovered 9mm"

weapon J Wilson used to 'defend' himself with! Showing Bias & prejudice"

11. "Testimony was allowed in front jury which only inflamed jury on racial slurs which weren't evidence"
12. "Attorneys allowed photo evidence after trial began without discussing with Defendant"
13. "No interview of J Wilson was conducted by Defense Attorneys"
14. "No investigation of evidence or arguments from Prosecution 'stereo' shell casings [...]"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, an applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. The Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, an applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

A. Ineffective Assistance of Counsel – Failure to Investigate and/or Prepare for Trial

a. Allegations # 1, 2, 3, 4, 13, 14

Regarding Applicant's claims of ineffective assistance of counsel, this Court finds Applicant has failed to meet his burden of proof. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

Applicant testified the carjacking incident arose as he was attempting to return a stereo to Wal-Mart. Applicant testified his niece was driving him to the store when they got in an argument, and he got out of her car in the parking lot of the Hollywood Video, taking the stereo with him. Applicant testified his stereo equipment was in the driveway of the video store when

the victim turned in, exited his car, and kicked the equipment out of the way. Applicant and the victim then exchanged words, and Applicant's testimony is that the victim pulled a pistol on Applicant, assaulted him, then left the scene and returned a few minutes later to assault Applicant again. Applicant further testified he then left and was arrested a short time later a few blocks away.

Applicant testified he retained Mr. Etheridge to represent him, and they spoke three or four times before trial. Applicant further testified he was unaware Mr. Suggs would be representing him at trial or that Mr. Etheridge would leave the courtroom after jury selection. Applicant testified he was never told Mr. Suggs would be the only attorney representing him at trial. However, Applicant admitted he never objected to continuing the trial with only Mr. Suggs or told the judge he did not want Mr. Suggs to represent him. Applicant testified he briefly spoke to Mr. Suggs before trial regarding his version of events, and Mr. Suggs told him just to sit and be quiet during the trial. Applicant testified he understood the defense would focus on the language of the carjacking statute and whether his actions fit the language of the statute.

Applicant testified there were written statements given by employees of the video store, whom Applicant wanted to be subpoenaed, but Mr. Suggs told him they could not be located. Applicant also testified neither attorney investigated the issue of 9mm shell casings recovered at the scene, and the stereo was not presented as evidence to corroborate Applicant's version of events. Applicant testified the solicitor characterized the stereo as "old," and Applicant thought it should have been present in court to show that it was brand new. Applicant conceded evidence of the stereo's condition was presented through photographs taken at the scene.

Mr. Suggs testified he and Mr. Etheridge have an unofficial partnership and often assist one another. Mr. Suggs testified Applicant consulted with Mr. Etheridge originally, and Mr.

Etheridge asked him to help with the case. Mr. Suggs testified Applicant was released on bond prior to trial and would come into the office. Mr. Suggs testified Applicant understood the relationship between himself and Mr. Etheridge, and Applicant was aware Mr. Suggs would be the attorney handling the trial, although there was no formal agreement between Applicant and Mr. Suggs. Mr. Etheridge also testified he told Applicant Mr. Suggs would be handling the trial, he and Applicant spoke to Mr. Suggs together at the courthouse, and then he turned the case over to Mr. Suggs and notified Applicant.

Mr. Suggs testified he prepared for trial by visiting the scene and taking his own photographs, talking to the solicitor, and researching the law on these charges. Mr. Suggs testified the theory of the defense was that Applicant's actions did not meet the elements of the carjacking statute, since carjacking requires "operation" of a vehicle. Mr. Suggs testified he did not specifically remember the issue of subpoenaing the video store witnesses, but he would have followed up on that and let Applicant know the results of his attempts to locate them. Mr. Suggs testified the issue of the age and condition of the stereo was not relevant to their theory of the case or their defense. Mr. Suggs testified he thoroughly cross examined the victim at trial regarding his version of events, including detailed questioning as to whether Applicant "operated" victim's vehicle. Mr. Suggs further testified he felt he had enough time to prepare the case for trial, and the fact that he did not make a motion for a continuance indicated he was confident in his preparation.

This Court finds Applicant's testimony regarding deficiency by either Mr. Etheridge or Mr. Suggs is not credible. This Court finds both attorneys provided effective assistance in this case. The record reflects both Mr. Etheridge and Mr. Suggs conferred with Applicant on multiple occasions, and both informed Applicant Mr. Suggs would handle the trial. Further, this

Court finds Mr. Suggs conducted an investigation of the facts, thoroughly researched the law of Applicant's case, and formulated and presented a defense based on the application of the facts to the specific language in the statute.

Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that Mr. Etheridge or Mr. Suggs committed either errors or omissions in their representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. Applicant also failed to present any evidence or witnesses that he was unable to present at trial due to his counsels' allegedly deficient performance. See Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) ("In order to support a claim that trial counsel was ineffective for failing to interview or call potential . . . witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.). This Court concludes Applicant has not met his burden of proving either Mr. Etheridge or Mr. Suggs rendered ineffective assistance by failing to investigate or call specific witnesses or by failing to adequately prepare for trial. These allegations are denied and dismissed with prejudice.

B. Ineffective Assistance of Counsel – Trial Performance

a. Allegations #1, 5, 6, 7, 8, 9, 10, 11, 12

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466

U.S. at 690. There is a strong presumption that trial counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). Counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

Applicant testified the officers assigned to his case gave contradictory statements regarding what the victim told them about the incident. Applicant contends the victim never told the officer he left the scene and then returned, and Mr. Suggs should have questioned the officer regarding this inconsistency. However, Applicant conceded Mr. Suggs did confront the victim about the discrepancy during his testimony. Applicant also testified he felt Mr. Suggs should have objected to attacks on Applicant's character, specifically regarding Applicant's use of a racial slur directed at the victim. Applicant admits he did in fact use the racial slur, but he testified Mr. Suggs should have objected to the victim's testimony because the racial makeup of the jury was 50% black, and the victim's testimony made Applicant appear racist. Applicant further testified Mr. Suggs should have objected to the solicitor's mention of the racial slurs during opening statements.

Applicant also testified Mr. Suggs advised him not to testify at trial, and he did not testify. However, Applicant contends both he and the victim had prior convictions for ABHAN, but the judge ruled the conviction could only be used to impeach Applicant, not the victim. Further, Applicant testified he felt Mr. Suggs was ineffective because Mr. Suggs stated to the jury he had not prepared an opening statement. See Transcript, p. 84.

Mr. Suggs testified he tried to keep out Applicant's statement, which included the use of racial slurs directed at the victim, pursuant to Jackson v. Denno. However, Mr. Suggs testified that once the judge ruled the statement was admissible, there was no basis to object to the victim's testimony regarding what he heard Applicant say. Mr. Suggs also testified there was no reason to object to the solicitor's mention of Applicant's use of the slur during opening statements if the solicitor can produce evidence to support the statement, which he did. Mr. Suggs testified he did specifically recall the testimony of the officers who responded to the scene, but contradictions between statements are not unusual or automatically concerning, and he cross examined all of the State's witnesses in both the Jackson v. Denno hearing and in front of the jury.

Mr. Suggs also testified he did not specifically remember the issue of impeaching the victim with a prior ABHAN conviction, but if the judge ruled it was not admissible, there could be a variety of reasons for that. The transcript reflects the victim successfully completed Pre-Trial Intervention on that charge, so the judge would not allow that to be used for impeachment purposes. Transcript, pp. 41-42. Mr. Suggs further testified he thoroughly cross examined the victim within the bounds of the court's ruling. Mr. Suggs also testified he and Applicant discussed whether Applicant should testify, as is his usual practice, and he gave Applicant his opinion that Applicant should not testify in this case. The transcript reflects Mr. Suggs asked the

judge and solicitor review Applicant's prior criminal history with him on the record so he would know exactly which convictions could be used for impeachment, including an ABHAN conviction. Transcript, pp. 269-277.

Finally, Mr. Suggs testified his remark that he "had nothing prepared" in his opening statement was a reference to using written notes or a prepared statement. Mr. Suggs testified it is not his practice to use notes because he does not feel that is the most effective way to present an opening statement. The transcript supports Mr. Suggs's characterization of his remark and reflects he gave a opening statement, which was responsive to points raised by the prosecution and which set up Applicant's defense that his actions did not conform to the elements of the carjacking statute. Transcript, p. 83-88.

This Court finds Mr. Suggs's performance with respect to Applicant's trial was not deficient. This Court finds Mr. Suggs's testimony on these issues to be credible, while also finding Applicant's testimony not credible. Specifically, this Court finds Mr. Suggs explained why he was unable to challenge the victim's testimony regarding Applicant's use of a racial slur, why he did not object to the solicitor's opening statement, and why he chose not "prepare" an opening statement. Because Mr. Suggs articulated "a valid reason for employing certain strategy[ies], such conduct will not be deemed ineffective assistance of counsel." Smith, 386 S.C. at 567, 689 S.E.2d at 632 (citing Caprood, 338 S.C. at 110, 525 S.E.2d at 517).

Further, the Court finds Applicant has not met his burden of proving he was prejudiced by Counsel's conduct. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691, 104. To establish prejudice, Applicant is required to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of

the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694. A “PCR applicant’s mere speculation is insufficient to establish prejudice and, accordingly, the applicant must put forth further evidence to support his claim.” Glover v. State, 318 S.C. 496, 501, 458 S.E.2d 538, 541 (1995) (Waller, J., dissenting). To establish prejudice, Applicant is required to show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694. Applicant did not present any evidence he was prejudiced by his counsel’s performance at trial. Applicant did not call any witnesses or present any evidence that he was unable to present at trial due to Mr. Suggs’s alleged deficiencies. See, e.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (“This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . .”). Accordingly, these allegations are denied and dismissed with prejudice.

CONCLUSION

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by counsel’s representation. Therefore, this PCR application must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel’s assistance in seeking review of the denial of post-conviction

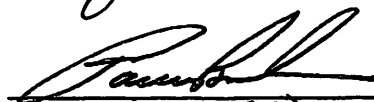
relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, Applicant must serve and file a notice of appeal on his own behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

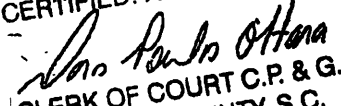
1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 5th day of January, 2018.

, South Carolina


 Paul M. Burch, Jr. (pud)
 Presiding Judge
 Twelfth Judicial Circuit

FILED
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 DORIS PULOS O'HARA
 CCP & GS
 FLORENCE COUNTY, SC

CERTIFIED: A TRUE COPY

 CLERK OF COURT C.P. & G.S.
 FLORENCE COUNTY, S.C.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	
	)	Case No.: 2013-CP-21-1949
CHARLES PENNELL,	)	
	)	MOTION TO ALTER OR AMEND
	)	
	)	
Applicant,	)	
vs.	)	
	)	
THE STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

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DORIS PHELPS CHARRA
CCCP & GS
FLORENCE COUNTY, SC

On January 19, 2018, this Court dismissed the above referenced case. Applicant's Counsel received notice of this order on January 23, 2018. Pursuant to Rule 59(e), SCRCPP, Applicant respectfully request that this Court reconsider its Order of Dismissal. *See Elam v. S.C. D.O.T.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004) ("[I]t is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court 'alter or amend the judgment,' but also as a vehicle to seek 'reconsideration' of issues and arguments."). In addition to the arguments raised at the hearing Applicant respectfully request that the Court consider the following:

1. The Court found that "Mr. Suggs explained why he was unable to challenge the victim's testimony regarding Applicant's use of a racial slur." Mr. Suggs's testified that he was unaware of grounds to object to the testimony concerning the use of a racial slur. Applicant submits that there are a plethora of evidentiary grounds Mr. Suggs should have asserted to suppress the use of the racial slur including the following:

- a. The racial slur was not relevant and therefore should have been suppressed. *See* SCRC Rule 401 ("Relevant evidence' means evidence having any tendency to

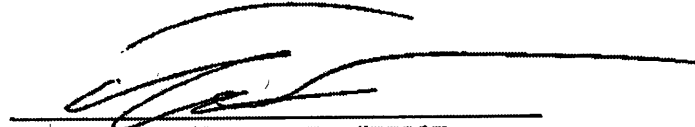
make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”); *see also*, SCRE Rule 402 (“All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible.”).

- b. Even if the racial slur was relevant it was unduly prejudicial. *See* SCRE Rule 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”); *See also*, SCRE Rule 404; *Joseph v. Publix Super Mkts., Inc.*, 151 F. App’x 760, 769 (11th Cir. 2005) (“[A]dmission of the racial slur was highly prejudicial and should have been excluded under Rule 403 even if the District Court concluded in the exercise of its discretion that it was relevant; the statement’s ‘probative value, if any, was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury’”).
- c. The introduction of the racial slur is so prejudicial that its introduction would violate Applicant’s right to a fair trial. *Cf. Bennett v. Stirling*, 842 F.3d 319, 327-28 (4th Cir. 2016) (holding that the prosecutor’s appeals to racial bigotry ‘so infected the trial with unfairness as to make the resulting [sentence] a denial of due process.’); *see also*, *United States v. Massey*, 50 C.M.R. 346, 348 (1975) (“The prejudicial character of the racial slur is apparent, notwithstanding the

admissible evidence of guilt. The introduction of such testimony serves to depict the appellant as a racial bigot. The characterization was probably correct, but bigots have as much right to a fair trial as anyone else." (emphasis added)).

2. The Court found trial counsel's articulated a valid strategy for not objecting to the testimony concerning racial slurs. Applicant respectfully submits that this finding is not supported by the evidence in the record.

Based on the foregoing and the arguments raised at the evidentiary hearing, Applicant respectfully request that the Court alter or amend its order dismissing the above referenced case.



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February 2, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE	)	FOR THE TWELFTH JUDICIAL CIRCUIT
	)	
Charles Pennell, #231231,	)	Case No. 2013-CP-21-1949
Applicant,	)	
	)	RETURN TO APPLICANT'S MOTION
v.	)	TO ALTER OR AMEND JUDGMENT
	)	
State of South Carolina,	)	
Respondent.	)	

Respondent, by and through undersigned counsel, making its Return to Applicant's "Motion to Alter or Amend," filed on February 5, 2018, would respectfully show unto this Court:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. In September 2009, the Florence County Grand Jury indicted Applicant for attempted carjacking (2009-GS-21-1532). B. Scott Suggs, Esquire, and John Etheridge, Esquire, represented Applicant. On October 11, 2010, Applicant proceeded to trial before the Honorable Thomas A. Russo and a jury. The jury found Applicant guilty as indicted. Judge Russo sentenced Applicant to ten years' imprisonment.

Applicant filed a timely notice of appeal, and Robert M. Dudek, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on June 26, 2013. State v. Pennell, Op. No. 2013-UP-285 (S.C. Ct. App. filed June 26, 2013). The remittitur was returned to the circuit court on July 12, 2013.

II. Current Post-Conviction Relief Action

On July 24, 2013, Applicant filed an application for post-conviction relief. Respondent made its Return on May 2, 2014. An evidentiary hearing into the matter was convened on March

16, 2017, at the Florence County Courthouse before the Honorable Paul M. Burch. Tristan Shaffer, Esquire, represented Applicant. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant raised multiple allegations, including an allegation that his trial counsel was ineffective because "[t]estimony was allowed in front jury which only inflamed jury on racial slurs which weren't evidence." Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, B. Scott Suggs, Esquire, testified for Respondent.

By written order signed January 5, 2018, and filed January 18, 2018, Judge Burch denied and dismissed the application with prejudice. On February 5, 2018, Applicant filed a "Motion to Alter or Amend." This Return follows.

III. Applicant's Motion to Alter or Amend

In his motion for reconsideration, Applicant argues this Court should reverse its prior rulings and grant post-conviction relief. Specifically, Applicant argues he established counsel was deficient for failing to object to the victim's testimony concerning racial slurs directed at him by Applicant during the commission of the crime. Applicant argues counsel had grounds to object based on relevance and prejudice, but counsel testified he did not see any basis for an objection. Therefore, Applicant argues the PCR court's finding that trial counsel articulated he a valid trial strategy for failing to object is not supported by the evidence in the record.

Respondent submits the Order of Dismissal signed by Judge Burch, filed January 18, 2018, contains the findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003) and Rule 52(a) SCRPC. Respondent contends the Order is an accurate reflection of the

findings and amendment is not necessary to support the ruling; therefore, Applicant's motion should be denied.

The facts of this case are somewhat unique in that the victim, in response to Applicant's carjacking attempt, assaulted Applicant twice, then fled the scene and returned in a different vehicle, creating some confusion as to who was the victim and who was the assailant. On direct examination, the victim testified Applicant approached him in the parking lot of the Hollywood Video store, when victim stopped his car to move Applicant's stereo equipment from blocking the entrance. Tr. p. 103. According to the victim, Applicant asked him for a ride, which he refused, and at that point, Applicant became aggressive and called the victim a variety of names, including a racial slur. Tr. pp. 103-04. The victim ignored Applicant and pulled his car around to the parking lot in front of the video store, where Applicant again approached the victim, this time telling him he would steal the car. Tr. pp. 104-05. The victim testified he was scared at that point and felt like he "could really get hurt." Tr. p. 106.

The victim initially drew his gun and fired into the air, and because he did not want to shoot Applicant, the victim punched and kicked him, then drove off and returned home. Tr. pp. 106-10. The victim explained he then got in his wife's car, in the hope Applicant wouldn't recognize him, and returned to the store to let the clerks know what had happened. Tr. p. 111, 158-59. However, Applicant was still in the parking lot, and he and the victim got into another physical altercation. Tr. pp. 112-13, 165-66. The victim then left again and this time he called the video store from his home, by which point law enforcement had arrived. Tr. pp. 113-15. At the officers' direction, the victim returned to the store a third time. Tr. p. 115. Applicant was questioned and detained and continued to shout vulgarities from the back of the police car. Tr. p. 116, 232-33.

On cross-examination, the victim admitted he never saw Applicant with a weapon, Applicant never attempted to grab the car keys from the victim or from the car's ignition, and Applicant "struck at him," but never made physical contact. Tr. pp. 148-49. He also testified Applicant took a step back after he fired a warning shot into the air. Tr. p. 153. When he returned to the video store in the second car and got into the second fight, Applicant never threatened to take the car or attempted to get the keys from the victim. Tr. p. 169.

Further, according to the investigators, Applicant's version of events was that *he* was actually victim and had been attacked without provocation. Tr. pp. 231. The lead investigator testified she initially "didn't know who was the victim and who was the suspect." Tr. p. 231. She also testified the victim appeared to be scared, but remained calm and straightforward, while Applicant was screaming vulgarities and out of control. Tr. pp. 232-33. She testified based on her observations of their respective behavior, she determined Applicant was the aggressor, and he was charged. Tr. p. 235.

One element of carjacking is the use of force or intimidation. S.C. Code Ann. § 16-3-1075(B)(1) ("A person is guilty of the felony of carjacking who takes, or attempts to take, a motor vehicle from another person by force or intimidation while the person is operating the vehicle or while the person is in the vehicle."). The victim specifically testified he felt afraid of Applicant after the confrontation over the stereo equipment, during which Applicant used the racial slur, and the lead investigator testified Applicant's continued use of verbally abusive language and aggressive behavior prior to his arrest was a large part of her determination as to who was the perpetrator and who the victim. Applicant's use of a racial slur coupled with his aggressive demeanor was therefore relevant to that element of the State's case, and admissible under Rule

401, SCRE. Counsel cannot be ineffective for failing to object to admissible evidence, and therefore, this Court's determination that counsel adequately explained his lack of objection, on the basis of counsel's testimony that he saw no valid objection, was correct.

Applicant argues even if the racial slur was relevant, counsel should have objected on the grounds of undue prejudice and contends its admission was so prejudicial as to violate Applicant's right to a fair trial. Applicant cites Joseph v. Publix Supermarkets, 151 F. App'x 760, 767 (11th Cir. 2005), for the proposition that racial slurs should be excluded on prejudice grounds. However, in that case, the racial slur admitted into evidence was made by a person who did not participate in the employment decision at issue in the case. Id. at 769. Contrary to Applicant's assertion, the Court of Appeals in Joseph based its decision on relevance, not prejudice. Id. ("Publix maintains the testimony. . . was not relevant because Mr. Cabel was a supervisor who retired. . . prior to Publix's alleged discrimination. We agree."). As discussed above, the testimony in Applicant's case was relevant to explain the State's version of events and helped establish one of the elements of the crime.

Applicant next cites to Bennett v. Stirling, in which the Fourth Circuit Court of Appeals granted habeas relief on the grounds that a *prosecutor's* use of coded racial language and repeated injection of race into a capital sentencing hearing was so improper as to render the hearing fundamentally unfair. 842 F.3d 319, 324. Bennett, however, is distinguishable from this situation in that the prosecutor independently injected race into the proceeding; the words were his own, not a recitation of a statement the defendant himself made during the commission of the crime, and his repeated references to the defendant's race caused the jury to focus, improperly, on race rather than the objective facts of the case. Id. In Applicant's case, counsel specifically testified he felt

he had no objection because Applicant himself used the racial slur; counsel testified he would have objected had someone else other than Applicant used the slur. The rule from Bennett is inapplicable here.

In United States v. Massey, the third case¹ cited by Applicant, the defendant was convicted of manslaughter after driving drunk, running a red light, and striking another car, killing one of the passengers. 50 C.M.R. 346 (1975). In the hospital after the accident, the defendant used a racial slur to refer to the deceased victim. Id. The appellate court found the admission of the statement to be improper, again based on relevance rather than prejudice, because there was no evidence the defendant knew the victim's race at the time of the accident such as to make the statement probative as to defendant's negligence. Id.

"A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2003). Probative value "is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues." State v. Gray, 408 S.C. 601, 610 (Ct. App. 2014). As discussed above, Applicant's statement was probative as to the issue of force or intimidation; in the cases Applicant cites to support his argument for unfair prejudice, the appellate courts found the statements at issue had no probative value, therefore, the statements were unfairly prejudicial. That is not so in Applicant's case. Here, the words were Applicant's own, directed toward the victim during the commission of a crime requiring the use of force or intimidation. The admission of Applicant's statement was not so prejudicial as to render his trial

¹ In any event, Joseph and Massey are not binding precedent as they are from the Eleventh Circuit and the Court of Military Review, respectively.

constitutionally unfair, and even if counsel had objected, the trial court's decision to admit the statement likely would have been upheld on appeal.

Respondent submits this Court's ruling was legally correct and supported by the record, and this Court should deny Applicant's request to alter or amend its ruling as to this issue. Respondent submits this Court properly ruled on all issues after ample opportunity for Applicant to present all his issues, and the motion should be denied in full.

IV. Relief Requested

WHEREFORE, having made its Return to the motion, Respondent requests the relief requested in the motion be denied and that said motion be dismissed.

Respectfully submitted,

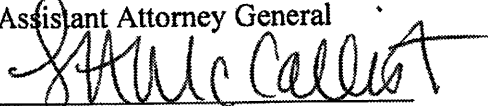
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Attorney General

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Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

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Assistant Attorney General

BY:


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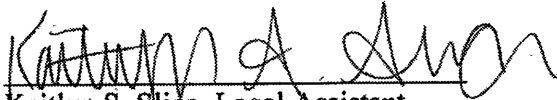
6/8, 2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE	)	
	)	
	)	2013-CP-21-1949
	)	
CHARLES PENNELL, #231231,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return to Applicant's Motion to Alter or Amend Judgment** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Tristan M. Shaffer, Esquire
Tristan M. Shaffer, Attorney at Law
P.O. Box 1021
Chapin, South Carolina 29036

DATED this the 8th day of June, 2018.


 Kaitlyn S. Slice, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

Charles Pennell, #231231

Applicant,)

v.

State of South Carolina,

Respondent.)

) IN THE COURT OF COMMON PLEAS
) OF THE TWELFTH JUDICIAL CIRCUIT

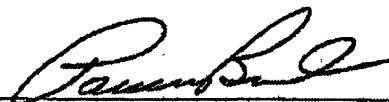
) Case Number: 2013-CP-21-1949

**ORDER DENYING APPLICANTS'
MOTION TO ALTER OR AMEND
JUDGMENT**

This matter is before the Court on Defendants' Motion to Alter or Amend Judgment. After carefully reviewing all evidence before me and my prior order in the above-referenced matter, the Defendants' Motion to Alter or Amend Judgment, is hereby DENIED.

THEREFORE, Defendants' Motion to Alter or Amend Judgment is hereby DENIED without further hearing.

AND IT IS SO ORDERED!



The Honorable Paul M. Burch
Judge, Fourth Judicial Circuit

Pageland, South Carolina
June 12, 2018

2018 JUN 18 PM 4:29
DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

FILED

Mailed 6/20/18 cc: T. Shaffer, L. McCallister

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

INDICTMENT FOR
ATTEMPTED CARJACKING

At a Court of General Sessions, convened on SEPTEMBER 10, 2009 the Grand Jurors of FLORENCE County present upon their oath:

COUNT ONE- ATTEMPTED CARJACKING

That Charles Berlin Pennell did in Florence County on or about the May 25, 2009, take and/or attempt to take one Chevy Blazer from Jonathan Wilson by force and violence or by intimidation while said victim was operating and/or in the vehicle, in violation of Section 16-3-1075(B)(1), S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



E.L. Clements, III
TWELFTH CIRCUIT SOLICITOR

Michael Robinson Florence Police Department

Michael Robinson

Florence Police Department

JOHN C. JEPERTINGER

ARREST WARRANT NUMBER

J399872

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date _____

VERDICT

TRUE BILL

Foreperson of Petit Jury

Date _____

The State of South Carolina

County of

FLORENCE

COURT OF GENERAL SESSIONS

SEPTEMBER

TERM

2009

THE STATE

VS.

CHARLES BERLIN PENNELL

Indictment for

ATTEMPTED CARJACKING

CLERICAL
CLERICAL
CLERICAL
CLERICAL

100