

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

RECEIVED

JAN 31 2013

S.C. Supreme Court

RAYMOND KELLY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212409

APPENDIX

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

SUZANNE H. WHITE
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

INDEX	i
TRIAL TRANSCRIPT	1
INDICTMENT AND SENTENCING SHEET	240
APPLICATION FOR POST-CONVICTION RELIEF	243
RETURN	250
POST-CONVICTION RELIEF HEARING TRANSCRIPT	256
ORDER OF DISMISSAL	279

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

State of South Carolina,

Plaintiff,

-VS-

Raymond Thomas Kelley

Defendants.

COURT OF COMMON PLEAS

Case No(s) : 06-GS-42-5099

TRANSCRIPT OF RECORD

September 17-18, 2007
Spartanburg, South Carolina

B E F O R E:

HONORABLE JOHN C. FEW, Judge.

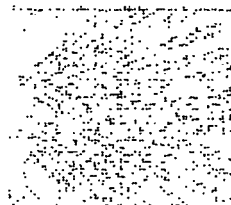
A P P E A R A N C E S:

DERRICK BULSA, Esquire
Assistant Solicitor

RICHARD WHELCHER, Esquire
Attorney for Defendant

Teresa B. Johnson
Certified Verbatim Reporter
P.O. Box 2812
Greenville, S.C. 29602

Records are
taken and
produced via



CAT 7

		<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1					
2	Jury Qualification	7			
3	Jury Selection	30			
4	<u>Jackson v. Deno</u>				
5	Joseph Bohon				
6	by Mr. Bulsa	39			
7	by Mr. Whelchel		46		
8	by Mr. Bulsa			51	
9	Raymond Kelley				
10	by Mr. Whelchel	52			
11	by Mr. Bulsa	60			
12	Ruling of the Court	68			
13	Michael Angel				
14	by Mr. Bulsa	69			
15	by Mr. Whelchel		73		
16	by Mr. Bulsa			80	
17	by Mr. Whelchel				86
18	Court Remarks	93			
19	Opening Statement				
20	by Mr. Bulsa	98			
21	by Mr. Whelchel	100			
22	Robert Shaffer				
23	by Mr. Bulsa	103			
24	by Mr. Whelchel		116		
25	by Mr. Bulsa			119	

		<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1					
2	Jordan Tarver				
3	by Mr. Bulsa	123			
4	by Mr. Whelchel		138		
5	by Mr. Bulsa			139	
6	Joseph Wyatt				
7	by Mr. Bulsa	140			
8	by Mr. Whelchel		150		
9	by Mr. Bulsa			151	
10	Michael Angel				
11	by Mr. Bulsa	152			
12	by Mr. Whelchel		161		
13	by Mr. Bulsa			165	
14	by Mr. Whelchel				166
15	Bryan Fraley				
16	by Mr. Bulsa	168			
17	by Mr. Whelchel		183		
18	Brandon Letterman				
19	by Mr. Bulsa	184			
20	Joseph Bohon				
21	by Mr. Bulsa	188			
22	by Mr. Whelchel		198		
23	by Mr. Bulsa			202	
24	by Mr. Whelchel				203
25	Motions	205			

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1				
2	Remarks to Defendant	206		
3	Closing Argument			
4	by Mr. Bulsa	212		
5	by Mr. Whelchel	214		
6	Jury Charge	220		
7	Verdict	234		
8	Motions	235		
9	Sentencing	236		
10	Certificate of Reporter	241		
11				
12				
13				
14				
15				
16				
17				
18				
19				
20				
21				
22				
23				
24				
25				

EXHIBITS

5

1	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
2		STATE'S EXHIBITS		
3	S-1	Waiver	40	190
4	S-2	Statement	40	195
5	S-3	Photo	105	106
6	S-4	Photo	105	106
7	S-5	Photo	105	106
8	S-6	Photo	105	106
9	S-7	Photo	105	106
10	S-8	Photo	105	106
11	S-9	Photo	108	109
12	S-10	Photo	108	110
13	S-11	Photo	108	116
14	S-12	Gun	110	119
15	S-13	Photo	118	121
16	S-14	Shells	119	120
17	S-15	Photo	121	122
18	S-16	Photo	121	122
19	S-17	Photo	121	122
20	S-18	Photo	121	122
21	S-19	Photo	121	122
22	S-20	Photo	147	148
23	S-21	Evidence Sheet	174	175
24	S-22	Evidence Sheet	174	175
25	S-23	Tow Sheet	179	180

EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
2	DEFENDANT'S EXHIBITS		
3	No exhibits offered.		
4			
5	COURT'S EXHIBITS		
6	C-1 Conviction	236	
7	C-2 Conviction	236	
8	C-3 Conviction	236	
9	C-4 Conviction	236	
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			

P R O C E E D I N G S

1
2 **THE COURT:** Ladies and Gentlemen of the jury,
3 let me introduce myself. I am John Few. I am
4 from Greenville. It is my privilege to be over
5 here in Spartanburg working with you all this
6 week. I know you were over there with Judge
7 Alford while I was in here doing the sort of
8 thing that you just saw me complete. That
9 obviously was a case that is absolutely unrelated
10 to the case that we are about to go through jury
11 selection on. I wanted to make that clear. Now,
12 we are going to go through now a series of
13 questions and answers that are similar in format
14 probably to what you just went through over there
15 with Judge Alford.

16 We're going to start the case of the State of
17 South Carolina versus Raymond Kelley. Mr.
18 Kelley has been indicted in indictment number
19 2006-GS-42-5099 for Armed Robbery. In that
20 indictment, it is alleged that Raymond Thomas
21 Kelley did in Spartanburg County on or about
22 November 11th, 2006 did take a sum of money from
23 Pizza-a-Plenty while armed with a shotgun, a
24 deadly weapon in violation of Section 16-11-
25 330(b) of the Code of Laws of South Carolina.

1 Now, for those of you who are selected to
2 serve on the jury in this case, after we come
3 back from lunch, I will give you some detailed
4 instructions about what some of your
5 responsibilities are and what some of the rules
6 and considerations that will govern your service
7 as jurors. But let me make one thing clear. The
8 indictment that I just read to you is not in any
9 sense evidence of the allegations that are
10 contained within the indictment.

11 The indictment is simply the formal document
12 that contains the allegations that have been made
13 against the Defendant. And the indictment serves
14 to process the case and bring it into this court
15 for trial. The Defendant has plead not guilty to
16 this indictment. And the plea of not guilty cast
17 the burden on the State to prove the Defendant
18 guilty beyond a reasonable doubt. And for those
19 of you who are selected to serve on the jury,
20 that will be your job to determine whether or not
21 the State has met that burden of proof.

22 Now in this series of questions that I'm
23 about to ask you, I want to remind you that -- I
24 assume you all were put under oath over across
25 the hall. You are still under oath. And that

1 oath applies to all of the information that you
2 will be giving me during the course of this voir
3 dire process we call it. When I ask you a
4 question, please listen very carefully to the
5 question. If you have any information that is
6 responsive to a question that I ask, then please
7 stand, tell me your name and tell me your
8 information. If you have any reason why you
9 don't want to tell me out loud, then you just let
10 me know that you would like to speak to me
11 privately and I will get you down front and you
12 can answer the question privately with me and
13 with the attorneys.

14 Now, if you happen to know something about
15 this case or if you know some of the people who
16 are going to be involved in this case and if you
17 think that giving your information out loud in
18 front of the other members of the jury panel
19 might expose those other jurors to information
20 they should not be exposed to, then in that
21 event, you must come down front and answer the
22 question privately with me and with the
23 attorneys.

24 Mr. Bulsa, would you please introduce
25 yourself and your assistant to the jury?

1 **MR. BULSA:** Thank you, Your Honor. My
2 name is Derrick Bulsa. Here with me is Sarah
3 Gadus. We both work for the Solicitor's office.

4 **THE COURT:** Is there any member of the jury
5 panel who is related by blood or by marriage to
6 Mr. Bulsa or Mrs. Gadus or do you know either
7 one of them in any way? If so, please stand.
8 (No response).

9 Now, these two attorneys work for Solicitor
10 Trey Gowdy who is the elected Solicitor of the
11 7th Circuit. And it is his responsibility to
12 prosecute criminal cases both here in Spartanburg
13 County and also in Cherokee County. He has a
14 staff of lawyers and also non-lawyers who assist
15 him in doing that. Is there any member of the
16 jury panel who is related by blood or by marriage
17 to Mr. Gowdy or anyone who works for him or do
18 you know Solicitor Gowdy or anyone who works for
19 him? If so, please stand.

20 Yes, sir.

21 **JUROR:** I know Solicitor Gowdy.

22 **THE COURT:** Tell me your name please.

23 **JUROR:** William Alex Hudson.

24 **THE COURT:** Mr. Hudson, how do you know him?

25 **JUROR:** Socially.

1 **THE COURT:** Do you consider yourself to have a
2 particularly close relationship with Mr. Gowdy?

3 **JUROR:** Not real close.

4 **THE COURT:** How often do you see him?

5 **JUROR:** Maybe once a month.

6 **THE COURT:** All right. And where would you
7 see him typically?

8 **JUROR:** We work out together, use the same
9 personal trainer.

10 **THE COURT:** All right. Okay. Thank you, Mr.
11 Hudson.

12 Yes, ma'am.

13 **JUROR:** I'm Jayne McQueen. I know Trey and
14 his wife socially. My husband is an attorney.
15 We don't see each other that often.

16 **THE COURT:** Mrs. McQueen?

17 **JUROR:** Uh-huh.

18 **THE COURT:** Okay. All right. Thank you.
19 Now, would the fact -- anybody else? (No
20 response).

21 Would the fact that you all know Mr. Gowdy
22 interfere in any way with either your willingness
23 or your ability to give both the State and the
24 Defendant a fair and impartial trial? Mr.
25 Hudson?

1 JUROR: No, it wouldn't.

2 THE COURT: Mrs. McQueen?

3 JUROR: No.

4 THE COURT: Mr. Whelchel, would you please
5 introduce yourself and your client to the jury.

6 MR. WHELCHER: My name is Richard
7 Whelchel. I practice here in Spartanburg Count
8 at the Public Defender's Office.

9 Stand up, Mr. Kelley.

10 This is my client, Raymond Kelley.

11 THE COURT: You can be seated, Mr. Kelley.

12 Is there any member of the jury panel who is
13 related by blood or marriage to Mr. Whelchel or
14 to Mr. Kelley or do you know either one of these
15 gentlemen in any way? If so, please stand.

16 Tell me your name, sir.

17 JUROR: Robin Bell.

18 THE COURT: Sir?

19 JUROR: Robin Bell.

20 THE COURT: Mr. Bell?

21 JUROR: Uh-huh.

22 THE COURT: Who do you know?

23 JUROR: Mr. Whelchel.

24 THE COURT: How do you know him?

25 JUROR: He was my divorce lawyer.

1 **THE COURT:** How long ago was that?

2 **JUROR:** About six years, maybe five.

3 **THE COURT:** In those five or six years that
4 have elapsed since then, have you had any
5 dealings with Mr. Whelchel?

6 **JUROR:** No.

7 **THE COURT:** Would the fact that Mr. Whelchel
8 used to represent you, would that interfere in
9 any way with either your willingness or your
10 ability to give both the State and the Defendant
11 a fair and impartial trial?

12 **JUROR:** No, sir.

13 **THE COURT:** Thank you, Mr. Bell.

14 Now, Ladies and Gentlemen, I'm going to --
15 Yes, sir.

16 **MR. WHELCHER:** Excuse me, Your Honor. I
17 forgot. Josh Schultz is also an attorney with
18 our office. He's not here yet.

19 **THE COURT:** Okay. There's a lawyer name Josh
20 Schultz who is going to be assisting Mr.
21 Whelchel from time to time during the course of
22 this trial. Is there any member of the jury
23 panel who is related by blood or by marriage to
24 Mr. Josh Schultz or do you know him in any way?
25 If so, please stand. (No response).

1 I'm going to read you all a list of potential
2 witnesses now. After I have read you the list of
3 potential witnesses, I'm going to ask you whether
4 you know or are related to any of these potential
5 witnesses. If the witness is in the courtroom,
6 when I call your name, please stand and face the
7 jury. Jordan Tarver.

8 Thank you, sir.

9 Joseph Wyatt. Thank you, Mr. Wyatt.

10 Bryan Fraley with the Spartanburg County
11 Sheriff's Office, Michael Angel.

12 Thank you.

13 Robert Shaffer, Spartanburg County Sheriff's
14 Office, Joseph Bohon. Did I pronounce that
15 correct?

16 **MR. BULSA:** Bohon.

17 **THE COURT:** Spartanburg County Sheriff's
18 Office and Brandon Letterman also with the
19 Sheriff's Office. Any additional witnesses?

20 **MR. BULSA:** No, sir.

21 **JUROR:** Your Honor, I used to go to church
22 with Bryan Fraley and his wife.

23 **THE COURT:** Tell me your name please.

24 **JUROR:** Jacquelyn Tucker.

25 **THE COURT:** Mrs. Tucker. How long has it

1 been since you went to church with Mr. Fraley?

2 **JUROR:** I think they've been gone for over a
3 year now.

4 **THE COURT:** In that year, have you seen Mr.
5 Fraley?

6 **JUROR:** No.

7 **THE COURT:** During the time when you went to
8 the same church, did you have a particularly
9 close relationship with him?

10 **JUROR:** No.

11 **THE COURT:** And you are Mrs. Tucker?

12 **JUROR:** Yes.

13 **THE COURT:** All right. Thank you. You can be
14 seated.

15 Is there any other member of the jury panel
16 who is related by blood or by marriage to any of
17 those potential witnesses or do you know any of
18 them in any way? If so, please stand.

19 **JUROR:** I know Joseph Bohon.

20 **THE COURT:** Tell me your name please.

21 **JUROR:** Johnny Anderson.

22 **THE COURT:** Mr. Anderson. How do you know
23 Mr. Bohon?

24 **JUROR:** I used to work with his father.

25 **THE COURT:** How long has it been since you

1 worked with this father?

2 **JUROR:** 15 or 20 years.

3 **THE COURT:** Okay. And during those 15 or 20
4 years, have you seen much of Mr. Bohon?

5 **JUROR:** No, I haven't.

6 **THE COURT:** All right. Thank you. You can be
7 seated. Would the fact that you folks know the
8 witnesses as you described, would that interfere
9 in any way with either your willingness or your
10 ability to give both the State and the Defendant
11 a fair and impartial trial? Mrs. Tucker?

12 **JUROR:** No, sir.

13 **THE COURT:** Mr. Anderson?

14 **JUROR:** No.

15 **THE COURT:** Sir?

16 **JUROR:** No.

17 **THE COURT:** Is there any member of the jury
18 panel or any member of your immediate family who
19 is currently or formerly an employee of any law
20 enforcement agency or police department whether
21 it be federal, state, county, city or military
22 police? If so, please stand. Anybody who has an
23 immediate family member who is now or who has in
24 the past worked for a law enforcement.

25 Mr. Anderson.

1 JUROR: Tim Tucker. He works with Spartanburg
2 County.

3 THE COURT: How is he related to you?

4 JUROR: He's my first cousin.

5 THE COURT: Does he still work for Spartanburg
6 County?

7 JUROR: Yes, sir.

8 THE COURT: To your knowledge, is Mr. Tucker
9 involved in this case, Mr. Bulsa?

10 JUROR: No, sir. He's not.

11 THE COURT: All right. Thank you, Mr.
12 Anderson.

13 Yes, sir.

14 JUROR: My son was a police officer in North
15 Carolina.

16 THE COURT: Tell me your name please.

17 JUROR: Stephen Ritter.

18 THE COURT: Mr. Ritter?

19 JUROR: Yes.

20 THE COURT: All right. Thank you.

21 Yes, sir.

22 JUROR: Phillip Terry. My wife is a
23 dispatcher over Greenville 911. And she works at
24 the federal building.

25 THE COURT: What was her name?

1 JUROR: Cynthia Terry.

2 THE COURT: And your name again please.

3 JUROR: Phillip Terry.

4 THE COURT: Terry. All right. Thank you, Mr.
5 Terry.

6 Yes, ma'am.

7 JUROR: My son-in-law is formerly employed
8 with the Spartanburg City Police Department.

9 THE COURT: What was his name or what is his
10 name?

11 JUROR: Charles Salters.

12 THE COURT: And your name please?

13 JUROR: Barbara Caldwell.

14 THE COURT: Thank you, Mrs. Caldwell.

15 Yes, ma'am.

16 JUROR: My husband is a Spartanburg County
17 Deputy.

18 THE COURT: And your name is?

19 JUROR: Martha Seals.

20 THE COURT: And what's your husband's name?

21 JUROR: My husband's name is Robert Seals.

22 THE COURT: Is Mr. Seals involved in any way
23 in this case?

24 JUROR: No, sir.

25 THE COURT: All right. Thank you, Mrs.

1 Seals.

2 Now, for you folks who have family members
3 who were involved in law enforcement, would the
4 fact that you have these family members in law
5 enforcement, would that interfere in any way with
6 either your willingness or your ability to give
7 both the State and the Defendant a fair and
8 impartial trial? Mr. Anderson?

9 JUROR: No.

10 THE COURT: Mr. Ritter?

11 JUROR: No, sir.

12 THE COURT: Mr. Terry?

13 JUROR: No.

14 THE COURT: Mrs. Caldwell?

15 JUROR: No, sir.

16 THE COURT: Mrs. Seals?

17 JUROR: I'm sorry. Repeat the question.

18 THE COURT: Would the fact that your husband
19 works for Spartanburg County --

20 JUROR: No, sir.

21 THE COURT: -- would it interfere in any way
22 with either your willingness or your ability to
23 give both the State and the Defendant a fair and
24 impartial trial?

25 JUROR: No, sir.

1 **THE COURT:** Thank you, ma'am.

2 Now, is there any member of the jury panel or
3 any member of your immediate family who has ever
4 been involved in any type of crime that you would
5 consider to be a violent crime? There, of
6 course, are a number of ways in which you or a
7 family member might have been involved in such a
8 crime. You might have been accused or your
9 family member might have been accused of
10 committing such a crime. You might have been the
11 victim of a crime. You might have been a witness
12 to such a crime or have been involved in the
13 investigation for such a crime.

14 If you or any member of your immediate family
15 has ever been involved in any crime that you
16 consider to be a violent crime in any of the ways
17 that I described or any other way, please stand.
18 Let me remind you folks who are standing that if
19 you would like to speak to me privately about
20 this, you are certainly welcome to do so.

21 Tell me your name, sir.

22 **JUROR:** Clifford Sprouse.

23 **THE COURT:** Mr. Sprouse?

24 **JUROR:** Yes.

25 **THE COURT:** Would you like to tell me about it

1 now or would you like to speak to me privately?

2 JUROR: Uh, when I was about 25, I was charged
3 with pointing and presenting a firearm. The
4 Court offered a simple assault charge that I pled
5 guilty to.

6 THE COURT: All right. Thank you, Mr.
7 Sprouse.

8 JUROR: Also my brother was convicted of a
9 crime.

10 THE COURT: And what was that crime?

11 JUROR: May I approach?

12 THE COURT: You certainly may.

13 (WHEREUPON, the following bench conference is
14 held with Juror Number 121, Clifford Sprouse.)

15 JUROR: My brother was convicted of a sexual
16 assault and battery.

17 THE COURT: Where?

18 JUROR: I'm not sure of the dates, Your Honor.

19 THE COURT: Was it in Spartanburg County?

20 JUROR: Yes.

21 THE COURT: Approximately the date?

22 JUROR: He served, I think, seven years. He's
23 been out about two years.

24 THE COURT: And that would have been
25 prosecuted by the same Solicitor who is the

1 Solicitor here now. Would the fact that your
2 brother was involved in this case and the fact
3 that it was prosecuted by the same people who
4 would be prosecuting this, not the same
5 individual people but the same office, would that
6 interfere in any way with your ability or your
7 willingness to give both the State and the
8 Defendant a fair and impartial trial?

9 JUROR: No, not at all.

10 THE COURT: Thank you.

11 (WHEREUPON, the bench conference is concluded.)

12 THE COURT: Mr. Ritter?

13 JUROR: Yes, sir.

14 THE COURT: You want to tell me about it now,
15 sir?

16 JUROR: Yes.

17 THE COURT: You are Mr. Ritter?

18 JUROR: No.

19 THE COURT: I'm sorry. What was your name,
20 sir?

21 JUROR: Terry.

22 THE COURT: Okay. Terry. I apologize to both
23 of you. Tell me about it, Mr. Terry.

24 JUROR: I would like to approach.

25 THE COURT: Okay. Tell me your name, ma'am.

1 JUROR: Polly Thornhill.

2 THE COURT: Would you like to tell me about it
3 now or would you want to tell me about it in
4 private?

5 JUROR: I could tell you right now.

6 THE COURT: Mr. Terry, hold on right there
7 for just a second.

8 Tell me, ma'am.

9 JUROR: About two years ago, my daughter was
10 at BB&T and was robbed at gunpoint.

11 THE COURT: Where did that occur?

12 JUROR: Here in Spartanburg.

13 THE COURT: Was anybody ever charged with that
14 crime?

15 JUROR: Yes, sir. He was.

16 THE COURT: Was the person convicted?

17 JUROR: Yes, sir. He was.

18 THE COURT: Were you involved in the actual
19 trial or resolution of that case?

20 JUROR: No, sir. I was not.

21 THE COURT: I'm sorry, ma'am. Tell me your
22 name one more time.

23 JUROR: Polly Thornhill.

24 THE COURT: Thank you, Mrs. Thornhill.

25 Yes, sir.

1 **JUROR:** Rockmond Robinson. My daughter was
2 robbed in a parking lot.

3 **THE COURT:** Where did it occur?

4 **JUROR:** Here in Spartanburg. I was not in the
5 state when the incident occurred. I don't know
6 all the details. She was brought up here in
7 Spartanburg.

8 **THE COURT:** Approximately how long ago did
9 that occur?

10 **JUROR:** About six years ago.

11 **THE COURT:** All right. Thank you, Mr.
12 Robinson.

13 Yes, ma'am.

14 **JUROR:** Our home was broken into several
15 times.

16 **THE COURT:** Tell me your name please.

17 **JUROR:** Frances Gore.

18 **THE COURT:** Gore?

19 **JUROR:** Yes, sir.

20 **THE COURT:** Is that G-o-r-e?

21 **JUROR:** Yes, sir.

22 **THE COURT:** Did those events all occur in
23 Spartanburg County, ma'am?

24 **JUROR:** Yes, sir.

25 **THE COURT:** What was the date of the most

1 recent event?

2 JUROR: I think it was January of 2000.

3 THE COURT: 2000. Was anybody ever prosecuted
4 for any of those crimes?

5 JUROR: Yes. I think they were prosecuted for
6 multiple crimes and ours was one of them.

7 THE COURT: All right. Thank you, ma'am.

8 Yes, sir.

9 JUROR: Uh, I wanted to approach the bench.

10 THE COURT: All right. Then, Mr. Terry and
11 you, sir, I will speak to you one at a time.

12 (WHEREUPON, the following bench conference is
13 held with Juror Number 154, Phillip Terry.)

14 THE COURT: Yes, sir.

15 JUROR: I have a stepson who was charged with
16 burglary out of York County.

17 THE COURT: What is his name?

18 JUROR: Winkle Godfrey.

19 THE COURT: Where did the crime occur?

20 JUROR: York County.

21 THE COURT: Were you actually involved in the
22 trial of the case?

23 JUROR: He had stolen a firearm from me.

24 THE COURT: From your house?

25 JUROR: The firearm that was used in the

1 burglary.

2 **THE COURT:** So you were a witness in the
3 trial?

4 **JUROR:** Yes. They said it was my gun. The
5 pistol was purchased in 1971. So it wasn't
6 bought for anything.

7 **THE COURT:** Would the fact that your stepson
8 was involved in the case, would that interfere in
9 any way with your willingness or your ability to
10 give both the State and the Defendant a fair and
11 impartial trial?

12 **JUROR:** No. Thank you. You may return to
13 your seat.

14 **MR. WHELCHER:** May I get his last name?
15 I didn't hear it.

16 **MR. BULSA:** Mr. Terry.

17 **JUROR:** T-e-r-r-y, 154.

18 **THE COURT:** Yes, sir. Thank you, sir. You
19 can return to your seat.

20 (WHEREUPON, the juror leaves the bench.)

21 **THE COURT:** There was one gentleman who was
22 seated on the front row who apparently had a
23 medical excuse that was presented to Judge
24 Alford. The doctor excused him. That's what it
25 was.

1 (WHEREUPON, the following bench conference is
2 held with Juror Number 112, Shawn Schuler.)

3 JUROR: My stepdad got robbed at gunpoint. He
4 was driving a taxi. I don't know any specifics
5 about the case other than just hearsay. It
6 happened before he married my mother..And also --

7 THE COURT: Let me ask you about that one.

8 JUROR: It was in Spartanburg. It was a long
9 time before he married my mother. He just told
10 me about it.

11 THE COURT: How long has he been married to
12 your mother?

13 JUROR: About seven years.

14 THE COURT: What was the other thing?

15 JUROR: His daughter, my now sister-in-law and
16 her children were molested by her husband. They
17 went to court over that. And from what I
18 understand, he never served any time for it.
19 They threw it out of court. Her children, I
20 guess they wouldn't testify, they wouldn't bring
21 it up or something.

22 THE COURT: Would the fact that you were
23 involved and your family members were involved in
24 those two situations, would that interfere in any
25 way with your willingness or your ability to give

1 both the State and the Defendant a fair and
2 impartial trial?

3 JUROR: No, it would not affect me. I just
4 thought I should bring it up.

5 THE COURT: Thank you very much. All right.
6 Do you know your jury number?

7 JUROR: 112.

8 (WHEREUPON, the juror leaves the bench.)

9 THE COURT: Any additional voir dire other
10 than those follow up questions?

11 MR. BULSA: No, sir.

12 MR. WHELCHER: No, sir.

13 THE COURT: Okay.

14 (WHEREUPON, the bench conference is concluded.)

15 THE COURT: Now, those of you who, uh, had,
16 uh, yourselves or family members who were
17 involved in the crimes that we just discussed,
18 would that interfere in any way with either your
19 willingness or your ability to give both the
20 State and the Defendant a fair and impartial
21 trial? Mrs. Sprouse?

22 JUROR: No, Your Honor.

23 THE COURT: Mr. Sprouse.

24 Is it Mr./Mrs. Thornhill?

25 JUROR: No, sir. It would not.

1 THE COURT: Mr. Robinson?

2 JUROR: No, sir.

3 THE COURT: Mrs. Gore?

4 JUROR: No, sir.

5 THE COURT: All right. And I think I covered
6 everybody who answered the question either out
7 loud or in private. Was there anybody else who
8 answered that question I didn't ask about whether
9 or not it would affect your ability to be a fair
10 and impartial juror? (No response).

11 Is there any member of the jury panel who has
12 any particular interest in the outcome of this
13 case? If so, please stand. (No response).

14 Is there any member of the jury panel who has
15 formed or expressed any opinion as to the guilt
16 or innocence of this Defendant? If so, please
17 stand. (No response).

18 Is there any member of the jury panel who has
19 any bias or prejudice either towards or against
20 the State or the Defendant in connection with
21 this case? If so, please stand. (No response).

22 Is there any member of the jury panel who
23 knows of any reason why you could not give both
24 the State or the Defendant a fair and impartial
25 trial? If so, please stand. (No response).

1 Any additional voir dire?

2 MR. BULSA: None from the State, Your
3 Honor.

4 MR. WHELCHER: No, sir.

5 THE COURT: All right. Ladies and Gentlemen,
6 we are going to strike a jury. You see this
7 highly technological wooden tube or barrel up
8 here. Your names are all in there on a piece of
9 paper. One at a time, the assistant clerk is
10 going to draw those names out in random fashion.
11 Then your name will be called. When your name is
12 called, please come down here to the center of
13 the courtroom. The bailiff will show you where
14 to stand and turn and face the attorneys.

15 We will hear first from Mr. Bulsa. He will
16 either ask that you be excused in which case you
17 may return to your seat or he will ask that you
18 be presented to the defense. If you are
19 presented to the defense, we will hear from Mr.
20 Whelcher who will also either ask that you be
21 excused or that you be seated on the jury. And
22 we will continue with that process until we have
23 a jury. Then it will be the coveted hour of
24 lunch.

25 THE CLERK: Juror Number 132, Jacqueline

1 Tucker.

2 What says the State?

3 MR. BULSA: Please present Mrs. Tucker.

4 THE CLERK: What says the defense?

5 MR. WHELCHER: Please excuse Mrs.

6 Tucker from the trial of this case.

7 THE CLERK: Juror Number 49, Charles E.
8 Godfrey, Jr.

9 What says the State?

10 MR. BULSA: Please present Mr. Godfrey.

11 THE CLERK: What says the defense?

12 MR. WHELCHER: Please seat Mr. Godfrey.

13 THE COURT: Strikes are five and ten, by the
14 way.

15 THE CLERK: Juror Number 160, Kurt Steinecke.

16 What says the State?

17 MR. BULSA: Please present Mr. Steinecke.

18 THE CLERK: What says the defense?

19 MR. WHELCHER: Please seat Mr.
20 Steinecke.

21 THE CLERK: Juror Number 62, Cheryl Hull.

22 What says the State?

23 MR. BULSA: Please excuse Mrs. Hull in
24 this case.

25 THE CLERK: 165, Judith Whitehull.

1 JUROR: Whitehill.

2 THE CLERK: Whitehill. I'm sorry. What says
3 the State?

4 MR. BULSA: Please present Mrs.
5 Whitehill.

6 THE CLERK: What says the defense?

7 MR. WHELCHER: Please excuse Mrs.
8 Whitehill from the trial of this case.

9 THE CLERK: Number 3, Johnny Anderson.
10 What says the State?

11 MR. BULSA: Please present Mrs. Anderson.

12 THE CLERK: What says the defense?

13 MR. WHELCHER: Please excuse Mrs.
14 Anderson from the trial of this case.

15 THE CLERK: 154, Phillip Terry.
16 What says the State?

17 MR. BULSA: Please excuse Mr. Terry.

18 THE CLERK: Number 157, Amy Powell.
19 What says the State?

20 MR. BULSA: Please present Mrs. Powell.

21 THE CLERK: What says the defense?

22 MR. WHELCHER: Please seat Mrs. Powell.

23 THE CLERK: 169, Barbara Hildreth.
24 What says the State?

25 MR. BULSA: Please present Mrs. Hildreth.

1 **THE CLERK:** What says the defense?

2 **MR. WHELCHER:** Please seat Mrs.

3 Hildreth.

4 **THE CLERK:** Number 6, Mark Bailey.

5 What says the State?

6 **MR. BULSA:** Please present Mr. Bailey.

7 **THE CLERK:** What says the defense?

8 **MR. WHELCHER:** Please seat Mr. Bailey.

9 **THE CLERK:** 13, Cynthia Bishop.

10 What says the State?

11 **MR. BULSA:** Please present Mrs. Bishop.

12 **THE CLERK:** What says the defense?

13 **MR. WHELCHER:** Please seat Mrs. Bishop.

14 **THE CLERK:** 43, John Edwards.

15 What says the State?

16 **MR. BULSA:** Please present Mr. Edwards.

17 **THE CLERK:** What says the defense?

18 **MR. WHELCHER:** Please seat Mr. Edwards.

19 **THE CLERK:** 129, Polly Thornhill.

20 What says the State?

21 **MR. BULSA:** Please present Mrs.

22 Thornhill.

23 **THE CLERK:** What says the defense?

24 **MR. WHELCHER:** Please excuse Mrs.

25 Thornhill from the trial of this case.

1 THE CLERK: 54, James Hart.

2 What says the State?

3 MR. BULSA: Please excuse Mr. Hart in
4 this case.

5 THE CLERK: 170, Daniel Robinson.

6 What says the State?

7 MR. BULSA: Please present Mr. Robinson.

8 THE CLERK: What says the defense?

9 MR. WHELCHER: Please excuse Mr.
10 Robinson from the trial in this case.

11 THE CLERK: 156, Frances Gore.

12 What says the State?

13 MR. BULSA: Please present Mrs. Gore.

14 THE CLERK: What says the defense?

15 MR. WHELCHER: Please excuse Mrs. Gore
16 from the trial of this case.

17 THE CLERK: 46, Elizabeth Fowler.

18 What says the State?

19 MR. BULSA: Please present Mrs. Fowler.

20 THE CLERK: What says the defense?

21 MR. WHELCHER: Please seat Mrs. Fowler.

22 THE CLERK: 163, Jacob Parrish.

23 What says the State?

24 MR. BULSA: Please excuse Mr. Parrish.

25 THE CLERK: 27, James Cash.

1 What says the State?

2 **MR. BULSA:** Please present Mr. Cash.

3 **THE CLERK:** What says the defense?

4 **MR. WHELCHER:** Please seat Mr. Cash.

5 **THE CLERK:** Number 50, Paula Green.

6 What says the State?

7 **MR. BULSA:** Please present Mrs. Green.

8 **THE CLERK:** What says the defense?

9 **MR. WHELCHER:** Please seat Mrs. Green.

10 **THE CLERK:** 20, Cynthia Bryant.

11 What says the State?

12 **MR. BULSA:** Please present Mrs. Bryant.

13 **THE CLERK:** What says the defense?

14 **MR. WHELCHER:** Please seat Mrs. Bryant.

15 **THE CLERK:** 89, Sonya Ricketts. Number 89,

16 Sonya Ricketts.

17 **MR. BULSA:** Your Honor, she was excused.

18 **THE COURT:** All right. Apparently, she was
19 excused this morning by Judge Alford.

20 **THE CLERK:** 75, Mary McCraw.

21 What says the State?

22 **MR. BULSA:** Please excuse Mrs. McCraw.

23 **THE CLERK:** 171, James Drummond.

24 What says the State?

25 **MR. BULSA:** Please present Mr. Drummond.

1 **THE CLERK:** What says the defense?

2 **MR. WHELCHER:** Please seat Mr.
3 Drummond, Your Honor.

4 **THE CLERK:** Alternate, Judge?

5 **THE COURT:** Alternate. Strikes are one and
6 two.

7 **THE CLERK:** 97, Melissa Price.

8 What says the State?

9 **MR. BULSA:** Please present Mrs. Price.

10 **THE CLERK:** What says the defense?

11 **MR. WHELCHER:** Please seat the juror,
12 Your Honor.

13 **THE COURT:** Any exception to the composition
14 or manner of selection of the jury?

15 **MR. BULSA:** No, Your Honor.

16 **MR. WHELCHER:** No, sir.

17 **THE COURT:** All right. Ladies and Gentlemen,
18 those of you who were selected to serve on the
19 jury, we are going to break for lunch now. I'm
20 going to have the bailiffs show you the jury room
21 that you will be using. I would like for you to
22 return to that jury room and be in there.

23 Do we have any pretrial matters that we need
24 to do?

25 **MR. BULSA:** (Nods head).

1 THE COURT: We do? How long will it take?

2 MR. BULSA: An hour or so, Your Honor.

3 THE COURT: An hour?

4 MR. BULSA: Yes, sir.

5 THE COURT: You agree with that?

6 MR. WHELCHER: Yes, sir.

7 THE COURT: Y'all come up here one second.

8 (WHEREUPON, a bench conference is held off the
9 record.)

10 THE COURT: All right. We have, I have a
11 little bit of pretrial stuff that I need to do in
12 this case that will not involve you all. I'm
13 going to ask you folks to be back at 2:30. When
14 you come back, I will talk to you as I mentioned
15 a minute ago about some of the things that govern
16 your service as jurors. And one of the things
17 that I stress to you is that you may not discuss
18 the case in any manner until I have given you
19 permission to begin your deliberations.

20 So while you are at lunch, if you each lunch
21 together or if you eat lunch with someone else,
22 do not discuss what little you know about this
23 case. Talk about something else. When you come
24 back to the jury room and you are in there
25 together waiting on me to bring you in, do not

1 discuss any aspect of this case. I will see you
2 all at 2:30.

3 It might take me a little longer to do what I
4 have to do then the time that I have allotted.
5 In that case, you will have to wait on me. I
6 will get to you as quickly as possible. I expect
7 that it will be either at 2:30 or right
8 afterwards. I will dismiss you in just a second.

9 Now, the rest of the panel is supposed to be
10 back at two o'clock?

11 **THE CLERK:** Yes, sir.

12 **THE COURT:** Uh, the rest of you need to be
13 back in the jury assembly room over on that other
14 end of the building at two o'clock for Judge
15 Alford. Y'all have a nice lunch break. I will
16 see you all at 2:30 and you all later in the
17 week.

18 (WHEREUPON, the jury panel exits at approximately
19 12:45 p.m.)

20 **THE COURT:** You can go ahead and take this
21 panel back.

22 (WHEREUPON, the jury exit at approximately
23 12:45 p.m.)

24 **THE COURT:** Anything further at this time?

25 **MR. BULSA:** No, sir.

1 **THE COURT:** All right. I will see you at two
2 o'clock for this hearing.

3 (WHEREUPON, a lunch recess is taken.)

4 (WHEREUPON, the Court resumes at approximately
5 2:14 p.m.)

6 **THE COURT:** All right. Mr. Bulsa, I'm ready.

7 **MR. BULSA:** Yes, sir.

8 **THE COURT:** All right. He's here. You can
9 proceed.

10 **MR. BULSA:** Call Joseph Bohon.

11 **JOSEPH BOHON**

12 having first being duly sworn testified as
13 follows:

14 **DIRECT EXAMINATION**

15 **BY MR. BULSA:**

16 **Q** Detective Bohon, did you have the occasion
17 to meet with the Defendant in regards to this case?

18 **A** Yes, sir.

19 **Q** Do you recall when you met with him?

20 **A** November the 11th, 2006.

21 **Q** And where did you meet with him?

22 **A** The Spartanburg County Sheriff's Office in
23 the investigation division.

24 **Q** Is that the first contact you had with him?

25 **A** Yes, sir.

1 Q Do you know how he got to the Sheriff's
2 Office?

3 A He was transported there by patrol deputies.

4 Q Do you recall where he was at?

5 A On Reidville Road.

6 Q Okay. And were you assigned to investigate
7 this case?

8 A Yes, sir. I was.

9 Q And where exactly was he when you met with
10 him at the Sheriff's Office?

11 A He was in a room that was being used for
12 interviews at the time.

13 Q And approximately what time was this?

14 A Approximately 9:40 p.m.

15 Q And what did you do when you approached him
16 to speak with him?

17 A I introduced myself. Told him who I was.
18 Told him that I wanted to speak with him. Advised him
19 that I first needed to read him his Miranda rights.

20 Q Were you alone?

21 A Deputy Fraley was with me.

22 (WHEREUPON, State's Exhibits 1 and 2 are marked
23 for identification purposes.)

24 BY MR. BULSA:

25 Q I'm going to first show you State's Exhibit

1 1. Can you identify that for us?

2 A Yes, sir.

3 Q What is it?

4 A This is the Miranda waiver form that I read
5 to Mr. Kelley on that day. And this is my signature
6 on there.

7 Q Would you tell us the process or procedure
8 you used with Mr. Kelley.

9 A I put the form down in front of both of us.
10 I filled out his personal information and his name,
11 address, age, the date and time and location where it
12 was taken at. I read him his rights, 1 through 5. I
13 placed my name in there. Asked him to sign that
14 portion if he understood it and after he read it also.

15 Q Let me stop you right there. What was his
16 demeanor at this time?

17 A Just like me and you are today. Normal. He
18 didn't seem to be under the influence of any type of
19 medication, drugs, alcohol or anything like that.

20 Q Did he understand what was taking place?

21 A Yes, sir. He did.

22 Q Did you know his real name at the time?

23 A He gave me his name. And after he gave me
24 his name, he told me he was Raymond Kelley. And he
25 said I had to lie to deputies earlier about my name.

1 I do not recall the name he gave them. I looked at
2 Deputy Fraley. And I said you know that. He said
3 yeah, he gave me a different name.

4 Q Okay. All right. He gave you the name
5 Raymond Kelley and that's the name you put on there?

6 A Yes, he did.

7 Q And after reading him those rights, did he
8 acknowledge that he understood those rights?

9 A Yes, he did.

10 Q And what did you ask him to do?

11 A I asked him to sign if he understood his
12 rights. And after he actually read over them himself
13 also.

14 Q And did he in fact sign?

15 A Yes, sir. He did.

16 Q And then what did you do?

17 A I began speaking with him, asking him what
18 was going on. He said I robbed a pizza joint.

19 Q Let me go back to the form. He signed it
20 acknowledging that he understood the rights and then
21 did he sign it again?

22 A Oh, yes, sir. I went into the reason I was
23 here to talk to him today was in reference to an armed
24 robbery. Then I asked him how far he finished school
25 and everything. He told me he only finished eight

1 years of school but he did have his GED. After
2 reading the second part of the waiver form, I asked
3 him to read that part. Then he signed it again.

4 Q Did he agree to waive his rights and speak
5 to you?

6 A Yes, sir. He did.

7 Q And he acknowledged that by signing in the
8 proper location?

9 A Yes, sir. He did.

10 Q You witnessed this form? You witnessed it?

11 A Deputy Fraley actually did both witness
12 places. I basically notarized his statement and Mr.
13 Kelley's statement or signature rather.

14 Q So it has your signature and Mr. Fraley's
15 signature?

16 A Yes.

17 Q Did you or anyone make any promises to him
18 in order to get him to cooperate with you?

19 A No, sir.

20 Q Were you threatening him in any way?

21 A No, sir.

22 Q How were you dressed?

23 A If I recall, I was in a POLO shirt and khaki
24 pants.

25 Q Nothing intimidating?

1 A No, sir. I'd be surprised if I were even
2 wearing a gun that night.

3 Q Did he then give you a statement?

4 A Yes, sir. He did.

5 Q Did you document that statement?

6 A Yes, sir. I did.

7 Q Okay. I'll show you what's been marked
8 State's Exhibit number 2. Do you recognize that?

9 A Yes, sir. I do.

10 Q Whose handwriting is it in?

11 A It's in my handwriting.

12 Q Why is it in your handwriting?

13 A He requested I write the statement for him.

14 Q Okay. And what process did you undertake in
15 order to document the statement?

16 A When I sat down, I spoke with him. We went
17 over his story basically verbally what he said
18 happened. After he gave me the statement verbally, I
19 asked him, I said, do you mind if we go ahead and
20 write it down on paper. He said I might as well, I
21 was caught red-handed. At that point, we basically
22 went over his statement and wrote it down on paper in
23 his words as he told it.

24 Q And once you finished writing it, did you
25 review it with him?

1 A Yes, sir. I did.

2 Q How did you do that?

3 A I read back over it. After I read over it,
4 I said is this all true, the whole truth. He said
5 yes. I advised him this is your statement, your
6 words. If there's anything in here that's not
7 correct, you need to change it now. He said
8 everything was fine with it. It was his words. I
9 turned the paper around and let him read back over his
10 statement.

11 At that point, after he read back over it, I
12 called Deputy Fraley back in to witness it. After
13 Deputy Fraley had witnessed the Miranda form, he
14 actually left the interview room and did paperwork on
15 his own. He came back in. Mr. Kelley signed it and
16 Deputy Fraley witnessed it.

17 Q And then you notarized it?

18 A Yes, sir.

19 Q Okay. At any time, did he ever ask for an
20 attorney?

21 A No, sir.

22 Q He never asked to remain silent?

23 A No, sir.

24 Q Thank you. Answer any questions Mr.
25 Whelchel has.

CROSS-EXAMINATION

BY MR. WHELCHER:

Q I'm sorry, Detective. I didn't get your first name.

A Joseph.

Q Okay. What time did you begin taking your statement, sir?

A At approximately 9:40.

Q Okay.

A Well, I read him his Miranda rights at 9:40. I'm assuming it was somewhere around the ten o'clock mark. We went over his statement. Then we took it. So if I read him his rights at 9:40, ten or 15 minutes later.

Q Okay. So the first thing you did upon meeting with Mr. Kelley is that you read him his rights, is that correct?

A Yes, sir.

Q And you say this was approximately 9:40. That's the time you filled in?

A Yes, sir.

Q Now, you were in the investigative room at the Spartanburg County Sheriff's Office?

A Yes, sir.

Q And there's only you and he in the room, is

1 that correct?

2 **A** During the statement, yes, sir.

3 **Q** Okay. When you first introduced yourself to
4 him, however it was that you did this interview, did
5 he request an attorney?

6 **A** No, sir.

7 **Q** Had anybody told you prior to you going in
8 to investigate or take a statement from him that he
9 had requested an attorney?

10 **A** No, sir.

11 **Q** During the entire time that you were there
12 with him reading him his rights and obtaining a
13 statement from him, did he request an attorney?

14 **A** No, sir.

15 **Q** You said you read him his rights first or is
16 that off of this sheet?

17 **A** Yeah. I read him his rights off that sheet
18 first.

19 **Q** And you filled out the sheet. He signed it
20 in the places you are talking about?

21 **A** Yes, sir.

22 **Q** And you say that you think you may have had
23 on khakis and a golf shirt. Is that one of the ones
24 with the sheriff's emblem on it or something?

25 **A** Yes, sir.

1 Q So it identifies you as a sheriff's
2 investigator or detective?

3 A Yes, sir.

4 Q Okay. You had a badge on also?

5 A I don't recall. I got called out.

6 Q You do not know if you had a weapon or not?

7 A No, I don't remember.

8 Q How about handcuffs?

9 A I don't remember that.

10 Q Was Mr. Kelley handcuffed?

11 A Yes, sir. Yes, sir.

12 Q He had --

13 A He was --

14 Q Go ahead.

15 A When I came in, he was unhandcuffed. He was
16 handcuffed and I unhandcuffed him.

17 Q Other than taking the handcuffs off, did he
18 have leg shackles or anything like that on or just
19 handcuffs? If you remember.

20 A From what I remember, he had just handcuffs
21 on. I don't remember him having any leg shackles at
22 all. I do remember taking handcuffs off of him.

23 Q Did you inform him that he was under arrest?

24 A Yes, sir. I made it clear that he was under
25 arrest.

1 Q Okay. And you are sure that Mr. Kelley
2 never asked for an attorney?

3 A Yes, sir.

4 Q Okay. And you wrote the statement because
5 he asked you to or you offered to?

6 A I asked him would he prefer to write his own
7 statement or would he rather me write it. He said he
8 prefer me to write it.

9 Q All right, sir.

10 A I think he said he wasn't that good at
11 writing or something to that effect.

12 Q And according to you, the statement was
13 completed at 10:15?

14 A Yes, sir.

15 Q When did anybody else come into the room
16 other than you and Mr. Kelley during this whole
17 process?

18 A After the statement was completed, after I
19 finished writing the last sentence, I went over it
20 with Mr. Kelley. He said that wasn't true. At that
21 point, I called Deputy Fraley in. I went back over
22 it. I asked him was his statement the whole truth and
23 nothing but the truth so help you God. He said yes.
24 At that point, he signed it. And then Deputy Fraley
25 signed it.

1 Q Is that Deputy Fraley's signature?

2 A Yes, sir.

3 Q Okay. What was the demeanor of Mr. Kelley
4 while all of that was going on, sir?

5 A It basically just occurred. I guess he was
6 upset about the fact that he was being arrested. He
7 wasn't exactly happy. As far as state of mind and
8 state of being, it was just like me and you talking
9 here today.

10 Q Did you inquire of him if he had had
11 anything to drink?

12 A No, sir.

13 Q Did you inquire of him if he was on any type
14 of drug?

15 A No, sir.

16 Q Did you inquire of him if he had eaten
17 recently?

18 A No, sir.

19 Q Did you ask him whether or not he had had
20 plenty of sleep the night before?

21 A No, sir.

22 Q Did you inquire of him whether anybody else
23 prior to you taking his statement had threatened him
24 in any way?

25 A No, I did not.

1 Q Okay. Did you tell him at any point that
2 giving a statement would benefit him, would help him?

3 A No, sir. I did not.

4 Q Did anybody else in your presence say that?

5 A No, sir.

6 MR. WHELCHER: Beg the Court's
7 indulgence, Your Honor. (Pause.)

8 That's all I have of this witness, Your
9 Honor.

10 MR. BULSA: Brief reply.

11 REDIRECT EXAMINATION

12 BY MR. BULSA:

13 Q Officer, did it appear that he had been
14 drinking alcohol?

15 A No, sir. Through my experience as a police
16 officer, I probably interviewed thousands of people
17 that have been under the influence of drugs or
18 alcohol. And after interviewing him, there was not a
19 question of whether he was under the influence of
20 alcohol or drugs.

21 Q What would you have done if there would have
22 been?

23 A Well, maybe get him some treatment before he
24 was booked in the county jail, maybe delay to a later
25 time.

1 Q Did he ever ask to smoke a cigarette?

2 A Yes, sir. He did.

3 Q Did you give him an opportunity to?

4 A Yes, sir. I did.

5 Q Did he ever ask for anything to drink?

6 A Yes, sir. He did.

7 Q Did you provide him something to drink?

8 A Yes, sir. I provided some water.

9 Q You spent a total of about 35 minutes with

10 him?

11 A Yes, sir.

12 Q Thank you. That's all I have.

13 MR. BULSA: That's all I have of this
14 witness.

15 THE COURT: Anything further, Mr. Whelchel?

16 MR. WHELCHER: No.

17 THE COURT: All right. You can step down,
18 sir.

19 MR. BULSA: Your Honor, that would be the
20 State's case.

21 THE COURT: Mr. Whelchel, you intend to put
22 up any evidence regarding this statement?

23 MR. WHELCHER: Yes, sir. We call Mr.
24 Kelley.

25 RAYMOND KELLEY

1 having first being duly sworn testified as
2 follows:

3 **DIRECT EXAMINATION**

4 **BY MR. WHELCHER:**

5 Q Mr. Kelley, I need you to speak up and
6 speak into the microphone so that everyone here can
7 hear you. All right, sir?

8 A Yes, sir.

9 Q All right. That ought to work. How old are
10 you, Mr. Kelley?

11 A 65.

12 Q You were 64 back on November the 11th of
13 last year?

14 A Yes, sir.

15 Q All right, sir. Did you have an occasion
16 last year to talk to Detective Bohon?

17 A Yes, I did.

18 Q Okay. When you talked to Detective Bohon,
19 were you in the investigative room by yourself before
20 he came in or did he bring you in?

21 A He brought me in the room that we talked in,
22 yes, sir.

23 Q All right, sir. During the course of the
24 conversation that you had with Detective Bohon, did
25 you tell him that you wanted a lawyer?

1 A Yes, sir. That's one of the first things I
2 said after he read me his rights.

3 Q What did you tell him?

4 A I said I don't want to proceed without a
5 lawyer.

6 Q Okay. In response to you saying I don't
7 want to proceed without a lawyer, what, if anything,
8 did the Detective say?

9 A He said it wasn't necessary. He would see
10 to it that if we went on to proceed without a lawyer,
11 he would help me and I wouldn't get over seven years
12 if I was convicted of this armed robbery.

13 Q Okay. Was there anybody else in the room
14 other than you and the Detective?

15 A At that time, I don't think so.

16 Q Okay. Sometimes later, somebody else came
17 in the room?

18 A Right.

19 Q Do you know who that was?

20 A I can't think of the name. It was another
21 detective as far as I know.

22 Q Was he dressed like Detective Bohon in a
23 khaki shirt?

24 A He was dressed casually.

25 Q Right. During the course of this statement

1 that they took with you, sir, were they armed? Did
2 they have sidearms on, weapons?

3 A I'm not exactly sure. I don't remember
4 whether -- they had holsters. I don't remember
5 whether they had pistols on them or not.

6 Q Wasn't any doubt in your mind that you
7 weren't free to leave, were you?

8 A No. I knew I couldn't leave.

9 Q Okay. Who was the first person you told
10 prior to meeting with Detective Bohon that you wanted
11 a lawyer?

12 A Who was the first? The first person I told
13 was I guess as soon as I was arrested.

14 Q The uniform officer that arrested you?

15 A Yes, sir. I would think so. He said he
16 didn't care one way or another. He wasn't going to
17 take a statement anyway.

18 Q That's the first person you told that you
19 wanted a lawyer?

20 A Yes, sir.

21 Q Did you tell anybody else in-between that
22 officer and Detective Bohon that you wanted a lawyer?

23 A I don't remember seeing anyone else.

24 Q Okay. And when Detective Bohon introduced
25 himself to you, was that when you told him you wanted

1 a lawyer the first time?

2 A I told him I didn't want to proceed without
3 a lawyer.

4 Q Okay. But y'all proceeded anyway. Is that
5 correct?

6 A (Nods head).

7 Q You need to answer so the lady --

8 A Uh, yes, sir. Apparently so. I never did
9 receive a lawyer.

10 Q How far did you go in school, sir?

11 A To the eighth grade.

12 Q Did you later obtain a GED?

13 A Yes, sir. I did.

14 Q On the day in question when you gave this
15 statement, had you been drinking?

16 A Yes, I been drinking off and on all day.
17 There was beer in the truck when that happened.

18 Q Okay. What time did you get up that day,
19 sir?

20 A Probably about 8:00 or 9:00 in the morning.

21 Q Okay. And this incident occurred at 9:40 in
22 the evening. What were you drinking that day? Beer,
23 liquor, wine, what?

24 A I had been drinking -- there was some wine
25 left up at the house after a party. I remember

1 killing it, drinking all of it, as much as I can find
2 plus a few beers.

3 Q Okay. When you say you drank as much of it
4 as you can find, you talking about the wine?

5 A Right. What was left over from my party.

6 Q Was it half a bottle or how much was it?

7 A I can't say exactly. But it seemed like two
8 or three different bottles with a small amount in each
9 one. It would probably make a half a bottle I would
10 imagine.

11 Q In addition to the wine, did you have
12 anything else to drink, Mr. Kelley?

13 A Some beer.

14 Q During that day, how many beers did you have
15 to drink, sir?

16 A I really couldn't say. If I said, I'd just
17 -- I wouldn't be truthful cause I don't know.

18 Q When you got up at 8:00 or 9:00, did you
19 start drinking as soon as you got up that morning?

20 A I believe I waited. I always wait til at
21 least noon before I started drinking. It's just
22 something that everybody in our family done, wait
23 until at least noon.

24 Q Okay. Did you have any hard liquor that
25 day?

1 A I don't believe I did. Wine is the
2 strongest thing I drank.

3 Q Wine. What about beer?

4 A I drank beer but like I said wine was the
5 strongest thing.

6 Q Wine and beer.

7 A Right.

8 Q Between noon when you started and 9:40 when
9 you went into the investigative room with this
10 investigator, how many beers did you have, sir?

11 A Well, there was probably seven or eight
12 there at the house. I drank all of them. That's when
13 I went out on the room to get some more.

14 Q Okay. During the day when you are drinking
15 all this wine and beer, are you taking any medication,
16 any pills, sir?

17 A I don't remember taking any, no, sir. Not
18 that day.

19 Q Have you been treated, Mr. Kelley in the
20 past for alcoholism, drug dependence or anything of
21 that nature?

22 A Yes, sir.

23 Q Okay. Would you characterize yourself as an
24 alcoholic or drug depended person?

25 A I'm a addict. I have been for most all my

1 life.

2 Q All right.

3 A I've been depended on heroin and heroin
4 products ever since I was a teenager.

5 Q The investigator asked you whether or not
6 you had anything to drink?

7 A He didn't have to ask. It was all over, it
8 was in the truck. An empty bottle was between my
9 legs. There was two or three bottles that hadn't been
10 opened.

11 Q In the truck?

12 A Right.

13 Q Okay. Did he ask you about any kind of drug
14 dependence or anything like that prior to you taking
15 or him taking statements from you?

16 A I don't remember him asking me that, no,
17 sir.

18 Q Now, I want to make sure I understand, Mr.
19 Kelley. You asked for a lawyer before these Miranda
20 rights were read to you?

21 A I can't swear that I did. I know that's
22 what reminded me about the lawyer. The Miranda rights
23 has in its contents that I'm, that I'm a -- allow for
24 me to have a lawyer.

25 Q Okay.

1 A I know at that time, I asked for a lawyer.

2 Q Before this statement was made?

3 A Right.

4 Q You asked for a lawyer?

5 A Right.

6 Q And when that happened, how many times did
7 you ask for a lawyer from the beginning to the end of
8 this whole process in that room, sir?

9 A Quite a few times. I can't tell you exactly
10 how many but quite a few times.

11 Q Did you ever get to talk to a lawyer?

12 A I never did see a lawyer.

13 Q All right, sir. Answer any questions Mr.
14 Bulsa might have.

15 **CROSS-EXAMINATION**

16 **BY MR. BULSA:**

17 Q Mr. Kelley, do I understand you to say that
18 you asked for a lawyer while you were at the Sonoco
19 pumping your gas?

20 A If the, uh, if the arresting officer
21 attempted to question me, I asked for a lawyer, yes,
22 sir. Like I said, I don't remember exactly. But I do
23 know after I was read those rights that he's talking
24 about, I asked for a lawyer.

25 Q Do you remember being read those rights at

1 the gas station where you were arrested?

2 A It seemed to me like another officer pulled
3 in while I was sitting in the car and read me those
4 rights.. It seems to me like that's what it was. I'm
5 not going to say that for a fact but I believe that's
6 right. So much of this was a blur sort of.

7 Q You remember being read your rights at the
8 gas station?

9 A I'm almost sure, yes, sir.

10 Q Are you telling this Court that you asked
11 for a lawyer at that point?

12 A I probably did. Yes, sir. After reading my
13 rights, I would have stated that I want a lawyer.

14 Q Why do you say that you probably did?

15 A Because it was reminding me that I needed a
16 lawyer.

17 Q And then you want, you're telling the Court
18 that when you were read those rights again at the
19 police station, you also asked for a lawyer?

20 A No doubt. Yes, sir.

21 Q You're not sure or you probably would have?

22 A I said no doubt, Yes, sir.

23 Q Why did you sign the form saying that you
24 would waive those rights?

25 A Because the arresting officer said that they

1 helped people before and don't worry about it. Even
2 if I got convicted, if I go on and how do they say, if
3 I helped them out, they would help me out. And they
4 would see to it I wouldn't get over seven years.

5 Q Okay. Do you recall telling the officer
6 that you were caught red-handed?

7 A I can't say that I remember that, no, sir.

8 Q You still had the money on you, didn't you?

9 A Yes, sir. They took the money off of me,
10 yes, sir.

11 Q Shotgun in your truck?

12 A Yes, sir.

13 Q Identified by individuals there at the gas
14 station.

15 A I don't remember if I was identified at that
16 time or not. I can't say that I was.

17 Q In fact, your statement itself includes the
18 words "red-handed".

19 A Uh, like I said --

20 MR. WHELCHER: Your Honor, if he's going
21 to cross-examine him about the statement, he
22 needs to let him look at it.

23 THE WITNESS: With the drinking and everything
24 was pretty blurry, I may have said it. I don't
25 remember saying it.

1 **THE COURT:** Wait just a minute. Wait just a
2 second.

3 The objection is he needs to let the --

4 **MR. BULSA:** Yes, sir. He's asking about
5 the statement but he doesn't give him the
6 statement.

7 **THE COURT:** I don't believe he is required to.
8 Overruled.

9 **BY MR. BULSA:**

10 **Q** Now, you are not only saying that you asked
11 for a lawyer, you are telling this Court that you were
12 promised something to give a statement. Is that
13 right?

14 **A** Yes, sir. Without the attendance of a
15 lawyer. They would help me more or less if I forgot
16 about the lawyer. My thoughts was don't answer
17 nothing until my lawyer gets here. We'll proceed like
18 this. And Mr. Kelley, I will help you. I will see
19 to it that you don't get over seven years without a
20 lawyer.

21 **Q** You are familiar with Miranda rights, aren't
22 you?

23 **A** I've had them read to me a few times, yes,
24 sir.

25 **Q** You've been arrested a few times before,

1 right?

2 MR. WHELCHER: Objection, Your Honor.

3 THE COURT: On what basis?

4 MR. WHELCHER: It doesn't have any
5 bearing at this point whether or not he's been
6 arrested before.

7 THE COURT: I think it's relevant. Overruled.

8 BY MR. BULSA:

9 Q You been arrested before, right?

10 A Right.

11 Q You been convicted of armed robbery before,
12 right?

13 A Right.

14 Q You certainly understand your rights?

15 A Yes, sir. I believe I do.

16 Q In fact, you signed a statement saying you
17 understood them. You signed a form, didn't you?

18 A I said I believe I do, yes, sir.

19 Q And you are also telling this Court that you
20 were, are you telling this Court that you were drunk
21 that day?

22 A I had consumed quite a bit of alcohol, yes,
23 sir.

24 Q Okay. But not enough to impair your
25 thinking?

1 A Apparently my thinking must have been
2 impaired or I wouldn't have done anything like that,
3 you know?

4 Q What? You wouldn't have done anything like
5 what?

6 A Like what I was charged with.

7 Q You just got out of prison for doing
8 something like that, didn't you?

9 A Yeah. But I said straight for twenty-
10 something months and thought I'd never see the
11 penitentiary again. I was doing everything I could to
12 keep from going back. They about starved me to death.

13 Q Excuse me.

14 A I said I was about to starve to death. I
15 didn't have no money. I didn't have no way of
16 surviving.

17 Q Who was starving you? Who was starving you?

18 A I didn't have no money.

19 Q Who was starving you?

20 A I don't know who.

21 Q You said they was starving you. Who was
22 starving you?

23 A I couldn't get no, I couldn't get means to
24 live on.

25 Q So that's why you went and robbed Pizza

1 Planet. Is that right?

2 A I was trying to get means -- I was trying to
3 get something to --

4 Q So you knew exactly what you were doing?

5 MR. WHELCHER: I would object to the
6 question, Your Honor. I don't whether he's
7 talking about the robbery or the statement or
8 what.

9 THE COURT: Sustained as to the form of the
10 question.

11 BY MR. BULSA: Now, you were there on the day that

12 Q You knew exactly what you were doing that
13 day when you went into Pizza Planet.

14 A Are you asking did I know exactly what I was
15 doing?

16 Q Yes.

17 A Apparently not. If I did, it certainly
18 didn't turn out to my way of liking it. You know?

19 Q So you got your GED?

20 A Yes, sir.

21 Q You can read and write?

22 A Yes, sir.

23 Q You listened to the Miranda warnings that
24 were read to you. You signed the paper at least
25 twice, right?

1 **A** That's my signature.

2 **Q** You waived your rights on paper?

3 **A** That's my signature.

4 **Q** Then you spoke to the other officer and he
5 wrote down what you told him, didn't he?

6 **A** Yeah. I told him that. He said that would
7 never get to court because the lawyer would have it
8 throwed out like the lawyer would be there, you know.

9 **Q** So you are telling us you asked for a
10 lawyer. Then he convinced you that you could give a
11 statement without a lawyer. And now you want us to
12 believe that the same officer told you that the
13 statement would get thrown out?

14 **MR. BULSA:** Nothing further, Your Honor.

15 **THE COURT:** Redirect?

16 **MR. WHELCHER:** No, sir.

17 **THE COURT:** You can step down, sir. Any
18 further evidence from the defense?

19 **MR. WHELCHER:** No, sir.

20 **THE COURT:** Any arguments?

21 **MR. BULSA:** No, sir.

22 **MR. WHELCHER:** Your Honor, based on the
23 testimony of the client, it's obvious that he
24 believes that he was coerced into this statement
25 and the statement was not voluntary. Based on

1 that, I would ask it be suppressed.

2 **THE COURT:** I find that the State has proven
3 by the preponderance of the evidence that the
4 Defendant did in fact make the statement, that he
5 had been administered or advised of his Miranda
6 rights before he made the statement, that he
7 understood the Miranda rights and waived them and
8 that the statement that was made was voluntary.

9 And that is primarily based on the fact that
10 the testimony of the Detective is credible and I
11 saw nothing to make me suspect the credibility of
12 that witness whereas the testimony of the
13 Defendant is remarkably inconsistent and contains
14 references to things such as the minimum seven
15 years that the officer wouldn't have used anyway.
16 If he was trying to induce him into making a
17 statement that he didn't want to make, it's
18 incredible to me that he would have used a
19 minimum sentence for armed robbery that existed
20 back in this Defendant's prime rather than now.
21 The seven-year minimum for armed robbery has been
22 out of our law for years.

23 The whole thing just convinces me that the
24 request for attorney was made up and it was not,
25 in fact, ever made. And so that's my ruling. We

1 will take a short break and come back with
2 openings.

3 MR. BULSA: Your Honor --

4 (WHEREUPON, a bench conference is held off the
5 record.)

6 THE COURT: Scratch the break. You can
7 proceed.

8 MR. BULSA: Thank you, Your Honor. The
9 State calls Michael Angel.

10 MICHAEL ANGEL

11 having first being duly sworn testified as
12 follows:

13 DIRECT EXAMINATION

14 BY MR. BULSA:

15 Q Michael, where do you work?

16 A I sell cares for a Honda store.

17 Q Which one?

18 A Vick Bailey.

19 Q All right. How long have you been doing
20 that?

21 A Just under two years, a year and a half.

22 Q You been working at the time of this
23 robbery?

24 A Right.

25 Q You recall the evening of the robbery?

1 A Yes.

2 Q Were you a patron at the Pizza Planet?

3 A I was.

4 Q And did you learn that something was taking
5 place?

6 A I did.

7 Q What caught your attention?

8 A One of the employees came into the side of
9 the room where I was at and said there was a guy out
10 in the front with a shotgun. He had a weird look on
11 his face. I didn't know if he was scared or joking.
12 So I came around the side and looked out that door
13 into that main area. I saw him with the shotgun on
14 basically the two other employees beyond the bar.
15 There was a couple eating. They had their hands up in
16 the air.

17 Q Okay. And how long did you stay there and
18 watch this?

19 A Seconds. I think when I came to that door,
20 I got his attention. I don't even know if he knew
21 that room was over there. As soon as I went back to
22 tell everyone that there really was someone with a
23 shotgun, that's when I heard people start screaming.
24 So I cut back into the kitchen. I heard two women
25 screaming. I think they ended up in the bathroom.

1 Q What did you do after you went into the
2 kitchen?

3 A I went in the kitchen. And apparently some
4 of the guys that were over there saw him out the front
5 door. I was in the kitchen looking out the side door,
6 the back door looked cracked. I could see his truck.
7 Then I saw him coming up to his truck backwards with
8 the gun pointing like this. (Demonstrating).

9 And there was someone he was talking to
10 inside the building because he kept saying stop or
11 I'll shot. And he went to put the gun down. They
12 kept must of moving because he kept raising it up.
13 And he did that two or three times before he got out
14 the truck.

15 Q Did you get a good look at the man in the
16 restaurant?

17 A Both times from in the front and in the
18 back.

19 Q Okay. So it was the same man that you saw
20 inside that you saw outside near that truck?

21 A Right.

22 Q And what did you see happen after he was
23 backing up to the truck?

24 A As soon as he got in the truck, he put the
25 gun in the cab with him. One of the employees was

1 right there with me. And his car was parked right by
2 that door cause he does delivery. And he said I'm
3 going to follow him. So I got in the car with him.
4 We never, we never lost sight of him. He took off
5 real slow. By the time he got to the corner of
6 Publix, we were already behind him. We followed him
7 out of the parking lot. That's when we called 911.

8 Q About how long did you follow him?

9 A We followed him all the way from the pizza
10 place to the 26 Intersection. I would say about six
11 miles.

12 Q Did you ever lose sight of him?

13 A Never lost sight and I never lost the call
14 with 911.

15 Q Okay. And did he eventually stop somewhere?

16 A He did. He pulled into the Sonoco station.
17 We, at that point, pulled right up to the other place.
18 The cops said don't pull in behind him because they
19 will apprehend him in less than ten seconds.

20 Q Was he still in your sight when you pulled
21 into the other location?

22 A That was the one place when he -- I saw him
23 pull up to the pump. We pulled into the Dominos right
24 there. That's when we saw the cops pull up. There
25 was about five seconds I didn't get to see him. I saw

1 him stop at the pump.

2 Q What did you do after you saw the police
3 arrive?

4 A They said -- I was still on the phone with
5 911. Go in there. Avoid that but you're going to
6 have to give a statement. The cops are going to want
7 a statement from you.

8 Q Did you go up to the area of the pumps where
9 they were arresting him?

10 A No, I actually -- we pulled in the back
11 corner, almost at CVS and just waited. Once they had
12 him handcuffed and everything, then we walked up to
13 the front.

14 Q And did you see the same man that you saw in
15 the restaurant with police?

16 A Yes.

17 Q And did you identify him to the police?

18 A Yes.

19 Q Was it the Defendant?

20 A Yes.

21 Q Thank you. Answer any questions Mr.

22 Whelchel has for you.

23 CROSS-EXAMINATION

24 BY MR. WHELCHER:

25 Q Your name again, sir?

1 A Mike Angel.

2 Q Mike Angel?

3 A (Nods head).

4 Q All right. Mr. Angel, you said when you
5 were answering questions by Mr. Bulsa that you saw
6 this person that was committing this robbery for
7 seconds. Is that correct?

8 A Right.

9 Q What time of day or night was it?

10 A It was --

11 THE COURT: Let me ask a question. Do you
12 intend to offer an identification by him at that
13 scene or are you simply offering the fact that he
14 followed the Defendant or somebody, the suspect
15 until he saw the suspect arrested?

16 MR. BULSA: I'm going to offer him as
17 identification because he saw him at the scene
18 during the robbery and identified him to the
19 police.

20 THE COURT: After they had him in handcuffs?

21 MR. BULSA: Yes, sir. He walked up. He
22 saw the truck. He was there.

23 THE COURT: Okay.

24 THE WITNESS: I'm thinking it was before 9:00.

25 BY MR. WHELCHER:

1 Q At night?

2 A Right..

3 Q Okay. How close were you to this person?

4 A Right now, from me to you. Three steps.

5 Right there.

6 Q Okay. And were you in the storage room or
7 back room?

8 A No. I don't think he realized the
9 restaurant is divided into two areas. There's the
10 takeout and there's the eating area that's got the TVs
11 and soft machines and stuff on that side. I was right
12 there at that side at that door.

13 Q Is it a door like that or is it a closed
14 door?

15 A No. It stays open. It looks right in.
16 From me to you, it looks right into that.

17 Q The lighting conditions that night were?

18 A On that side, it's always bright. That's
19 where they did the deliveries and the takeout.

20 Q You were looking from the dark into the
21 light?

22 A No. That room's not even that dark.

23 Q That's what I'm trying to find out.

24 A It was no dark and light. One room was
25 slightly darker than the next. That was it.

1 Q Okay. And after you peeped in for a couple
2 of seconds according to your testimony, you turned
3 away and did what?

4 A I turned away to tell everyone that there
5 really was someone in there with a shotgun.

6 Q Did they flea out of some other door?

7 A They did. Some of them came out towards the
8 front. That's the one that he was going out. Those
9 are the ones that met him. And the rest of them went
10 out the back.

11 Q Where did you go?

12 A I went through the kitchen.

13 Q And that's when you met the employee?

14 A Right. Cause there's two back doors.
15 There's a back door that everyone piled out of. Then
16 there's the back door at the kitchen.

17 Q All this time that you are running through
18 the kitchen and everything right there and walking or
19 whatever you were doing, you don't have this person in
20 your sight?

21 A No.

22 Q So the next time you see him is behind?

23 A At the back door.

24 Q How close were you to him at that time?

25 A That time, it was closer from me to the

1 guard over there in the chair or the officer.

2 Officer. Sorry.

3 Q This one over here? What distance would you
4 say that was, sir?

5 A 35 feet, 30 feet.

6 Q And he's outside. You are inside looking
7 through an open doorway?

8 A Cracked door.

9 Q How wide is the crack in the door?

10 A It wasn't much.

11 Q And what was the lighting like?

12 A It was dark outside. There was the street
13 lights but it wasn't like it was inside.

14 Q Okay. So it's dark outside. The only
15 illumination you have is the street lights?

16 A Right.

17 Q How long did it take for this person to walk
18 away? Let me rephrase that. How long were you able to
19 observe this person from the time you looked out this
20 back door?

21 A Right. From the time he came around the
22 side of the building --

23 Q Let me finish.

24 A Okay.

25 Q How long were you able to observe him from

1 the time you started looking out the back door until
2 he got in the truck?

3 A Right. That's what I was going say. When
4 he hit my vision, it was about ten seconds.

5 Q At that point, where was the fellow that you
6 got in the car with?

7 A He was right there. Apparently he was
8 behind me. I didn't know it. When I opened the door,
9 he was right there.

10 Q He said something. That's when he got in
11 your vehicle?

12 A Right. He said he was going to get -- it
13 was in his vehicle actually. He said he wasn't going
14 to go after them. I just jumped in so I could help
15 with the 911.

16 Q From that point on, all you saw was the rear
17 of the truck?

18 A Except for the time that the 911 operator
19 asked if I could get the tag. We tried to get real,
20 real close. That's the time he knew we were behind
21 him. He started hitting the breaks and just driving
22 like he knew we were behind him. He almost even stop
23 in the road one time. I was able to get the tag and
24 we backed up immediately and kept a safe distance.

25 Q Okay. So during all this time, all you see

1 was the back of this person's head?

2 A Yes.

3 Q And during this time, all you see was the
4 back of this person's head?

5 A Right.

6 Q And during all of this pursuit that you and
7 this other fellow performed, when, if any, time did
8 you get to see the person that was driving the
9 vehicle, his face?

10 A Once the cops had him outside the truck.

11 Q Okay. And when the cops had him outside the
12 truck, was he handcuffed?

13 A Yeah. They took him to the ground
14 immediately. As soon as he came up from the ground,
15 he was handcuffed.

16 Q And subsequent to them taking this man to
17 the ground and handcuffing him, that was when you just
18 drove up on your own or somebody told you to go?

19 A I was on the phone the whole time. As soon
20 as we saw the cops, we actually pulled up into the
21 median. And we watched the takedown happen. I don't
22 remember her exact words. It was almost a year ago
23 but somehow get in there so you could give your
24 statement.

25 Q Did anybody ask you to come forward at that

1 point and make an identification?

2 A Uh-huh.

3 Q Okay. Where and when was that?

4 A That was right after they had him. I can't
5 remember if he was in the car or if he was out of the
6 car. That's when the officer came up to me and took
7 my statement and asked me if that was the person in
8 the vehicle that I had seen.

9 Q But regardless to whether he was in the car
10 or out of the car, you had already seen him stopped by
11 the officer, --

12 A Right.

13 Q -- taken down to the ground and handcuffed?

14 A It wasn't actually taken down. It was at
15 gunpoint. He was asked to go to the ground.

16 Q He complied with that request, did he not?

17 A Yes.

18 MR. WHELCHER: That's all I have of this
19 witness, Your Honor.

20 REDIRECT EXAMINATION

21 BY MR. BULSA:

22 Q Was anybody else in that truck?

23 A No.

24 Q Okay. About how long was it before the
25 police arrived that you actually walked up?

1 **A** Less than a minute or two minutes.

2 **Q** Okay. Any doubt in your mind that that was
3 the same person that you saw?

4 **A** No doubt.

5 **Q** Thank you. That's all I have.

6 **MR. BULSA:** That's the State's showing on
7 identification. Beg the Court's indulgence, Your
8 Honor. (Pause.)

9 Your Honor, the other individual, the other
10 gentleman is a student. He's in Florida.

11 **THE COURT:** Okay. Any further evidence on
12 this question of the suggestiveness and the
13 reliability of the identification?

14 **MR. BULSA:** Beg the Court's indulgence.
15 (Pause.)

16 No, sir. I wouldn't have any evidence.

17 **THE COURT:** Any arguments?

18 **MR. WHELCHER:** Yes, sir. Your Honor,
19 the witness stated that when the alleged robbery
20 was taking place, he viewed the gentleman for a
21 couple of seconds. There had been no description
22 of what he viewed, who he viewed or anything like
23 that. There's no height, length, anything like
24 that that's introduced into evidence. There's
25 nothing in the statement. There's nothing today.

1 In addition, when he saw him the second time
2 or saw a person the second time, he said that was
3 about ten seconds. The next time, the last time
4 he seen him, he's already under arrest,
5 handcuffed and taken into custody. I think that
6 identification is unduly suggestive, Your Honor.
7 I'd ask that it be stricken.

8 **THE COURT:** All right. He's at the scene when
9 they arrested him and so he watches the car pull
10 up to the gas pump and he hangs back at the
11 direction of the 911 dispatcher. Law enforcement
12 comes in. Makes the arrest and takes him down in
13 whatever way, whether it was voluntarily done or
14 not. What is the way in which the, uh, what is
15 the way in which he is asked to or happens to
16 identify the Defendant?

17 **MR. WHELCHER:** He's taken to the scene
18 where they took him down and asked to identify
19 him after he's already witnessed --

20 **THE COURT:** The officer took him over there?

21 **MR. WHELCHER:** Yes, sir. I think he was
22 directed -- his testimony was he was directed by
23 the person on the phone to go over there so that
24 he could give a statement. And when he was over
25 there, that's when he made the ID.

1 **THE COURT:** Yeah, but I want the question
2 answered precisely. I want to know exactly what
3 happened when he gets over to the scene where
4 this Defendant was. If he just walks over there
5 and says, hey, that's the guy who did it, then
6 there are no Neil versus Biggers implications to
7 what just happened. If he walks over there and
8 law enforcement says is this the guy who did it
9 and he says yes, there are constitutional
10 implications to that. I want to know exactly
11 what happened.

12 **MR. WHELCHER:** Yes, sir.

13 **THE COURT:** Mr. Bulsa.

14 **MR. BULSA:** Your Honor, I can put him back
15 on the stand. I don't believe that specific
16 question was asked by either myself or Mr. --

17 **THE COURT:** Okay. I didn't think so. Put him
18 up.

19 **BY MR. BULSA:**

20 **Q** Mr. Angel, when the -- did you actually
21 witness the -- I think you testified that you actually
22 witnessed the takedown.

23 **A** Right.

24 **Q** How much later did you then go up to where
25 he was taken down?

1 A No more than two minutes.

2 Q What caused you to go up there?

3 A I pulled in the back of the parking lot. I
4 knew I had to give a statement. That's when the
5 officer came over to me and asked if I was the one on
6 the phone with 911.

7 Q You were still at your car and the law
8 enforcement officer walked over to your car?

9 A Yes.

10 Q And what exchange took place there?

11 A That's what I don't remember. I don't know
12 how I walked over there and saw him or if they -- I
13 don't remember that part. That's when I was still in
14 shock about what happened. I don't remember.

15 Q You don't remember specifically what he
16 might have said or asked you?

17 A I don't.

18 Q Well, did you walk ever there with the
19 officer?

20 A The whole thing -- I was at the front of the
21 store about six feet from the truck.

22 Q You didn't actually walk up to the truck
23 where they had the Defendant?

24 A That's what I don't remember. I don't know
25 if I walked up to the truck or not.

1 Q If you had seen him, about how far were you
2 looking at it?

3 A If I had seen him, it would have been less
4 than 15 feet. That happened right in front of the
5 store.

6 Q You don't recall if you were asked whether
7 this was the same man or you just told them?

8 A I wish I did. But it was, like I said,
9 almost a year ago. I don't remember how that was
10 worded.

11 Q Were you in any way, did anybody suggest in
12 any way whether this was the same man or not?

13 A No.

14 Q Was that the same truck you were following?

15 A It was the same truck I was following the
16 whole time. The same tag. There was no doubt about
17 the truck.

18 Q And the same truck that you saw this man get
19 into?

20 A Yes.

21 Q And did you ever see another person in that
22 truck?

23 A No.

24 Q Did you ever see another person get out of
25 that truck when the police arrived?

1 A No.

2 Q Was the man you saw standing with the police
3 dressed in the same fashion as the man you saw at the
4 restaurant?

5 A Yes. I do remember that.

6 MR. BULSA: Thank you. That's all I have.

7 THE COURT: Any questions?

8 **RECROSS-EXAMINATION**

9 BY MR. WHELCHER:

10 Q Did you talk to a uniform officer at the
11 Sonoco station?

12 A I gave my statement to a uniform officer.

13 Q Did the uniform officer tell you to come
14 over here and see if you can identify this person or
15 the person who committed the robbery?

16 A That's the part I can't remember. I mean...

17 MR. WHELCHER: That's all I have for
18 this witness, Your Honor.

19 THE COURT: Let me ask you a question before
20 you step down, sir. Now, you described your
21 observation of what happened at the restaurant
22 and your following of the car all the way to the
23 place where the arrest occurred. And you saw the
24 arrest occur. And you described it, except for
25 just a few seconds, I believe you said right at

1 the time you pulled up to the gas pump. You had
2 the car and its occupants in your vision the
3 whole time, right?

4 **THE WITNESS:** Yes.

5 **THE COURT:** After you got to the gas station
6 where the arrest occurred, did you ever tell
7 anybody that that is the man who committed the
8 armed robbery?

9 **THE WITNESS:** I know I did in the statement.
10 I don't know if I did verbally or not.

11 **THE COURT:** Well, where is the statement? Or
12 let me ask you this, do you intend to offer the
13 statement?

14 **MR. BULSA:** I was going to offer his
15 testimony.

16 **THE COURT:** Well, he just testified he doesn't
17 remember whether he told anybody if that was him
18 or not.

19 **MR. BULSA:** I was going to offer his
20 identification in court that this was the man.

21 **THE COURT:** That has no, that has no
22 constitutional implications as far as I can see
23 at this point, nor does the entire course of
24 having followed that car from the restaurant to
25 the gas station, nor is his having observed the

1 police arrest the person who got out of the car.
2 If you can't remember actually making an
3 identification, then there is nothing for you to
4 offer that has any constitutional implication.

5 There's no identification issue surrounding
6 his testifying that he watched the man walk out
7 of the restaurant with a shotgun. He watched him
8 get in the car. He jumped in the car with the
9 pizza delivery guy, followed him all the way.
10 The whole time they were following them, the
11 person never got out of their sight. And when
12 they got to the gas station, they watched him be
13 arrested.

14 There's no identification issue in any of
15 that. And he doesn't remember making an oral
16 statement of identification. He made a written
17 statement that you are going to decide now
18 whether you are going ever offer.

19 **MR. BULSA:** I can offer it for the sake of
20 this hearing, Your Honor.

21 **THE COURT:** If you're going to -- the point is
22 this. The only thing that has a constitutional
23 question associated with it is what this witness
24 might have said at the gas station about who
25 committed the crime. Nothing else is, uh, has a

1 constitutional issue unless it is claimed that
2 the identification there at the gas station has
3 tainted the identification that he might make
4 here in court. I haven't heard that yet.

5 MR. BULSA: I wasn't sure what Mr.
6 Whelchel's motion was. You heard the testimony
7 that we are going to offer. In reviewing the
8 statement, he did not state in here that he told
9 the officer. He just said the officer took the
10 suspect into custody.

11 THE COURT: I just don't think that has any --
12 I mean, are you going to offer the written
13 statement?

14 MR. BULSA: No, sir. I'm not.

15 THE COURT: I don't know that there's anything
16 to decide.

17 MR. WHELCHER: As long as he's not going
18 to testify about any kind of identification at
19 the scene.

20 THE COURT: I don't think I'm mistaken about
21 this. If you think I'm wrong, you let me know.

22 MR. WHELCHER: Yes, sir.

23 THE COURT: If he is standing off to the side
24 watching the person who he's had in his eyesight
25 since the time he saw the suspect leave the

1 restaurant with his shotgun in his hand and he's
2 watching that person be arrested, then that's not
3 an identification. That's just testifying to
4 what I saw. I don't think that there's any
5 consequence of there perhaps being any
6 suggestiveness.

7 I don't think there's anything law
8 enforcement did that brings up the question of
9 suggestiveness. That's connected up and made
10 relevant by the fact that I assume the officer is
11 going to come along and testify that the person
12 who he arrested right then is the person sitting
13 over there at the counsel table. That's what
14 ties it up. It's not an identification question.

15 Nevertheless, to the extent it is, if it is
16 an identification, which I don't think it is,
17 it's clearly suggestive. And to the extent what
18 he testifies to, what he just testified to in
19 this hearing is an identification, then his
20 having seen the officer arrest him, take him down
21 at gunpoint, put handcuffs on him is suggestive.

22 But -- so that gets us to the second prong
23 which is the reliability prong. And one of the
24 things, one of the factors, of course, is the
25 length of time between the crime and the

1 confrontation. And essentially under this
2 scenario, it's all continuous. There is never a
3 pause. The only possible pause between the crime
4 and the confrontation is that five seconds that
5 he testified to when he couldn't see him when he
6 was behind the gas pump or maybe it was 15
7 seconds. That would be the biggest factor in
8 determining reliability.

9 You mentioned of course that he never gave
10 any kind of independent description. And under
11 other circumstances, that might be significant.
12 He has testified to a very high level of
13 certainty. He has testified to a very high
14 degree of attention. He's also testified to what
15 I think is a very reliable opportunity to view
16 the criminal at the time of the crime, not so
17 much because he was able to see his face and see
18 the factual features and to remember those but
19 because he had a constant eye on him from the
20 time the crime was committed or the time he saw
21 him walk out of the restaurant with the shotgun
22 all the way to the point in time when he was
23 arrested.

24 So I say that I believe and I ruled that even
25 if there was an identification issue despite the

1 fact that there is suggestiveness associated with
2 it, the identification is nevertheless so
3 reliable that there is very little possibility of
4 a misidentification. So I will allow the
5 testimony of this witness, whatever it may be
6 concerning what he saw into evidence.

7 MR. WHELCHER: I understand, Your Honor.

8 THE COURT: Anything further?

9 MR. WHELCHER: No, sir.

10 THE COURT: Okay. Short break. Four minutes.
11 Then we come back and bring the jury in.

12 (WHEREUPON, a short recess is taken at
13 approximately 3:20 p.m.)

14 (WHEREUPON, the Court resumes at approximately
15 3:25 p.m.)

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

17 (WHEREUPON, the jury enter at approximately
18 3:27 p.m.)

19 THE COURT: You all can be seated.

20 Are you prepared to swear the jury?

21 THE CLERK: I am.

22 THE COURT: Swear them.

23 THE CLERK: Would you please stand and raise
24 your right hand. Do you solemnly swear in the
25 case that is about to be tried that you will try

1 the issues that are joined in this case and a
2 true verdict render according to the law and
3 evidence so help you God?

4 (WHEREUPON, the jurors respond affirmatively.)

5 **THE COURT:** Well, Ladies and Gentlemen, it
6 took us a little longer to get done what we had
7 to do than I had anticipated. I apologize. I
8 take full responsibility for the fact that you
9 had to stay back in the jury room for an extra
10 hour after you came back from lunch.

11 We are ready now to begin with the trial in
12 the State of South Carolina versus Raymond Thomas
13 Kelley who has been indicted in indictment 2006-
14 GS-42-5099 for Armed Robbery. And in that
15 indictment, it is alleged that Raymond Thomas
16 Kelley in Spartanburg County on or about November
17 11th, 2006, he did take a sum of money from Pizza
18 Planet while armed with a shotgun, a deadly
19 weapon in violation of section 16-11-330(b) of
20 the Code of Laws of South Carolina.

21 Now, Ladies and Gentlemen, as I told you
22 earlier, the indictment that I just read to you
23 is not in any sense evidence of the allegations
24 that are contained within that indictment. The
25 indictment is simply the formal document that

1 contains the allegations that have been made
2 against the Defendant. And the process that
3 serves the case and bring it into this court for
4 trial.

5 The Defendant has pled not guilty to this
6 indictment. And the plea of not guilty cast the
7 burden on the State to prove the Defendant guilty
8 beyond a reasonable doubt. And that is your job,
9 or it will be, to determine whether or not the
10 State has met that burden of proof.

11 It is a very important rule of law in our
12 country that a Defendant in a criminal trial will
13 always be presumed to be innocent of the crime
14 with which he has been charged unless and until
15 his guilt has been proven by evidence that
16 satisfies you of that guilt beyond a reasonable
17 doubt. This of course is what we refer to as the
18 presumption of innocence.

19 The presumption of innocence is not merely a
20 legal theory. It's not just a legal phrase that
21 we use. It is a substantial constitutional right
22 to which every Defendant is entitled. The
23 presumption of innocence accompanies the
24 Defendant from the time he is charged, throughout
25 the trial and into the jury room until you reach

1 a verdict of guilt that is based on evidence that
2 has satisfied you of that guilt beyond a
3 reasonable doubt.

4 The trial of this case can be divided up into
5 five basic phases. I'm going to go over those
6 phases with you now. The first is the opening
7 statements when the lawyers will stand before you
8 and they will explain to you what this case is
9 about. They will tell you what the issues are in
10 the case. They will tell you how each side
11 stands on those issues. They will also go over
12 for you some of the evidence that you can expect
13 to see that will relate to those issues.

14 The second phase is the evidentiary phase
15 which we will begin in just a few minutes when
16 the witnesses will come here to this witness
17 stand, you will hear their testimony. And there
18 will be other physical evidence that will also be
19 offered for you to consider. The third phase is
20 the closing arguments where the lawyers will
21 stand before you again. And this time, they will
22 argue to you as to whether or not the State has
23 met that burden of proof. The fourth phase is
24 the jury charge when I will explain the law that
25 is applicable to this case. And the fifth phase

1 is when you will go back into the jury room and
2 you will deliberate.

3 Now, Ladies and Gentlemen, it's very
4 important that you not begin to make up your mind
5 about the facts in the case, about whether or not
6 the State has met its burden of proof until you
7 have been through all five of those phases
8 including at least the first part of that fifth
9 phase when you will have a chance to listen to
10 each other discuss the evidence and discuss
11 whether or not the State has met its burden.
12 Only then will you be in the right position to
13 begin to make up your mind about the facts. Now,
14 as I mentioned to you just before you went to
15 lunch, you may not discuss this case in any
16 manner until I have given you permission to begin
17 those deliberations.

18 As members of the jury, you are the exclusive
19 judges of the facts. And I am not permitted to
20 indicate to you how I might feel about the facts.
21 If I say anything or do anything that might lead
22 you to believe that I have an opinion about the
23 facts, then you should disregard that. But on
24 the other hand, I am the exclusive judge of the
25 law. If you have any idea as to what the law is

1 or what the law should be and if that is
2 different from what I will tell you the law is,
3 then you are obligated under the oath that you
4 have just taken as jurors to set your notion of
5 the law aside and to accept and apply the law
6 precisely as I will explain it to you.

7 One other role that I play is to decide on
8 the admissibility of evidence. From time to
9 time, I expect that objections will be made when
10 one of the lawyers believe that evidence has been
11 offered that does not comply with our rules of
12 evidence. When that happens, that's not an
13 attempt on the part of the lawyers to hide
14 anything from you. That's just the way our
15 system of evidence works. When the objection is
16 made, it becomes my responsibility to rule on the
17 objection.

18 If I sustain the objection, that means I
19 believe the evidence is not admissible and I will
20 not allow it in for you to consider. If I
21 overrule the objection, that means I believe the
22 evidence is admissible and I will allow it in and
23 you may consider it. Most of the time I can do
24 that just as I sit here. You will hear the
25 lawyers say objection. They might briefly state

1 the grounds for their objection. Then you will
2 hear me say either sustained or overruled.

3 Sometimes I might have to get the lawyers to
4 step up here to bench so I can briefly discuss
5 the question with them before I rule. Sometimes
6 I might even have to send you all back into the
7 jury room like I just had, like I just did, so I
8 can openly discuss the evidence question.
9 Sometimes I actually have to listen to the
10 testimony before I can decide whether or not you
11 can listen to it.

12 Mr. Bulsa.

13 **MR. BULSA:** Thank you, Your Honor. Please
14 the Court.

15 Good afternoon, Ladies and Gentlemen. Thank
16 you for your patience in waiting. This is a
17 serious case. 18-year old Jordan Tarver was
18 working at the Pizza Planet November the 11th,
19 2006. At approximately 7:55, he was working the
20 counter when the Defendant walks in with a single
21 barrel shotgun and points it at him demanding the
22 money. Mr. Tarver acted as one rightfully
23 should. He gave him the money.

24 Other employees in the store witnessed this
25 act. Two of those, two people followed the

1 Defendant from the scene, watched him drive his
2 truck away, followed the truck, told the police
3 where he was going and watched the police
4 arrested the man at a Sonoco station down the
5 road. He was within their sight pretty much the
6 whole time.

7 It was clear that the police arrested the man
8 that robbed the Pizza Planet and Jordan Tarver.
9 Not only that, the police found the shotgun that
10 he used to be in the seat of the truck, found the
11 money on the Defendant, collected that and took
12 it into the police station where he then met with
13 the Defendant and gave a statement telling the
14 officer that he was caught red-handed, he might
15 as well give a statement.

16 He gave a statement. You will have that
17 before you to consider. The evidence is clear.
18 I will come back at the end of this case and
19 argue that the evidence shows that he committed a
20 crime of armed robbery. The judge will instruct
21 you on the law of armed robbery. You will then
22 go and decide as the judge told you in jury
23 deliberations.

24 Armed robbery is fairly straightforward.
25 It's the robbery while you are armed with a

1 deadly weapon. A robbery is taking by force. I
2 submit to you this is a simple clear case of
3 robbery. The Defendant was caught red-handed and
4 he is guilty of this charge. Thank you.

5 **MR. WHELCHER:** Wow. If that's the case,
6 why are you here?

7 **MR. BULSA:** Objection, Your Honor.

8 **THE COURT:** Overruled.

9 **MR. WHELCHER:** My client has rights to a
10 jury trial. He has the right to have twelve
11 people who don't know him and don't the
12 prosecutor, twelve people. The prosecutor has got
13 a duty. It's not that simple. The judge has
14 already told you that there is a presumption in
15 the law of this state. It's called the
16 presumption of innocence. Raymond Kelley has
17 that presumption. Every person in this state and
18 country has that presumption. You probably will
19 hear this when the judge charges you at the end
20 of this case, too.

21 It's extremely difficult for somebody to
22 prove themselves innocent. And it's not his job
23 to decide. It will be your job. Whoever is
24 bought in this courtroom by the authority of the
25 State of South Carolina and said you are going to

1 trial for armed robbery, they don't have to do a
2 thing. The burden of proof is right here on this
3 table. It stands with them. They are the ones
4 to have to prove to you beyond a reasonable doubt
5 that it happened just like Mr. Bulsa said it
6 happened. You get to listen to the evidence. If
7 by Mr. Bulsa's proclamation, we can say --

8 MR. BULSA: Objection, Your Honor.

9 MR. WHELCHER: -- he's not guilty.

10 MR. BULSA: Objection.

11 THE COURT: And state the basis please.

12 MR. BULSA: Your Honor, he's interjecting
13 the prosecutor in this case.

14 THE COURT: Stand back just for a second. Let
15 me make something clear to the jury that should
16 be clear anyway. You will hear testimony
17 beginning in just a minute. The testimony will
18 come from the witness stand. The lawyers make
19 their opening statement to try to explain the
20 testimony that is about to come out. They
21 perhaps make argumentative statements during
22 their opening and closings to you. But the
23 evidence comes from the witness stand, not from
24 the lawyers.

25 With that explanation, you can proceed.

1 **MR. WHEELCHEL:** Thank you, Your Honor.

2 The bottom line is this. You decide who is
3 guilty or not guilty. You decide what you
4 believe, who you believe. The way that you do it
5 is applying your common sense. That same force
6 stands that your mother, your father and your
7 bossman, whoever talks to you about. There's not
8 going to be a bunch of evidence like you see on
9 TV on CSI. There's not going to be much
10 scientific stuff. It's going to be what you
11 believe and who you believe. By and large, most
12 of the trials end up with that.

13 Twenty-five years plus, I've been working in
14 the courtroom. I used to do what Mr. Bulsa
15 does. And you need to understand something.
16 It's very important. You decide the facts. You
17 decide who you believe, what to believe and if
18 you believe that.

19 But the ultimate fact is this. Raymond
20 Kelley as he sits there today is not guilty. And
21 he is not guilty because of the presumption of
22 innocence that the judge told you about. It is
23 your duty to hear the facts in this case and
24 determine what the facts are. That evidence has
25 to be so clear and so convincing as to strip

1 Raymond Kelley of his cloak of innocence,
2 presumption of innocence so that you could render
3 a guilty verdict. If they don't meet the burden
4 of proof that is required of the State, they are
5 the ones who decide to prosecute this case. They
6 bring the persons to court. The burden is on the
7 State just like when I was prosecuting.

8 What you need to do today is this, listen to
9 the testimony. Some of it is going to be very
10 straightforward. And some of it, you may have a
11 doubt. It may create what the judge will talk to
12 you about later which is a reasonable doubt.

13 You were chosen as jurors because we decided
14 you could listen to all the evidence and then
15 make a decision. The judge, when it gets to the
16 deliberation phase or during the charge phase
17 will tell you the verdict has to be unanimous.
18 All of you will have to agree. It needs
19 literally to speak the truth. Your verdict
20 speaks the truth. We will have no qualms with
21 your verdict. Thank you.

22 MR. BULSA: The State calls Robert
23 Shaffer.

24 ROBERT SHAFFER

25 having first being duly sworn testified as

1 follows:

2 DIRECT EXAMINATION

3 BY MR. BULSA:

4 Q Officer, let me ask you some questions.

5 Tell us your full name.

6 A Robert L. Shaffer.

7 Q And who are you employed with?

8 A Spartanburg County Sheriff's Office.

9 Q In what capacity?

10 A I'm a forensics officer now.

11 Q When did you start in the forensics
12 division?

13 A February of last year.

14 Q February of '06?

15 A Yes, sir.

16 Q And what did you do before that?

17 A I was an investigator with the Sheriff's
18 Office.

19 Q How long have you been in law enforcement?

20 A Approximately eight and a half years.

21 Q All of it with Spartanburg County?

22 A Yes.

23 Q Do you recall getting a call to go to Pizza
24 Planet on November the 11th of 2006?

25 A Yes, I did.

1 Q Approximately what time did you arrive at
2 that location?

3 A We arrived on the scene approximately
4 8:27 p.m.

5 Q Did you go there first or go to the Sonoco
6 first?

7 A I went to the scene first.

8 Q To the scene first. And what did you do at
9 the scene?

10 A I got the information from the officer of
11 what happened to the incident. And I walked in,
12 started my photographing and processing the scene.

13 Q What kind of business is this?

14 A It's a restaurant, pizza.

15 Q And did you take pictures from the outside
16 as well as the inside?

17 A Yes, I did.

18 (WHEREUPON, State's Exhibit 3 through 8 are
19 marked for identification purposes.)

20 BY MR. BULSA:

21 Q And did you digital cap these?

22 A Yes, I did.

23 MR. BULSA: Any objection to these
24 photographs? (Pause.)

25 BY MR. BULSA:

1 Q Let me show you a series of photographs
2 marked for identification, State's Exhibit 3 through
3 8. Would you review those photographs?

4 A (Reviewing).

5 Q Are those photographs of the scene you took?

6 A Yes, they are.

7 Q Did they accurately depict the restaurant
8 that evening?

9 A Yes, they do.

10 MR. BULSA: Your Honor, I would offer
11 these into evidence.

12 MR. WHELCHER: Is there going to be
13 testimony about specific photographs?

14 MR. BULSA: I ask them as a series State's
15 3 through 8.

16 MR. WHELCHER: Are you going to put in
17 all of them?

18 MR. BULSA: State's 3 through 8, yes.

19 MR. WHELCHER: Okay. (Pause.)
20 That's fine.

21 THE COURT: They are admitted.

22 (WHEREUPON, State's Exhibit 3 through 8 are
23 admitted into the record.)

24 BY MR. BULSA:

25 Q Now, these series of photographs are the

1 ones that you took at the scene?

2 A Yes, they are.

3 Q You took many more pictures but those are
4 the ones I selected?

5 A Yes, I did.

6 Q Okay. And did you do anything else at the
7 scene?

8 A I did a process for latent prints on the
9 counter. And there was a \$10-bill laying on the floor
10 between the door and the counter.

11 Q Were you able to lift any fingerprints?

12 A I wasn't able to lift any prints,
13 correction, I didn't process the counter. I processed
14 the front door.

15 Q Were you able to get any prints?

16 A No, I didn't lift any prints.

17 Q Is that unusual?

18 A No.

19 Q Why not?

20 A Certain surfaces aren't printable, time
21 period, weather condition, the actual surface itself.

22 Q Okay. And you don't actually know how they
23 actually tested the door, do you?

24 A No, I do not.

25 Q Were you then called to another scene that

1 evening?

2 A Yes, I was.

3 Q Where was that?

4 A At the Sonoco station at 2391 Reidville
5 Road.

6 Q Do you know approximately how far that was,
7 how far away that was?

8 A I would say between three and four miles.

9 Q And what did you see when you got to that
10 scene?

11 A There was an older model Chevy pickup truck
12 that was at the fuel pumps. The front of the truck
13 was pointing towards Spartanburg and the backside was
14 pointing towards Reidville, going towards
15 Reidville/Duncan area.

16 (WHEREUPON, State's Exhibits 9, 10 and 11 are
17 marked for identification purposes.)

18 BY MR. BULSA:

19 Q I'm going to now show you what's been marked
20 for identification as State's number 9. Do you
21 recognize that picture?

22 A Yes, I do.

23 Q Does that accurately depict the vehicle that
24 you saw at the pumps?

25 A Yes, it does.

1 Q And did you process that vehicle?

2 A No, I did not.

3 Q Why not?

4 A Due to the surface of the vehicle, it's not
5 a known -- forensically, we can't process it.

6 MR. BULSA: Your Honor, I'm going to offer
7 State's number 9 into evidence.

8 MR. WHELCHER: No objection.

9 THE COURT: It's admitted.

10 (WHEREUPON, State's Exhibit 9 is admitted into
11 the record.)

12 BY MR. BULSA:

13 Q Now, this is just one of many pictures of
14 the truck that you took?

15 A Yes, it is.

16 Q Inside the truck, did you collect anything?

17 A Yes, I did.

18 Q What?

19 A It was a twelve gauge pump shotgun.

20 Q I'm going to show you what's been marked
21 State's Exhibit number 10. Do you recognize that
22 photograph?

23 A Yes, I do.

24 Q Does that show the location of the shotgun?

25 A Yes, it does.

1 Q And the truck? Is that where it was
2 actually recovered from?

3 A Yes, it was.

4 MR. BULSA: We offer State's number 10
5 into evidence.

6 (WHEREUPON, State's Exhibit 10 is admitted into
7 the record.)

8 BY MR. BULSA:

9 Q So you photographed the gun as it is in the
10 truck?

11 A Where I located the gun is where I
12 photographed it.

13 Q And did you then take the weapon into
14 evidence?

15 A Yes, I did.

16 Q Did you do anything with it before you put
17 it into evidence?

18 A I made the shotgun safe, clearing the
19 ammunition in the gun, ammunition in the weapon.
20 There was a round in the chamber and also there was
21 one in the tube, the lower part. There was a round in
22 there.

23 (WHEREUPON, State's Exhibit 12 is marked for
24 identification purposes.)

25 BY MR. BULSA:

1 Q Can you look at State's Exhibit 12 for
2 identification? Make sure it's clear first.

3 A (Reviewing).

4 Q Do you recognize that weapon?

5 A Yes, I do.

6 Q How so?

7 A This was the shotgun I recovered from the
8 front seat of the truck.

9 MR. BULSA: Your Honor, we would offer
10 this into evidence.

11 MR. WHELCHER: No objection.

12 THE COURT: Officer, let me ask you a couple
13 of questions. Obviously, the weapon is unloaded.

14 THE WITNESS: Yes, Your Honor.

15 THE COURT: Has it been secured in such a way
16 that it can not be loaded?

17 THE WITNESS: There is a zip tie here. They
18 can't move the pump forward so you can't put a
19 round in it.

20 THE COURT: It can not be loaded unless the
21 zip tie is moved?

22 THE WITNESS: Yes, Your Honor.

23 THE COURT: Can it be moved?

24 THE WITNESS: Yes, Your Honor.

25 THE COURT: Okay. Then you are going to need

1 to secure the weapon before I admit it. I'm
2 going to decline the offer to admit it at this
3 time. You can take it back over to counsel table
4 and secure it. And then when you've got it ready
5 to be admitted so that it can't be loaded, then I
6 will admit it.

7 BY MR. BULSA:

8 Q Can you make it secure officer?

9 A No.

10 Q What were you attempting to do?

11 A Take off the barrel here. You can't.

12 Q While you are here, State's Exhibit number
13 12 was collected from the truck?

14 A Yes, it was.

15 Q Not only was it in evidence, it was loaded?

16 A Yes, it was.

17 Q And you described how it was loaded. Please
18 describe that again?

19 A There was one round of federal heavy dub
20 load in the chamber. When I pulled it back, there was
21 a round in there. When I ejected it, there was still
22 another one in the tube. I removed that one.

23 Q There was actually more than one round in
24 this at a time? How many shells will this hold?

25 A If there is a plug in there, you would be

1 able to put one in the chamber and two in the tube
2 when the plug is taken out. Sometimes you can put
3 between three and four rounds in there.

4 Q Would it fire?

5 A Yes, it would.

6 Q So you fire the one in the chamber and eject
7 it?

8 A You have to pull back the action, the pump.
9 You have to manually take it out. When it closes, you
10 eject one and put it up into the chamber.

11 Q And then it reloads?

12 A Yes, it does.

13 Q Okay. Did you collect anything else at that
14 scene?

15 A No, I did not.

16 Q Are you aware of whether any money was
17 collected?

18 A The other officer on the scene, he collected
19 some money.

20 Q And did you photograph the money that he
21 collected?

22 A I photographed at the Sheriff's Office.

23 Q I want to show you what's been marked as
24 State's Exhibit number 11. Do you recognize that?

25 A Yes, I do.

1 Q What is that?

2 A It's the money Officer Fraley collected on
3 the scene.

4 Q What's the purpose of the photograph?

5 A Just to document.

6 Q Do you know if the money was returned back
7 to the business?

8 A I do not know.

9 MR. BULSA: Your Honor, we will offer
10 State's number 11 into evidence.

11 MR. WHELCHER: Your Honor, I will object
12 at this time. He may have testified and I missed
13 it. I don't know how he can tell this layout of
14 money from any other layout of money. I don't
15 think sufficient foundation has been laid. What
16 is that Exhibit number please?

17 MR. BULSA: Number 11.

18 BY MR. BULSA:

19 Q Can you tie this picture to this case?

20 A I know it was money the officer bought in
21 that he collected.

22 Q And what process did you take to photograph
23 it?

24 A Laid it out on paper there and laid it out
25 in 20's, 10's and 5's and 1's and just laid it out and

1 just photographed that.

2 Q And was that with the same series of
3 photographs you had taken before?

4 A Was that --

5 Q Was that in the same series of photographs
6 you had taken before?

7 A It was after the Sonoco, yes.

8 Q Was there a case number attached to it?

9 A Yes, there is.

10 Q And you see that case number in that
11 picture?

12 A Above it but it's not one in the picture
13 itself.

14 Q It's on the picture, not on the actual print
15 of the picture but on the print of the paper?

16 A Yes, there is.

17 Q Is that the case number that is assigned in
18 this case?

19 A Yes, it is.

20 Q So it's your testimony, is that the same
21 money that you would have photographed that night?

22 A Yes, it was.

23 Q We would offer this into evidence.

24 MR. WHELCHER: I would object, Your
25 Honor.

1 **THE COURT:** Let me see it please. (Pause.)

2 I overrule the objection. I will explain my
3 ruling at the next break.

4 **MR. BULSA:** Thank you, Your Honor.

5 (WHEREUPON, State's Exhibit 11 is admitted into
6 the record.)

7 **MR. BULSA:** Officer, if you would, would
8 you answer any questions Mr. Whelchel has for
9 you.

10 **CROSS-EXAMINATION**

11 **BY MR. WHELCHER:**

12 **Q** Now, you were asked earlier if you could
13 recognize this shotgun. You were asked earlier if you
14 could recognize the shotgun. You just can't look at
15 it and tell if it was that shotgun that was given to
16 you at this time, right?

17 **A** The shotgun they gave me, yes, it was. I
18 checked the serial numbers in my report.

19 **Q** That's what I'm asking you. You had to
20 check the serial numbers so you can match it to what
21 you've written down, is that right?

22 **A** Yes, they are.

23 **Q** In this photograph number 11, the one with
24 all the money, how much money was taken? Do your
25 notes reflect that?

1 A They would be on the evidence sheet from the
2 officer. If I had the full-size picture, I could be
3 able to count.

4 Q You can't tell from that picture, can you?

5 A I can give a rough, I can give a guess on
6 this.

7 Q I don't want a guess. I want to know how
8 much money was taken.

9 (WHEREUPON, there is a pause.)

10 A I give a close -- but I really can't.

11 Q Excuse me?

12 A I can give it close but I can't from this
13 side of the picture.

14 Q State's Exhibit number 9 is a pickup truck.
15 You arrive at the scene and they essentially tell you
16 what to photograph, is that correct?

17 A Well, they ask what I need and also what I
18 know from experience.

19 Q They don't tell you to photograph everything
20 in the, every vehicle in the parking lot, do they?

21 A No.

22 Q Okay. You do the same thing with these
23 other photographs at the scene. You just take
24 photographs so that ultimately later, somebody can see
25 what the place looked like?

1 A Yes, I do.

2 Q You didn't see anybody that night? You
3 didn't take any statements from anybody that night?

4 A No, I did not.

5 Q All you did was photograph the scene and
6 whatever else that they tell you to photograph?

7 A Yeah. And process the scene.

8 Q And when the other officer brings some money
9 to you and says this is the money I've got, you take a
10 picture of that?

11 A Yes, I do.

12 Q Okay. And now, when you look at the
13 incident report numbers, you can tell that this is the
14 money that you photographed?

15 A Uh-huh.

16 Q Okay. It's kind of like a shotgun, once you
17 match up the numbers -- excuse me. Once you match up
18 the numbers, you can then testify that that's the
19 photograph you took of the money and that's the
20 photograph you took of the truck?

21 A Uh-huh.

22 Q Okay. Thank you, sir.

23 (WHEREUPON, State's Exhibit 13 and 14 is marked
24 for identification purpose.)

25 MR. BULSA: Your Honor, the weapon has

1 been secure and I would offer it into evidence.

2 **THE COURT:** All right. Hand it back to the
3 witness.

4 Is it possible, Officer, for that weapon to
5 be loaded and fired?

6 **THE WITNESS:** No, Your Honor.

7 **THE COURT:** All right. It's admitted.

8 **MR. BULSA:** Thank you.

9 (WHEREUPON, State's Exhibit 12 is admitted into
10 the record.)

11 **REDIRECT EXAMINATION**

12 **BY MR. BULSA:**

13 **Q** Officer, now that we have the weapon into
14 evidence, let me show you what's been marked as
15 State's Exhibit 14 for identification.

16 **MR. WHELCHER:** Objection, Your Honor.
17 Improper redirect.

18 **THE COURT:** Let me see what you just offered.

19 **MR. BULSA:** It's the shells that were
20 taken from the weapon. I didn't want to admit
21 them because the weapon wasn't in.

22 **THE COURT:** You what?

23 **MR. BULSA:** I was holding off from
24 introducing them until the weapon was secured. I
25 was not sure it could be secured.

1 **THE COURT:** As it being improper redirect, I
2 overrule the objection.

3 **MR. WHEELCHER:** Thank you, Your Honor.

4 **BY MR. BULSA:**

5 **Q** Can you identify that package and the
6 contents?

7 **A** Yes, I can.

8 **Q** What is it?

9 **A** Evidence envelope of two shotgun shells.

10 **Q** Is that package State's Exhibit number 14,
11 does that contain the shells that were taken from
12 State's Exhibit 12?

13 **A** Yes, sir.

14 **Q** How do you know?

15 **A** This is what I collected and also matches my
16 report and also with the evidence envelope.

17 **MR. BULSA:** We offer this into evidence.

18 **THE COURT:** All right. They are admitted.

19 It's marked as one exhibit? It's admitted.

20 (WHEREUPON, State's Exhibit 14 is admitted into
21 the record.)

22 **BY MR. BULSA:**

23 **Q** Now, the defense questioned you on the
24 vehicle that you photographed. I will show you
25 State's Exhibit number 13 for identification. Would

1 that assist you in identifying why you photographed
2 that vehicle?

3 A The vehicle was BOLO'd out. And when I
4 arrived on the scene, they advised me of it.

5 Q Was it surrounded by the patrol cars?

6 A Yes, it was.

7 MR. BULSA: I would offer State's Exhibit
8 13 into evidence.

9 MR. WHELCHER: I don't have any
10 objection to that.

11 (WHEREUPON, State's Exhibit 13 is admitted into
12 the record.)

13 BY MR. BULSA:

14 Q Officer, defense attorney questioned you on
15 the amount of the money. You attempted to count the
16 bills in that picture.

17 (WHEREUPON, State's Exhibits 15 through 19 are
18 marked for identification purposes.)

19 BY MR. BULSA:

20 Q Officer, you took a picture of the money?

21 A Yes, I did.

22 Q This is showed the money?

23 A Yes, overall.

24 Q I'll show you State's Exhibits 15 through 19
25 for identification. You recognize those?

1 A Yes, I do.

2 Q And what do those pictures show?

3 A They are individually -- each row shows
4 more detail.

5 Q Okay.

6 MR. BULSA: We'll offer into evidence
7 State's 15 through 19.

8 MR. WHELCHER: No objection.

9 THE COURT: They are admitted.

10 (WHEREUPON, State's Exhibits 15 through 19 are
11 admitted into the record.)

12 BY MR. BULSA:

13 Q Do you have a record of the money that was
14 collected?

15 A Yes, I do.

16 Q Did you have any contact with the Defendant?

17 A No, I did not. I saw him on location there
18 but I did not talk to him.

19 Q Do you recall what happened to the truck?

20 A No, I do not.

21 Q Whose job would it have been to take care of
22 the truck?

23 A Uniform patrol deputies.

24 Q And you first went to the scene of the
25 crime, photographed this.

1 **A** Yes, I did.

2 **Q** Thank you. Please answer any questions Mr.
3 Whelchel may have.

4 **MR. WHELCHER:** None, Your Honor.

5 **THE COURT:** You can step down.

6 **MR. BULSA:** The State calls Jordan Tarver
7 to the stand.

8 **JORDAN TARVER**

9 having first being duly sworn testified as
10 follows:

11 **DIRECT EXAMINATION**

12 **BY MR. BULSA:**

13 **Q** Jordan, introduce yourself to the jury, if
14 you will.

15 **A** My name is Jordan Tarver. I'm 19 years old
16 right now. I go to USC Upstate. I'm a sophomore
17 there.

18 **Q** What do you study?

19 **A** Information Management.

20 **Q** You said you are a sophomore?

21 **A** Sophomore.

22 **Q** And you still work at the Pizza Planet?

23 **A** Yes, sir.

24 **Q** How long have you been working there?

25 **A** Three years this November.

1 Q You actually started there when you were in
2 high school?

3 A Yes, sir.

4 Q Do you recall the night of November 11th,
5 2006?

6 A Yes, sir.

7 Q Do you recall the time of this incident?

8 A It was getting dark outside.

9 Q How long had you been working that day?

10 A Came in at 5:00. Not that long.

11 Q Do you recall what day of the week it was?

12 A I want to say it was a Tuesday or a
13 Thursday.

14 Q One day during the week?

15 A I think so.

16 Q How was business?

17 A It was doing pretty good. We had been
18 delivering pizzas that night.

19 Q What is your actual job there?

20 A You do just about everything in there. I do
21 everything but bartend. I make the pizza, take the
22 orders over the phone, cash people out, deliver the
23 pizza, everything.

24 Q When you made the comment about bartending,
25 is there a separate bar area?

1 A Yes, sir. When you walk in either one of
2 the main front doors, you are in a dining area.
3 There's the buffet, salad bar, the counter where
4 another register is. To the left is a wall with a two
5 opening, two doors, one facing the counter and one
6 facing the back of the store. We have a bar.

7 Q Okay. Let me show you State's Exhibit
8 number 8. Let me show you a picture, State's Exhibit
9 8. You were commenting about the two front doors.

10 A Uh-huh. The one on the right. And the
11 left.

12 Q Okay. Make sure you speak up for the Court
13 Reporter.

14 A Yes, sir.

15 Q Where was the front door?

16 A The front door would be the entry right
17 there and then the exit right there.

18 Q Which side were you on?

19 A I would be right behind that window right
20 there. The counter right there and the dining area
21 right here.

22 Q Please walk into this side and go to the
23 right.

24 A Yes, sir.

25 Q There would be a counter there. There is

1 State's Exhibit number 7. What am I seeing in that
2 picture?

3 A That would be the door on the right.
4 There's the counter. There's the computer cash draw.
5 The kitchen is over that way.

6 Q Do you work behind the counter?

7 A Yes, sir.

8 Q The night that this occurred, describe for
9 us what happened?

10 A I came in from a pizza delivery. I saw an
11 old long-bed truck sitting behind the pizza store
12 parked where the delivery guys usually park. I didn't
13 think anything about it. I walked inside. They told
14 me we needed something from the grocery store.
15 Somebody ordered a pizza. We didn't have the
16 ingredients for it or the topping for it. So I went to
17 the Publix.

18 On the way back, I see an older guy standing
19 out in front of the store leaning against the, right
20 in this area right here. He was leaning about --
21 there's a pillar right there that sticks out. Right
22 there. I said hey, how are you doing. He was saying
23 all right, how about you. Oh, I'm good. I walked
24 right back inside.

25 I walked around to the kitchen. Came back

1 around to about right in there. I was still holding a
2 bag of, I think it was spinach. He comes in the front
3 door. I say hey, have you already ordered. He said
4 no, I've not ordered. I said can I take your order.
5 He said yeah, you can take my order and then pulls out
6 this gun right here on me. I was standing right about
7 there. I was right about there.

8 Q Is that the first time you saw the gun?

9 A Yes, sir.

10 Q You know where he had it hid?

11 A It must have been on like --

12 MR. WHEELCHER: Objection, Your Honor.

13 It calls for speculation.

14 THE COURT: The way the question was phrased
15 or the way he phrased the introduction to his
16 answer, I sustain the objection. You can
17 rephrase the question if you'd like.

18 MR. BULSA: Yes, sir.

19 BY MR. BULSA:

20 Q Did you see the weapon until this time?

21 A No, sir.

22 Q And what view of him did you have?

23 A When I walked inside?

24 Q Yes.

25 A From the grocery store?

1 Q Yes.

2 A I had his -- you could see his whole side,
3 front, not the right side. He was leaning against the
4 front of the store facing the parking lot.

5 Q So you couldn't see his full body?

6 A Uh, not the right side.

7 Q Not the right side, okay. When he came in
8 the store, what view did you have of him?

9 A The counter right there is pretty high. All
10 I could see would be maybe about here, the chest area
11 up.

12 Q Okay. So what happened when he pulled the
13 -- let me ask you, you said he pulled the gun?

14 A After I asked him if I could take his order,
15 yes, sir.

16 Q Describe what you saw.

17 A What I saw?

18 Q Describe the gun.

19 A I'm not big into guns. But I could tell it
20 was shotgun. It had one barrel on it. It was kind of
21 shiny at the time.

22 Q State's Exhibit number 12, could that have
23 been the weapon?

24 A Yes, sir. No doubt.

25 Q How close was he to you?

1 A He was standing right there. He pulled the
2 gun. I was about a foot away from the barrel. He had
3 it over the counter. So I put my hands up and backed
4 off like four feet just saying whoa, whoa, watch out.

5 Q Did he ever touch the counter?

6 A I think when I was handing him the money, he
7 sat one hand on top of the counter, I believe.

8 Q How did he grab the money or take the money
9 from you when holding the shotgun?

10 A He had -- the gun would be right there
11 resting on the counter itself. He held that with, I
12 believe it was his right hand.

13 Q Where was the register?

14 A The register is, I would say a computer is
15 right there. The register on the counter.

16 Q It's not in the picture?

17 A No, sir.

18 Q But it's right there at the counter?

19 A Yes, sir.

20 Q How many times did he demand the money?

21 A I believe it was just once.

22 Q And how did you respond?

23 A I said okay. I took my time getting it to
24 him. I could see other people on the other side of
25 the bar sticking their head around and looking to see

1 what was going on. I didn't -- I wanted to make sure
2 they had time to get out before he would leave with
3 the money.

4 Q Why is that?

5 A I didn't want him to get anybody else. If
6 he was going to shoot me, I'd rather everybody be out
7 so that maybe they could get away from him.

8 Q Were there any other employees behind the
9 counter?

10 A Nobody was behind the counter. You can't
11 see it in this picture.

12 Q Let me show you State's Exhibit number 6.
13 First of all, describe for the jury what view that is.

14 A That would be his view, Mr. Kelley's view
15 right there. There's a cash drawer right behind this
16 wall right here. I'm probably standing about right
17 there. This wall here, there's a cutting table on it.
18 We cut all our pizzas on them. Take them out of the
19 oven and put them right there.

20 There were two employees behind me cutting
21 the pizza. They poked their heads around the corner
22 when they heard me saying whoa and backing up. I was
23 getting pretty close to them. They stuck their heads
24 around and one of them ran outside and ran away. The
25 other one ran over to the bar and alerted the rest of

1 our customers what was happening.

2 Q Okay. So looking at this picture, continue
3 to describe what you did.

4 A I handed him the money. He was standing
5 right there. He sticks it in his pocket and puts both
6 hands back on the gun. And he keeps it pointed on me
7 and we just stand there. We didn't do anything,
8 didn't say anything. Just looked at each other. I
9 asked him if he wanted the change. I didn't know if
10 he was wanting the quarters, dimes or nickels or
11 something. He said no, he was fine. He stood there
12 for another few seconds.

13 Then the manager at the time, Joe, walked
14 around the corner. And he had the gun pointed on him
15 and told him to back his, uh, back off. He was about,
16 I'd say from me to maybe a little farther than me to
17 you away from us. He walked around the area would be
18 from this way.

19 Q He walked that way?

20 A Uh-huh. He came from the bar.

21 Q Show you State's Exhibit number 5. What
22 does that show you?

23 A That would be Mr. Kelley's view of the
24 counters right there. The bar is over there behind
25 this wall right here. We have exit right there in the

1 bar area itself and an exit right about there from
2 behind our bar area where we keep the beer and other
3 cash register. And Joe walked around from this corner
4 right here. He put his hands up once he got the gun
5 pointed on him.

6 Q Joe who?

7 A Joe Wyatt.

8 Q Okay.

9 A And, uh, then there were a few seconds. Joe
10 asked if I could leave. We weren't really doing
11 anything. We were just standing there. And he thinks
12 about it for a minute. He says okay. I back off
13 slowly. We go back behind the counter where they were
14 cutting the pizzas. I get on the phone and call 911.

15 He was still at the store at the time. The
16 doorbell had not ring. No doors were opened at that
17 time. I stayed on the phone with them. I see Mike
18 Angel and one of the employees that was behind there
19 cutting the pizza when I was getting robbed there at
20 the back door. I was still on the phone. I walked to
21 the back door. I see it crack. I see somebody
22 getting into the blue pickup truck.

23 Q Once you were allowed there, let me ask you
24 some specific questions.

25 A Okay.

1 Q Going back to State's Exhibit number 6,
2 where is the back door?

3 A The back door would be, the front is over
4 this way. The back door would be back there.

5 Q Can you get to the back door from the
6 kitchen?

7 A Yes, sir.

8 Q All right. And you were calling the police.
9 Where were you standing?

10 A I would be standing right here behind the
11 wall right here walking back towards the back door
12 where I see Matt Greer and Mike Angel standing.

13 Q Did you still have a view of the robber from
14 here?

15 A No. I lost him as he exited the building.

16 Q How did he get out?

17 A They told me he walked out the front door.

18 MR. WHELCHER: Objection, Your Honor.

19 THE COURT: Sustained.

20 BY MR. BULSA:

21 Q Did you see him leave?

22 A I did not see him leave.

23 Q Did you have a view of the back door from
24 this location?

25 A Not from up here. When I was behind calling

1 911, I could see the back door.

2 Q Did you see anybody go out the back door?

3 A Nobody. Not until Mike and Matt went to the
4 back door. They left through the back door.

5 Q Mike and Matt went out the back door. Mike
6 Angel and Matt Greer?

7 A Yeah.

8 Q They went out the back door?

9 A Yes.

10 Q Okay. And from this location, you saw Joe
11 where?

12 A Back here. It is a doorway, not a doorway
13 but there's no walls.

14 Q Okay. There were different angles. That's
15 Exhibit number 4, what view is this from?

16 A That would be pointing in the other
17 direction from where the last view was. The bar is
18 right here. The open door right there where I saw
19 people sticking their head out while I was getting
20 robbed. They are seeing from there over this way to
21 the counter. Joe was right there in that area right
22 there.

23 Q Okay. Help the jury to understand this.
24 State's Exhibit number 8 is the front of it. You have
25 a wall separating two businesses.

1 A Right about here. You have a bar that way
2 and an open dining area that way.

3 Q So the bar, the wall we see is the one we
4 just pointed out?

5 A Yes, sir.

6 Q And the open door up to the lefthand corner,
7 lefthand side of that picture --

8 A That's the doorway to get to the bar from
9 the front.

10 Q That is the throughway from the restaurant
11 to the bar area?

12 A Uh-huh. If you want to come in and go to
13 the bar, you would probably go in through that door
14 right there.

15 Q Did you see anybody come through that door?

16 A While he had the gun on me?

17 Q Yes, sir.

18 A Nobody came through. They just stuck their
19 heads around the edge of the door and looked.

20 Q What did you tell those people?

21 A I believe I saw Mike and I saw a guy named
22 Russell stick his head. I don't remember his last
23 name.

24 Q Mike is Mike Angel?

25 A Mike Angel, yes, sir.

1 Q Is that the same Mike that ran out the back
2 door?

3 A Yes, sir.

4 Q Okay. Now, what monies did the robber leave
5 with?

6 A I gave him all the 20's, 10's, 5's and 1's.
7 And the hundreds were under the drawer. I didn't give
8 him those.

9 Q So you gave him all the money that was
10 showing?

11 A Yes, sir.

12 Q Okay. You have any idea how much was it?

13 A It was a good little bit. I don't know the
14 exact number.

15 Q Okay. How were you dealing during all this?

16 A I was thinking, well, I might die right
17 here. But I was more focused on doing what I thought
18 I needed to do right there to make him happy and maybe
19 stay myself.

20 Q Were you ever asked to identify anybody?

21 A No, sir.

22 Q Did you ever learn that anybody was
23 arrested?

24 A I did.

25 MR. WHELCHER: Objection, Your Honor.

1 **THE COURT:** Sustained.

2 **BY MR. BULSA:**

3 **Q** Were you ever taken anywhere to look at
4 anybody?

5 **A** No.

6 **Q** Did the police ever bring you any pictures
7 to look at?

8 **A** No, sir.

9 **Q** Did you ever see the man that robbed you
10 again?

11 **A** Not until today.

12 **Q** Can you identify the man who robbed you?

13 **A** Right now?

14 **Q** Yes, sir.

15 **A** Yes, sir.

16 **Q** Point him out for us.

17 **A** He's right there in the white shirt.

18 **MR. WHELCHER:** Objection, Your Honor.

19 **THE COURT:** On what basis?

20 **MR. WHELCHER:** How he can ask him to
21 identify him in this dark courtroom.

22 **THE COURT:** Overruled.

23 **BY MR. BULSA:**

24 **Q** Can you identify him in the white?

25 **A** He's still the man in the white shirt.

1 Q Any doubt in your mind that's the man that
2 held the gun to you?

3 A Uh, no doubt whatsoever.

4 Q That's the man that took the money from you?

5 A 100 percent sure.

6 Q Thank you. Answer any questions Mr.
7 Whelchel has.

8 CROSS-EXAMINATION

9 BY MR. WHELCHER:

10 Q It just so happens he's the only fellow
11 sitting at the defense table with me, doesn't it?

12 A It does, yes, sir.

13 Q Okay. There were two people behind you.
14 You said they stuck their head around the corner?

15 A Uh-huh.

16 Q Who were they?

17 A They were Matt Greer and Kyle Whiteside.

18 Q Matt Greer and Cal Whiteside.

19 A Kyle.

20 Q Kyle?

21 A Yes, sir.

22 Q Okay. They were working that night also?

23 A Yes, sir.

24 Q How do you spell Greer? G-r-i-e-r? Do you
25 know?

1 A G-r-e-e-r.

2 Q Okay. I think you said the fellow that
3 robbed you put his hand up on the counter when you
4 handed him the money?

5 A Yes, sir. I believe so.

6 Q Okay. You put the money in his hand?

7 A Uh-huh. Like this. (Demonstrating).

8 MR. WHELCHER: Okay. That's all I have,
9 Your Honor.

10 MR. BULSA: Just briefly.

11 REDIRECT EXAMINATION

12 BY MR. BULSA:

13 Q Matt Greer, do you know where he might be?

14 A I believe he is in Florida right now. He is
15 in Florida right now. He's attending either Florida
16 State or some school majoring in Music Production.

17 Q He's a student out of town, out of state?

18 A Out of state, yes, sir.

19 Q And he's the one that left out the back with
20 Mike Angel?

21 A Yes, sir.

22 Q Kyle Whiteside, where was he working that
23 night?

24 A He works with me at the time. He was right
25 there with Matt cutting pizzas behind me when he came

1 with the gun.

2 Q Is Kyle the one that ran out the back door?

3 A Yes, sir.

4 Q Okay. Thank you. That's all I have.

5 THE COURT: You can step down, sir.

6 MR. BULSA: The State calls Joseph Wyatt.

7 JOSEPH WYATT

8 having first being duly sworn testified as
9 follows:

10 DIRECT EXAMINATION

11 BY MR. BULSA:

12 Q Please introduce yourself to the jury.

13 A My name is Joe Wyatt. I used to be the
14 manager at Pizza Planet. Now, I'm the manager at a
15 movie theater, Westgate.

16 Q Okay.

17 A I'm 28. Single.

18 Q Joe, how long had you worked at Pizza
19 Planet?

20 A About six years. A long time.

21 Q Okay. And do you recall the night of this
22 incident?

23 A Yes, I do.

24 Q Were you working?

25 A Yes, I was. I was working the bar. We had

1 a good little crowd over there. Probably at least 12
2 people which doesn't sound like a lot. But for that
3 little area, it's a good many.

4 Q Whereabouts is this business?

5 A On the corner of Reidville Road and 290 in
6 the Publix shopping center.

7 Q Is that in Spartanburg County?

8 A Yeah.

9 Q How long has it been there?

10 A A little longer than I've been there. The
11 business probably been there eight and a half years.
12 I probably ended up being there around 7:00 or close
13 to it.

14 Q So you have employees on the pizza side and
15 the bar side?

16 A Not really. I kind of, whoever was working,
17 if they were over 21, you would be required to do
18 everything. It's kind of like Jordan was saying
19 earlier. Nobody really has a specific job. We were
20 kind of a smaller place. Everybody needed to do a
21 little bit of everything so we could get everything
22 done.

23 Q If they were under 21, --

24 A Of course.

25 Q -- they are restricted to pizza?

1 A Of course, make pizza, answer telephone and
2 deliver.

3 Q Do you recall who was working that night?

4 A Jordan, Jordan Tarver, Kyle Whiteside, Matt
5 Greer and myself.

6 Q Okay. What first caught your attention that
7 something was going on?

8 A Matt Greer came running like around the back
9 of the bar. I was sitting there talking to customers.
10 And I looked at him. I don't know if I can say what
11 he said. There's a crazy old man up front with a
12 shotgun --

13 MR. WHELCHER: Objection, Your Honor.

14 It's hearsay. He's testifying to what somebody
15 else said who is not here and --

16 THE COURT: I don't believe it's offered to
17 prove the truth of the manner asserted.

18 Overruled.

19 BY MR. BULSA:

20 Q Okay.

21 A And I kind of looked at him. I wasn't sure
22 if he was joking because as long as I been there, I
23 never had a gun on me. I never been robbed. You
24 know, it wouldn't have been above somebody that worked
25 with us, a group of maniacs to, uh, be joking like

1 something like that. He said, no, I'm serious,
2 there's a crazy freakin' old man up front with a
3 shotgun.

4 I just kind of stood there. And probably 80
5 percent of the people at the bar went booking out the
6 back exit. And some other people testified that some
7 of the others went up front and started looking. I
8 kind of swallowed. I walked around the front to see
9 what was going on.

10 And sure as the world, as soon as I get in
11 eyesight of Mr. Kelley, the gun's on me before I can
12 even look him in the eye. I immediately stop, put my
13 hands in the air. He's like, whoa, big man, you go
14 right back around that corner. I kind of stand there
15 and surveyed the area.

16 We had some customers eating with their back
17 turned to him. So they were facing me. I looked at
18 them. I looked at Jordan. I looked at Mr. Kelley
19 and I kind of did the same thing again and trying to
20 understand what was going on and what I should do.
21 They are just kind of standing there at this point. I
22 don't really know what's going on.

23 I look at Mr. Kelley and I say can Jordan,
24 can he back away from you. He kind of stood there.
25 He said yes. I look at Jordan and I'm like go back

1 around the corner. And Jordan starts backing up. I,
2 in turn, back back around the corner.

3 Q I'm going to show you a picture so we can
4 get a perspective for the jury. State's Exhibit
5 number 4. This picture shows where you were?

6 A Yes, that's, uh, pretty much the way this
7 looks is almost from where he would have been
8 standing. He would have been standing about this
9 area. I came walking out from around here to see what
10 was going on. That's when I immediately held my hands
11 up. The gun was on me before I even made eye contact
12 with him.

13 Q About what was the distance between your
14 location where you would have seen him?

15 A That's probably 20 to 25 feet roughly give
16 or take.

17 Q Okay. I'm going to show you Defense Exhibit
18 number 3. What view is that?

19 A That would be roughly my view. This is when
20 I walked out. That's the front of the store. That's
21 the front door on the right. Jordan was standing
22 there. The couple was eating here. He was standing
23 about here. I walked up to about right there and
24 stopped.

25 Q You actually spoke to him?

1 A Yeah.

2 Q Did he have the gun pointed on you while you
3 were talking?

4 A He had the gun on me before I even made eye
5 contact with him. Before I even actually saw him, the
6 gun was pointed at me by the time I was looking at
7 him. And he told me to go back around the corner.

8 Q Any doubt in your mind that he knew you were
9 there?

10 A No.

11 Q Okay. And you said you came back around the
12 second time?

13 A Actually no. I came back -- when Jordan
14 backed up back around the wall, I backed back up. My
15 heart was 100 miles an hour. I hear the, we have a
16 beeper on the door that goes ding-ding. I heard it.
17 I peeped, I walked up and around to the other door,
18 they were talking about that white door that other
19 people were looking through, yeah, this one right
20 here. I walked back around and walked up here and
21 peeked out and noticed he was gone after I heard the
22 bell.

23 Then I was like all these people outside, I
24 need to get them back inside. So there's an emergency
25 exit right there. I walked back there to go get the

1 people that ran out. He was gone. Get back in here.
2 As I opened the door, the emergency exit, I opened it.
3 He was probably three feet from me, points the gun up
4 and says get your big ass back inside. I was like,
5 whoa, whoa, whoa, did not know you were out here. I
6 saw his truck where he had parked it right beside the
7 emergency exit. I just kind of went back and pulled
8 the door closed. I thought I was going to get shot
9 right then.

10 Q How good of a view did you get of this man?

11 A Very good view. Like I said, he was three
12 feet from me. I had a short conversation with him.

13 Q Show you State's Exhibit number 9. Do you
14 recognize this vehicle?

15 A Yeah. I always saw it from behind though.

16 Q You did?

17 A Yeah. It's a light blue and rusty look.

18 Q Okay.

19 A I only saw the back.

20 Q Does this appear to be the same vehicle?

21 A Uh, from the front, I couldn't --

22 MR. WHELCHER: Objection, Your Honor.
23 He's already said he only seen it from behind.
24 That doesn't show the rear of the vehicle. He
25 can't possibly identify it.

1 **THE COURT:** Overruled.

2 (WHEREUPON, State's Exhibit 20 is marked for
3 identification purposes.)

4 **BY MR. BULSA:**

5 **Q** Does that appear to be the same vehicle?

6 **A** Yeah. I knew it was the vehicle he was
7 walking towards to get in. Well, I knew the vehicle
8 he was getting in was not any of the employees. And
9 it wasn't supposed to be there. It's not a vehicle
10 I've ever seen before.

11 **Q** Let me show this picture, State's Exhibit
12 number 20 for identification. Can you look at that?

13 **A** Yes.

14 **Q** Does that, what's in that picture, does that
15 look familiar to you?

16 **A** Yes, sir. That's the bumper. Like I was
17 saying it was a light blue rusty look. It's light
18 blue in the back and really rusty bumper.

19 **Q** Does that picture depict the vehicle that
20 you saw that night?

21 **A** Yes, sir.

22 **MR. BULSA:** The State would offer State's
23 Exhibit 20 into evidence.

24 **MR. WHELCHER:** Same objection as
25 earlier, Your Honor.

1 **THE COURT:** Let me see that exhibit please. I
2 don't think you've made an objection to State's
3 Exhibit 20.

4 **MR. WHELCHER:** I objected to both
5 photographs, Your Honor.

6 **THE COURT:** You need to make it again. What's
7 the objection?

8 **MR. WHELCHER:** Originally he was asked
9 if he could identify the truck based on that
10 photograph and I objected because he said had
11 only seen the rear. That photograph does not
12 show the rear of the truck. That one does.

13 **THE COURT:** Well, right now, we're talking
14 about State's Exhibit 20. I don't understand
15 what your objection is.

16 **MR. WHELCHER:** My objection is
17 sufficient identification to the rear of the
18 vehicle other than saying I can identify the
19 truck.

20 **THE COURT:** I think the foundation for the
21 admission of this Exhibit has been sufficiently
22 laid. I admit it.

23 (WHEREUPON, State's Exhibit 20 is admitted into
24 the record.)

25 **BY MR. BULSA:**

1 Q State's Exhibit number 20 shows the rear of
2 the vehicle.

3 A Yes, sir.

4 Q Is that the truck that the person got into?

5 A Yeah. I can't say that I saw the -- I can't
6 actually say that I saw him get into the truck. Like
7 I said, he was outside of the truck. I guess I
8 surprised him by opening the door. He was right
9 there. But the truck I saw was an older model, it was
10 light blue and rusty.

11 Q Okay. So you went inside. And you didn't
12 see him actually get in?

13 A No. I took my tail back inside.

14 Q All right. Now, did you get a good view of
15 this person?

16 A Yeah. Like I said, I had a short
17 conversation with him.. And he as close to me and this
18 guy when I surprised him out the back door.

19 Q Were you ever taken anywhere to look at
20 anybody?

21 A No, sir.

22 Q You ever shown any pictures?

23 A No, sir.

24 Q You were never asked identify anybody?

25 A No, sir. He just took my statement. That's

1 the last I heard of it until I got the subpoena.

2 Q Had you seen the person since then?

3 A Yes, sir. Today.

4 Q Can you identify him for the jury?

5 A Mr. Kelley.

6 Q You have been using the phrase Mr. Kelley.
7 Why do you use his name?

8 A I don't know. I didn't actually realize I
9 was doing it.

10 Q Okay. How did you learn his name?

11 A Uh, actually on the police re -- my
12 subpoena. That's the first time I knew his name. I
13 knew his face 100 percent.

14 Q Let the record reflect witnesses identify
15 the Defendant. Thank you. Answer any questions Mr.
16 Whelchel has.

17 **CROSS-EXAMINATION**

18 **BY MR. WHELCHER:**

19 Q So if the subpoena said Mr. Whelchel
20 instead of Mr. Kelley, you would call him Mr.
21 Whelchel?

22 A I guess I would.

23 Q Okay.

24 A As long as he still had that face.

25 Q You say there were about twelve people?

1 A Roughly.

2 Q Okay.

3 A We were filled up. Our bar only seats about
4 eight. There were a few others over there.

5 Q Do you remember who any of those were?

6 A Russell Davis, Mike Angel, a couple of
7 ladies. Jake Burnette, Valerie -- I don't know her
8 last name. Jake Burnette's girlfriend's named
9 Valerie, Benjamin Cox. Those are the only ones I can
10 actually name.

11 Q All right. Thank you, sir.

12 **REDIRECT EXAMINATION**

13 **BY MR. BULSA:**

14 Q Mr. Whelchel asked you the people at the
15 bar. Do you recall the Deputy that you worked with?

16 A I do not.

17 Q You don't remember his name. How many
18 officers responded?

19 A Uh, I want to say two. I dealt mostly with
20 one. But I do not remember his name.

21 Q Is he the one that --

22 A He's the one that -- I actually, uh, I was
23 trying to get my statement written. There was a whole
24 lot of commotion. And he actually told me, Get in my
25 police car. It's quiet and you can actually get it

1 written. And I remember apologizing cause it was
2 taking me so long because I was shaken.

3 Q Thank you. That's all I have.

4 THE COURT: You can step down.

5 Let me see y'all for just one second.

6 (WHEREUPON, a bench conference is held off the
7 record.)

8 THE COURT: You can go ahead and call your
9 next witness.

10 MR. BULSA: Michael Angel.

11 MICHAEL ANGEL

12 having first being duly sworn testified as
13 follows:

14 (WHEREUPON, a bench conference is held off the
15 record.)

16 THE COURT: Tonya, did you swear him in?

17 THE CLERK: I did already.

18 THE COURT: In front of the jury?

19 THE CLERK: You want me to reswear him?

20 THE COURT: I just wasn't paying attention.

21 If you just swore the witness, that's fine.

22 THE CLERK: Okay.

23 MR. BULSA: I didn't ask him any
24 questions.

25 THE COURT: Huh?

1 MR. BULSA: I didn't ask him any
2 questions.

3 THE COURT: Did you just swear him?

4 THE CLERK: Yes, sir.

5 THE COURT: You may proceed.

6 MR. BULSA: Thank you.

7 DIRECT EXAMINATION

8 BY MR. BULSA:

9 Q Please introduce yourself for the jury.

10 A Michael Angel. I work at Vick Bailey Honda
11 and I got friends that work and have worked at Pizza
12 Planet. So I go up there sometimes.

13 Q How old are you?

14 A 29.

15 Q How long have you been with Vick Bailey?

16 A Roughly I would say a year and a half.

17 Q Would you speak up just a little?

18 A Yeah. Sorry.

19 Q You said you used to work at Pizza Planet?

20 A No. I just have a lot of friends that
21 either have worked there or work there now.

22 Q Okay. And you were there on the night of
23 November 11th?

24 A Yes.

25 Q What part of the business were you in?

1 A I was over on the bar side.

2 Q How long had you been there?

3 A It couldn't have been long. I worked winter
4 hours until 7 o'clock. I couldn't have got there
5 before 7:30 if I got out of work on time. I would say
6 less than 45 minutes.

7 Q You were called approximately when this
8 happened?

9 A Some time between 8:00 and 9:00.

10 Q What first drew your attention that
11 something was wrong?

12 A Actually, the first I heard anything was
13 with Matt Greer came running through the bar side
14 saying that there was somebody out there with a
15 shotgun.

16 MR. WHELCHER: Objection, Your Honor.

17 THE COURT: Again, I don't believe it's
18 offered to prove the truth of the matter
19 asserted. Overruled.

20 MR. BULSA: Do you remember Matt Greer
21 saying --

22 MR. WHELCHER: I don't know why it is
23 offered. I hadn't heard.

24 THE COURT: Overruled.

25 BY MR. BULSA:

1 Q What did you do when you heard that?

2 A I ran up to the door that goes from the bar
3 to the eating area. Again, I thought, I never thought
4 that this was, I thought he was joking and there was
5 something going on. So I just kind of abruptly just
6 walked right to that doorway.

7 Q For the record, this is State's Exhibit
8 number 4. That picture shows what you are talking
9 about?

10 A That one right there. That door always
11 stays open unless someone is having a private party or
12 something over there. Right, right there. Then he
13 would have been right there somewhere.

14 Q What did you see when you looked?

15 A When I looked, he had the shotgun pointed on
16 Jordan. And then I saw a family eating either at this
17 table or this table. And they had their hands up in
18 the air.

19 Q How long did you stay up in that doorway?

20 A A couple of seconds.

21 Q What did you do?

22 A At that time, I ran over here and told a few
23 people at the bar that hadn't ran out that this was
24 real and that there was somebody with a shotgun. And
25 everyone was clearing out this backdoor. I think some

1 people were hiding in the ladies' bathroom. I ran
2 right down that wall, out this little entryway back in
3 the kitchen and went to the back door, cracked it, and
4 that's when I saw his truck was there.

5 Q Did you, you ran through that area, did you
6 still see him in the business?

7 A No, no.

8 Q Did you even look up that way?

9 A No.

10 Q Why did you run that way?

11 A I actually, I don't know. I just ran
12 towards the back of the building and wanted to just
13 see what was going on. I think I was going to run out
14 the back building. But that's when I saw his truck,
15 the truck, a truck was back there.

16 Q You didn't recognize the truck?

17 A No.

18 Q What did you do when you saw it?

19 A I pulled back on the door a little bit. I
20 just had it cracked. About the time I got it cracked,
21 I saw him coming down through the side of the building
22 to the outside. He got right to the corner. He still
23 had the shotgun on someone saying "Stay back or I will
24 shoot". And they must have not stayed back. They
25 must have kind of paused. He put the gun down, then

1 he would raise it again.

2 I think he did it three times total saying
3 "Stay back or I will shoot". You can see his finger
4 was on the trigger or close to the trigger. And he
5 seemed serious that he was going to shoot whoever was
6 following him. So I waited with the door cracked
7 open. Then he, uh, got into the truck and put the gun
8 in the cab with him. About that time, Matt Greer,
9 another employee was right behind me. His car was
10 parked even closer to the door than the truck. So we
11 both got in his car.

12 Q The back door is?

13 A You can't see it from any of those.

14 Q You can't see it from any of the photos?

15 A It's back behind all that kitchen area.

16 It's right about there.

17 Q Okay. Was the man you saw outside with the
18 shotgun the same man you saw inside?

19 A Yes.

20 Q Any doubt in your mind?

21 A No.

22 Q After you saw him raising the shotgun and
23 saying those words, what did he do?

24 A He kept walking backwards until he got to
25 his truck. And I guess he made sure that he had time

1 to get in the truck. And then he put the gun down in
2 the truck. And then took off. That's when,
3 instantaneously, Matt was right there at the back door
4 with his keys and his car was right there.

5 Q Look at State's Exhibit number 9. Do you
6 recognize that?

7 A I do.

8 Q What is it?

9 A That's his truck. And from where I was at,
10 I had pretty much a full side rear angle.

11 Q What did you do?

12 A We followed him.

13 Q You say "we", who is "we"?

14 A Me and Matt Greer. He was driving. I got
15 on the phone with 911 right away. We followed him
16 behind the store. We followed him to the stop light
17 or the stop sign there leaving Publix. He turned left
18 going towards Spartanburg. And I remember when I was
19 on the phone with 911, I actually saw all the cops
20 going towards the pizza place. I told her what was
21 going on, that they needed to turn around.

22 At one point, she asked if I could get close
23 enough to get his license plate number. We did. And
24 I think that's when he realized we were behind him.
25 Because then he started driving weird and hitting the

1 brakes and almost coming to a stop in the middle of
2 the road. And we got the tag. And we backed off
3 forty or fifty feet and followed him all the way.

4 I was on the phone. I said he's pulling into
5 the Sonoco station. I said what do you want me to do.
6 She said don't pull up on him. Just hang tight. The
7 officers will be there within ten seconds. I watched
8 him get out of the truck. I told Matt to just go up
9 in Dominos parking lot and make a U-turn. And before
10 we could get back, this was in three or four seconds,
11 the cops were there.

12 I watched them. Right from the median, I
13 watched them get him to the ground. They had the guns
14 on him. Once we knew it was safe to pull in there,
15 she said go in and pull around cause you're going to
16 have to give a statement. So we pulled to the back of
17 the store which would have been behind that wall. And
18 my statement would have been done right there on that
19 side wall.

20 Q Okay. Now, did you see anybody else in the
21 truck?

22 A No.

23 Q Do you think you would have seen anybody if
24 somebody was in there?

25 A Definitely. The glass isn't tinted. It's

1 clear glass. We were behind him with our headlights.

2 I could see his head the whole time.

3 Q Did you have him in view the whole time?

4 A Absolutely. We were wanting to do this but
5 at the same time, we didn't want to get in danger
6 ourselves. So we were both watching real close to
7 make sure he didn't try some shooting out of the car
8 maneuver.

9 Q And so you see one patrol behind him in this
10 picture. Let me show you State's Exhibit 13. Is that
11 a view you also had?

12 A That was my view when I had gone up and
13 made, Matt had gone up and made the turn. I was
14 talking to 911. That was my view from the middle of
15 Reidville Road. That's when we saw them get him to
16 the ground and put the cuffs on him.

17 Q Show the jury where that would have been.

18 A They took him down right there. He was
19 getting gas. It was right there on that spot.

20 Q Okay. All right. After you saw that, is
21 that when y'all pulled around to the side?

22 A It is. We were watching that. We were
23 watching it right from probably about here. We pulled
24 into the median on Reidville Road.

25 Q Any doubt in your mind that the person the

1 police were arresting were the same person?

2 A No.

3 Q No doubt?

4 A Not a doubt at all.

5 Q Did you actually come and get a view of him
6 when you got out of vehicle?

7 A I saw him. I don't remember how close I got
8 to him. I just saw him. I was busy doing my
9 statement. I can't remember how close I got to him at
10 the Sonoco station.

11 Q Did you recognize him then?

12 A I did.

13 Q Was it the same person you saw in the store
14 with the gun?

15 A It was. It was the same person, the same
16 truck I had seen and followed.

17 Q And you see him in the courtroom?

18 A Yes.

19 Q Please identify him for the jury.

20 A Right there in the white shirt.

21 Q The record will reflect that the witness has
22 identified the Defendant. Thank you. Answer any
23 questions Mr. Whelchel has.

24 **CROSS-EXAMINATION**

25 **BY MR. WHELCHER:**

1 Q How close were you to the fellow who had the
2 shotgun in his hand?

3 A The first time?

4 Q The first time you saw him.

5 A Closer than you are now.

6 Q Was this outside the store?

7 A No. This was inside. I was looking about
8 right there or a foot back. And he was turned
9 sideways. Right there and he was turned sideways.

10 Q You were on the outside of the store?

11 A No. I'm on the inside of the store.

12 Q Where was he?

13 A He was right there probably six feet from
14 the front door right at the front counter.

15 Q Okay. And where were you inside the store?

16 A I was about six feet off to his left in an
17 area, an open way between the bar side and the
18 restaurant side.

19 Q All right, sir. I believe you testified
20 earlier that you looked at him for about two seconds?

21 A Right.

22 Q All right. Then you ducked back behind that
23 doorway and go to the bar area, is that correct?

24 A I didn't duck back. I actually ran back to
25 the back of the store. Yeah.

1 Q You got out of the way?

2 A Right.

3 Q The next time, you see the individual who
4 was robbing the place. He's leaving. Is that
5 correct?

6 A Yes.

7 Q Walking to the truck you talked about
8 earlier?

9 A Yes.

10 Q Was his back to you?

11 A No. Again, I had another side view.

12 Q Okay. How close are you to this person at
13 this time?

14 A At this time, uh, over by the officer in the
15 chair, I would say he was about that far.

16 Q Okay.

17 A And his truck was real close to him.

18 Q And he was on the back of the pizza store?

19 A Right around the side and then ended up in
20 the back.

21 Q And how well is it illuminated back there?

22 A It's a parking lot. But there are street
23 lights. It was enough light that I could see him,
24 good enough to see the shotgun and everything else
25 that was going on. I'm going to say it was as bright

1 as in here but it is illuminated.

2 Q Not as bright as it is here?

3 A No, for a parking lot.

4 Q How long was he in your view at this time?

5 A This time, it would be at least ten seconds.

6 Q After that, he was in the truck, correct?

7 A Correct.

8 Q And driving away and you were behind him?

9 A Yes.

10 Q This identification you made moments ago in
11 the dark are based on this twelve seconds?

12 A That and the time I saw him at the front of
13 the store for about two to three seconds.

14 Q That's what I've done. I added those two or
15 three --

16 A Oh, yeah.

17 Q Two seconds to the back, two seconds to the
18 front.

19 A I mean, this was a weird moment about a year
20 ago. But I'm thinking those times were very accurate.

21 Q I'm not putting words in your mouth.

22 A Oh, no. I'm just saying, under the
23 circumstance, I would say that's accurate.

24 Q Did you ever tell the officers how tall he
25 was?

1 A No.

2 Q How much he weighed, whether he was a white
3 man, black man --

4 A I did say --

5 Q -- fat man, skinny man?

6 A I think I may have said he was an older man.
7 I don't remember.

8 Q All right. Thank you, sir.

9 **REDIRECT EXAMINATION**

10 BY MR. BULSA:

11 Q Mr. Angel, you had this man in view from
12 the time you left the back door of the restaurant to
13 the time the police apprehended him?

14 A The only time that I would have lost view
15 was the two to three seconds it took to get into
16 Matt's car and turn around. But we were back on his
17 truck before he had gotten 60 feet before around the
18 store. He hadn't even come out from around the back
19 stores yet.

20 Q Had you ever seen anybody else other than
21 the Defendant at that truck?

22 A No.

23 Q And the man in the truck, was that the same
24 man in the store?

25 A Yes.

1 Q Thank you.

2 **RECROSS-EXAMINATION**

3 **BY MR. WELCHEL:**

4 Q Have you ever been to the mall or a football
5 game, basketball game, you name it and spoke to
6 somebody, waived at somebody that you thought you
7 knew, a friend of yours acquaintance or cousin and it
8 turned it wasn't the cousin?

9 A Yes.

10 Q Okay. And you knew that person? I mean,
11 you knew them for more than twelve seconds?

12 A Right.

13 Q Okay.

14 **THE COURT:** You can step down, sir.

15 All right. Ladies and Gentlemen, we're going
16 to break here for the day. We're going to start
17 back tomorrow morning at ten o'clock. I have an
18 issue that I need to take up with our Grand Jury
19 in Greenville at nine o'clock in the morning. I
20 expect it will take about 15 minutes. Then I
21 should be over here about a quarter of 10:00,
22 maybe ten til. And so we will try to start back,
23 we will start back tomorrow morning at 10:00.

24 You all have a nice night. Remember that you
25 may not discuss this case. I will see you all

1 tomorrow morning at 10:00. Let me say one more
2 thing. I know some of you may know this area.
3 You may know something about it. Maybe you been
4 by where this is alleged to have happened. You
5 should not be going by this case. And you should
6 not be doing any type of outside of court
7 research. Just go home. Relax. Enjoy the
8 evening and come back tomorrow morning and we
9 will resume the trial at that time.

10 (WHEREUPON, the jury exit at approximately
11 5:09 p.m.)

12 **THE COURT:** All right. I said I was going to
13 explain the two, I think you had objections to
14 State's Exhibits 19 and 20. They were
15 photographs of the pickup truck in the gas
16 station. And your objection was the foundation
17 has not been laid. And while the specific
18 language of, uh, does this photograph fairly and
19 accurately depict the truck as it looked on that
20 particular night were never used, the whole of
21 his testimony is that, in my opinion, that
22 foundation was laid.

23 But in particular, this vehicle that's shown
24 in this picture is not so much a question of
25 whether it looks like it did at the time that it

1 was at the restaurant but whether it is the same
2 vehicle. And I believe the foundation of
3 personal knowledge of seeing the vehicle is such
4 a distinctive vehicle that the foundation was
5 properly laid. So I admitted the two photos.
6 Anything further before we break for the day?

7 MR. BULSA: No, sir.

8 MR. WHELCHER: No, sir.

9 THE COURT: All right. See y'all in the
10 morning.

11 (WHEREUPON, the Court recesses at approximately
12 5:11 p.m.)

13 (WHEREUPON, the Court resumes on September 18,
14 2007 at approximately 10:11 a.m.)

15 THE COURT: Good morning. Call your next
16 witness.

17 MR. BULSA: The State calls Bryan Fraley.

18 BRYAN FRALEY

19 having first being duly sworn testified as
20 follows:

21 DIRECT EXAMINATION

22 BY MR. BULSA:

23 Q Detective, please introduce yourself the
24 jury.

25 A My name is Bryan Fraley.

1 Q You are an employee of the Spartanburg
2 County Sheriff's Office?

3 A Spartanburg County Sheriff's Office coming
4 up on nine years now.

5 Q What are your duties at the Sheriff's
6 Office?

7 A Currently, I'm assigned, I'm a canine
8 handler on first shift.

9 Q How long have you been doing that?

10 A Almost three years.

11 Q And does some of your duties also include
12 patrol?

13 A Yes, sir. I'm actually the canine handler
14 on the uniform patrol division.

15 Q So on November the 11th, 2006, were you on
16 regular duty?

17 A Yes, sir. I was.

18 Q Did you get a call to go to Pizza Planet?

19 A Yes, sir. I did.

20 Q Can you describe what took place on that
21 call?

22 A We were advised by dispatch that they had an
23 armed robbery to Pizza Planet at the corner of Highway
24 290 and Reidville Road. At that time, we responded in
25 emergency mode to the location.

1 Q Did you make it to the location?

2 A I had just pulled into the parking lot of
3 the location.

4 Q And then what happened?

5 A I was advised by dispatch that there was an
6 individual following the suspect from the Pizza Planet
7 back down Reidville Road.

8 Q Did any other officers go to the Pizza
9 Planet?

10 A Yes, sir. Another officer actually went on
11 inside Pizza Planet.

12 Q Two cars responded?

13 A Yes, sir.

14 Q One of them stayed and one of them went?

15 A Yes, sir.

16 Q Who was the officer who stayed?

17 A Deputy Kevin Carper.

18 Q He's no longer with us?

19 A No, sir. He's deceased.

20 Q Okay. Now, when you left Pizza Planet, what
21 did you do?

22 A I turned around and started heading back
23 down Reidville Road towards Spartanburg.

24 Q And where did you go?

25 A I was advised by communications that the

1 gentleman had just pulled into the Sonoco at 2391
2 Reidville Road. I turned into the parking lot at the
3 Sonoco.

4 Q Okay. About how long from the Pizza Planet
5 is the Sonoco?

6 A It's about four miles.

7 Q Okay. And were you given a description of
8 the vehicle?

9 A Yes, I was. I was advised it was an older
10 model gray truck with an older white male driving.

11 Q When you pulled into the Sonoco, did you
12 identify such a truck?

13 A Yes, I did.

14 Q What did you do?

15 A At that time, I pulled my patrol car
16 actually in front of his patrol car. He was not able
17 to see me yet because of the gas pumps themselves. I
18 exited my vehicle, came around to the front of my
19 vehicle and confronted the white male subject who was
20 standing beside the truck.

21 Q What happened at that time?

22 A I advised him to get his hands up where I
23 could see them. At that time, he did comply. I then
24 ordered him down to the ground. He did comply. I
25 started up towards him. As I come by the truck, I

1 look in the truck to make sure, one, there's nobody
2 else in the vehicle and observed a shotgun laying on
3 the seat of the truck. I then went up to a gentleman
4 and placed handcuffs on him.

5 Q And what did you do after you handcuffed
6 him?

7 A Actually, I waited for another unit to get
8 to me. Once another unit got to me, I got him up and
9 began a pat down of him.

10 Q What was the purpose of waiting for another
11 unit?

12 A Just for safety reasons.

13 Q You secured him and then waited for backup.

14 A Yes, I did.

15 Q And then began to search him?

16 A Yes, I did.

17 Q And what did you find?

18 A I found a large amount of U.S. currency was
19 found in his right front pocket. A shotgun shell was
20 found in the cargo pocket of the pants also.

21 Q Shotgun shells, let me show you State's
22 Exhibit 14. Would you look at those shells?

23 A (Reviewing).

24 Q Does the shell you found in his pocket match
25 those shells?

1 A They were the same brand.

2 Q In fact, did you recover the shells and put
3 it into evidence?

4 A Yes, sir. I did.

5 Q Okay. How did you secure it and enter it
6 into evidence?

7 A I actually kept the shotgun shells with me.
8 I filled out an evidence envelope with my handwriting.
9 Then it was taken to the Sheriff's Office and placed
10 into evidence by me.

11 Q Did you put the cash in evidence too?

12 A Yes, I did.

13 Q Do you know if the cash was eventually
14 returned?

15 A It was. I was advised later that it was
16 released back to the business.

17 Q Did you ever do an accounting of the total
18 monies of it?

19 A Yes, I did.

20 Q Do you remember how much it was?

21 A I don't remember the exact total. We did an
22 exact sheet itemizing each bill, how many of each bill
23 domination.

24 Q All right. You itemized it on the bag
25 itself?

1 A Yes.

2 Q Let me get this marked and then show it to
3 you.

4 (WHEREUPON, State's Exhibit 21 is marked for
5 identification purposes.)

6 BY MR. BULSA:

7 Q I am showing you what is marked State's
8 Exhibit 21. What does that show that you recovered?

9 A I recovered a shotgun shell, a yellow
10 cigarette lighter, brown case knife and U.S. currency.

11 Q All right. Does that have the itemization of
12 the monies?

13 A Not on this one.

14 Q You had a separate evidence sheet?

15 A Yes, sir.

16 Q Okay. I'm going to get this one marked if I
17 may.

18 (WHEREUPON, State's Exhibit 22 is marked for
19 identification purposes.)

20 BY MR. BULSA:

21 Q I'm going to show you what was marked State's
22 Exhibit 22 for identification. Do you recognize that
23 document?

24 A Yes, sir. This is a evidence sheet I filled
25 out on that night.

1 Q Is that of the items you recovered?

2 A Yes, it does.

3 Q Does it itemize the money?

4 A Yes, it does.

5 Q And was this secured in the evidence at the
6 Sheriff's Office?

7 A Yes, it was.

8 Q The money was later returned to the store?

9 A Yes, sir.

10 MR. BULSA: Your Honor, I would move items 21
11 and 22 into evidence.

12 MR. WHELCHER: No objection.

13 THE COURT: They are admitted.

14 (WHEREUPON, State's Exhibits 21 and 22 are
15 admitted into the record.)

16 BY MR. BULSA:

17 Q If you would, pull out the contents of
18 State's 21. What you pulled out appears to be a
19 photograph?

20 A Yes, sir.

21 Q Is that a photograph of the monies?

22 A Yes, sir.

23 Q Is that essentially State's Exhibit number 11
24 in a larger form?

25 A Yes, sir.

1 Q So the money was turned over and the picture
2 was placed in the evidence bag?

3 A Yes, sir.

4 Q That shell casing that you got out of his
5 pocket -- don't get them mixed up because I need to
6 put them back in the same bag. Could all of those
7 rounds been fired from the shotgun that was recovered?

8 A Yes, sir.

9 Q Once the other officer arrived and searched
10 Mr. Kelley, what took place?

11 A He was placed in the back of Deputy
12 Letterman's patrol car. At that time, I advised him
13 of his Miranda warnings verbally. He stated he
14 understood them and then he told me his name.

15 Q What name did he give you?

16 A James Emmanuel Hawkins.

17 Q Did he have any identification on him?

18 A No, sir.

19 Q He didn't have a driver's license?

20 A No, sir.

21 Q So at that time, you thought he was James
22 Emmanuel Hawkins?

23 A Yes, sir.

24 Q And when he was transported to the Sheriff's
25 Office, is that the name that y'all transported him

1 under?

2 A At the time, yes, sir.

3 Q Why didn't you put him in your patrol car?

4 A Due to the fact that I am a canine handler
5 and my dog was in the back seat of the car. It's our
6 policy at the Sheriff's Office not to transport
7 anybody with a canine just for safety reasons.

8 Q How did he appear to you? You were the first
9 officer to come into contact with him. How did he
10 appear to you at that time?

11 A Just a normal person, very calm. Nothing
12 that stuck out in my mind at all.

13 Q Did he make any admissions to you about what
14 he had just done?

15 A No, sir.

16 Q Did you ask him about it?

17 A Yes, sir.

18 Q What did you ask him?

19 A I asked him what had happened, what he had
20 done. He kept stating to me he did not know what I
21 was talking about.

22 Q Okay. Did you see the two men that followed
23 him?

24 A After the fact, yes, I did.

25 Q You did not actually notice their car when

1 you pulled into the Sonoco?

2 A No, sir. I did not.

3 Q When did you actually see them?

4 A They had, I assume, parked somewhere towards
5 the side of the business, back toward the CVS
6 Pharmacy. They come walking up around the corner of
7 the building was the first time I noticed.

8 Q Did you actually speak to them yourself?

9 A I don't recall if I did.

10 Q You know if Officer Letterman might have?

11 A Yes, Officer Letterman did in fact take
12 statements from both of them.

13 Q Do you recall if any identification was made
14 at the scene by them?

15 A I don't recall.

16 Q After you secured him, what was done with his
17 truck?

18 A It was towed to the county impound.

19 Q Were you able to identify the owner?

20 A I believe we sent a deputy by the residence
21 that the tag came back to. And he was unable to get
22 anybody to the door. We were unable to get
23 verification.

24 Q You ran the tag and got an address?

25 A Yes, sir. One of our deputies went out to the

1 address.

2 Q Did you fill out a tow sheet?

3 A Yes, sir.

4 (WHEREUPON, State's Exhibit 23 is marked for
5 identification purposes.)

6 BY MR. BULSA:

7 Q I'm going to show you State's Exhibit 23 for
8 identification. Do you recognize that document?

9 A Yes, sir. This is a copy of our tow impound
10 report.

11 Q And it has information about the truck?

12 A Yes, sir.

13 Q Who did you believe it belonged to?

14 A A Patricia Kelley.

15 Q Where was that person?

16 A 905 Bear Shoals Road.

17 Q Is that in Spartanburg?

18 A Yes, sir. It is.

19 Q Did you later learn that she was somehow
20 related to the Defendant?

21 MR. WHELCHER: Objection. I believe it is
22 hearsay, Your Honor, how he learned it.

23 MR. BULSA: I can ask another question.

24 THE COURT: Sustained at this time.

25 BY MR. BULSA:

1 Q Did the Defendant ever tell you who's truck
2 it was?

3 A No, he did not.

4 MR. BULSA: Your Honor, I offer this into
5 evidence, State's Exhibit 23.

6 MR. WHELCHER: Is that the --

7 MR. BULSA: Yes.

8 THE COURT: It is admitted.

9 (WHEREUPON, State's Exhibit 23 is admitted into
10 the record.)

11 BY MR. BULSA:

12 Q Did you ever go back to the Pizza Planet?

13 A No, I did not.

14 Q So your involvement in this case was
15 apprehending the Defendant and have him transported to
16 the Sheriff's Office, did you later come in contact
17 with him at the Sheriff's Office?

18 A Yes, sir. I did.

19 Q How is that?

20 A I was in the room when detective Bohon came
21 to the office. I was present with him. Detective
22 Bohon advised him of his Miranda warnings in writing.
23 I was present during that.

24 Q Okay. Did the Defendant give a statement to
25 him?

1 A Yes, sir.

2 Q Did you witness that statement?

3 A No, sir. I did not. I left the room to finish
4 my paper.

5 Q Did you then later sign it?

6 A Yes, I did.

7 Q Why did you later sign the statement?

8 A I came back in the room and asked him if that
9 was his statement. He stated yes, that was his
10 statement. I then signed it as a witness.

11 Q You witnessed his signature?

12 A Yes, sir.

13 Q His acknowledging that that's his statement?

14 A Yes, I did.

15 Q Did you read the statement?

16 A No, sir. I didn't.

17 Q You don't know what is contained in the
18 statement?

19 A No, sir. I don't.

20 Q So, you are a patrol officer and you turned
21 it over the investigation to the detective?

22 A Yes, sir. I did.

23 Q Okay. How did he appear at the Sheriff's
24 Office?

25 A Under the circumstances, very calm. No

1 unusual behavior or anything that stuck out to me.

2 Q How did you learn his real name?

3 A Detective Bohon actually advised me of his
4 real name.

5 Q So Detective Bohon apparently had some
6 conversation with him and then he spoke to you?

7 A Yes.

8 MR. WHELCHER: Calls for conjecture on his
9 part, Your Honor. I will object.

10 THE COURT: Sustained as to lack of
11 foundation.

12 BY MR. BULSA:

13 Q Did you see Detective Bohon speaking with him
14 before Detective Bohon came and spoke to you?

15 A Yes, I did.

16 Q Did he advise Detective Bohon of name the
17 Defendant gave to you?

18 A Yes, I did.

19 Q What name did Detective Bohon have?

20 A I am sorry?

21 Q What name did Detective Bohon have?

22 A Mr. Kelley.

23 Q In fact, State's Exhibit 1 for identification
24 and State's Exhibit 2 for identification, is that the
25 name that was on those document?

1 A Yes, Raymond Thomas Kelley.

2 Q Did you ever learn why he give you a fake
3 name?

4 A No, sir.

5 Q Briefly going back to the scene and the
6 apprehension of him, was anybody else in the vehicle?

7 A No, sir. There was not.

8 Q Did you see anybody else around?

9 A No, sir.

10 Q Did it appear that anybody else had been in
11 it?

12 A No, sir.

13 Q Thank you. Answer any questions Mr. Whelchel
14 may have for you.

15 **CROSS-EXAMINATION**

16 **BY MR. WHELCHER:**

17 Q Officer Fraley, you did not go to the store?

18 A No, sir. I did not.

19 Q You did not make contact with the truck
20 owner?

21 A No, sir.

22 Q Okay. Your knowledge today about what
23 happened is based upon what you did, what you
24 observed, not at the scene but at the Sonoco station?

25 A Yes, sir.

1 Q Thank you, sir.

2 REDIRECT EXAMINATION

3 BY MR. BULSA:

4 Q At that Sonoco station, you found a shotgun
5 in the vehicle?

6 A Yes, sir. I did.

7 Q And you found money on the Defendant?

8 A Yes, I did.

9 Q As well as a shotgun shell on the Defendant?

10 A Yes, I did.

11 Q Thank you. Nothing further?

12 THE COURT: You can step down, sir.

13 MR. BULSA: We ask that Deputy Fraley be
14 excused.

15 MR. WHELCHER: No objection.

16 THE COURT: He is excused.

17 MR. BULSA: The State calls Brandon
18 Letterman.

19 BRANDON LETTERMAN

20 having been sworn testifies as follows:

21 DIRECT EXAMINATION

22 BY MR. BULSA:

23 Q Deputy Letterman, please introduce yourself
24 to the jury.

25 A My name is Brandon Letterman.

1 Q How long have you been a deputy?

2 A I been a deputy with the Spartanburg County
3 Sheriff's Office for a little over a year and a half.

4 Q What were your duties back on November 11,
5 2006?

6 A On that date, I was assigned to uniform
7 patrol division.

8 Q Did you get a call to go to Pizza Planet?

9 A Deputy Fraley had actually called out the
10 suspect. When Deputy Fraley got the suspect, I
11 advised communications that I would be in route to
12 backup Deputy Fraley.

13 Q When you arrived at the Sonoco, what did you
14 see happen?

15 A When I arrived at the Sonoco, Deputy Fraley
16 already detained the subject that was in the vehicle.
17 At which point when I arrived on the scene, Deputy
18 Fraley began his pat down search, pat down of the
19 subject. The subject was secured in the back of my
20 patrol vehicle.

21 Q Okay. Then what did you then do?

22 A At that point, once the suspect was secured
23 in the back of my patrol vehicle, I observed two other
24 individuals on the scene that stated they were at the
25 pizza place when it happened.

1 Q Did you try to get a statement from them?

2 A At that point, I did. I returned to my
3 patrol car and retrieved two voluntary statements and
4 asked them if they would give a statement.

5 Q You basically gave them a form and had them
6 write out?

7 A Correct.

8 Q Do you recall whether they identified the
9 Defendant?

10 A Yes, they did. I'm asked the witnesses who
11 witnessed it if they recognized anybody that was
12 there. At which point they stated the guy at the
13 station was at the scene.

14 Q Did you actually have any conversation with
15 the Defendant?

16 A If I did have any conversation, it was simple
17 questions as to just questions I have about the
18 incident.

19 Q Were you present when Deputy Fraley read him
20 his Miranda?

21 A I was.

22 Q Did he understand those?

23 A Yes, he said he did.

24 Q Did you hear the name that he gave Deputy
25 Fraley?

1 A I get heard the name of Emmanuel, I believe.

2 Q After you got the statements from the two
3 witnesses, where did you transport the Defendant?

4 A He was transported to the Spartanburg County
5 Sheriff's Office.

6 Q How long of a trip was that?

7 A Roughly -- in distance or time?

8 Q Time.

9 A Time roughly 5 to 8 minutes.

10 Q Did he state anything?

11 A No.

12 Q Did you ask him any questions?

13 A No, I did not.

14 Q How did he appear to be?

15 A He appeared to be a normal individual.

16 Nothing that he did stood out in my mind as being odd.

17 The only thing that stood out is he was extremely

18 calm. That is about it.

19 Q Did he appear to understand what was taking
20 place?

21 A Yes, he did, in my opinion.

22 Q Where did you actually take him?

23 A I took him to the criminal investigation
24 division of the Sheriff's Office and waited for
25 Detective Bohon to respond.

1 Q Thank you. Answer any questions Mr. Whelchel
2 . has for you.

3 MR. WHELCHER: Beg the Court's indulgence,
4 Your Honor. (Pause).

5 No questions, Your Honor.

6 THE COURT: You can step down, sir.

7 MR. BULSA: We ask that he be excused.

8 THE COURT: He is excused.

9 MR. WHELCHER: Yes, sir.

10 THE WITNESS: Thank you.

11 MR. BULSA: The State calls Joseph Bohon.

12 JOSEPH BOHON

13 having been sworn testifies as follows:

14 DIRECT EXAMINATION

15 BY MR. BULSA:

16 Q Please introduce yourself to the jury.

17 A Joseph Bohon.

18 Q Where are you employed?

19 A Spartanburg County Sheriff's Office.

20 Q In what capacity?

21 A A detective.

22 Q How long have you been a detective?

23 A Four years.

24 Q How long have you been a police Officer?

25 A Six and a half.

1 Q Were you called to investigate this crime?

2 A Yes, sir. I was at home, probably sitting on
3 the couch watching TV. I received a call roughly
4 around nine o'clock to respond to the Sheriff's Office
5 in reference to interviewing a subject they had in
6 custody in reference to an armed robbery?

7 Q Why would you had been called at home?

8 A Our schedule is first shift, 9:00 to 5:00.
9 And after five o'clock, detectives are on call after
10 that point.

11 Q You were on call that evening?

12 A Yes, sir.

13 Q All right. Do you remember when you actually
14 arrived at the Sheriff's Office?

15 A It was around 30 to 35 minutes later.

16 Q What did you do when you got there?

17 A I spoke with Deputy briefly. He basically
18 gave me a scenario of what was going on. Mr. Kelley
19 was in a room that we were using as an interview room
20 at the time. I went in there and spoke with him
21 briefly. That is when he advised me about giving the
22 officer a false name earlier. I spoke with Fraley,
23 Deputy Fraley about that. At that point, Deputy
24 Fraley and myself went in the interview room and gave
25 Mr. Kelley his Miranda rights.

1 Q Okay. I'm going to show you State's Exhibit 1
2 for identification. Do you recognize that form?

3 A Yes, sir.

4 Q What is it?

5 A This is the pre-interrogation waiver form
6 that was filled out that night.

7 Q That is the form you read to him that
8 contained his Miranda warnings?

9 A Yes, sir.

10 Q Did he sign that form?

11 A Yes, sir. He did in two different places.

12 Q Did Deputy Fraley witnessed it?

13 A Yes, sir.

14 Q Did you notarize it?

15 A Yes, sir. I did.

16 Q That is the actual original copy of that
17 form?

18 A Yes, sir. It is.

19 MR. BULSA: Your Honor, I move State's
20 Exhibit 1 into evidence.

21 MR. WHELCHER: No objection.

22 THE COURT: It is admitted.

23 (WHEREUPON, State's Exhibit 1 is admitted into
24 the record.)

25 BY MR. BULSA:

1 Q Before I put it on the screen, tell us the
2 process in which you took to read him that form.

3 A The first step we take is they had a case
4 number for this case where the robbery occurred. I
5 filled out the case number. The second step is just
6 basically put in information of the suspect or the
7 person that's being questioned. I put in Mr. Kelley's
8 name here, the address he gave, the day's date of when
9 it happened or when I was sitting down speaking with
10 him and the actual time it was, 9:40 p.m. The
11 location is the Spartanburg County.

12 After that, I read him his Miranda rights. We
13 had it labeled out steps 1 through 5. You have the
14 right to remain silent. And as I would read it, I
15 would actually scratch beside each number as I would
16 read each. Anything you say can be used against you in
17 a court of law. You have the right to talk to a
18 lawyer and have him present with you while you are
19 being questioned. If you cannot afford to hire a
20 lawyer, one will be appointed to represent before any
21 questions if you wish so. And number five, you have a
22 right to stop answering any questions at any point.

23 Then it says above rights are read by me,
24 Detective Bohon. Then I fill out that. Then I say you
25 understand your rights fully. That's where Mr. Kelley

1 signed and Deputy Fraley witnessed. It goes into a
2 second part of this form where it says I waive or give
3 up my rights explained above and I agree to talk to
4 Detective Bohon in reference to an armed robbery. I
5 made it clear to him that he was being questioned in
6 reference to an armed robbery. Any statement he made
7 was of his own free will.

8 There is a line down here that says I am able
9 to read and write in the English language and had
10 finished blank years of school. I asked Mr. Kelley
11 how many years he finished in school. He told me 8.
12 He did advise me he had completed his GED. There is
13 another section for him to sign right here if he
14 understood that and if he did waive his rights. and he
15 did sign there. Deputy Fraley witnessed that. I
16 notarized both of their signatures Deputy Fraley and
17 Mr. Kelley.

18 Q All right. Let's see what you were just
19 reading. What was his demeanor when you were speaking
20 with him?

21 A Normal behavior. Just being a normal person.

22 Q How did he appear to you?

23 A He was calm, he was upset.

24 Q Did he appear that he was under the influence
25 of any alcohol or drug?

1 A No, sir.

2 Q Did he appear to understand what was taking
3 place?

4 A Yes, sir. Definitely.

5 Q You said it was you and Deputy Fraley in the
6 room when you were reading him these rights. Were
7 there any other officers?

8 A No, sir.

9 Q How were you dressed?

10 A If I remember correctly, this was a year ago,
11 usually at night when I get called out, pretty much
12 khaki pants and a Polo shirt or just a button up
13 shirt. Usually when I go to an office to interview
14 someone, a lot of times, I don't even put a gun on
15 just to walk in the Sheriff's Office to talk to
16 someone.

17 Q Did you in any way threaten him?

18 A No, sir.

19 Q Did you promised him anything?

20 A No, sir.

21 Q Did he ever during your interview seek to
22 invoke any of his rights as shown on State's Exhibit
23 21, I mean State's Exhibit 1?

24 A No, sir.

25 Q He never asked for an attorney?

1 A No, sir.

2 Q He never said he wanted to stop speaking?

3 A No, sir.

4 Q Once you got this form signed, what was the
5 process then that you took with him?

6 A After reading the Miranda waiver form, I
7 asked him would he tell me about what was going on. He
8 basically told me what happened from starting out of
9 when he went to the pizza place. He basically told me
10 the story verbally. After he gave me the story
11 verbally, I asked him to give me a written statement.
12 And he stated to me he was caught red-handed, he might
13 as well.

14 Q Did you then write it down?

15 A Yes, sir.

16 Q Did you write it or did he write it?

17 A I wrote it at his request. I asked him if he
18 wanted to write it or did he rather me write it. He
19 said that he would prefer me write it for him.

20 Q The time on this waiver form is 9:40. Is that
21 when you first began speaking to him?

22 A Yes, sir.

23 Q So you got the form signed. Then you spoke
24 with him. Verbally told you what happened then you
25 sought to put it in writing?

1 **A** Yes, sir.

2 **Q** All right. Let me show you State's Exhibit
3 number 2 for identification. What is that document?

4 **A** This is my handwriting and the words of Mr.
5 Kelley. This is a statement that he gave. It's the
6 statement that he signed twice. It also contains my
7 signature and Deputy Fraley's signature.

8 **Q** Is that the actual original document?

9 **A** Yes, sir. It is.

10 **Q** Okay. Was Mr. Kelley given a copy of it?

11 **A** Yes, sir. He was.

12 **MR. BULSA:** Your Honor, the State would move
13 State's Exhibit number 2 into evidence.

14 **THE COURT:** Over your previous objection, it
15 is admitted.

16 **MR. WHELCHER:** Yes, sir.

17 **MR. BULSA:** Thank you, Your Honor.

18 (WHEREUPON, State's Exhibit 2 is admitted into
19 the record.)

20 **BY MR. BULSA:**

21 **Q** Officer, when you wrote that statement, whose
22 words were you using?

23 **A** Mr. Kelley's.

24 **Q** How did you do that?

25 **A** Just wrote down what he said. Like I said,

1 we went over it verbally. When he requested I write
2 the handwritten statement for him, I wrote the words
3 down as he told it to me.

4 Q He would speak and you would write, basically
5 dictated and you wrote it?

6 A Yes, sir.

7 Q Before he signed it, did you go over it with
8 him?

9 A Yes, sir. I did. I read it over to him.
10 Reread it to him. After I reread it, I actually
11 turned it over to him and let him read it also. After
12 he did that, that's when I called Deputy Fraley back
13 into the room. I asked Mr. Kelley in front of Deputy
14 Fraley is this the whole truth and nothing but the
15 truth. He said yes. I said is this your statement.
16 He said yes. That's when Mr. Kelley signed it. And
17 Deputy Fraley witnessed it.

18 Q Did you document the time the statement was
19 completed?

20 A Yes, sir. It was completed at 10:15.

21 Q You started at 9:40 and finished at 10:15.

22 All of this was done in 35 minutes?

23 A Yes, sir.

24 Q Okay. If you would, read that, publish it to
25 the jury by reading that?

1 A This statement is written by Detective Bohon
2 at the request of Raymond Kelley. Early tonight, I
3 went to a pizza joint because I needed some money. I
4 parked in the back parking lot. I was in my son's
5 pickup truck and I had my daughter-in-law's shotgun.

6 I went to the pizza joint and pointed the
7 shotgun at the blond-haired guy that was behind the
8 counter. I told him give me your money. He said do
9 you want it all and I said yes. I got the money and
10 put it in my pocket. I never counted to see how much
11 it was. I went out the front door and walked around
12 to my truck that was behind the pizza joint.

13 A lot of customers came out. I thought they
14 were going to do something to me. So I told them I
15 would shoot them and I pointed the shotgun at them. I
16 would have never shot. I was just trying to scare
17 them so I could get away. I never thought there would
18 be that many people in the pizza joint. I just needed
19 some gas money to get back to my son's house.

20 I got out of prison around six months ago --
21 correction -- around 16 months ago and have not been
22 able to find work. I would have never did this if I
23 had been working. I'm sorry for what happened
24 tonight. My son is Thomas Joseph Kelley and my
25 daughter-in-law is Pat Kelley. My son told me not to

1 take the truck. End of statement.

2 Q And it is signed?

3 A Yes, sir.

4 Q During the interview with him, did he ever
5 asked to smoke a cigarette?

6 A Yes, sir.

7 Q Did you afford him that opportunity?

8 A Yes, sir. I did.

9 Q Did he ever ask for a drink?

10 A Yes, he asked for some water. I gave him
11 some water.

12 Q How did you treat Mr. Kelley?

13 A With respect.

14 Q Did you make him any promises after that
15 statement?

16 A No, sir.

17 Q What was done with Mr. Kelley after you got
18 finished speaking with him?

19 A He was transported to the county jail.

20 Q Answer any questions Mr. Whelchel has.

21 CROSS-EXAMINATION

22 BY MR. WHELCHER:

23 Q Where's the tape recording of this statement?

24 A There is not one.

25 Q You have the capability to do that?

1 A Yes, sir. I do.

2 Q Where is the videotape of this statement?

3 A There is not one.

4 Q Do you have the capability to do that?

5 A No, I don't.

6 Q Your office doesn't have the capability to
7 videotape a statement?

8 A Not that I'm familiar with. I don't have
9 access to a camera. We don't have an interview room
10 set up.

11 Q Does the Sheriff's Department have access or
12 the capable to videotape a statement?

13 A I am sure we could get a camera somehow.

14 Q That was not done in this case?

15 A No, sir.

16 Q Did you ask Mr. Kelley when was the last time
17 he had eaten?

18 A No, sir.

19 Q Did you ask Mr. Kelley if he had anything to
20 drink?

21 A No, sir.

22 Q Did you ask Mr. Kelley if he was under the
23 influence of any alcohol or drugs?

24 A No, sir. I did not.

25 Q Do you know why I ask you these questions?

1 MR. BULSA: Objection, Your Honor. Calls for
2 speculation.

3 THE COURT: Overruled.

4 THE WITNESS: Do I know why you ask me these
5 questions?

6 BY MR. WHEELCHEL:

7 Q Yes, sir.

8 A No, sir.

9 Q You been an investigator for how long?

10 A Four years.

11 Q You been to some type of schooling to be an
12 investigator?

13 A Yes, sir.

14 Q Do they teach you at that school about the
15 effects of alcohol or drugs or the lack of food on a
16 person when they are under that type of stress of
17 taking a statement? They teach you that?

18 A Yes, sir.

19 Q What do they teach you?

20 A Anybody under the effects of alcohol or
21 drugs, it can affect their statement. But Mr. Kelley
22 being in normal state of mind, that was never a
23 thought to even ask him about that. I been a police
24 officer for six and a half years. I've dealt with
25 thousands of people who have been under the influence

1 of drugs, alcohol, sleep deprivation. None of that
2 was apparent to me at all that night to even ask that
3 question.

4 Q Are you taught that you were supposed to ask?

5 A I was taught that it can affect someone's
6 statement.

7 Q Okay. Did you ask him when the last time was
8 that he slept? How much rest he had, did you ask him
9 that?

10 A No, sir. He did not appear to be sleepy.

11 Q I did not ask you if he was sleepy. I asked
12 you if you asked him when was the last time was he had
13 any sleep or rest?

14 A No, sir.

15 Q They teach you also that can affect the
16 voluntariness of your statement and what you say in a
17 statement, is that correct?

18 A Yes, sir.

19 Q You did not ask him about sleep, food, drink
20 or drugs, is that correct?

21 A That is correct, sir.

22 Q After this 30, 40-minute process, he goes to
23 the jail. Where did you go?

24 A Home.

25 Q Okay. Did you make any promises to Mr. Kelley

1 about giving a statement and it benefitting him?

2 A No, sir..

3 Q None?

4 A No.

5 Q Mr. Kelley, calm though he was as you say,
6 never asked for an attorney?

7 A No, sir.

8 Q In all of that time, not once did he ask for
9 an attorney?

10 A No, sir. He did not.

11 Q Thank you, sir.

12 THE COURT: Wait.

13 REDIRECT EXAMINATION

14 BY MR. BULSA:

15 Q In your experience, did the Defendant appear
16 to be sleepy?

17 A No, sir.

18 Q Did he appear to be malnourished?

19 A No, sir.

20 Q I believe you even testified you allowed him
21 to get some water?

22 A Yes, sir.

23 Q Did he appear to be under the influence of
24 alcohol or drugs?

25 A No, sir. He did not.

1 Q Did he ever ask for anything else?

2 A No, sir.

3 Q Did he ask any questions at all?

4 A He may have asked him what would happen to
5 him. I told him I didn't know or something like that.
6 I told him something like that is completely out of my
7 hands. I just gather the facts about stuff.

8 Q In your observation of Mr. Kelley, did he
9 appear to understand what was taking place?

10 A Yes, sir. He did.

11 Q Thank you. That's all I have.

12 **RECROSS-EXAMINATION**

13 **BY MR. WHEELCHEL:**

14 Q So you just took it on face value that, one,
15 he hadn't been up for 72 or more hours?

16 A I just used my common sense.

17 Q Did you take it on face value was my
18 question. Did he appear that he needed sleep?

19 A Did it appear that he needed sleep?

20 Q Yeah.

21 A No, he didn't appear to be sleepy.

22 Q Did he look tired?

23 A No.

24 Q Did you ask him when was the last time you
25 slept?

1 A No, sir.

2 Q Even though you know that can affect the
3 validity of the statement?

4 A Yes, sir.

5 Q And the same would go, the same questions can
6 be proffered for the use of alcohol, correct, you did
7 not ask him if he had been using alcohol?

8 A No, sir.

9 Q Did anybody tell you he had been using
10 alcohol?

11 A No, sir.

12 Q How about drugs?

13 A I did not ask him if he was on drugs.

14 Q That affects both the voluntariness and what
15 you give in a statement, does it not?

16 A Obviously, it does affect what you give in a
17 statement, yes, sir.

18 Q So, correct me if I am wrong. He came in.
19 You didn't ask him how long it had been since he
20 slept, whether or not he was under the influence of
21 any alcohol, whether or not he had eaten or whether or
22 not he was under the influence of any drugs. You
23 spent 30 or 40 minutes with him. You get the
24 statement and you go home, is that it?

25 A Yes, sir. I did not feel the need to ask him

Remarks

205

1 those questions.

2 MR. BULSA: Nothing further.

3 THE COURT: You can step down, sir.

4 MR. BULSA: Can I confer with the Court
5 Reporter. (Pause).

6 Your Honor, at this time, the State would
7 rest.

8 THE COURT: Ladies and gentlemen, at this
9 time, I'm going to ask you to step back in the
10 jury room while I deal with a matter of law. I
11 will have you back out here shortly to resume the
12 trial.

13 (WHEREUPON, the jury exit at approximately 10:56
14 a.m.)

15 THE COURT: Any motions, Mr. Wheelchel?

16 MR. WHEELCHEL: Your Honor, at this time, I
17 would make a motion on behalf of Mr. Kelley for a
18 directed verdict of not guilty based on the
19 insufficiency of the evidence as presented by the
20 State, Your Honor, and I would renew all of my
21 prior objections and motions made.

22 THE COURT: I deny a motion for a directed
23 verdict. Uh, do you have any evidence that you
24 would put up before the Defendant testifies if
25 the Defendant were to choose to testify?

1 MR. WHELCHER: No, sir.

2 THE COURT: If he chooses to testify, he
3 would be your first witness?

4 MR. WHELCHER: Yes, sir.

5 THE COURT: Have you had a chance to discuss
6 with him before today his right to remain silent
7 and also his right to testify?

8 MR. WHELCHER: Yes, sir.

9 THE COURT: In those discussions, were you
10 satisfied that he understood those two rights?

11 MR. WHELCHER: Yes, sir.

12 THE COURT: You may have already had the
13 chance to discuss it with him today. Since we
14 have had an hour or so of additional testimony, I
15 am going to take a break to allow you to discuss
16 it again. After you concluded that discussion,
17 let me know. I would like to discuss it with him
18 myself.

19 MR. WHELCHER: Yes, sir.

20 THE COURT: Just let me know when you are
21 done.

22 MR. WHELCHER: Yes, sir.

23 (WHEREUPON, a short recess is taken at
24 approximately 10:57 a.m.)

25 (WHEREUPON, the Court resumes at approximately

1 10:58 a.m.)

2 THE COURT: Have you had a chance to discuss
3 with Mr. Kelley his right to remain silent and
4 also his right to testify?

5 MR. WHELCHER: I have done that on numerous
6 occasions, Your Honor.

7 THE COURT: Have you done that again during
8 this break?

9 MR. WHELCHER: Yes, Your Honor.

10 THE COURT: Have you had all the time you
11 need to have that discussion?

12 MR. WHELCHER: Yes, sir.

13 THE COURT: Are you satisfied now that he
14 understands both his right to testify and his
15 right to remain silent?

16 MR. WHELCHER: Yes, sir.

17 THE COURT: All right. Mr. Kelley, please
18 stand and raise your right hand.

19 (WHEREUPON, the defendant is sworn.)

20 THE COURT: Mr. Kelley, you have heard me
21 have this discussion with Mr. Whelcher about his
22 discussions with you about your right to remain
23 silent and also your right to testify?

24 MR. KELLEY: Yes, sir.

25 THE COURT: Now, in those discussions, not

1 only today but on days before today, have you
2 understood what Mr. Whelchel was telling you
3 about these two rights?

4 **MR. KELLEY:** Yes, sir. I believe I have.

5 **THE COURT:** Have you had all the time you
6 need to discuss those two rights with Mr.
7 Whelchel?

8 **MR. KELLEY:** Yes, sir.

9 **THE COURT:** I'm going to talk about it with
10 you for a few minutes so that I can make sure you
11 understand. Then I will find out what your
12 decision is. You have the right to remain
13 silent. That right comes to you by the way of
14 the Fifth Amendment to the United States
15 Constitution. What that means is no one can make
16 you or no one can compel you to testify in the
17 trial of this case.

18 On the other hand, you have the right to
19 testify if you choose to do so. If you choose to
20 testify, you will be subject to cross-examination
21 on whatever subject might be relevant to your
22 testimony including the subject matter of the
23 testimony but also relating to your credibility
24 which could include your criminal record. I
25 understand you do have at least one prior

Remarks

209

1 conviction for armed robbery but I'm not sure.

2 MR. KELLEY: That's correct.

3 THE COURT: And if you have other
4 convictions, possibly those can be inquired into.
5 We have to have that discussion. I'm sure you've
6 had that discussion with Mr. Whelchel, haven't
7 you?

8 MR. KELLEY: Yes, sir.

9 THE COURT: Do you understand everything I
10 just told you?

11 MR. KELLEY: Yes, sir.

12 THE COURT: You have any questions for me
13 right now about what I just told you?

14 MR. KELLEY: No, sir.

15 THE COURT: You understand that even though
16 you should listen very carefully to the advice
17 that Mr. Whelchel has given you, in the end, you
18 are the one who has to make the decision as to
19 whether or not you wish to testify. Mr. Whelchel
20 can not make that decision for you. Do you
21 understand that?

22 MR. KELLEY: I understand.

23 THE COURT: Are you prepared to make your
24 decision?

25 MR. KELLEY: Yes, sir. I am.

1 THE COURT: What is your decision?

2 MR. KELLEY: I would rather not testify.

3 THE COURT: Do you choose not to testify?

4 MR. KELLEY: I choose not to testify.

5 THE COURT: Now, when you say you rather not
6 testify, I just want to make this clear. It is
7 your choice. You understand that?

8 MR. KELLEY: I realize that. Your Honor, I
9 think considering everything, I may be better off
10 if I don't testify.

11 THE COURT: Okay. So your choice is to not
12 testify.

13 MR. KELLEY: I'm not going to testify. No,
14 sir.

15 THE COURT: You can be seated. Mr. Whelchel,
16 do you intend to put up any other evidence?

17 MR. WHELCHER: No, sir.

18 THE COURT: Okay. Then I am ready to proceed
19 into closing arguments as soon as y'all are. If
20 you need a short break to prepare your thoughts,
21 I'll be happy to allow that. But unless there is
22 some other reason that I am not aware of now, I
23 would be ready to move right into it.

24 MR. BULSA: I'm ready. The State is ready.

25 THE COURT: Are you ready now?

1 MR. WHELCHER: I am assuming --

2 THE COURT: He's going first. He's going
3 first and you close.

4 MR. WHELCHER: Yes, sir.

5 THE COURT: Any special request for charge?

6 MR. BULSA: No, sir.

7 THE COURT: Bring in the jury.

8 (WHEREUPON, the jury enter at approximately
9 11:17 a.m.)

10 THE COURT: Who is Mrs. Price? Let me get
11 you two over here on the end to switch seats
12 please.

13 Now, Ladies and Gentlemen, you have heard all
14 the testimony and evidence that you will hear in
15 this case. We are going to move right now into
16 closing arguments. Then I will charge you on the
17 law. When I'm done with that, it will be close
18 to 12:00. The Clerk's office, at that time, will
19 be prepared to show you some menus and allow you
20 to order lunch. You can begin your deliberation
21 shortly thereafter. If you choose to have lunch
22 brought in, we will bring it into you. We are
23 now ready for the State to make its closing
24 argument.

25 MR. BULSA: Thank you, Your Honor.

1 Good morning, Ladies and gentlemen. Thank
2 you for your attention. You have heard a tale of
3 Jordan said he was not that afraid. He was
4 acting calmly. He wanted to save himself and
5 other people in Pizza Planet. So he did what he
6 was asked. He did what he was asked at gunpoint.

7 We do not know whether the weapon was loaded
8 or not. We later found that it was. It was
9 loaded with two rounds. It could have not only
10 killed him but could have killed another
11 individual in that restaurant. Jordan acted in a
12 composed fashion to save himself and save the
13 other lives of people in the restaurant.

14 You've heard his testimony. You heard how he
15 identified the Defendant as being a man with that
16 shotgun. You heard from two other people that
17 were in the restaurant who also identified the
18 Defendant as being the man with that shotgun.

19 That is armed robbery.

20 He left with -- you can count the money if
21 you need to. You don't have to. If he took one
22 dollar, that is armed robbery. He took hundreds
23 of dollars. An armed robbery occurred. The
24 judge will charge you on the law.

25 I'm going to answer some of the questions

1 that, well, not some of the questions. Mr.
2 Whelchel asked why we are here. We are here
3 because the Defendant has a right to a jury
4 trial. The State appreciates that right.
5 Everybody has a right. So we present the
6 evidence.

7 What evidence did you hear? You heard
8 uncontradicted evidence that the Defendant
9 committed an armed robbery. He was seen at the
10 crime scene. He was followed from the crime
11 scene. He was observed as the police took him
12 down. He was identified at the Sonoco station as
13 the person who had committed the crime. He was
14 caught with the weapon. He was caught with the
15 cash. He was caught with additional the
16 ammunition.

17 He was caught red-handed in the words of Mr.
18 Kelley himself. He used a fake name. Perhaps he
19 thought he could get out of something. I don't
20 know. He was caught red-handed. He was
21 confronted by the police at the Sheriff's
22 Department. He gave a voluntary written
23 statement where he admitted to the crime.

24 Ladies and Gentlemen, you will have the
25 documents in the jury room before you if you need

1 to review them once again. You will have the
2 pictures if you need to look at them. I am not
3 going to show them. I think you had a clear
4 picture of what occurred and where it occurred.
5 The shotgun was found on the seat in plain view.

6 Ladies and Gentlemen, this is a
7 straightforward case. I submit to you that the
8 Defendant is guilty beyond a reasonable doubt. I
9 ask that you do your duty and hold him
10 responsible. He was caught red-handed. He is
11 guilty of the crime of armed robbery. Thank you
12 for your time and attention.

13 **MR. WHELCHER:** Ladies and gentlemen of the
14 jury, you may wonder and have been wondering
15 throughout this trial why it was that I asked
16 certain questions and why it was that the
17 Solicitor did the closing argument, Mr. Bulsa. I
18 will be asking these questions that would be a
19 appear to him to be an open and shut case
20 according to the State.

21 However, let's back up and look at some of
22 the testimony of these people who were actually
23 there some months ago. Today and yesterday is
24 the first chance that I, on behalf of Mr. Kelley,
25 get to ask these questions such as how long did

1 you get to look at him? Two seconds. And when
2 this person was walking away, how long did you
3 get to look at him? Ten seconds.

4 The same witness on cross-examination
5 admitted as you know just how problematic it can
6 be to base an identification on that kind of
7 time. I asked the witness and you all know this
8 happen to every one of you that we see somebody
9 we thought we knew. As a matter of fact, it
10 happened to me. I came back to Spartanburg --

11 **MR. WHELCHER:** Objection, he is interjecting
12 personal experience in this.

13 **THE COURT:** I will allow him to illustrate
14 his point with an anecdotal story. Overruled.

15 **MR. WHELCHER:** Thank you, Your Honor.

16 I came back to Spartanburg in 1985. I
17 started working at the Solicitor's Office here.
18 The wife and children are still in Columbia until
19 the school year is over. One day, I am coming
20 out of my office here at the courthouse. I see
21 this woman and she is with a man.

22 I kind of glance over. I glance over and I'm
23 thinking the lady looks a lot like my wife. I
24 take a second look. She really does look a lot
25 like my wife. On the third look, my wife.

1 Finally, she speaks and I do recognize my own
2 wife who at that time I had known since 1968. It
3 took me three different looks to recognize the
4 mother of my children.

5 This fellow gave you 12 seconds. He said
6 that's him, no questions. And he and the other
7 fellow identified him in the dark. I don't know
8 if he can see that well. I don't know if it just
9 happens to be that the statement, the description
10 you get from everybody, not height, not weight,
11 or anything but was an old man. The only old men
12 in this place are sitting at that table. Fairly
13 easy. With that, you have your identification.

14 One of the other witnesses, I think it was
15 the fellow that was working the counter referred
16 to him as Mr. Kelley. Even the prosecutor said,
17 cause I think he knew I was going to be asking,
18 why do you keep calling him Mr. Kelley. I believe
19 the obvious question is do you know this fellow?
20 Oh, no, I just read his name on the subpoena. He
21 gets up there and he talks about Mr. Kelley.

22 They want to talk to you about all of the
23 evidence that they have. There's no question
24 they've got the shotgun, the pictures, the
25 pictures of money, pictures of trucks and all of

1 this kind of stuff. Nobody said, can you
2 describe the fellow that did it, an old man, an
3 old truck.

4 I dare to say that there might be other old
5 men in Spartanburg. There might possibly be
6 other old trucks in Spartanburg. But that is
7 what we've got. Ten months after the fact, that
8 is what you have got. Other than, you know, the
9 obvious guy got the table. Oh, yeah. That's him.
10 That is what you get from the Sheriff's
11 Department. This is pretty easy.

12 You may be wondering why I kept asking about
13 the money, the amount. I want to know about the
14 amount of details that might be involved in this
15 investigation. It is the same. The judge will
16 tell you it doesn't matter the amount, one dollar
17 or \$101. I just want you to know did anybody
18 bother.

19 You heard when I was asking the officer. You
20 can't really tell this is the money that you took
21 pictures of until you match up the case numbers
22 just like you can't do it on something else. You
23 can't testify that is the gun. You write down
24 the serial number, now, I know that is the gun.

25 Let's talk about the details that matters the

1 most in my opinion. When I summed up his job
2 that evening, Detective Bohon came in, did a 30
3 to 40-minute statement and he went home. Never
4 asked him -- and it is his job to ask. Never
5 asked him about whether there was any sleep
6 deprivation. Never asked Mr. Kelley about
7 whether or not he was under the influence of
8 alcohol or drugs. You are going to have the
9 State's Exhibit 10. You will be able to see what
10 is on the seat in addition to the shotgun. You
11 cannot professionally make those assumptions.

12 Raymond Kelley is presumed innocent. Raymond
13 Kelley has no burden of proof. Raymond Kelley is
14 innocent of armed robbery unless and until you
15 believe that that outweighs the presumption of
16 innocence, the fact that they don't bother to
17 find out when the last time was he slept, when
18 the last time was he ate, whether or not he was
19 under the influence of alcohol, whether or not he
20 was under the influence of drugs. None of those
21 questions were asked. Freely admitted he did not
22 ask those questions. They affect the validity of
23 the statement and the voluntariness of the
24 statement. I don't guess it matter, does it?

25 The question is this, does it matter to you?

1 If it does and it should, we have got a problem.
2 Our problem is simply this. While there may be a
3 whole lot of physical stuff here, you don't have
4 what you need to convict Mr. Kelley. You don't
5 have what they are required to give Mr. Kelley
6 ahead of time in order to ensure that you, I mean
7 each of you individually and as a collective
8 body, you don't have what you need in order to
9 agree with Mr. Bulsa and say yes, he is guilty
10 beyond a reasonable doubt.

11 Reasonable doubt, the judge will tell you
12 what it means. It is fairly simple. I emphasize
13 that each and everyone of you have to be
14 convinced in your mind. The judge will tell you
15 the verdict must be unanimous. As I said before,
16 it must be your verdict.

17 Now, I am not for one minute telling you that
18 somebody didn't go in and rob this pizza place.
19 But what I am asking is for you to ask the same
20 questions that I asked. The burden rest not on
21 Raymond Kelley and has not since the day he was
22 arrested, ten months ago. His burden is none in
23 this courtroom other than the obvious fact that
24 he was placed on the trial roster.

25 The burden is always on the State to prove to

1 you individually and collectively beyond a
2 reasonable doubt if this took place like they
3 said it took place. If you have doubt as to
4 whether or not they've proven they have met their
5 burden then obviously that doubt must be given to
6 Mr. Kelley. That doubt must be given to Mr.
7 Kelley based on what evidence there is and what
8 evidence there isn't.

9 You are the ones who decide. You are the
10 ones who decide what and who. I submit to you,
11 based on this case, on the failure to treat Mr.
12 Kelley properly, I submit to you that your
13 decision must be that he is found not guilty and
14 you must find him not guilty. Thank you.

15 **THE COURT:** Ladies and gentlemen, now that
16 you have heard the evidence and arguments of the
17 lawyers, it becomes my responsibility to explain
18 the law that is applicable in this case. Under
19 our Constitution and Code of Laws here in South
20 Carolina, only the jury can make the findings of
21 fact here. And I am not permitted to indicate to
22 you how I might feel about the facts. If I have
23 said anything or done anything that might lead
24 you to believe I have an opinion about the facts,
25 then you must disregard that.

1 To determine the facts you have to evaluate
2 the credibility which of course means the
3 believability of the witnesses who have been
4 called on to testify. Some of the things you
5 might wish to consider as you decide whether to
6 believe a particular witnesses testimony include
7 the following: the manner and appearance of the
8 witness who testified, was he or she
9 straightforward or hesitant in answering
10 questions, is the testimony of a witness
11 consistent or inconsistent, how did the witness
12 come to know the facts that he or she is
13 testifying to and what is that witness' ability
14 to know those facts, is there some reason that a
15 witness might want to give testimony that would
16 help or hurt one side or the other, in other
17 words is the witness biased or prejudiced either
18 towards or against the state or the defendant, is
19 the testimony of a witness strengthened or
20 weakened by other testimony and evidence.

21 As members of the jury, you can believe as
22 much or as little of each witness' testimony as
23 you think it is appropriate to do. You can
24 believe the testimony of one witness against all
25 of the rest of them or you can do just the

1 opposite. And you are not required to except
2 testimony as true even if it is uncontradicted.

3 The same Constitution and Code of Laws that
4 make you the exclusive judge of the facts also
5 makes me the exclusive judge of the law. If you
6 have some idea as to what the law is or what the
7 law should be and if that were to disagree with
8 what I now tell you the law is, then you are
9 obligated under the oath that you have taken as
10 jurors to set your notion of the law and to
11 accept and apply the law precisely as I now
12 explain it to you.

13 The fact the Defendant was arrested and
14 charged in this case is not evidence and cannot
15 be considered by you in any manner as evidence of
16 the Defendant's guilt. Nor does it create any
17 presumption or inference of guilt. The
18 indictment is simply the formal written
19 instrument that contains the charges and the
20 allegations that have been made against the
21 Defendant and the indictment serves to process
22 this case and bring it into this court for trial.

23 The Defendant has pled not guilty to this
24 indictment. And the plea of not guilty cast the
25 burden on the State to prove the Defendant guilty

1 beyond a reasonable doubt. A person charged with
2 committing a criminal offense in South Carolina
3 is never required to prove themselves innocent.

4 It is a very important rule of law in our
5 country that a Defendant in a criminal trial will
6 always be presumed to be innocent of the crime
7 with which he has been charged unless and until
8 his guilt has been proven by evidence that
9 satisfies you of that guilt beyond a reasonable
10 doubt. As I told you yesterday, this is the
11 presumption of innocence of course.

12 The presumption of innocence is not merely a
13 legal theory or just a legal theory Or a legal
14 phrase it is a substantial constitutional right
15 to which every Defendant is entitled. The
16 presumption of innocence accompanies the
17 Defendant from the time he is charged throughout
18 the trial and into the jury room until you reach
19 a verdict of guilt that is based on evidence that
20 has satisfied you of that guilt beyond a
21 reasonable doubt.

22 Ladies and gentlemen, I instruct you now and
23 I emphasize to you that the fact that the
24 Defendant did not testify in this trial cannot be
25 considered by you in any way during your

1 deliberations. The Defendant has a
2 constitutional right to remain silent. The
3 exercise of that constitutional right cannot and
4 must not be held against the Defendant.

5 Under the oath that you have taken as jurors,
6 you are to draw no conclusion and no inference
7 whatsoever from the fact that the Defendant did
8 not testify. Do not even discuss this in the
9 jury room. The Defendant is not required to
10 prove anything. The burden of proof remains on
11 the State.

12 A reasonable doubt is a doubt that makes an
13 honest, sincere, conscientious juror in search of
14 the truth in the case to hesitate to act. Proof
15 beyond a reasonable doubt must be therefore proof
16 of such a convincing character that a reasonable
17 person would not hesitate to rely on it and act
18 on it in the most important of his or her own
19 affairs. Proof beyond a reasonable doubt can also
20 be described as proof that leaves you firmly
21 convinced of the Defendant's guilt.

22 There are very few things in this world that
23 we know with absolute certainty. In criminal
24 cases, the law does not require proof that
25 overcomes every possible doubt. If, based on

1 your consideration of the evidence, you are
2 firmly convinced that the Defendant is guilty of
3 the crime charged, then you must find him guilty.
4 On the other hand, if you think there's a real
5 possibility that he is not guilty, you must give
6 him the benefit of the doubt and find him not
7 guilty.

8 I have admitted into evidence in this case
9 statements alleged to have been made by the
10 Defendant. Before you may consider this
11 statement as evidence for any purpose, you must
12 first find that the State has proven beyond a
13 reasonable doubt that the answer is yes to both
14 of the following questions. The questions are,
15 did the Defendant make the statement. That is
16 the first question. The second statement [sic]
17 is did the Defendant make the statement
18 voluntarily.

19 The word "voluntarily", of course, means that
20 he freely chose to make the statement. That it
21 was not induced by pressure or force or
22 intimidation. If the statement was voluntarily
23 made, it may be used against him. If the
24 statement was not voluntarily, then it cannot be
25 used against the Defendant.

1 In determining whether or not the statement
2 of the Defendant was voluntary, you should
3 consider all the facts and circumstances
4 surrounding the statement including the
5 Defendant's age and maturity, his level of
6 education and intelligence, his physical and
7 mental health, his background and environment,
8 the nature of any questioning and any other
9 evidence you believe bears on the voluntariness
10 of the Defendant's statement.

11 If the Defendant was in custody at the time
12 the statement was made, you should also consider
13 the place and length of the custody and whether
14 or not he was given and whether or not he
15 understood his constitutional rights or what are
16 commonly referred to as his Miranda rights which
17 are that he has the right to remain silent, that
18 any statement he does make can and will be used
19 against him in a court of law, that he has a
20 right to consult a lawyer before and during any
21 questioning, that if he cannot afford a lawyer,
22 the Court can appoint one to represent him
23 without cost and that he has the right to
24 exercise these rights at any time and terminate
25 questioning or not answer any questions or make

1 any statement. I find as a matter of law that the
2 Defendant was in custody at the time of the
3 alleged statement.

4 Before you may convict the Defendant of the
5 crime charged, you must find the State has proven
6 beyond a reasonable doubt that this Defendant is
7 the person who committed crime. In this regard,
8 you have heard the testimony of witnesses who
9 have identified the Defendant. Identification
10 testimony is an expression of belief or
11 impression by a witness. And you must evaluate
12 the credibility of each identification witness in
13 the same way you would for any other witness.

14 You must determine not only whether the
15 witness' testimony is truthful but also whether
16 the witness' identification is accurate. In
17 considering the accuracy of the identification,
18 you should consider whether the witness had an
19 adequate opportunity to observe the offender at
20 the time of the offense. This will be affected
21 by factors such as the length of time available
22 for observation, the distance from the witness to
23 the Defendant, the lighting conditions and
24 whether the witness had the chance to see or to
25 know the person in the past.

1 You should also consider whether the later
2 identification made by the witness was the
3 product of his own recollection. This would
4 affected by the same factors listed above and
5 also the time that elapsed between the witness'
6 observation of the Defendant and his later
7 identification, whether there were any other
8 occasions on which the witness failed to make an
9 accurate identification, the strength of the
10 identification, the circumstances under which it
11 was made and any other factors that you deem to
12 be important.

13 I emphasize to you that the State must prove
14 every element of crime charged. This
15 specifically includes the burden of proving
16 beyond a reasonable doubt the identity of this
17 Defendant as the person who committed this crime.
18 If, after examining all of the evidence in this
19 case, you have a reasonable doubt as to whether
20 or not this Defendant committed the crime, you
21 must find him not guilty.

22 The Defendant is charged with armed robbery.
23 In order to convict the Defendant of armed
24 property, the State must prove five essential
25 elements each beyond a reasonable doubt. First,

1 the State must prove that the Defendant took
2 personal property from the person or presence of
3 another person. Second, the State must prove
4 that the Defendant carried the property away.
5 Third, the State must prove the Defendant
6 intended to permanently deprive the owner of the
7 property and to keep the property for the
8 Defendant's own use. Fourth, the taking away of
9 the property must have be done with violence or
10 by putting the owner of the property in fear of
11 violence. Finally, the State must prove beyond a
12 reasonable doubt that the Defendant was armed
13 with a deadly weapon during the property robbery.

14 Now, property is in the presence of a person
15 if it is within the person's reach, inspection,
16 observation or control so that the person could
17 keep possession of the property if not overcome
18 with violence or overcome by fear. The slightest
19 removal of the property or the complete
20 possession of the property even for an instance
21 by the Defendant is sufficient to show a taking
22 and a carrying away of the property.

23 A deadly weapon is any article, instrument or
24 substance that is likely to cause death or great
25 bodily harm. Whether an instrument has been used

1 as the deadly weapon depends on the facts and
2 circumstances of each case.

3 Now, Ladies and gentlemen, your verdict must
4 be unanimous. All twelve of you must agree
5 before you can write a verdict. In just a
6 second, I'm going to send you back to the jury
7 room. I'm going to ask you not yet to begin your
8 deliberations until I have had a chance to take
9 up some matters of law with the attorneys.

10 While I am doing that, I would like for you
11 all to select a foreperson to serve over the
12 jury. The job of the foreperson is to preside
13 over the deliberations and then when it becomes
14 necessary to communicate with the Court and those
15 communications will have to be in writing.

16 One of the times the jury will need to
17 communicate with me is when you have reached a
18 verdict. You will have with you in the jury room
19 the indictment. On the back of the indictment in
20 the lower left-hand corner, you see the word
21 verdict. And below that, there are four blank
22 lines. When the jury has unanimously reached a
23 verdict, the foreperson will write the verdict on
24 one of those blank lines, sign it and date it and
25 then notify the bailiff that you have a verdict.

1 And we will get you back out here into the
2 courtroom to receive the verdict. Your options
3 here are either guilty or not guilty. One of
4 those two is what the foreperson would write on
5 one of those blank lines after the jury has
6 unanimously reached a verdict.

7 Now, you will also have with you in the jury
8 room the exhibits that have been introduced into
9 evidence here. You will recall that there was an
10 exhibit introduced that was a shotgun. There
11 were also exhibits introduced that were live
12 cartridges for the shotgun, shotgun shells. I'm
13 not going to send both of them back to the jury
14 room at the same time. We will send the shotgun
15 back. We will retain the shells here in the
16 courtroom.

17 If there ever comes a time when any member of
18 jury would like to examine the shotgun shells,
19 then we will retrieve the gun and send back
20 shells. If anybody feels they need to examine
21 both of them at the same time, we will be happy
22 to do that but we will do that out here in the
23 courtroom under my supervision. The reasons for
24 that are obvious. That is a standard procedure
25 that I follow in every case that I try involving

1 a weapon.

2 What goes on in the jury room is private to
3 you. You should not disclose to anyone what goes
4 on back there including particularly whether or
5 not there had been votes taken and what are the
6 results of that vote. That is a private matter
7 that stays internal with the jury and should not
8 be revealed to anyone else.

9 I mentioned to you that you will have the
10 option of ordering lunch. It is ten minutes
11 until 12. I will let you decide whether or not
12 you want to order lunch. If you do want to, you
13 can choose between -- and these options were
14 given to us by the Clerk of Court -- Chic-fil-a,
15 Steak Out, the third option which I will confess
16 to having eliminated for you is the Beacon. If
17 you want lunch, you can pick between Steak Out
18 and Chic-fil-a. They will take up your orders
19 and have lunch here within 30 to 45 minutes
20 depending on which option you choose.

21 At this time, I'm going to send you all back
22 to the jury room except Mrs. Price. Please do
23 not begin your deliberations until I have sent to
24 you all of the exhibits and the indictment. At
25 that time, the bailiff will tell you that you may

1 began your deliberations. As soon as you pick
2 the foreperson, let us know who that is. Y'all
3 can go on back now.

4 (WHEREUPON, the jury exit at approximately
5 11:52 a.m.)

6 THE COURT: Mrs. Price, do you have anything
7 in the jury room?

8 THE JUROR: No, I do not.

9 THE COURT: Can you take Mrs. Price back here
10 in the back hallway for just a second.

11 THE BAILIFF: Sure.

12 THE COURT: Any exceptions to the charge?

13 MR. BULSA: No, sir.

14 MR. WHELCHER: None from the defense, Your
15 Honor.

16 THE COURT: Come up here and make sure you
17 agree what is the proper set of the exhibits that
18 go back to the jury. Once you have done that,
19 here is the indictment. We will put on the
20 record the identity of the foreperson and they
21 can begin.

22 MR. WHELCHER: Beg the Court's indulgence.

23 THE COURT: Certainly.

24 THE COURT: I see you have agreed on the
25 exhibits. Where is the -- you have the shells?

1 The foreman is Kirk Steinecke, number 160. They
2 have been instructed to began their
3 deliberations. We will be in recess until we
4 hear from the jury. Anything further?

5 **MR. BULSA:** Nothing from the State.

6 **THE COURT:** Any pleas you need to do right
7 now?

8 **MR. BULSA:** If you give me a few minutes to
9 check.

10 **MR. WHELCHER:** Your Honor, I want to talk
11 with Mr. Kelley for one moment.

12 (WHEREUPON, deliberations began at 12:00 p.m.)

13 (WHEREUPON, the Court resumes at approximately
14 1:32 p.m.)

15 **THE COURT:** Are you ready to proceed?

16 **MR. WHELCHER:** Yes, sir.

17 **THE COURT:** Bring in the jury.

18 (WHEREUPON, the jury enter at approximately
19 1:33 p.m.)

20 **THE COURT:** Mr. Foreman, has the jury reached
21 a verdict?

22 **THE FOREPERSON:** Yes, we have.

23 **THE COURT:** Pass the verdict to the bailiff
24 please.

25 Thank you, Mr. Nesbitt.

Verdict.

235

1 You can publish it, Tonya?

2 **THE CLERK:** I can. In the State of South
3 Carolina, County of Spartanburg, the indictment
4 2006-GS-42-5099, the State versus Raymond Thomas
5 Kelley indicted for Armed Robbery, the verdict in
6 Spartanburg County Clerk of Court's General
7 Sessions guilty signed by the foreperson dated
8 9/18/07.

9 Ladies and gentlemen of the jury, is your
10 verdict and still your verdict? If so, please
11 raise your right hand.

12 (WHEREUPON, each juror raises right hand.)

13 **THE CLERK:** So say you all.

14 **THE COURT:** All right. Pass the verdict back
15 up here.

16 Anything else before we move into sentencing,
17 Mr. Wheelchel?

18 **MR. WHELCHER:** No, sir.

19 **THE COURT:** Bring him around.

20 (WHEREUPON, the following bench conference is
21 held.)

22 **MR. WHELCHER:** Your Honor, I would make a
23 motion for new trial based on all the prior
24 objections and motions.

25 **THE COURT:** Okay. You mind putting it on the

1 record. I will come down there. You can say it
2 out loud if you want to.

3 (WHEREUPON, the bench conference is concluded.)

4 MR. WHELCHER: Your Honor, at this time, I
5 would make a motion for a new trial based on all
6 the previous motions and objections made by the
7 defense during the course of the trial.

8 THE COURT: I deny those motions.

9 MR. WHELCHER: Yes, sir.

10 THE COURT: I see you have a sentencing
11 sheet. Can you review it for the correctness of
12 the information that's in the caption and if so,
13 sign it. You can give your client a chance to
14 review it as well.

15 MR. WHELCHER: Yes, sir. (Pause.)

16 MR. BULSA: Your Honor, I have some documents
17 I would like to mark as Court's Exhibits.

18 THE COURT: All right, sir.

19 (WHEREUPON, Court's Exhibits 1 through 4 are
20 marked for identification purposes.)

21 THE COURT: Pass those exhibits up.

22 Yes, sir. He does not have to sign it if he
23 doesn't want to. The only dispute about this --
24 is there any dispute about whether or not this is
25 his second strike?

1 **MR. WHELCHER:** None.

2 **THE COURT:** The conviction from Kentucky is,
3 qualifies as a most serious offense under South
4 Carolina law?

5 **MR. WHELCHER:** I believe so, Your Honor.

6 **THE COURT:** Does he have any prior record?

7 **MR. BULSA:** He does. It is set out in the
8 documents I provided to the Court from Kentucky.
9 It sets out a second Armed Robbery from 1974, I
10 believe. A marijuana conviction, Receiving
11 Stolen Goods, then the second Armed Robbery from
12 1992.

13 **THE COURT:** The '92 Armed Robbery, where is
14 that? Here or there?

15 **MR. BULSA:** If the Court would please, the
16 indictment is for the '92 Armed Robbery.
17 Indictment number 91-CR-134 sets out the robbery,
18 sets Count 1, the facts which describe a use of a
19 weapon and the thief. In the Count 2, it is a
20 persistent felony offender from Kentucky that
21 sets out his past criminal history.

22 **THE COURT:** Which includes the armed robbery
23 from '74?

24 **MR. BULSA:** Yes, sir. Then attached to that
25 is the judgement and sentence for that 1991 Armed

1 Robbery conviction in 1992.

2 THE COURT: Okay. Anything else from the
3 State?

4 MR. BULSA: No, sir.

5 THE COURT: Do any of the victims wish to be
6 heard?

7 UNIDENTIFIED SPEAKER: No, sir.

8 THE COURT: Mr. Whelchel.

9 MR. WHELCHER: Your Honor, I have reviewed the
10 prior record with Mr. Kelley. There is no
11 question in my or his mind about the prior
12 convictions for armed robbery. Your Honor knows
13 that with Mr. Kelley being served with life
14 without parole notification that essentially a
15 trial at this point was his only option.

16 Mr. Kelley is 65. He has a son that is here.
17 He had just come down to South Carolina when he
18 was paroled on the previous armed robbery.

19 Is there anything you would like to say, Mr.
20 Kelley?

21 MR. KELLEY: Nothing except that I really put
22 forth an effort to stay out this time. I
23 couldn't get ahold of no money. I was broke only
24 half the time. I was just wanting to get back to
25 Kentucky. I just couldn't do it legally. I

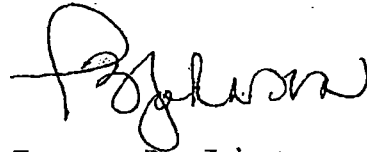
CERTIFICATE

241

1 I, the undersigned, Teresa B. Johnson, Official Court
2 Reporter for the Thirteenth Judicial Circuit of the State
3 of South Carolina, do hereby certify that the foregoing is
4 a true, accurate and complete Transcript of Record of all
5 the proceedings had and evidence introduced in the trial of
6 the captioned case, relative to appeal, in the Court of
7 General Sessions for Spartanburg County, South Carolina, on
8 the 17th and 18th days of September, 2007.

9 I do further certify that I am neither of kin, counsel
10 nor interest to any party hereto.

11
12 December 17, 2007

13 
14

15 Teresa B. Johnson

16 Official Court Reporter
17
18
19
20
21
22
23
24
25

WITNESSES

DOCKET NO.

06-GS-42-5099

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

JAN 08 2007

TERM

THE STATE
VS.

Raymond Thomas Kelley

Indictment for

ARMED ROBBERY

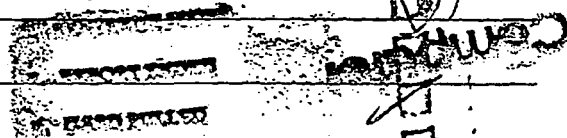
SC Code: 16-11-330 (A)

CDR Code: 139

Class FEL/A

Spartanburg County Sheriff's Office

Deputy David Turley



ARREST WARRANT NUMBER

CHECKED WARRANT

CHD-JUD SIGNATURE

K183293-7 ASSESSMENT AND
FINE CARD MADE

TRAFFIC VIOLATIONS FORM

ACTION OF GRAND JURY

Forperson of Grand Jury

Date: 12-28-06

VERDICT

GUILTY

Forperson of Petit Jury

Date: 9-18-07

240

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2007 JAN -2 AM 11:29
MARC KITCHENS

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

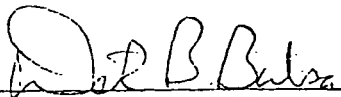
DEC 28 2006

At a Court of General Sessions, convened on _____ the Grand
Jurors of Spartanburg County present upon their oath:

ARMED ROBBERY

That Raymond Thomas Kelley did in Spartanburg County on or about November 11, 2006, did take a sum of money from Pizza A Plenty while armed with a shotgun, a deadly weapon, in violation of §16-11-330 (B), *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF
STATESpartanburg
VS
Raymond Thomas Kelley

AKA:

Race:

Sex:

Age:

DOB:

SS#:

Address:

City, State, Zip:

DL#

SID#

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

06 GS-42-5099

AAW#:

K183293

Date of Offense:

11/11/06

S.C. Code §:

16-11-330(A)

CDR Code #:

0139

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

TO:

Armed Robbery

in violation of § 16-11-330(A) of the S.C. Code of Laws, bearing CDR Code #

0139

☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory GPS (CSC
w/minor 1st or Lewd Act)☒ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

D. B. B. B. B.

Solicitor

Defendant

T. A. W. W. W.

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of days/months/years or ☐ under the Youthful Offender Act not to exceed yearsand/or to pay a fine of \$ LIFE, provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which
are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: ☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

§14-1-206 (Assessments 107.5%)

§14-1-211(A)(1) (Conv. Surcharge)

§14-1-211(A)(2) (DUI Surcharge)

§56-5-2995 (DUI Assessment)

§35.13 (Public Def/Prob)

§73.3, 1B TP (Law Enforce. Funding)

§33.7, 1B TP (Drug Court Surcharge)

§50-21-114(BUI Breath Test Fee)

§56-5-2942(J) (Vehicle Assessment)

3% to County (if paid in installments)

TOTAL

\$100

\$100

\$12

\$500

\$25

\$100

\$50

\$40/ea

\$

\$

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ beginning\$ paid to Public Defender FundOther: ☐ Appointed PD or appointed other counsel, §35.13 TP

Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

2, 1, 1, 2, 3
9/18/07

Court Reporter:

Clerk of Court/Deputy Clerk

FORM 5

STATE OF SOUTH CAROLINA

County of SpartanburgRaymond Kelley, #324064

Full name and prison number (if any) of Applicant

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2010-CP-42-4730

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River Corr. Inst., 4460 Broad River Road
Columbia, S.C. 29210
2. Name and location of Court which imposed sentence Spartanburg County
Court Of General Sessions, Spartanburg, S.C. 29306
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) 2006-GS-42-5099 - Armed Robbery
(b) _____

M. HOPE LACKEY

2010 SEP - 7 PM 2:47

FILED
CLERK OF COURT
SPARTANBURG COUNTY

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) September 17, 2007 - Life without Parole
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Conviction and Sentence Affirmed, Appeal Dismissed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. January 27, 2010
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Unpublished Opinion NO. 2010-UP-048
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2010 SEP - 7 PM 2:47
M. HOPE BLACKLEY

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance Of Trial Counsel
- (b) Ineffective Assistance Of Appellate Counsel
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Please See: Initial Brief Of Applicant, hereto affixed
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? N/A
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
- (d) any other petitions, motions or applications in this or any other Court? N/A
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

FILED
CLERK OF COURT
SPARTANBURG COUNTY

2010 SEP -7 PM 2:47
M. HOPE BLANKLEY

(c) the disposition thereof:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(d) the date of each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. N/A
- ii. N/A
- iii. N/A

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. N/A
- iii. N/A

M. HOPE BLACKLEY

2010 SEP - 7 PM 2:47

SPARKMANBURK COURT

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) First time raised - First Opportunity
 (b) _____
 (c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? No
 (b) your trial, if any? Yes
 (c) your sentencing? Yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
No

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:
 i. Rich Wheelchely, Esq. from the Spartanburg County Public Defender's Office, Spartanburg, S.C. 29304
 ii. Michelle Robinson, Esq. of the Division of Appellate Defense in Columbia, S.C. 29211
 iii. _____
 (b) the proceedings at which each such attorney represented you:
 i. Trial and Sentencing
 ii. Appeal
 iii. _____

SPARTANBURG COUNTY
 2010 SEP - 7 PM 2:47
 M. HOPE BLACKLEY

19. State clearly the relief you seek in filing this application:

Conviction and/or Sentence should be vacated or
Reversed and remanded; possibly for resentencing

20. Are you now under sentence from any other court that you have not challenged?

STATE OF SOUTH CAROLINA)

County of Spartanburg)

VERIFICATION

I, Raymond Kelley, #324064, 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.

Raymond Kelley #324064

SWORN to and subscribed before me this 15
 day of July, 2010.

Susan J. Johnson (L.S.)
 Notary Public

My Commission Expires: My Commission Expires
March 5, 2018

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2010 SEP - 7 PM 2:47
 M. HOPE BLACKLEY

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Raymond Kelley #324064, 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.

Raymond Kelley #324064
Applicant

SWORN or affirmed to and subscribed before me this

05 day of July, 2010.

Susan J. Johnson
Notary Public

My Commission Expires: _____ My Commission Expires
March 5, 2018

CLERK OF COURT
SPARTANBURG COUNTY
2010 SEP -7 PM 2:47
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

COUNTY OF SPARTANBURG)

2010-CP-42-4730

Raymond Kelley, #324064,)

Applicant,)

v.)

RETURN

State of South Carolina,)

Respondent.)

In response to the post-conviction relief application filed on September, 2010, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the January 2007 term of General Sessions for armed robbery (07-GS-42-5099). Richard H. Whelchel, Esquire, represented the Applicant. On September 18, 2007, the Applicant was convicted of the charge by a jury. The Honorable John C. Few sentenced the Applicant to confinement for life, pursuant to S.C. Code Ann. §17-25-45(A) (1976).

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. An Anders brief was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence in State v. Kelley, Op. No. 2010-UP-048 (filed January 27, 2010). The Remittitur was returned on February 12, 2010.

For the purpose of this Return, the Respondent incorporates the trial transcript, the Clerk of

Court records, and the South Carolina Department of Corrections' records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel, in that;
 - a. Counsel failed to move to dismiss the invalid armed robbery indictment;
 - b. Counsel failed to request a Blair hearing or obtain an independent mental evaluation,
 - c. Counsel allowed prior convictions to be used to enhance sentence to life without parole,
 - d. Counsel failed to object to the State's failure to provide written notice to Applicant of the intent to see a sentence of life without parole,
 - e. Counsel failed to investigate, research, and prepare for trial.
2. Ineffective assistance of appellate counsel, in that;
 - a. Appellate counsel failed to argue the identification issue, and
3. Subject matter jurisdiction, in that;
 - a. The trial court's "constructive amendment" to the armed robbery indictment removed the court's jurisdiction to enter a conviction and sentence against Applicant.

III.

Respondent asserts that the Applicant's allegation of ineffective assistance of trial counsel is without merit. Respondent asserts that the Applicant's attorney rendered effective assistance well within the standard of reasonableness within professional norms for a criminal defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668, 104 S. Ct. 2052. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland v. Washington. 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, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The allegation that appellate counsel was ineffective is without merit. Respondent contends that the Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that

appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. Id. Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland v. Washington test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

The Applicant has claimed that the trial court lacked subject matter jurisdiction due to a "constructive amendment" to his indictment. Defects in the indictment do not affect subject matter jurisdiction. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); See also U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002). The indictment is a notice document, and any challenges to its

sufficiency must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). See also S.C. Code § 17-19-20 (2003). Subject matter jurisdiction is the power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. See Gentry, 363 S.C. 93, 610 S.E.2d 494; Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994).

In post-conviction relief, an Applicant wishing to raise challenges to the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, basically alleging that his trial counsel failed to properly move to quash the indictment in accordance with S.C. Code Ann. § 17-19-90 (2003). A claim of this nature is subject to the procedural bars in the Uniform Post-Conviction Procedure Act – notably the statute of limitations and successiveness. See S.C. Code §§ 17-27-45, -90 (2003).

An Applicant may still challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), overruled in part by Gentry, 363 S.C. 93, 610 S.E.2d 494. However, “[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters.” Gentry, 363 S.C. at 101, 610 S.E.2d at 499; See also S.C. Const. Art. V, § 7. Thus, Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. Applicant’s conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction.

VI.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VII.

WHEREFORE, the Respondent requests an evidentiary hearing.

Respectfully submitted,

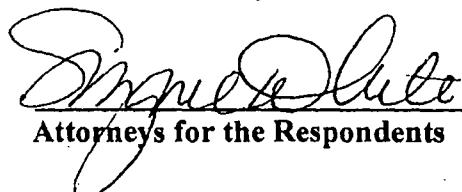
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Attorney General

By:



Attorneys for the Respondents

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

April 19, 2011.

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF COMMON PLEAS
3
4 Raymond Kelly,)
5) TRANSCRIPT OF RECORD
6) 2010-CP-42-4730
7 -vs-)
8 The State,)
9)
10) April 3, 2012
11) Spartanburg, South Carolina
12 Respondent.)

11 B E F O R E:

12 HONORABLE J. DERHAM COLE, JUDGE
13
14

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

16 DAVID C. ALFORD, ESQ.
17 Attorney for the Applicant

18 SUZANNE H. WHITE, ESQ.
19 Attorney for the Respondent
20
21
22

23 Margaret A. Woods
24 Circuit Court Reporter
25

ORIGINAL

INDEXWITNESSESPAGE

RAYMOND KELLY

Direct examination by Mr. Alford

5

Cross-examination by Ms. White

13

RICHARD H. WHELCHER

Direct examination by Mr. Alford

16

Cross-examination by Ms. White

19

Certificate of reporter

23

MOTIONS AND MATTERS

1 THE COURT: Alright, Raymond Kelly.

2 MS. WHITE: Your Honor, this is Raymond Kelly vs. the
3 State 2010-CP-42-4730, he's represented today by David Alford.
4 Mr. Kelly was indicted January 2007 for armed robbery,
5 proceeded to trial and was convicted, received a sentence of
6 life without parole from Judge Few on September 18th 2007, an
7 Anders brief was filed on his behalf on appeal, sentence was
8 affirmed. He filed his application September 2010 alleging
9 various allegations of ineffective assistance of counsel,
10 ineffective assistance of appellate counsel and subject matter
11 jurisdiction and he's represented today by David Alford so I
12 can turn it over to him at this point.

13 MS. ALFORD: Thank you, Your Honor. As a preliminary
14 matter there is an initial brief of applicant filed by
15 Mr. Kelly, it should be with the PCR, it it sets out as best I
16 can determine eight issues, the the and I'm just gonna cover
17 'em and then we can have Mr. Kelly testify to those that are
18 necessary. Number -- first, he's challenging the aspiration
19 element in his indictment ---

20 THE COURT: Tell me where you're reading from.

21 MS. WHITE: That should be attached to the application,
22 Your Honor. He attached a brief to his application.

23 MR. ALFORD: I don't know if it went in with the
24 application or if it was filed shortly thereafter. Do you
25 need that, Your Honor?

MOTIONS AND MATTERS

1 THE COURT: Let me see if it's in that one. See if it's
2 in there. What you got?

3 MR. ALFORD: It's not in there, it's not thick enough.
4 Oh, wait a minute, Your Honor, here, I think this is it.

5 MS. WHITE: Yeah, it should be the handwritten ---

6 MR. ALFORD: This (indicating) is it.

7 MS. WHITE: --- thing that's attached to the back of the
8 application.

9 MR. ALFORD: This appears to be it front and ---

10 MS. WHITE: Yeah.

11 MR. ALFORD: --- and back, ---

12 MS. WHITE: Yes.

13 MR. ALFORD: --- it just has a different cover to it.

14 THE COURT: Okay.

15 MR. ALFORD: This one came with a cover and it looks like
16 you're pickin' up on page 2. Thank Your Honor. The that the
17 first issue raised and these are set out in the the various
18 arguments is the aspiration element of the indictment. He is
19 challenging the fact that he should have been subject to a
20 Blair evaluation or that it was insufficient for his mental
21 capacity. The issue of the prior conviction bein' introduced
22 or bein' taken into consideration by the Court on the
23 sentencing, he challenges the lack of a written notice of life
24 without opportunity of parole. He has challenged the
25 constructive amendment of his indictment at trial. With

RAYMOND KELLY - DIRECT EXAMINATION BY MR. ALFORD

1 respect to the preparation for trial, he has identified the
2 lack of investigation of his potential witnesses for the or at
3 trial by his trial counsel, he's a - he's attacked the the
4 efficiency of his or the the ineffectiveness of trial counsel
5 at trial and the appellate counsel, especially with respect
6 again to the issues on the potential witnesses he would have
7 had if they had been called or properly investigated and does
8 not believe the Rule 5 request for discovery was adequate by
9 trial counsel. Those are the issues as I identified 'em in
10 the initial brief of the applicant talkin' to Mr. Kelly last
11 time he was up here and I call Mr. Kelly as a witness.

12 THE COURT: Okay.

13 MR. ALFORD: Mr. Kelly, if you would ---

14 (Whereupon, the applicant came forward.)

15 RAYMOND KELLY, having been first
16 duly sworn, testified as follows:

17 THE BAILIFF: Have a seat right here (indicating), sir.

18 THE APPLICANT: Over there (indicating)?

19 THE BAILIFF: Yes.

20 DIRECT EXAMINATION BY MR. ALFORD:

21 Q. Mr. Kelly, I stated for the Court I believe the issues
22 you've raised in your PCR, is that what you recall? is that
23 correct?

24 A. Yes, sir.

25 Q. Okay.

RAYMOND KELLY - DIRECT EXAMINATION BY MR. ALFORD

1 MR. ALFORD: Your Honor, a few of these issues are legal
2 in nature, I don't know that that testimony is is sufficiently
3 or or it would be necessary to put 'em before the Court. If
4 the Court wants the the testimony, for example, the issue of
5 aspiration in the indictment, I think it would speak for
6 itself. Uh, ---.

7 THE COURT: Asportation?

8 MR. ALFORD: Asportation. I'm sorry, Your Honor. So we
9 can have Mr. Kelly, ya know, restate his argument but I think
10 his argument is set out in his petition and I just wanted to
11 clarify with Mr. Kelly that that was an issue raised as far as
12 the defect in your indictment, is that correct, Mr. Kelly?

13 THE APPLICANT: That was one of 'em yes, yes, sir.

14 BY MR. ALFORD:

15 Q. Tell me about your concern about the mental evaluation or
16 the state of your men -- of your mental competency at the time
17 you were set for trial.

18 A. Well at the time I I had been, I was on parole and they
19 changed my a parole officers, uh, and I was stayin' with my
20 son and he had just got off parole also and the new parole
21 officer was real concerned about that arrangement but I didn't
22 have no other place to go, I didn't have no money and I I'm
23 from Kentucky and I was tryin' to get back to Kentucky. I
24 knew I'd done worn my welcome out at my son's house. I I just
25 thought -- I just had -- finish, let me go back and I'd make

RAYMOND KELLY - DIRECT EXAMINATION BY MR. ALFORD

1 parole from Kentucky after doin' 17 years ---

2 THE COURT: Did you understand Mr. Alford's question.

3 THE APPLICANT: I'm not sure that I did.

4 THE COURT: Ask it again.

5 BY MR. ALFORD:

6 Q. Mr. Kelly, you have raised your mental competency for
7 trial and I'm, and I'm asking you what happened prior to
8 trial that you don't feel that or or why you've raised your
9 mental competency, what's called a "Blair hearing," why did
10 you raise that as an issue?

11 A. Because some of it I don't understand, you know, and,
12 uh, I ---

13 Q. And at the time a your trial were you under any
14 medications?

15 A. At the time of the trial?

16 Q. Yes, sir.

17 A. No, sir.

18 Q. Okay, have have -- why do you think you should have had a
19 mental evaluation prior to your trial?

20 A. Due to the fact that that I could've wound up with life
21 without parole so, uh, and I didn't realize that, I didn't
22 know that, you know. Uh, ---

23 Q. Have ya ever been diagnosed with any mental disorders?

24 A. Nothing except bein' nervous. I had a nerve problem so
25 yes. Uh, ---

RAYMOND KELLY - DIRECT EXAMINATION BY MR. ALFORD

1 Q. Okay. Mr. Kelly, I'm gonna move to issue number 3. You
2 raise that trial counsel was ineffective because they allowed
3 your prior convictions, what you refer to as your Kentucky
4 sentencing to be used, now had that been discussed with you?
5 You gotta answer yes or no or ---

6 A. They never, it never been discussed no, sir.

7 Q. Okay. How did you -- when did you first find out that
8 your Kentucky convictions were gonna be considered by the
9 Court?

10 A. The day I went to court, ---

11 Q. Okay.

12 A. --- the the day I received a sentence.

13 Q. Okay, did you ever discuss that with your trial counsel
14 prior to court?

15 A. No, sir.

16 Q. Okay. Do ya know if your trial counsel made any
17 objections to the introduction of your Kentucky sentencing?

18 A. I don't believe he did. I I expected him to to object to
19 a whole lotta things that he, that he never did object to and
20 I I wondered about it and I, and I asked him about it a time
21 or two and he shrugged it off.

22 Q. Okay. Your, one of the issues that you're raising is
23 your sentence of life without parole; how did you or when did
24 you first learn of that as a sentencing? Had you been
25 provided any notice of it prior to trial?

RAYMOND KELLY - DIRECT EXAMINATION BY MR. ALFORD

1 A. I didn't know it until I was sentenced to life without
2 parole. I didn't, I didn't know that it's, um, know the
3 sentence for the, for the crime that I was charged with.

4 Q. Okay. So your testimony is you never received any type
5 notice from the State or through your trial counsel that life
6 without parole was a possibility?

7 A. Right, ---

8 Q. Okay.

9 A. --- yes, sir.

10 Q. And issue 5 deals with the constructive amendment of the
11 armed robbery indictment as to the judge's instruction. I
12 don't know that there's any factual testimony, Your Honor,
13 we'll we'll leave that as a question of law. Okay, you've
14 raised ineffective assistance of your counsel at trial; tell
15 me about the issue of the other potential witnesses or the
16 other persons involved. Why do you feel they would have been
17 important?

18 A. Other people involved in ---

19 Q. Yeah, who who would you have wanted to have your trial
20 counsel bring to trial?

21 A. I don't think anybody else was involved. I don't, I
22 don't remember, uh, I don't remember makin' that statement.
23 Uh, ---

24 Q. Okay, you raise an issue about to eyewitnesses that the
25 State relied upon at your trial but but you're concerned

RAYMOND KELLY - DIRECT EXAMINATION BY MR. ALFORD

1 because your trial counsel did no investigation of them?

2 A. Oh, I understand now that ---

3 Q. Okay, can you explain to the Court what issue you're
4 raising or what your concern is.

5 A. I mean, I I thought I should've been notified who who was
6 gonna testify against me and why they was gonna testify
7 against me and like I said, I didn't know these people.

8 Q. Did you discuss these eyewitnesses with your trial
9 counsel?

10 A. At the time that's the on -- that's the only chance that
11 I had that at the trial itself. It -- we're talkin' about it
12 right now, I've I've asking about it then, you know.

13 Q. Okay, you do not -- you did not have a conversation with
14 trial counsel prior to trial about the witnesses against
15 you?

16 A. If I did I don't remember it, you know, I'll I'll put it
17 that way. Was was such a light conversation that I don't, I
18 don't remember.

19 Q. One of your issues you raise dealt with on your appeal;
20 do you recall the appeal you had from ---

21 A. It ---

22 Q. --- trial?

23 A. I don't ---

24 Q. Okay, you raise an issue that the identification should
25 have been raised on appeal; do you recall the facts

RAYMOND KELLY - DIRECT EXAMINATION BY MR. ALFORD

1 surrounding that, that you're talkin' about here in in your
2 submittal that you're challenging the fact that they could
3 have identified you as the, as the person responsible and
4 you're concerned because that was not raised on appeal.

5 A. What is your question again, sir? I'm not ---

6 Q. Okay, do you -- can you tell the Court what you're tryin'
7 to seek here, what your issue is.

8 A. I'm not sure, I'm not sure that I I understand what the,
9 what the -- what's goin' on. Uh, ---

10 Q. Do you recall how the witness, Angel, think it's
11 Michael Angel, identified you as the -- at the crime scene?
12 Do you recall that?

13 A. I re -- I remember somebody identifyin' me.

14 Q. You don't remember the name a that witness?

15 A. No, sir. See, I was drinking that night and the pictures
16 that showed up in my trial show a shotgun layin' in the front
17 sheet of that Ch -- that old Chevrolet truck with a can of
18 beer, there was beer cans all over the floor and a Whiskey
19 bottle and there -- and and the the arresting officer said I
20 wasn't drinkin'. He he knew I was drunk ---

21 Q. Okay.

22 A. --- or close to it. He he's already told me if if we
23 didn't get ya for armed robbery we we coulda surely got ya for
24 bein' drunk, he he made that statement at the time, you know,
25 and that but he, but he told it in trial that I wasn't

RAYMOND KELLY - DIRECT EXAMINATION BY MR. ALFORD

1 drinkin'.

2 Q. Okay, but one of the the issues you're raisin' in your
3 brief is that the appellate counsel in filing your appeal
4 should have also raised as an issue the reliability or the
5 basis for the identification of you. Is -- I mean, that's
6 that's -- just wanted to cover that with you and if I
7 understand it you're -- you put in your brief that they did
8 not raise that on appeal, ---

9 A. Right.

10 Q. --- and you believe they should have.

11 A. Right.

12 Q. Okay. Is there anything else you'd like to tell this
13 court?

14 A. Yes. Yes, sir, there is. The arresting officer said,
15 uh, said it's, Oh, it's not as bad as it looks, like I said, I
16 can probly get you 7 years, I can get you over to the trustees
17 armed annex building and he said most probly get you 7 or 8
18 years, I've done it before and but I would like you to be my
19 snitch and you help me, I'll help you more or less, you know,
20 and I couldn't believe that. I done, I done time in Kentucky
21 and in the federal place where that is real dangerous, that's
22 dangerous bein' a snitch. I've seen people killed for that
23 and and he said it so off the wa -- just like it was every day
24 thing, you know, that, I mean, he wasn't he he was not carin'
25 at all about ---

RAYMOND KELLY - CROSS-EXAMINATION BY MS. WHITE

1 Q. Did did did ---

2 A. --- about me.

3 Q. --- if I understand your testimony you did not become a
4 snitch.

5 A. Sir?

6 Q. You did not become a snitch. Do you feel that prejudiced
7 you at trial?

8 A. I think that's why I asked, I think that's the main
9 reason I wound up with life without parole.

10 Q. Okay. And was that person who told you that did they,
11 did they appear as a witness at your trial, ---

12 A. The person that told me that, right.

13 Q. --- that asked you to be a snitch?

14 A. Right.

15 Q. Did that person testify at trial?

16 A. I'm almost sure, right. I believe he did, yes.

17 Q. Okay. Please answer any questions of Ms. white.

18 CROSS-EXAMINATION BY MS. WHITE:

19 Q. Just a couple questions. Mr. Kelly, you said that you
20 never got notice of the life without parole option?

21 A. Yes, sir -- yes, ma'am.

22 Q. Okay, so your counsel never talked with you about that
23 when he received that?

24 A. No, sir, I I -- no, ma'am, I I don't believe so no,
25 ma'am, ---

RAYMOND KELLY - CROSS-EXAMINATION BY MS. WHITE

- 1 Q. Okay.
- 2 A. --- he never mentioned it.
- 3 Q. Did he talk with you when they made, the State made a
- 4 plea offer to you?
- 5 A. He told, he he told me that they would offer between, I'm
- 6 almost sure now, it's been a good while and like I said my
- 7 memory's not that good, I certainly don't intend to tell any
- 8 lies here on the stand but I could say somethin' that might, I
- 9 could be mistaken about but I think I'm right, he's, I'm
- 10 almost sure he said between 15 and 30 years is what the offer
- 11 will be and I said, Well, which one will it be, he said, We're
- 12 not gonna let you know that until you, until you take the
- 13 deal. Well I know which one it's gonna be if I take the deal,
- 14 it's gonna no no doubt be 30 years which is a life sentence
- 15 anyway. Ya know I'm 64-years-old at the time, 30 years, you
- 16 know, I'm not, I'm not gonna live to be 94 or or if I do, I
- 17 got Alzheimer's disease and won't know whether I'm out, in or
- 18 out anyway.
- 19 Q. And you said that was a life sentence anyway so did ---
- 20 A. Yes.
- 21 Q. --- you know that if you didn't take the deal that you
- 22 were facin' potentially life?
- 23 A. Yes, ma'am. Yes, ma'am.
- 24 Q. Okay. And you you said you had previously served time in
- 25 Kentucky for armed robbery, is that right?

RAYMOND KELLY - CROSS-EXAMINATION BY MS. WHITE

1 A. Yes, ma'am.

2 Q. Alright, and had you ever told your counsel that you
3 thought you might need a mental evaluation before your
4 trial?

5 A. I assumed we would get -- I would get one, in Kentucky
6 that you automatically get one and I I assumed it, I I don't
7 know. I didn't know nothin' about the difference in the laws
8 between Kentucky and South Carolina.

9 Q. Okay, but you didn't a -- you didn't tell counsel that
10 that ya needed, you thought you had some issues with your
11 competency or anything.

12 A. If I did I don't remember it. I could have but like I
13 said I'm not gonna lie and say that I remember back that far
14 and and it -- I may have said it, I may not have said it, I
15 don't know, ---

16 Q. Okay.

17 A. --- I should've said it I'll put it that way.

18 Q. Okay. And you said you don't remember if you talked with
19 counsel about the witnesses that were gonna testify against
20 you; did you meet with him before the trial at all?

21 A. He had come to, he come over to the annex building the
22 and talked talked with me a time or two usually about
23 accepting plea bargain, yes.

24 Q. Okay. Did he talk with you when he talked with you about
25 the plea bargain about what the State was gonna be put --

RICHARD H. WHELCHER - DIRECT EXAMINATION BY MR. ALFORD

1 puttin' on as evidence against you at the trial if ya didn't
2 take the plea?

3 A. If he did I don't remember it.

4 Q. Okay.

5 MS. WHITE: Alright, I think that's all I have at this
6 time, Your Honor.

7 MR. AFFORD: Uh, uh, ---

8 THE COURT: You wanna ask him anything else?

9 MR. ALFORD: --- no no redirect, Your Honor.

10 THE COURT: You may step down.

11 (Whereupon, the applicant left the stand.)

12 MR. ALFORD: I'll call Mr. Whelchel.

13 RICHARD H. WHELCHER, having been
14 first duly sworn, testified as follows:

15 DIRECT EXAMINATION BY MR. ALFORD:

16 Q. Mr. Whelchel, where were you workin' when you were
17 assigned or or represented Mr. Kelly?

18 A. Spartanburg County Public Defender's Office.

19 Q. Okay. And as to the the State's eyewitnesses, I believe
20 there were two, and I got a copy of your file from from your
21 office and I do not see anything in in the file concerning any
22 investigation on the State's witnesses or any other
23 eyewitnesses; is is the file complete and accurate or how
24 would that be annotated?

25 A. When I contact the witnesses, if they tell me something

1 that's different from what's in their statements, there would
2 be notes made of that. If there's nothing that contradicts
3 what they say that I'll be able to use at the trial then there
4 won't be any notes made. If there's no notes in there then
5 they didn't tell me anything when I contacted them that would
6 conflict with what was in their statements or what was in the
7 incident reports.

8 Q. Okay. Did you have any discussions with Mr. Kelly as to
9 his mental being?

10 A. Yes, sir.

11 Q. Can you tell us what you recall from that.

12 A. When I talked to Mr. Kelly, I asked him, when he fills
13 out, when the defendant or our client is initially interviewed
14 by our people, sometimes they will put things in there about
15 their mental capacity and that reflected that he had a stroke
16 several years before that and I asked Mr. Kelly if the fact
17 that he had a stroke had affected his mental capacities and I
18 asked him if he thought it was necessary for us to have a
19 *Blair* or a mental health evaluation made to determine whether
20 or not he was able to understand right from wrong and in
21 addition whether or not he was capable of assisting in his
22 defense and based on my conversation with Mr. Kelly, his
23 responses to me and our review of the case before we went to
24 trial I didn't think it was necessary to have a *Blair* hearing.
25 He was able to understand what we reviewed in the discovery

RICHARD H. WHELCHER - DIRECT EXAMINATION BY MR. ALFORD

1 and what the people were saying about him and how they could
2 charge him with armed robbery. I asked him, he said he didn't
3 think it was necessary, I agreed with him. If I'da thought it
4 was necessary, I would've requested a mental health
5 evaluation.

6 Q. Can you tell us what discussions you had with Mr. Kelly
7 concerning his prior convictions.

8 A. When the case came up on the trial docket and maybe even
9 before then when I get the discovery and talk to my client the
10 first time about the discovery, we go over his prior record
11 'cuz that's included in the discovery and I have to confirm
12 with him whether or not he has prior convictions for armed
13 robbery and when we got notified that this was going to be a
14 life without parole case, I talked to him him again when we
15 reviewed the discovery of his prior armed robbery convictions.

16 Q. Well talkin' about the life without parole is there any
17 written notice you're aware of that was provided to
18 Mr. Kelly?

19 A. I asked Mr. Kelly if he had been informed that he was, he
20 was going to be tried as a life without parole case, he in --
21 he indicated to me that he had. I know that I had been
22 informed already, that's why I went up there.

23 Q. Okay, do you know if there's anything in your file that
24 would show a written notice?

25 A. In my file?

RICHARD H. WHELCHER - CROSS-EXAMINATION BY MS. WHITE

1 Q. Yes.

2 A. For him?

3 Q. Yes.

4 A. No, sir. I don't take their notice from them, I just
5 will keep my notice.

6 Q. Did did you keep your notice?

7 A. I believe so, yes.

8 Q. Okay. Did you review the the indictment for the element
9 of asportation?

10 A. I reviewed the indictment and the all of the discovery
11 with Mr. Kelly and with about everybody, you know, that that's
12 goin' to trial. I don't recall whether or not we talked about
13 the asportation element or not.

14 Q. Okay. Please answer any questions of Ms. White.

15 MS. WHITE: Thank you.

16 CROSS-EXAMINATION BY MS. WHITE:

17 Q. And you should've gotten, if I can I'm gonna approach,
18 does this (indicating) look like, without your glasses I know,
19 can you see that? Does that look -- can you tell me what that
20 looks like?

21 A. That's notice of life sentence pursuant to Section
22 17-25-45(A) ---

23 Q. Okay.

24 A. --- the life without parole notice.

25 Q. Okay, and that was filed August 16th 2007 with the

RICHARD H. WHELCHER - CROSS-EXAMINATION BY MS. WHITE

1 clerk's office.

2 A. Yes, ma'am.

3 Q. And this trial was held September 2007?

4 A. Yes, ma'am.

5 Q. And page 238 of the the record on appeal during
6 sentencing you reviewed with the Court, you actually said you
7 reviewed his prior record with Mr. Kelly, no question about
8 the prior convictions, Your Honor knows that with him bein'
9 served with a life without parole, trial was the only option,
10 do you recall that?

11 A. Yes, yes, ma'am.

12 Q. So at that point you had talked with him about that and
13 felt confident that he knew that's what he was facing?

14 A. We had received a plea offer from Mr. Bulsa. If I
15 remember correctly the offer was he could plea to a 20-year
16 sentence or he can go to trial for life without parole. When
17 I told Mr. Kelly that, he said, At my age pleading to a 20-
18 year sentence is a life sentence anyway so I'm gonna go to
19 trial. Before we actually had the trial Judge Few called us
20 back, myself and Mr. Bulsa, in chambers and wanted to know if
21 this was possible to be worked out, if if the State had made
22 an offer and I said, Well they've they've offered 20 years, my
23 client is 65-years-old, uh, 20 years on an armed robbery,
24 Judge Few said, Well that's an offer and then we went to
25 trial.

1 Q. Okay, and you said that you went over the prior record
2 with him when he got discovery; did you feel like he
3 understood the witnesses that -- and evidence that was gonna
4 be presented against him?

5 A. Yes, ma'am.

6 Q. So his his choice to go to trial was knowing what he was
7 gonna face at trial and what witnesses were gonna testify
8 against him?

9 A. Yes, ma'am.

10 Q. Okay.

11 MS. WHITE: That's all the questions I have this time,
12 Your Honor.

13 MR. ALFORD: No redirect, Your Honor.

14 THE COURT: Step down.

15 (Whereupon, the witness left the stand.)

16 MR. ALFORD: Petitioner rests, Your Honor.

17 MS. WHITE: And the State has no witnesses, Your Honor.

18 THE COURT: I'll read the record and issue an order.

19 MR. ALFORD: Thank you, Your Honor.

20 MS. WHITE: Thank you, your Honor.

21 MR. ALFORD: Judge, Your Honor, can I just put one thing
22 on the record, please?

23 THE COURT: Sure.

24 MR. ALFORD: I have reviewed the ---

25 THE COURT: Oh, I'm sorry, you, did you have some legal

MOTIONS AND MATTERS

1 arguments you wanted to make ---

2 MR. ALFORD: I I ---

3 THE COURT: --- in addition to the testimony?

4 MR. ALFORD: --- I just wanted to -- yes, sir.

5 THE COURT: Okay.

6 MR. ALFORD: That Mr. Kelly has submitted, I think the
7 Court saw his initial brief in there, I just wanted to put on
8 record I have researched the issues he has raised, legally I
9 have no other cases to introduce to the Court on our behalf.

10 THE COURT: Okay.

11 MS. WHITE: The State has nothing, Your Honor.

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 CERTIFICATE OF REPORTER

2
3 I, Margaret A. Woods, Court Reporter in and for the State
4 of South Carolina at Large, hereby certify that I reported the
5 preceding case on April 3, 2012 at the time and place
6 heretofore set forth; and that the foregoing pages numbered
7 from 3 through 22, inclusive, constitute a true and accurate
8 transcription of my stenographic notes of the said proceeding.

9 I further certify that I am neither attorney nor counsel
10 for, nor related to or employed by any of the parties
11 connected to the action, nor am I financially interested in
12 the action.

13 August 25, 2012

14
15 Margaret A. Woods

16 Margaret A. Woods, Court Reporter
17 in and for the State of South Carolina at Large.
18
19
20
21
22
23
24
25

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Raymond Kelley, #324064,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2010-CP-42-4730

Rec'd
6/20/11 *A*

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed September 7, 2010. The Respondent made its Return on or about April 20, 2011. An evidentiary hearing into the matter was convened on April 3, 2012, at the Spartanburg County Courthouse. The Applicant was present and represented by David C. Alford, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Richard H. Whelchel, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the trial transcript, and Applicant's appellate records.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the January 2007 term of General Sessions for armed robbery (07-GS-42-5099). Richard H. Whelchel, Esquire, represented the Applicant. On September 18, 2007, the Applicant was convicted of the charge by a jury. The Honorable John

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 JUN 15 AM 11:44
M. HOPE BLACKLEY

C. Few sentenced the Applicant to confinement for life, pursuant to S.C. Code Ann. §17-25-45(A) (1976).

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. An Anders brief was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence in State v. Kelley, Op. No. 2010-UP-048 (filed January 27, 2010). The Remittitur was returned on February 12, 2010.

ALLEGATIONS

In the current application, the Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel, in that;
 - a. Counsel failed to move to dismiss the invalid armed robbery indictment,
 - b. Counsel failed to request a Blair hearing or obtain an independent mental evaluation,
 - c. Counsel allowed prior convictions to be used to enhance sentence to life without parole,
 - d. Counsel failed to object to the State's failure to provide written notice to Applicant of the intent to see a sentence of life without parole,
 - e. Counsel failed to investigate, research, and prepare for trial.
2. Ineffective assistance of appellate counsel, in that;
 - a. Appellate counsel failed to argue the identification issue, and
3. Subject matter jurisdiction, in that;
 - a. The trial court's "constructive amendment" to the armed robbery indictment removed the court's jurisdiction to enter conviction and sentence against Applicant.

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2012 JUN 15 AM 11:44
 M. HOPE BLANKENHORN

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).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCF). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, *Id.* The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under the first prong, attorney performance is measured by its "reasonableness under professional standards." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (*citing* Strickland).

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 JUN 15 AM 11:46
M. HOPE BLACKBERRY

The Applicant first claims that Counsel was ineffective for failing to object to the defective indictment. Applicant testified that the indictment was invalid because it failed to alleged the common law element of "asportation." However, the record reflects that the indictment stated that the Applicant "did take a sum of money from Pizza A Plenty while armed with a shotgun." The word, "asportation," is defined as "[t]he act of carrying away or removing (property or a person)." Black's Law Dictionary (9th ed. 2009). The Applicant offered no testimony or evidence to support his claim of ineffectiveness, other than the initial allegation raised in the application. This Court also finds that this allegation lacks merit. Therefore, this Court finds that the Applicant failed to meet his burden of proof as to this claim and it is denied and dismissed.

The Applicant also alleged that Counsel was ineffective for failing to request a Blair hearing or obtain a mental evaluation. Applicant testified that he does not understand some things and had been diagnosed as nervous, but was not on any medication at the trial of the trial. Additionally, although Applicant testified that he never asked Counsel to request an evaluation, he testified that he assumed that he would be evaluated because in Kentucky, where he previously lived, one automatically is evaluated. Counsel testified that he talked with the Applicant about his mental state because the Applicant mentioned previously having a stroke and would have requested a Blair hearing if he thought it was necessary. Counsel testified that after discussing the matter neither he nor the Applicant thought an evaluation or Blair hearing was necessary. An Applicant claiming that trial counsel was ineffective in failing to pursue this defense "must produce some evidence of insanity or showing that with the exercise of due diligence, an insanity defense could have been developed." Jeter v. State, 308 S.C. 230, 233-34, 417 S.E.2d 594 (1992). The Applicant must show that he was "unable to distinguish moral or

FILED
CLERK OF COURT
SPRINGFIELD COUNTY
2012 JUN 15 AM 11:44
M. HOPE BLACKLEY

legal right from wrong and to recognize the particular act charged as morally or legally wrong." This Court finds that other than his initial allegation and testimony that he thought he would get an evaluation, the Applicant failed to offer any testimony or evidence to support his claim and this claim is therefore denied and dismissed.

Applicant alleged that Counsel was ineffective for failing to object to the Applicant's prior conviction in Kentucky being used to enhance his sentence in South Carolina. Applicant testified that Counsel never discussed with Applicant the fact that those convictions would be used. Counsel testified that he reviewed all of the discovery materials with the Applicant and discussed the Applicant's prior record with him to confirm the prior conviction. This Court notes that the record reflects that Counsel indicated to the court that he and the Applicant had reviewed the Applicant's prior record, which played a part in his decision to proceed to trial rather than plead guilty. (ROA p. 238). This Court finds that this allegation lacks merit and is directly refuted by the record. Therefore, this claim is denied and dismissed.

Applicant also claimed that Counsel was ineffective for failing to object to the State providing written notice to Applicant of their intent to seek a sentence of life without parole. Applicant testified that he did not know until trial that he was facing a sentence of life without parole. However, Applicant testified that he was aware of the State's offer to allow him to plead to a range of fifteen to thirty years, but Applicant testified that since thirty years would be a life sentence to him, he chose not to plead guilty. Counsel testified that the State offered the Applicant a plea to twenty years or indicated that they would seek life without parole if he proceeded to trial and after discussing with the Applicant, Applicant expressed that he would serve life no matter what because of his age, so he wished to proceed to trial. Counsel also testified that he was served with written notice that the State intended to seek a sentence of life

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 JUN 25 AM 11:44
M. HOPE BLASKEY

without parole and made sure with the Applicant that the Applicant had been served with notice as well. This Court notes that the record reflects that Counsel indicated to the court that the Applicant had been served with written notice. (ROA p. 238). Again, this Court finds that this allegation lacks merit and is directly refuted by the record. It is therefore denied and dismissed.

Applicant also claimed that Counsel was ineffective for failing to investigate and prepare for the case fully; in particular as to the witnesses the State was planning on presenting. Applicant testified that he did not know prior to trial who would be testifying against him and only talked with Counsel about witnesses at the time of trial. Applicant testified that he did meet with Counsel a couple of times prior to trial to discuss the plea offer, but did not remember if they ever discussed the evidence against him or potential witnesses. Counsel testified that he reviewed all of the discovery materials with the Applicant, including witness statements and the incident report. This Court finds that Counsel met with the Applicant and discussed the case with the Applicant thoroughly, including what witnesses would potentially testify for the State. In addition, this Court notes that Counsel requested a Jackson v. Denno hearing and a pre-trial hearing on the identification of Applicant, which were both heard by the trial court. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). The Applicant offered no testimony as to what information he believes Counsel could have obtained had he completed any additional investigation or preparation. Therefore, this Court finds that the Applicant failed to meet his burden of proof as to this claim and it is denied and dismissed.

This Court finds Counsel's testimony to be more credible than the Applicant's testimony. This Court finds that Counsel is an experienced attorney who was prepared for and effectively

represented Applicant at his trial. This Court finds that the Applicant has failed to meet his burden of proof as to this claim; therefore, this claim is denied and dismissed.

Ineffective Assistance of Appellate Counsel

The Applicant claimed that Appellate Counsel was ineffective for failing to raise the issue of identification on appeal. Other than raising the allegation in his application, the Applicant failed to offer any evidence or testimony to support his claim that Appellate Counsel was deficient or that he suffered any prejudice as a result of the alleged deficiency. Therefore, this Court finds that the Applicant has failed to meet his burden of proof as to this claim and it is denied and dismissed.

Lack of Subject Matter Jurisdiction

The Applicant alleged that the trial court lacked subject matter jurisdiction to enter a judgment of conviction against him because the judge gave the jury instructions as to the elements of armed robbery and the indictment did not include the element of "asportation," which was not listed in the indictment. Therefore, the Applicant alleged that the trial court amended the indictment improperly. However, as indicated previously, the indictment properly stated that the Applicant "did take a sum of money from Pizza A Plenty while armed with a shotgun." The word, "asportation," is defined as "[t]he act of carrying away or removing (property or a person)." Black's Law Dictionary (9th ed. 2009). Additionally, defects in the indictment do not affect subject matter jurisdiction. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002). The indictment is a notice document, and any challenges to its sufficiency must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). See also S.C. Code § 17-19-20 (2003). Subject matter jurisdiction is the power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. See Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005);

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 JUN 15 11:11 AM
M HOPE BLACKLEY

Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994). Therefore, this Court finds that the court did not lack subject matter jurisdiction and this allegation lacks merit as a whole. It is therefore denied and dismissed.

Summary

This Court finds counsel adequately conferred with the Applicant, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See *Fraser*, *supra*. Therefore, this allegation is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel 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

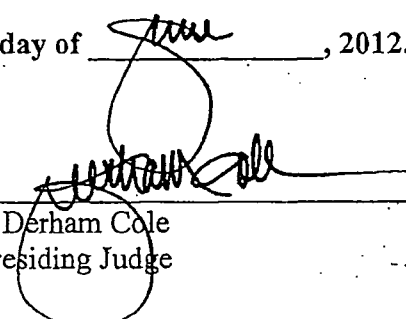
FILED
CLERK OF COURT
SOUTHAMPTON COUNTY
2012 JUN 15 AM 11:44
H. HODE BLACKLEY, JR.

(1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention 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 must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 15 day of June, 2012.


 J. Derham Cole
 Presiding Judge

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2012 JUN 15 AM 11:44
 M. HOPE BLACKLEY