

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Sumter County

S.C. Supreme Court

R. Ferrell Cothran, Jr., Circuit Court Judge

MARK LOWERY, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212170

APPENDIX

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STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF SUMTER) THIRD JUDICIAL CIRCUIT
2007-GS-43-206

THE STATE,)
PLAINTIFF,)
VS.) TRANSCRIPT OF RECORD
MARK JAMES LOWERY, JR.,)
DEFENDANT.)

SEPTEMBER 10, 2007
SUMTER, SOUTH CAROLINA

B E F O R E:

THE HONORABLE GEORGE C. JAMES, JUDGE

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

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LAUREN B. STEVENS, ESQUIRE
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1 THE COURT: All right. This is the State versus
2 Lowery. Do you have that caption, Melissa?

3 COURT REPORTER: Yes, sir. I do.

4 THE COURT: And Ms. Stevens, I think you had some
5 motions?

6 MS. STEVENS: Yes, sir, your honor. My first motion
7 is a Jackson v -- Jackson v Deno Motion for -- to
8 terminate voluntariness of my client's statement.

9 THE COURT: All right. All right, Mr. Conner, do you
10 have any witnesses to offer on the -- And what I have --
11 I assume what you're talking about is the document
12 entitled Suspect Statement bearing the date of November
13 27, 2006 and what purports to be the signature of Mark
14 Lowery, Jr. witnesses by Theresa Colclough and by someone
15 else whose signature I can't ascertain.

16 MS. STEVENS: Yes, sir.

17 THE COURT: It's a pretty signature, but I can't tell
18 whose it is. Mr. Johnston -- Is that Mr. Johnston?

19 MR. CONNER: It is, your honor.

20 THE COURT: All right. Mr. Conner, do you have any
21 witnesses on this ---

22 MR. CONNER: I have Mr. Johnston here, your honor.

23 THE COURT: All right.

24 MR. CONNER: I'd call him as a witness, your honor.

25 MARCUS JOHNSTON, being first

1 duly sworn, testifies as follows:

2 DIRECT EXAMINATION BY MR. CONNER:

3 Q. State your name, spell your last for the record.

4 A. Marcus Johnston, J-o-h-n-s-t-o-n.

5 Q. Mr. Johnston, where do you work?

6 A. I work at Financial Peace Investment Services, which
7 is -- Basically we're brokered by Linsco Private Ledger,
8 which is a brokerage firm, retirement firm.

9 Q. And how long have you been doing that?

10 A. Since March.

11 Q. And prior to March of 2007, where did you work?

12 A. I worked for the Sumter Police Department.

13 Q. And in what capacity?

14 A. I was a detective in the Violent Crimes Division of
15 the Investigative Services Division at the police
16 department.

17 Q. And how long did you work with the police department
18 here?

19 A. For about two years.

20 Q. And prior to working for the police department in
21 Sumter, what kind of work did you do?

22 A. I was a state trooper here in South Carolina.

23 Q. And how long have you -- did you work in law
24 enforcement in total?

25 A. I totaled eight years.

1 Q. And did you have an occasion to become involved in a
2 robbery that occurred out at a Kangaroo station at Cross
3 Creek and Stamey Livestock back on November the 27th of
4 2006?

5 A. I did.

6 Q. And in that capacity, did you also have an
7 opportunity to interview this Defendant Mark Lowery, Jr.?

8 A. I did.

9 Q. And tell us about where you saw him and about when
10 you saw him.

11 A. All right. It was that morning. The crime actually
12 occurred after midnight, so it was the -- that same
13 morning. He was interviewed at the police department.

14 Q. And where in the police department did you talk to
15 him?

16 A. He was interviewed in our interview room back in the
17 Investigative Services Division.

18 Q. And who was present when you were interviewing him?

19 A. It was myself and I believe Detective Ross.

20 Q. And did -- did you make any promises to him if he
21 would talk to you?

22 A. I did not.

23 Q. Did you threaten him in any way to get him to talk
24 to you?

25 A. I did not.

1 Q. Did you read him his Miranda warnings?

2 A. I did.

3 Q. And I show you this form and ask you if you can
4 identify it.

5 A. Yeah, that's the -- the Sumter Police Department
6 Interview Form that has all the rights on it that -- that
7 we used.

8 Q. And that -- that's the one you used in advising this
9 Defendant of his rights?

10 A. That's correct.

11 Q. And tell us about what time of day was it that you
12 were talking to him?

13 A. It was right at around nine o'clock that morning.

14 Q. And what did you tell him in regards to his rights?

15 A. As I pulled the form out and started explaining it
16 to Mr. Lowery, before I could get about half way through
17 my explanation, he advised me that he had been through
18 this before and he understood what this was. I advised
19 him I -- he still needed to read it and I needed to make
20 sure he understood what his rights were -- were. I read
21 him his rights individually. At the bottom here is the
22 Waiver of Rights. Made sure to ask if there were any
23 questions that he was furnished with the statements of
24 his rights and he understood. He said he understood. It
25 was -- I wrote the time, the date, where we were at, and

1 my name, and he signed it.

2 Q. Did -- did you read him each one of these rights
3 individually?

4 A. I did.

5 Q. And would you read them to us just as you read them
6 to him?

7 A. Okay. It says, you have the right to remain silent.
8 Anything you say can be used against you in court. You
9 have the right to talk to a lawyer for advice before we
10 ask you any questions and to have him or her with you
11 during the questioning. If you cannot afford a lawyer,
12 one will be appointed for you before any questioning if
13 you wish. If you decide to answer any questions now
14 without a lawyer present, you will still have the right
15 to stop answering at any time until you talk with a
16 lawyer.

17 And then under that is a Waiver of Rights that says,
18 before any questioning, I was furnished the above
19 statement of my rights at 8:59 a.m. on 11-27-06 at the
20 Sumter Police Department by Officer Johnston of the
21 Sumter Police Department. At the bottom of that form it
22 says, I have read or had read to me the statement of my
23 rights. I understand what my rights are. I'm willing to
24 answer questions at this time without a lawyer present.
25 No promises or threats have been made to me, and no

1 pressure has been used against me. Signed Mark Lowery,
2 Jr., 11-27-06 at 9 a.m., witnessed by myself and
3 Detective Ross.

4 Q. Okay.

5 MR. CONNER: Your honor, we'd offer this document
6 into evidence at this time as State's Exhibit Number -- I
7 guess Court's Exhibit Number 1.

8 THE COURT: All right. Any objection to that?

9 MS. STEVENS: No, sir.

10 THE COURT: We have Court's Exhibit 1.

11 (Whereupon, Sumter Police Department Interview Form,
12 is marked and entered into evidence as the Court's
13 Exhibit 1.)

14 Q. Now, he said he would talk with you; is that
15 correct?

16 A. That's correct.

17 Q. And was his willingness to talk with you freely and
18 voluntarily given?

19 A. It was.

20 Q. No promises of any kind?

21 A. None.

22 Q. And -- and no threats?

23 A. No threats.

24 Q. Now, after that did you talk with him and go over
25 the case, or did you take him anywhere to complete his

1 statement? Or just what happened next?

2 A. Well, we sat in the interview room. We talked about
3 the case. After he signed his -- his rights, he pretty
4 much explained to me everything that had happened, what
5 he was going through that night from a stress standpoint
6 and mental standpoint with his family.

7 Once we got through with that, I asked him if he
8 would give me a written statement. He agreed. We took
9 him to Ms. Colclough's office, which is a normal practice
10 back there in investigations. We sat down with her. He
11 basically said his statement verbally, and she typed it.
12 And then at the end he signed it, and she witnessed it.

13 Q. And I show you this document here and ask you if you
14 can identify it.

15 A. I can.

16 Q. And what is that?

17 A. That's the suspect statement that Ms. Colclough
18 typed as Mr. Lowery gave it to her.

19 Q. And does that statement that's presented there, did
20 he sign it?

21 A. He did.

22 Q. Does it fairly and accurately reflect what was said
23 by him and typed by Ms. Colclough?

24 A. It does.

25 MS. STEVENS: Okay.

1 MR. CONNER: We'd offer this document into evidence
2 at this time, your honor, State's -- Court's Exhibit
3 Number 2.

4 THE COURT: Ms. Stevens?

5 MS. STEVENS: Huh-uh.

6 THE COURT: No objection to that?

7 MS. STEVENS: No, sir, your honor.

8 THE COURT: All right.

9 (Whereupon, Suspect Statement as typed by Ms.
10 Colclough, is marked and entered into evidence as the
11 Court's Exhibit Number 2.)

12 MR. CONNER: Would you like to have these so if ---

13 THE COURT: I've got -- I've got -- I've got the ones
14 you gave to me when we were back ---

15 MR. CONNER: Okay.

16 THE COURT: --- in the office a while ago with Ms.
17 Stevens. All right.

18 MR. CONNER: I have no further questions of him.

19 THE COURT: Ms. Stevens?

20 CROSS EXAMINATION BY MS. STEVENS:

21 Q. You said that the incident occurred approximately
22 one a.m.?

23 A. Around that time, yes.

24 Q. And what time did you interview Mr. Lowery?

25 A. Around nine o'clock that next morning.

1 Q. And do you know where he was between one o'clock and
2 nine a.m.?

3 A. I know he was taken to I guess Richland Memorial
4 Hospital for treatment.

5 Q. Do you know how he got back to Sumter?

6 A. He was transported back here after he was released.

7 Q. Were you aware that he had suffered serious injury
8 during the incident?

9 A. It's -- it -- The only thing I knew that he had been
10 treated at Richland Memorial and they saw fit that he was
11 medically okay to be released from their facility and did
12 so.

13 Q. Did you ask him if he had been given any medication
14 at the hospital?

15 A. I recall asking him if he was okay. Only thing he
16 asked me for that morning was a cup of coffee. Just said
17 he was a little sleepy.

18 Q. Okay. But you didn't specifically ask if he was on
19 any sort of pain medication ---

20 A. Not that I recall.

21 Q. --- or anything like that?

22 A. No.

23 Q. Okay. Were you present when Ms. Colclough typed the
24 statement?

25 A. I was.

1 Q. Okay. And so after you read it, it was basically
2 your saying what he had said to you?

3 A. That's correct.

4 Q. And you didn't have any concerns about whether he
5 knew exactly what was going on or not?

6 A. Based on the conversation that I had with him pretty
7 much the entire morning and the statements that he made
8 to me, I had no reason to believe whatsoever based on his
9 demeanor, and again the statement -- the conversations
10 that we had as well as the fact that medical
11 professionals from Richland Memorial Hospital saw fit
12 that he was okay to be released into law enforcement
13 custody.

14 Q. Were you aware that he was unresponsive with severe
15 bleeding from the nose and mouth at the scene?

16 A. I do recall them saying he was unresponsive, yes.

17 Q. Do you -- Are you aware that he was having
18 convulsions at the scene?

19 A. I believe that was in the report, yes.

20 Q. And yet you didn't need -- think you might need to
21 ask him and make sure that he wasn't on some sort of
22 medication that might alter his thinking?

23 A. I had no reason to believe that -- that he wasn't
24 capable to sit there and talk to me.

25 Q. But you didn't ask?

1 A. Didn't ask -- Asked him if he was okay. He said,
2 yes. Said only thing he needed was a cup of coffee and I
3 provided him with that.

4 Q. Okay.

5 MS. STEVENS: I don't have anything further, your
6 honor.

7 THE COURT: Mr. Conner?

8 REDIRECT EXAMINATION BY MR. CONNER:

9 Q. You say his demeanor was normal?

10 A. It was.

11 Q. And he was -- How about some conversation, did he
12 ramble or was he coherent?

13 A. No, he was -- He answered questions. I mean, like I
14 say, he gave me no reason to believe that he wasn't
15 perfectly capable to sit there and talk to me about the
16 incident that occurred earlier that night.

17 Q. And in your capacity as a highway patrolman, I
18 assume you've met many people who are under the influence
19 of various different substances?

20 A. I have.

21 Q. And you -- If they are adversely affected by those
22 substances, you can usually detect it, can't you?

23 A. You can.

24 Q. And did you detect any problems with this man that
25 morning?

1 A. I did not.

2 Q. Thank you.

3 MR. CONNER: I have no further questions.

4 THE COURT: Anything else, Ms. Stevens?

5 MS. STEVENS: No, sir, your honor.

6 THE COURT: Thank you, Mr. Johnston, you can step
7 down.

8 A. Thank you, your honor.

9 THE COURT: Mr. Conner?

10 MR. CONNER: I have nothing further, your honor.

11 THE COURT: Ms. Stevens, do you have any witnesses?

12 MS. STEVENS: Yes, sir, your honor. I have
13 explained to my client that he can testify at this
14 hearing without waiving his -- his rights to testify.
15 Your honor, I would ask ---

16 THE COURT: Without waiving his right to silence?

17 MS. STEVENS: Yes. That's what I meant, your honor.
18 If we continue with the other motions in this case, there
19 is something I would like to address with you at the
20 bench after he testifies on this motion.

21 MARK JAMES LOWERY, JR., being first
22 duly sworn, testifies as follows:

23 BAILIFF: State your name and spell your last for
24 the record.

25 WITNESS: Mark James Lowery, Jr. L-o-w-e-r-y.

1 DIRECT EXAMINATION BY MS. STEVENS:

2 Q. Mark, as you're aware, we are here concerning an
3 incident that occurred on 11-27-06; is that correct?

4 A. Yes, ma'am.

5 Q. And isn't it true that you were taken to Richland
6 Memorial Hospital?

7 A. Yes, ma'am.

8 Q. Do you remember going to Richland Memorial Hospital?

9 A. No, ma'am.

10 Q. What's the first thing you remember after getting to
11 Richland Memorial Hospital?

12 A. I was -- The doctor has come in there -- One of the
13 doctors had come in there when I -- I had came around.
14 And all I remember was he took blood. He had to get a --
15 an IV into my leg because he couldn't get it into my
16 arms.

17 Q. Do you know what time that was?

18 A. No, ma'am.

19 Q. To your knowledge, did they give you any sort of
20 pain medication?

21 A. Yes, ma'am.

22 Q. Do you know what it was?

23 A. No, ma'am.

24 Q. Can you tell me what effect it had on you?

25 A. It -- I had a severely broken nose, cracked ribs,

1 and I had knots on my head. I guess you could -- some
2 type of mild concussion. And it just basically
3 stabilized my pain so they could do further examinations
4 on me.

5 Q. Do you know what time you were released?

6 A. No, ma'am.

7 Q. Do you remember how you got from Columbia to Sumter?

8 A. It -- it was an officer. I'm not sure, you know,
9 who -- what officer or whatever, but it was an officer.

10 Q. Were you awake the whole time?

11 A. No, ma'am. I actually slept till midway back. We
12 was on some back road -- they pulled over and got me out
13 of the cop car and put into a detective's car and ---

14 Q. And that's when you woke up?

15 A. Yes, ma'am.

16 Q. And then did you fall back asleep?

17 A. Yes, ma'am.

18 Q. But you don't know what time -- Was it light
19 outside? Was it still dark outside?

20 A. It was -- it was daylight.

21 Q. Did you go straight to the jail, or did you go
22 straight to the law enforcement center?

23 A. I -- police department. I suppose the law
24 enforcement center.

25 Q. Okay. Did you have to wait for someone to come and

1 talk to you?

2 A. They put me in an interview room. I did wait for a
3 period of time.

4 Q. Were you awake that whole time?

5 A. Yes, ma'am.

6 Q. So ---

7 A. I was -- I was drowsy, but that's -- I -- I asked
8 Detective Johnston for a cup of coffee.

9 Q. Did -- did you feel that you were aware of what was
10 going on?

11 A. Yeah. I mean, to an extent. I knew I had been
12 arrested. I -- I -- I knew that I was in some trouble to
13 a certain extent. I did not -- I wasn't really aware of
14 what happened. I didn't know what I was being charged
15 with or anything of that nature until Detective Johnston
16 and Ross come in. They informed me that I had been
17 charged with armed robbery and things of that nature.

18 Q. Okay. And did -- did they ask you to read this
19 Miranda Form?

20 A. They did, but -- They asked me to read it, and --
21 but I didn't -- I -- I -- I couldn't -- When I tried to
22 read it, I couldn't make it out, so I believe one of them
23 read it to me.

24 Q. Okay. And when you said that you understood them,
25 did you really understand them, or were you just telling

1 them that?

2 A. In all reality, I -- I really just wanted to get --
3 I wanted to get somewhere where I could go to sleep, lay
4 down. I was just ready for everybody to leave me alone
5 at that time.

6 Q. Were you -- were you in pain?

7 A. Yes, ma'am. My nose had been -- my nose was still
8 broken at the time.

9 Q. Did they give you any -- a prescription to take back
10 to the jail with you?

11 A. I believe they did. They gave me a prescription, a
12 couple prescriptions, but the jail wouldn't fill them at
13 the time or something -- something of that nature. I had
14 to get them filled once I got out.

15 Q. Okay. So explain to me how this -- this statement
16 was -- was given.

17 A. I was advised if I -- if I cooperated, things would
18 go smoother if I just talked to them, so on, so forth. I
19 did -- I was having some flashes of -- of things that
20 happened. I couldn't really piece everything together.
21 They did tell -- They told me pretty much that I was
22 being accused of robbing a store and I had fled from the
23 police and that I had wrecked my truck. And they asked
24 me why -- why I would rob a store or something. Did I
25 have a drug problem, things of that nature, or was it

1 family issues and things like that. And from my own --
2 my own memory bank, I did tell Detective Johnston things
3 about stress levels at my house and things of that
4 nature. I don't -- I don't really think that I was
5 connected to the robbery, but it was -- it was put
6 together there that it was due to that.

7 Q. So you're not denying that you ran from the police?

8 A. No, ma'am.

9 Q. Okay.

10 MS. STEVENS: I don't have anything further, your
11 honor.

12 THE COURT: Mr. Conner?

13 CROSS EXAMINATION BY MR. CONNER:

14 Q. Mr. Lowery, I show you this Miranda Form, State's
15 Exhibit -- I keep saying State's Exhibit. It's Court's
16 Exhibit Number 1 and ask you to examine that. Now, right
17 there about two inches from the bottom of the page in the
18 right-hand corner, that is your signature, isn't it?

19 A. Yes, sir.

20 Q. And you recall them reading you your rights?

21 A. I recall them reading -- reading several things to
22 me and signing several things.

23 Q. And you told them that you knew what your rights
24 were in regards in Miranda because you've been arrested
25 before and charged with armed robbery; is that correct?

- 1 A. No, I don't -- I don't recall saying that.
- 2 Q. You don't recall saying that?
- 3 A. No, sir.
- 4 Q. But you have been arrested before?
- 5 A. Yes, sir.
- 6 Q. And you were charged with armed robbery?
- 7 A. Yes, sir.
- 8 Q. And you were convicted of attempted armed robbery --
- 9 -
- 10 A. Yes, sir.
- 11 Q. --- is that correct? And when you were -- In those
- 12 cases, you were advised of your Miranda Rights, weren't
- 13 you?
- 14 A. Yes, sir.
- 15 Q. And you know the Miranda Rights, don't you?
- 16 A. Yes, sir.
- 17 Q. What's the first one?
- 18 A. You have the right to remain silent.
- 19 Q. So you -- you know that, don't you?
- 20 A. Well, I mean, I don't know them by heart. But off
- 21 of this paper, I can read them to you.
- 22 Q. But you know that you have a right to remain silent,
- 23 don't you? And you knew it before this happened, didn't
- 24 you?
- 25 A. Yes, sir.

1 Q. Based upon your experience from the past?

2 A. Yes, sir.

3 Q. Now, you were released over there at the hospital;
4 is that correct?

5 A. I suppose so.

6 Q. They gave you prescriptions for your -- for your
7 medications?

8 A. Yes, sir.

9 Q. They didn't give you any medicine; they just gave
10 you prescriptions?

11 A. Well, I was taken out by a deputy, so I -- I don't -
12 - no, they didn't give me no medications to -- at all.

13 Q. And when you got back here to Sumter, you met with
14 Mr. Johnston; is that right?

15 A. Yes, sir.

16 Q. And you talked with him?

17 A. Yes, sir.

18 Q. Freely and voluntarily?

19 A. Well, I mean, it was conversation. I mean, I
20 suppose it was freely and voluntary. I wasn't ---

21 Q. You talked to him?

22 A. Yes, sir.

23 Q. And after you finished talking with him, you were
24 placed in -- in the local jail, weren't you?

25 A. Yes, sir.

1 Q. And they accepted you in the condition you were in,
2 didn't they?

3 A. Yes, sir.

4 Q. Now, I show you here also State's Exhibit, or I beg
5 your pardon, Court's Exhibit Number 2 and ask you to
6 examine that.

7 A. Yes, sir.

8 Q. Now, down here on the left-hand corner, the second
9 line up from the bottom, what is that?

10 A. That's a signature, my signature.

11 Q. Your signature. You signed that paper, right?

12 A. Yes, sir.

13 Q. And -- and that's your -- That statement accurately
14 reflects what you told them, doesn't it?

15 A. No. It reflects what was discussed between us, not
16 what I told them.

17 Q. Did the -- the lady there, Ms. Colclough, the
18 typist, she typed it down as you said it, didn't she?

19 A. She -- she -- yeah, she typed it down as it was
20 spoke between me and Mr. Johnston.

21 Q. And you told Mr. Johnston that you were having some
22 problems with your family?

23 A. Yes, sir.

24 Q. And what in particular did you tell him?

25 A. I just told him I was having some stress problems at

1 home, so to speak, as far as living up to my father's
2 expectations.

3 Q. And did you tell him about going to this Kangaroo
4 store out there on Broad Street?

5 A. I told him several times that I did not remember
6 what happened. I didn't remember that incident. I told
7 him -- Several times throughout the statement you can
8 read where I told him I -- I don't know what happened.
9 Several bits of information were fed to me, and I assumed
10 that I did do my past record. I assumed that maybe I had
11 done something like that and just didn't remember it.
12 But I don't remember doing it.

13 Q. You had on a camouflage coat, didn't you?

14 A. I don't remember.

15 Q. And you had on a camouflage mask?

16 A. I don't recall.

17 Q. You had more than one knife, didn't you?

18 A. Again, I don't recall.

19 Q. And you -- How did you get to Columbia from the
20 scene of the wreck?

21 A. From the reports I read, I was flown in a
22 helicopter.

23 Q. I want to call your attention to this sentence here.
24 This is a statement you made in this statement, isn't it:
25 I was in a -- in a helicopter going to the hospital?

1 A. Yes, sir. As I said, when I reached the police
2 station, I was having flashes of bits and pieces of
3 things that had happened. So I mean, if I had made the
4 statement I briefly remembered waking up in a helicopter
5 or things of that nature.

6 Q. Some of the other things in -- in this statement are
7 -- are things you remember doing, too, aren't they?

8 A. It's possible.

9 MR. CONNER: I have no further questions of him.

10 THE COURT: Anything else, Ms. Stevens?

11 MS. STEVENS: No, sir, your honor.

12 THE COURT: Thank you, sir. You can step down. Do
13 you want to speak -- you can have a seat. Did you want
14 to speak to me up here before we went further or after
15 you make your argument on this motion?

16 MS. STEVENS: Make my argument on this motion.

17 THE COURT: All right.

18 MS. STEVENS: Your honor, I would contend that my
19 client was seriously injured in a car accident at
20 approximately one a.m. That he was -- that -- that his
21 injuries were such that they felt the need to airlift him
22 to Richland Memorial Hospital instead of wait for an
23 ambulance. That I have testimony from at least three
24 officers in their incident report that he was severely
25 bleeding, that he was convulsing, that he was

1 unresponsive ---

2 THE COURT: I don't have those police reports. Mr.
3 Johnston said when he was -- they were gather that at
4 some point he was unresponsive, but I don't have anything
5 else other than what he said and Mr. Lowery's testimony
6 that he didn't remember going ---

7 MS. STEVENS: I have a statement from Daeburto
8 Quiroz, Jr., your honor. And the highlighted portion on
9 page one and then the highlighted portion on page two.
10 And then I have incident report from Mr. Osborne who was
11 another officer at the scene. And you can see, your
12 honor, that he was doing severe bleeding from the head
13 and -- from the nose and mouth. Mr. Quiroz says on the
14 first page that he was unresponsive and he noticed him
15 going into convulsions. And then on the second page says
16 that he was severely injured. And as I mentioned, your
17 honor, they felt the need to call the helicopter to come
18 and get him instead of get an ambulance. This -- this
19 statement was given less than -- well, approximately
20 eight hours from the time of the incident, your honor.
21 And you have to consider that it took a while for the
22 helicopter to get there. When he went to the hospital,
23 he was admitted. He was released. If -- he says he was
24 given pain medication. I would assume they would've
25 given him pain medication, especially if he was -- his

1 nose was broken and had broken ribs. I don't have any --
2 any evidence of what he -- he was given, your honor. But
3 I would contend, your honor, that if he was given some
4 sort of Darvocet or something to that effect that might
5 have dulled his pain, that it may ---

6 THE COURT: But what's the proof that he was given
7 that? The -- there's proof that he may have walked out
8 with some paper prescriptions. But he said he was given
9 what he thinks to be pain medication, but how do we know
10 it wasn't Tylenol?

11 MS. STEVENS: Your honor, even Tylenol Four has
12 codeine in it.

13 THE COURT: But not Extra Strength Tylenol.

14 MS. STEVENS: Well, your honor, they don't have proof
15 that he wasn't given any drugs either. They didn't
16 bother to ask.

17 THE COURT: All right. I know -- I know I
18 interrupted you, so go ahead.

19 MS. STEVENS: That's okay. Your honor, I would
20 simply argue that he was not in control of his faculties.
21 That although he was having conversation with them, he
22 did admit to him that he was drowsy. He testified, your
23 honor, that he was in and out on the way from Columbia to
24 Sumter. I would argue more that it wasn't voluntary in
25 the sense that my client was not in complete control of

1 his faculties at the time and therefore could not make a
2 voluntary statement.

3 THE COURT: All right. Mr. Conner, how -- how do you
4 address the -- the issues she raised, particularly the --
5 the condition of Mr. Lowery supposedly at the scene of
6 where he eventually came to rest at the scene of the
7 crash I'll call it and then transported him by helicopter
8 and some sort of claim of disorientation? How do you
9 address all that?

10 MR. CONNER: Well, he -- your honor, I -- I would
11 submit that the concern of the people who were first
12 responders there to the scene, they have to be cautious
13 in their dealings with people because they might be more
14 seriously hurt than they think even. And they were just
15 trying to protect his -- his health. But that doesn't
16 mean that some eight hours later that he wasn't
17 knowledgeable about what was going on or wasn't competent
18 or had been impaired in some way. And in -- in that
19 regard, Mr. Johnston's had a lot of experience in dealing
20 with people who are under the influence of various
21 different substances. And he said in his conversations
22 with him he seemed to be coherent and understand what was
23 going on. That he didn't appear to have any problems.
24 He appeared to understand. He even interrupted him while
25 -- when he started reading his Miranda to say he knew all

1 about it, so to speak. And it's obvious that he does
2 know something about Miranda in that he's been advised of
3 his Miranda Rights previously in other cases. And I
4 would submit that Mr. Johnston's skill in dealing with
5 this kind of people's important. And another thing, as
6 Mr. Johnston pointed out, the hospital released him. So
7 the hospital felt like he was capable. And in addition
8 to that, the jail accepted him. And I can tell you from
9 dealing with this local jail that they don't accept them
10 if they think there's something wrong with them. They
11 send them to the hospital. And for those reasons, we
12 submit that he was competent. He did know what was going
13 on. And he is -- he admitted that he signed these
14 documents.

15 THE COURT: All right. Any last word, Ms. Stevens?

16 MS. STEVENS: Well, I would submit to you, your
17 honor, that the hospital didn't release him on his own
18 recognizance. They knew -- they released him to the
19 sheriff's department, so he wasn't going to be driving.
20 They weren't concerned about his ability to think or
21 react because he was going to be driven somewhere in the
22 back of a car. And, your honor, the jail doesn't really
23 have a choice if he's not, you know -- I'm not telling
24 you that he was bleeding and that they were remiss in
25 giving him medical attention. I'm telling you or

1 submitting to you, your honor, that his mental capacity
2 was in some way affected by these pain medications. And
3 the jail -- none of them were doctors and neither is Mr.
4 Johnston. And while I agree that he probably has dealt
5 with drunks that he can smell, that perhaps he hasn't had
6 as much experience with people who are on pain medication
7 as he has had with people who are intoxicated.

8 THE COURT: All right. Do you know what medications
9 he was on?

10 MS. STEVENS: No, sir.

11 THE COURT: All right. Any -- you said you needed to
12 speak to me up here in chambers -- I mean, at side bar?

13 MS. STEVENS: Yes, sir.

14 THE COURT: All right. Go ahead, Ms. Stevens.

15 MS. STEVENS: Your honor, I also would like to make a
16 motion of suppression for first the videotape that
17 allegedly comes from the scene, your honor. Also ---

18 THE COURT: And photographs, or just the tape?

19 MS. STEVENS: Tape and the photographs, your honor.
20 I would also make a motion to suppress the evidence that
21 was taken from the vehicle.

22 THE COURT: All right. Talk to me first about why
23 the photos and the tape should be suppressed.

24 MS. STEVENS: Your honor, I have copies, and I'm not
25 handing them to you for the quality of the pictures but

1 just so that you can see. Your honor, this incident
2 allegedly occurred on 11-27-2006 at approximately 12:55
3 a.m. And as you can see, your honor, the date on those
4 pictures that were allegedly taken straight from the tape
5 show that there was somebody in that store on 11-26-2006
6 at 1:43 in the morning. That is the day before the
7 incident in question, not the day of the incident.

8 THE COURT: All right. And I assume your objection
9 to the tape itself would be based on the same ---

10 MS. STEVENS: Yes, sir, your honor.

11 THE COURT: All right. Mr. Conner?

12 MR. CONNER: Your honor, I'm told from talking with
13 the police authorities and also with the victim that the
14 -- the date on that is incorrect. It did occur on 11-27,
15 054. But it's just a ---

16 THE COURT: Do you have -- Would the witness be able
17 to testify that this incident that's complained of in
18 this case is depicted on the tape and these photographs
19 regardless of the date or time noted?

20 MR. CONNER: That's what the victim tells me.

21 THE COURT: All right. Well, we'll just address that
22 at the trial. If the witness can't do that, then I'll --
23 I'll be inclined to side with you, Ms. Stevens. But if
24 they have a witness who says this is the guy and this is
25 what I'm here about on this offense regardless of what's

1 on this, we're not -- we'll be inclined to let all that
2 in.

3 MS. STEVENS: Yes, sir, your honor.

4 THE COURT: And I'll give you your ---

5 MS. STEVENS: Thank you, your honor.

6 THE COURT: I'll give you this back later.

7 MS. STEVENS: Okay.

8 THE COURT: All right. How about the contents of the
9 vehicle?

10 MS. STEVENS: Yes, sir, your honor. And I probably I
11 guess will hand these up to you, your honor, as they
12 address them. I got them from Mr. Conner so he has
13 copies of them I am sure. The first is an incident
14 report, your honor. The second page of the supplementary
15 report that was written by Officer McCoon, the last
16 sentence -- the last two sentences, it tells me that the
17 car was towed to -- by Sumter Wrecker to the City
18 Impound. I have no documentation other than what is
19 written in this report that that was indeed true, your
20 honor. And it's a chain of custody issue as far as I'm
21 concerned.

22 THE COURT: What does that have to do with the
23 contents?

24 MS. STEVENS: Well, I'm going to tell you, your
25 honor. I have several reports. I have an incident

1 report that I'm assuming was typed up by Mr. Johnston
2 which says that several items were taken as evidence from
3 the accident scene, including the Browning hat, knife,
4 mask, and coat that Mr. Lowery was wearing during the
5 armed robbery. Well, what's interesting about that, your
6 honor, is that I have a document signed by Truman Duggin
7 that says that the knives and the baseball cap were taken
8 from the city impound. I also have a disc, your honor --

9 -

10 THE COURT: A what?

11 MS. STEVENS: A disc of the pictures, and it says
12 Scene Impound. Every one of the things that they
13 allegedly took from my client's truck at the scene is
14 still in this truck at the impound.

15 THE COURT: Couldn't you cross examine the folks on
16 that?

17 MS. STEVENS: Well, the problem is, your honor, if
18 two officers are saying that they took them at the scene,
19 what are they still doing in his truck? And I don't know
20 who towed his truck from the scene. I don't have an
21 inventory of what was in the truck at the scene and now
22 what's in the -- I mean, how do we know that some of
23 these items weren't put in his truck between -- I mean,
24 these are taken the next day.

25 THE COURT: Well, I'm not going to rule on that from

1 an illumine standpoint. I'll have to see what the
2 testimony -- if -- if necessary, we can take testimony
3 outside the presence of the jury. But I -- I don't think
4 I'm prepared to -- to rule on that right this minute.

5 MS. STEVENS: Yes, sir, your honor. I just took -- I
6 just wanted to put it front of you so that everyone would
7 be aware of -- of what ---

8 THE COURT: Okay.

9 MS. STEVENS: --- what was going to occur.

10 THE COURT: Anything else?

11 MS. STEVENS: No, sir

12 THE COURT: And, Mr. Conner, you said earlier in my
13 office that they weren't going to be any identification
14 issues from a bigger standpoint because the perpetrator
15 had on a mask and a hooded jacket of some sort, or maybe,
16 excuse me, a mask and a hat.

17 MR. CONNER: Had -- has on a ball cap.

18 THE COURT: Okay.

19 MR. CONNER: What I would call a baseball cap. And
20 also a coat and a mask.

21 THE COURT: Do you have anything you want to put on
22 the record at this time about her chain of custody
23 concerns?

24 MR. CONNER: I don't believe so.

25 (Off the record.)

1 THE COURT: All right, we've got one last quick
2 thing to put on the record. Where's Mr. Conner and Ms.
3 Stevens? All right. Ms. Stevens, do you need -- your
4 client wanted to talk to you? Y'all can have a seat if
5 you like, or you can stand, whichever you want to do.

6 MS. STEVENS: Yes, sir?

7 THE COURT: Y'all can have a seat. All right. I've
8 read and reviewed the -- the notes that I made
9 particularly during the testimony of the Defendant and
10 former Officer Johnston. I've reviewed the highlighted
11 portions of the materials given to me by Ms. Stevens. Of
12 course I've read the Court's Exhibits as well, the
13 Miranda form and the Suspect Statement.

14 And it's my finding that the preponderance of the
15 evidence shows that the Miranda Warnings were given to
16 the Defendant in the matter set forth on Court's Exhibit
17 1 and as explained and testified to by Mr. Johnston and
18 specifically right to remain silent, anything could be
19 used against him in court. He had the right to talk to
20 an attorney for advice before asking -- before the police
21 were to ask any questions and to have a lawyer with him
22 during questioning and that if he could not afford an
23 attorney one would be appointed. And if he decided to
24 answer questions that -- without an attorney, he would
25 still have the right to stop answering questions at any

1 time until he did talk to a lawyer. Now, I also do find
2 that, to the extent that what I just said is not clear,
3 that he knowingly and intelligently waived his right
4 terms of the Fifth and Sixth Amendments in that regard.
5 And also, do find that the statement obtained, and that's
6 Court's Exhibit 2, was freely and voluntarily given
7 without duress, with coercion or undue influence and
8 without promise or -- or hope of reward and without
9 threat of injury and without compulsion. Now, I also
10 find that the voluntary product of his free and
11 unconstrained will. Now, I make those findings with the
12 same -- in the same breath saying that the jury will
13 ultimately be charged on those specific issues, and they
14 will have to find that the statement was given
15 voluntarily beyond a reasonable doubt. And I may
16 suggest, Ms. Stevens, if you have any charges in that
17 regard for me to look at for orders that he would take,
18 I'll be happy to do that. But I've got the standard
19 charge on that. As far as the -- as far as the other
20 issues that you raised about the chain of custody, I
21 certainly think that that is sufficiently raised eyebrows
22 quite substantially, but that'll have to come out on a
23 cross examination. And I'm not foreclosing the
24 possibility that I may rule with you at some point, but I
25 haven't heard that evidence yet.

1 MS. STEVENS: Yes, sir, your honor.

2 THE COURT: All right? Well, I'll see you folks
3 tomorrow morning about 9:15.

4 (Court adjourned)

5 (Court resumed)

6 THE COURT: All right. Mr. Conner, Ms. Stevens,
7 anything before we bring in the jury?

8 MS. STEVENS: Yes, sir, your honor.

9 MR. CONNER: Your honor, he has been examined at the
10 State Hospital to determine whether he was competent to
11 stand trial based on -- This was at the motion of his
12 attorney Ms. Stevens, and this is the report we got back.
13 I would have this marked as Court's Exhibit Number 3, I
14 believe.

15 (Whereupon, report of examination by the State
16 Hospital is marked for identification as Court's Exhibit
17 Number 3.)

18 THE COURT: All right. This is Court's Exhibit 3,
19 and it's a March 9, 2000 letter from Kenneth Kepler,
20 Program Coordinator Forensic Evaluation Services of the
21 Department of Mental Health. The evaluation performed
22 according to this exhibit on February 22, 2007, Ms.
23 Stevens, do you take the position that Mr. Lowery is not
24 competent to stand trial?

25 MS. STEVENS: No, sir, your honor.

1 THE COURT: Do you agree based on your knowledge of
2 the circumstances insofar as your client's concerned, do
3 you agree with the content of the report?

4 MS. STEVENS: Yes, sir, your honor. There was
5 originally some concern that my client had driven his
6 truck into the gas station with the intent to do harm to
7 himself, and that is one of the reasons that he was
8 evaluated, your honor, is to see perhaps if his state of
9 mind at the time of the incident would have rendered him
10 incapable of being tried. But it appears that, after the
11 evaluation, that they determined that his state of mind
12 was not such that his judgement was impaired.

13 THE COURT: The opinion of Michael Cross, M.D. in
14 the actual report is that the Defendant does not have a
15 major mental illness, disease or defect, defect that
16 would make him lack a sufficient rational and factual
17 understanding of the legal system or lack of a sufficient
18 present ability to rationally consult with his attorney
19 regarding defense. And agree -- Again, Ms. Stevens, you
20 concur with that --

21 MS. STEVENS: Yes, sir, your honor.

22 THE COURT: -- based on your knowledge?

23 MS. STEVENS: Yes, sir, your honor.

24 THE COURT: All right. Then I find that Mr. Lowery
25 is competent to stand trial. Anything else, Mr. Conner,

1 before we bring in the jury?

2 MR. CONNER: I don't -- I can't think of anything
3 else, your honor.

4 THE COURT: Ms. Stevens?

5 MS. STEVENS: No, sir.

6 (Jury enters the courtroom, 9:45 a.m.)

7 BAILIFF: Your honor, we have all, all the jurors
8 and alternates present in the courtroom.

9 THE COURT: Thank you, sir. All right, ladies and
10 gentlemen, the bailiff is now going to swear you in.
11 We're going to begin the trial of the case.

12 (Whereupon, the jury is sworn.)

13 THE COURT: All right, ladies and gentlemen, before
14 we begin this trial, I wanted to speak to you for a few
15 minutes to tell you what you might expect in this
16 particular trial. Let me tell you first off that this
17 trial is not going to be what you may see in trials on
18 television. That's not how things operate in the real
19 world. We have in this state and in all of the states a
20 set of rules that the lawyers know and that the lawyers
21 will go by. We have in this book that I'm holding up the
22 Rules of Civil Procedure, which of course don't apply in
23 this case, the Rules of the Criminal Procedure -- We have
24 the Rules of Evidence. And on top of this book we have
25 numerous, numerous other publications that interpret

1 these rules. And the lawyers in this case are going to
2 follow those rules. So don't think that this is going to
3 be a trial like what you see on television where a person
4 is arrested, charged and a trial occurs within a matter
5 of an hour. That's not the way it happens. Now, during
6 this trial -- Well, the trial will be conducted in
7 various stages. And the first stage of the trial will be
8 the opening statements by the attorneys. The State will
9 give an opening statement, and if the Defendant so
10 chooses, the Defendant can present an opening statement.
11 And the purpose of the opening statements is for the
12 lawyers to tell you what they think the evidence will
13 show or perhaps what will not show. And what the lawyers
14 say to you or what the lawyers even say in the form of a
15 question to a witness is not evidence. And I'll touch
16 on, touch on that a little bit more in just a minute.
17 After the opening statements, the State will present its
18 case in chief. And the State will present its case
19 through witnesses and other evidence that it might
20 introduce or seek to introduce through exhibits. After
21 that, the Defendant, if he so chooses, can present a
22 defense. He does not have to. I'll touch more on that
23 in just a moment as well. After the evidence is present,
24 the attorneys will give you their closing arguments. And
25 again, what they say to you during the closing arguments

1 is not evidence. That will be their opportunity to argue
2 to you what conclusion you should reach in this case.
3 After the arguments of counsel, the charge on the law
4 will be given to you by me, and that's one thing that you
5 don't see on television. You go straight from the
6 closing arguments straight to a jury verdict. So those
7 are the basic stages that the trial will go through.
8 Now, from time to time during this trial, you may hear
9 one or both of the lawyers object to a question or to an
10 answer, and there's a reason for that. And, again, this
11 little blue book I'm holding up has the Rules of
12 Evidence. From time to time, there will be differences
13 of opinion between the two sides as to whether or not a
14 particular piece of evidence is relevant, admissible in
15 some other form, and then it will become my
16 responsibility to rule on whether or not that evidence is
17 admissible. You may hear things such as the objection is
18 overruled or the objection is sustained. It may be
19 necessary from time to time to rule on these points for
20 me to send you to your jury room. And the reason for
21 that is you, you folks on the jury are, as I indicated
22 yesterday, the only people in the world who can decide
23 this case from a factual standpoint. So you are the
24 judges of the facts. When you go to retire to your jury
25 room to deliberate this case in the end, you are the only

1 people that are going to go. There's not going to be
2 microphone in there where we can hear what you say.
3 There's not going to be a court reporter in there. The
4 lawyers aren't going to be there, and I'm not going to be
5 in there. So when you hear the facts, you have to use
6 your collective common sense to determine where the truth
7 lies in this case. I don't do that for you because I
8 don't have a position on the facts of this case. My, my
9 position is to be the judge of the law. So for the same
10 reason that we won't be in the jury room with you when
11 you talk about the facts, sometimes you cannot be out
12 here when I have to hear fully arguments on the points of
13 the law, so that's why I may have to send you out. Now,
14 the fact that a lawyer might object to a question does
15 not mean that lawyer's trying to hide something from you.
16 And the fact that a lawyer asks a question that is
17 objected to does not mean that that lawyer's trying to
18 pull a fast one on you. Again, because sometimes there
19 are differences of opinion on whether or not some
20 evidence is admissible. Now, as the judge, as the judges
21 of the facts, you are required to use your collective
22 common sense to determine what the truth is in this case.
23 Now, how do you do that? Again, common sense and
24 experience and necessarily, as jurors, when somebody
25 testifies, you're going to have to evaluate their

1 credibility, which is a legal term that means
2 believability. And you -- There -- You don't have a book
3 to take back there in your jury room and say, all right,
4 let's, let's go to the chapter on believability. You use
5 your common sense and your judgement in doing that. You
6 can base your determination on whether or not you believe
7 someone on what you do every day. How does the person
8 appear? Was the person hesitant or straightforward when
9 the person answered questions? Was there some reason or
10 another that the witness might have a reason to give
11 testimony that would be for or against one side or the
12 other? In other words, was the witness biased or
13 prejudiced? You can determine whether or not that
14 witness's testimony would strengthen or weaken other
15 testimony that you may have heard or strengthened or
16 weakened or contradicted by another statement that person
17 may have given on a prior occasion. Again, those are
18 just examples. And you use your common sense in
19 determining whether or not to believe someone. Now, in
20 addition, ladies and gentlemen, you are going to have to
21 pay attention. Obviously that is the key. You have to
22 pay attention to everything every person says on this
23 witness stand. Now the reason I tell you that now and
24 you may say, well, gosh, I'm certainly going to pay
25 attention. Well, when you come back after lunch, you

1 will have just eaten. And it's going to be warm outside.
2 It may be a little bit warm in here. And I'm telling
3 you, you might start to get a little leery-eyed. If I
4 notice that, of course I will -- We'll take a break or I
5 may ask you to stand in place. But please don't let your
6 attention wonder or, or totally disappear behind your
7 eyelids because the State and the Defendant both expect
8 and are entitled to a fair trial. And the only way they
9 can get it is for the jury to listen carefully and take
10 the oath very seriously. As I will tell you later, the
11 word verdict comes from a Latin word which means speak
12 the truth. And the only way that your verdict can speak
13 the truth is if you pay attention and take your oath
14 very, very seriously. Now, you are not allowed to
15 discuss the case until I tell you that you can do so, and
16 that will not be until after I give you a jury charge.
17 Again, you'll be -- You have been back in that room for
18 the last 20 minutes or so with the 12 other people, and
19 the only thing you have in common is this case. And this
20 is the only thing in the world you can't talk about. And
21 that may seem a little bit strange, but that's the way it
22 is. Now, you cannot even, you cannot even begin to make
23 up your own mind until you've heard everything, and that
24 includes the evidence, the arguments and the charge of
25 the law. And this will all become clear to you later.

1 You have an important job, so it's important for you to
2 keep an open mind. Now specifically in this case, the
3 Defendant is charged with three offenses in this
4 indictment that I referenced yesterday. He's charged
5 with Armed Robbery, Failure to Stop for a Blue Light, and
6 Possession of a Knife during the Commission of a Violent
7 Crime. However, the simple fact that a person such as
8 the Defendant has been arrested, charged, or indicted and
9 even though there are words on this indictment, that is
10 evidence of nothing. The evidence that you're to
11 consider in this case is what comes to you from the
12 witness stand and in the form of other exhibits that
13 might be introduced. The Defendant has entered a plea of
14 not guilty to all three of these charges. And that plea
15 puts the burden of proof on the State to prove his guilt
16 beyond a reasonable doubt. And I will instruct you later
17 on what a reasonable doubt is. The Defendant is presumed
18 innocent, and that presumption of innocence is, as I will
19 you later, is not a simple legal phrase. It is a
20 substantial right that every Defendant who's, who is
21 accused of a crime enjoys in this state. Again, ladies
22 and gentlemen, I look forward to working with you. The
23 attorneys will do an excellent job. They both know the
24 rules, and they both know the case. And having said
25 that, Mr. Conner, is the State ready to proceed?

1 MR. CONNER: We're ready, your honor.

2 THE COURT: Is the Defendant ready to proceed?

3 MS. STEVENS: Yes, sir, your honor.

4 THE COURT: All right. Mr. Conner?

5 MR. CONNER: May it please the court.

6 THE COURT: Yes, sir.

7 OPENING STATEMENT FOR THE STATE BY

8 MR. CONNER: Ladies and gentlemen, my name is Harry
9 Conner. I'm the solicitor here in Sumter County. As you
10 are already know, that the charges on Mr. Lowery are for
11 armed robbery, blue lights and possession of a knife
12 during a violent crime. The blue lights means failing to
13 stop for the blue light of a police vehicle. Well,
14 shortly you're going to hear from the lady -- This
15 happened at a convenient store, a Kangaroo out on the
16 corner of Broad Street and Stamey Livestock Road, right
17 there at that intersection. Some of you may know that
18 store or know the location. In any event, the -- the
19 attendant there was Sharonda Alston. You're going to
20 hear from her. And you're going to hear from the
21 officers who were involved in this. Fortunately in this
22 particular case, or unfortunately I guess if you're the
23 Defendant, the police response was terrific. They were
24 right on top of -- In fact, you're going to find out that
25 one of the officers had been in the store just a few

1 minutes before and had just left the store, and he
2 returned to the store and a sheriff's department officer
3 was in the vicinity and he responded. Ms. Alston is
4 going to tell you that she was inside the store. She saw
5 this fella outside with a camouflage jacket on with a
6 mask on and of course, being there by herself, her first
7 response -- thought was that something bad was going to
8 happen. Here's a fella walking around outside with a
9 mask on. And so she hit what she called the silent alarm
10 to send a signal to her company that she was -- that
11 something was going wrong there. After it was all over
12 with, a minute or two later, she calls 911 to -- And she
13 has some trouble getting through, but she can tell you
14 about that. In any event, she called 911 and these
15 officers responded right away. And what she says is
16 important. And what she said right there at that time is
17 important, because it indicates that, you know, she gave
18 out good, accurate information. And these officers were
19 able to act on it. And also, you're going to find out
20 that Wayne Acevedo with the sheriff's department was
21 behind him very quickly, and he wouldn't stop for the
22 blue light of the police vehicle. There was a chase out
23 or from -- down Stamey Livestock going out to Frierson
24 Road. And he turned on Frierson Road and headed out
25 behind the air base. He got to a point there where

1 there's a gate, and he got out. Mr. Acevedo thought he
2 was -- was giving up. But he jumped back in his vehicle
3 and took off again, and the chase proceeded back toward
4 Dalzell across 521 where he wrecked his vehicle into a
5 store called Rabon Sav-On. And of course, by this time,
6 several city police officers were brought out as well as
7 county officers. And all this time with a police vehicle
8 chasing him, with the blue lights on. They got him out
9 of the -- the vehicle, and some items had been recovered
10 from this vehicle and from -- from his person. And
11 you'll get a look at those items as we -- And you --
12 you'll get a look at the photograph that was taken of him
13 in the store when he was on the store video. The -- In
14 the end of this case, ladies and gentlemen, you will get
15 to hear a statement that he's given to law enforcement
16 authorities about his involvement in this case. In any
17 event, all we ask for throughout the matter is your
18 careful attention. Thank you.

19 THE COURT: Ms. Stevens, does the Defense care to
20 make opening statements?

21 MS. STEVENS: Yes, sir, your honor.

22 OPENING STATEMENT FOR THE DEFENSE BY

23 MS. STEVENS: Ladies and gentlemen, I know you saw
24 my client yesterday, but this is Mark Lowery. And you
25 have to remember that he is innocent until proven guilty

1 beyond a reasonable doubt. And this is his day in court.
2 Please have a seat. And those are his mom and dad that
3 are sitting behind him. Mr. Conner's told you what he
4 thinks he's going to be able to -- to show you or tell
5 you. I'm simply going to ask you to please pay attention
6 to everything that you do hear and see, but also to what
7 you don't hear and don't see. I submit to you that when
8 you see this video allegedly of my client, you're not
9 going to be able to see my client. We're not denying
10 that he ran from the police. We're not denying that he
11 is guilty of failure to stop for a blue light. But we
12 are contesting that he is guilty of the armed robbery.

13 I submit to you that my client was merely in the
14 wrong place at the wrong time and ran from the police. I
15 want to thank you all for being here. I know that this
16 is probably not where you planned on being the Tuesday
17 morning of this week. But it is because of people like
18 you who come and do their duty that we have the wonderful
19 justice system that we have, and I thank you.

20 THE COURT: All right, Mr. Conner?

21 MR. CONNER: Thank you. Your honor, I'd call
22 Sharonda Alston.

23 SHARONDA ALSTON, being first
24 duly sworn, testified as follows:

25 DIRECT EXAMINATION BY MR. CONNER:

1 Q. Please state your full name, spell your last name
2 for the record.

3 A. Sharonda Alston, A-l-s-t-o-n.

4 Q. Do you live -- Where do you live?

5 A. [REDACTED], Sumter.

6 Q. How long have you lived in Sumter?

7 A. Basically my whole life.

8 Q. Were you -- were you working here in Sumter back
9 on, on November the 27th of 2006?

10 A. Yes, sir.

11 Q. And where were you working at that time?

12 A. At Kangaroo Gas Station, 2995 Broad Street
13 Extension.

14 Q. That's Kangaroo?

15 A. Yes, sir.

16 Q. Is that at the intersection of another road, Broad
17 Street, what other road comes in there?

18 A. Stamey Livestock.

19 Q. Stamey Livestock. Now, how long had you been
20 working at the store, Sharonda?

21 A. Maybe about five months.

22 Q. And what shift were you working that night?

23 A. That night I worked third shift.

24 Q. And what time did you come in on shift?

25 A. Eleven.

1 Q. At 11 p.m.?

2 A. P.M, yes, sir.

3 Q. So you -- Now this incident, according to the
4 police records, occurred about 055 or about 55 minutes
5 after midnight. Is that accurate?

6 A. Yes, sir.

7 Q. So you had been at work then for just about two
8 hours?

9 A. Yes, sir.

10 Q. Now, if you would, tell us what you observed
11 happening.

12 A. That night I was standing in front of the register.
13 We have two registers in the store and one of them that
14 basically --- and it's another register that faces the
15 window. And I was standing at the register that is the
16 window because, when I don't have anything to do or I
17 completed all my work, I usually stand in front of the
18 register that doesn't work because it faces the parking
19 lot and I can watch the parking lot. So I was standing
20 in front of that register, and I was talking on my cell
21 phone. And I seen a man come -- Before I saw the man
22 coming around the corner, I -- My officer that usually
23 checks on me during the night, I think his name is
24 McQueen, he had just been in there. And we would always
25 talk every time he came in there. And ---

1 Q. Is he back here in the courtroom?

2 A. Yes, sir.

3 Q. Is Officer McCoon -- Could you just stand up
4 wherever ... Is this the officer?

5 A. Yes, sir.

6 Q. And he had been in there ---

7 A. Uh-huh. And he left. And he couldn't been gone
8 for five minutes, and when I seen a young man come
9 around the corner in a camouflage jacket, he had a ski
10 mask on that covered his whole face all the way up into
11 his eyes and he had on a hat pulled down over his head.
12 He came in the store. As he was coming in the store, I
13 automatically knew, I mean, on instinct something was
14 going to happen because it wasn't cold outside at all.
15 It was warm that night. I didn't even wear a jacket to
16 work, and it was big camouflage ski coat he had on. And
17 a ski mask and a hat. He had his hands in his pockets.
18 So when he came in the store, he, he pulled his hand out
19 his pocket and he told me to give him all the money out
20 the register. He had a knife in his hand. So I did as
21 I was told. Took all the money out the register and
22 handed it over to him over the counter. He told me to
23 give him my register underneath the -- Give him the
24 money from underneath the register. I told him there
25 wasn't any money underneath the register, but I also

1 showed him. I took the top and set it on the counter
2 and showed him that there wasn't any money in the
3 register.

4 He then told me to put it into a bag. When I tried
5 to put it into the bag, it fell on the floor. He told
6 me to pick all of it up. I picked all of it up, put it
7 in the bag, gave it to him, and he left. When he left,
8 I tried to call the police, but being as though I'm
9 guessing when I pushed the silent alarm, it was sending
10 a signal to the police. I picked up the, the store
11 phone and it gave me a busy signal. It wouldn't let me
12 dial out. I tried it twice, and it didn't go through so
13 I called off my cell phone. I called the police off my
14 cell phone, and then I locked the door.

15 Q. So you had pushed the silent alarm when?

16 A. As he was coming through the door.

17 Q. Uh-huh.

18 A. As he was walking up to the register, I pushed the
19 silent alarm.

20 Q. And you tried to use the store phone to call the
21 police on, 911?

22 A. Yes, sir.

23 Q. And that wouldn't work, so you used your cell
24 phone?

25 A. Yes, sir.

1 Q. Now, the -- What did he do with the knife when he
2 was talking to you?

3 A. He just like pointed it towards me over the
4 counter.

5 Q. And what did he say to you?

6 A. Put the money in a bag. Give me all the money out
7 the register and put it in the bag.

8 Q. Now, did you notice what kind of vehicle he was
9 driving?

10 A. Yes, I did. As he left the store, it's a window --
11 If I was standing at the register that faces the store,
12 it's the window directly behind me, a big glass window.
13 And it just so happened he parked on that side of the
14 store in the farthest parking -- On the farthest parking
15 spot towards the edge of the building. So when he ran
16 out the store and he ran towards the part of the
17 building that he came from around and I went to the
18 window and I seen the truck was parked in that parking
19 space. It was a black mid-size truck. And he got in
20 that and he backed all the way up and so -- Well, he
21 never turned around for me to see his license plate. He
22 backed all the way into the road. Never turned on his
23 lights, and he went down Stamey Livestock.

24 Q. And which direction did he go on Stamey Livestock?

25 A. He went the opposite of the highway.

1 Q. So he went away -- He went away from 378 then?

2 A. He --

3 Q. Broad Street? He went out toward Frierson Road?

4 A. Yeah, like Stamey Livestock it'll either take you
5 to 571 if you turn right, or it'll take you to Shaw if
6 you turn left when it gets all the way up to the end of
7 the road.

8 Q. And did you -- Did you talk with the dispatcher?

9 A. Yes.

10 Q. And did you give her the information that you,
11 you've given here?

12 A. Yes, sir.

13 Q. And the, the -- Now, did your store have a video
14 in, in -- Video camera inside the store?

15 A. Yes.

16 Q. And who was the first officer to come back to your
17 store, or come to your store, after this thing happened?

18 A. The same officer that had just left the store?

19 Q. Mr. McCoon?

20 A. Yes, sir.

21 Q. And did he come back there?

22 A. Yes.

23 Q. And did, did he get the video from the store?

24 A. Yes.

25 Q. Now, have you had an opportunity to view these

1 photographs, and I'll show them to you. That is
2 photographs -- Can you identify those?

3 A. Yes, sir.

4 Q. Do they fairly and accurately represent what
5 happened there when the Defendant was in your store?

6 A. Yes, sir. Pictures are accurate. The only thing
7 that isn't right is the time.

8 Q. The time?

9 A. Yes, sir.

10 Q. So tell us about that.

11 A. Our machine being a bit off because the managers,
12 they don't change the tapes until the next morning, so
13 it runs from the morning before right next to the next
14 morning. But they change it when they shift come in at
15 five.

16 Q. But --

17 A. But it may have been off.

18 Q. The picture shows the fella that robbed you?

19 A. Yes, sir.

20 MS. STEVENS: Objection.

21 MR. CONNER: I understand there's no objection,
22 your honor --

23 MS. STEVENS: Oh, no, no. I said I do have an
24 objection.

25 MR. CONNER: Oh, you do?

1 MS. STEVENS: Yes, sir.

2 MR. CONNER: I, I misunderstood.

3 THE COURT: All right. And these -- Have these
4 photographs been marked?

5 MR. CONNER: We'd mark them at this time. This is
6 State's Exhibit Number 1.

7 (Whereupon, photograph marked as the State's
8 Exhibit Number 1 for identification.)

9 THE COURT: For ID at this time?

10 MR. CONNER: Two. Three.

11 (Whereupon, photographs marked as the State's
12 Exhibit Numbers 2, 3 and 4 for identification.)

13 THE COURT: All right. Ms. Stevens, is there
14 something you'd like to take up outside the presence of
15 the jury?

16 MS. STEVENS: Yes, sir, your honor.

17 THE COURT: All right. Ladies and gentlemen, I'm
18 going to ask you to go to your jury room at this time.
19 Please do not discuss the case. And when you do come
20 back out, you can bring water or coffee or whatever --
21 Whatever you want to bring that you may have, you can
22 bring those back in the courtroom. And if the bailiff
23 comes to the door and you're not ready to come back out,
24 just let him know. We'll wait on you. Thank you.

25 (Jury exits the courtroom, 10:13 a.m.)

1 THE COURT: All right. The jury's left the
2 courtroom, and I have Exhibits 1, 2, 3 and 4 from the
3 State for ID. What's your objection, Ms. Stevens?

4 MS. STEVENS: I don't know where those pictures
5 came from, your honor. I don't know who took them.

6 THE COURT: Well, if the witness is able to say
7 that these photographs show or depict the, the act as it
8 took place, does that matter? Is there, is there a rule
9 that says you have to have the person who took the
10 pictures? In other words, this -- The -- It appears to
11 me to be from some transposition off a camera.

12 MS. STEVENS: My guess is it's off a videotape,
13 which I don't see over here on his table for him to
14 enter into evidence, so how do we know that it wasn't
15 tampered with like from the time that it was on the
16 videocassette tape to when it was put on the CD they
17 have there or when those pictures were taken? She -- I
18 mean, it may look like what happened to her. But she
19 doesn't know that those pictures are accurate.

20 THE COURT: All right. I'm going to allow the
21 photographs, and then you can cross examine her on those
22 issues and any other witness who testifies. Mr. Conner,
23 do you have the videotape?

24 MR. CONNER: I have a videotape, your honor. I
25 have ---

1 THE COURT: Have you seen the tape, Ms. Stevens?

2 MS. STEVENS: I've seen the -- A CD of it, your
3 honor, but I haven't actually seen the tape.

4 MR. CONNER: I also have a CD of it. And I --
5 While we're outside the presence of the jury, I'd like
6 to ask the witness as to the videotape CD:

7 Q. Did you have an opportunity to observe that in my
8 office recently?

9 A. Yes.

10 Q. And does it fairly and accurately reflect what
11 happened?

12 A. Yes, sir.

13 Q. And I also asked you about this audio tape or audio
14 disk of the 911 information that you gave to the
15 dispatcher. Did you have an opportunity to listen to
16 that?

17 A. Yes, sir.

18 Q. And did it fairly and accurately reflect your
19 conversation with the dispatcher ---

20 A. Yes, sir.

21 Q. --- and the information you gave her?

22 A. Yes, it did.

23 MR. CONNER: We would offer those at this time.

24 THE COURT: Any objection to the -- You talking
25 about some CDs; is that what you're talking about?

1 MR. CONNER: Yes.

2 THE COURT: How about the tape, you going -- Which
3 one do you intend to use?

4 MR. CONNER: Well, we, we've got -- We're going to
5 introduce the tape that was taken by McCoon that night.
6 And through Officer Duggin, he will say that he made
7 this -- The other CD from it. What we can't -- We don't
8 have the machinery to display the, the store tape.

9 THE COURT: You don't have a television?

10 MR. CONNER: We have a television. But it's my
11 understanding that it, it, it won't play on it, the
12 speed, you have to do it at the store to, to watch it.

13 THE COURT: All right. Now, do you -- Do you have
14 any objection to the CD, Ms. Stevens?

15 MS. STEVENS: Yes, if you can't watch it on the TV,
16 how do you make a CD of it?

17 THE COURT: I, I, I am the last one to be able to
18 answer that question. I don't know. But ---

19 MS. STEVENS: I mean ---

20 THE COURT: --- have you, have you reviewed the
21 tape?

22 MS. STEVENS: No.

23 THE COURT: Have you reviewed the CD?

24 MS. STEVENS: Yes.

25 THE COURT: Do you have any objection to the CD

1 coming into evidence ---

2 MS. STEVENS: Yes.

3 THE COURT: --- to be viewed? And the basis of
4 that objection is what?

5 MS. STEVENS: When the original's available, I
6 thought I was entitled to have the original.

7 THE COURT: And do you ---

8 MS. STEVENS: I mean, if, if you ---

9 THE COURT: --- so you want to go out to the store
10 and watch it?

11 MS. STEVENS: Well, if you can't watch it on a
12 normal TV, my question is how was he able to make an
13 accurate CD of it so that we can see it. Is there some
14 sort of technology?

15 THE COURT: That's a -- All right. Well, if we
16 want to get into that now, we can. Or we can get into
17 it at the time you seek to introduce the, the CD for the
18 jury's viewing. How about the 911 tape?

19 MS. STEVENS: I have not heard it.

20 THE COURT: All right. So then you want to play
21 that now?

22 MR. CONNER: We can play that.

23 THE COURT: Has that been marked, Mr. Conner?

24 MR. CONNER: It's not been marked, your honor.

25 THE COURT: Want to mark it Number 5 for ID?

1 (Whereupon, CD of 911 tape is marked as the State's
2 Exhibit Number 5 for identification.)

3 THE COURT: And this is the CD of the 911 tape.

4 (Whereupon, audio of 911 call is played.)

5 THE COURT: All right, Ms. Stevens, any objection
6 to that tape?

7 MS. STEVENS: No, sir, your honor.

8 THE COURT: All right, the 911 tape is in.

9 (Whereupon, State's Exhibit Number 5 is moved into
10 evidence.)

11 THE COURT: The -- Do you intend to use the video
12 with this witness?

13 MR. CONNER: Well, I, I --

14 THE COURT: Yes?

15 MR. CONNER: Yes.

16 THE COURT: All right. Has that been marked? If I
17 could refer to it by number, that'd be Number 6 for ID,
18 the CD of the -- The CD of the incident is what I'll
19 call it.

20 (Whereupon, CD of the incident is marked as the
21 State's Exhibit Number 6 for identification.)

22 THE COURT: What's Mr. Greenan going to have to do
23 to show the CD if that's something I need to look at
24 before I rule on whether or not -- We got to put a
25 screen up?

1 MR. CONNER: Yes. You, you want us to go ahead and
2 do that now?

3 THE COURT: Yes, sir. Have, have you -- Have you
4 seen the CD, Ms. Stevens?

5 MS. STEVENS: Yes, your honor.

6 THE COURT: Your objection is that a tape of
7 something you haven't viewed and you don't have any way
8 to compare the -- One against the other?

9 MS. STEVENS: Yes, sir, your honor.

10 MR. GREENAN: Judge, you want me to go ahead and
11 set up?

12 THE COURT: Yes.

13 MR. GREENAN: Okay. Mr. Bradley, could you cut down
14 some of the lights, please?

15 MR. BRADLEY: Yes, sir.

16 (Whereupon, video CD of incident is played.)

17 THE COURT: So Mr. Conner, your question of the
18 witness was whether or not she had an opportunity to
19 review that tape. And whether or not that was an
20 accurate depiction of what had occurred. If you would
21 pick up at that point and redirect that question.

22 MR. CONNER: Okay.

23 DIRECT EXAMINATION BY MR. CONNER RESUMES:

24 Q. Ms. Alston, is that the video you viewed in my
25 office?

1 A. Yes.

2 Q. And is that a fair and accurate reflection of what
3 happened there in the store at the time the robbery
4 occurred?

5 A. Yes, sir.

6 THE COURT: And then just for the record that's
7 State's Exhibit 6 for ID.

8 MR. CONNER: That is State's Exhibit 6.

9 THE COURT: All right. Ms. Stevens, do you -- Do
10 you have any questions of the witness on that point, and
11 then I'll hear you ---

12 MS. STEVENS: No, sir.

13 THE COURT: --- your objections based on what?

14 MS. STEVENS: The fact that the videotape maybe
15 clearer, you may be able to see better because it's an
16 original. This is a copy. And the original is
17 available. I don't know what Mr. Duggin had to do to
18 make that video on that CD, but it could've disturbed
19 something that would be exculpatory to my client.

20 THE COURT: All right. Would you then want to
21 allow the jury to go escorted to the station to review
22 it on the television screen if that's the only way that
23 the witness, excuse me, that the officer says it can be
24 done?

25 MS. STEVENS: You mean like a field trip?

1 THE COURT: Well, and, and, and I don't know that
2 the technology involved, but I -- And I don't know why
3 it can't be looked at a television screen. But if
4 that's something that you want to at least look at
5 during lunch, I would certainly entertain a request from
6 you to do that.

7 MS. STEVENS: I would make that request, your
8 honor.

9 THE COURT: All right. To, to -- For you to review
10 the videotape at a store?

11 MS. STEVENS: Yes.

12 THE COURT: All right.

13 MS. STEVENS: Does it have to be ---

14 THE COURT: Prior, prior to you asking the jury to
15 visit ---.

16 MS. STEVENS: Yes, sir.

17 THE COURT: --- the television?

18 MS. STEVENS: Yes, sir.

19 THE COURT: You wouldn't be visiting the scene,
20 then you're visiting the television.

21 MS. STEVENS: Correct.

22 THE COURT: All right. Well, we'll -- I'll
23 certainly let you do that during lunch. But based on
24 the witness's testimony that this does accurately depict
25 what occurred, you can certainly introduce the tape or I

1 would certainly allow the tape to be introduced if it's
2 clear.

3 MS. STEVENS: Yes, sir.

4 THE COURT: I don't know whether I'm going to go
5 with you during lunch, but I'll certainly let you do
6 that.

7 MS. STEVENS: Yes, sir.

8 THE COURT: Mr. Conner, would you have any
9 objection to that?

10 MR. CONNER: We don't have any objection to it.

11 THE COURT: All right. Well, I'll allow the tape
12 in, the 911 tape without a, excuse me, 6 for ID, the CD
13 of the incident is in over the Defendant's objection.
14 And of course, Ms. Stevens, you -- You are going to want
15 to renew -- Ms. Stevens, you're going to want to renew
16 your objections at the time they're introduced in front
17 of the jury so you don't waive those.

18 MS. STEVENS: Yes, sir, your honor.

19 THE COURT: And Defendant's 1 through 4 were
20 allowed in over your objection, and Number 5 is in
21 without objection. All right, we -- Can we leave the
22 screen up?

23 MS. STEVENS: Yes, sir.

24 THE COURT: Are you ready for the jury?

25 MR. CONNER: We're ready.

1 THE COURT: Ms. Stevens, ready for the jury?

2 MS. STEVENS: Yes, sir.

3 THE COURT: Ask them if they're ready.

4 (Whereupon, State's Exhibit Numbers 1 through 4 and
5 Number 6 are moved into evidence.)

6 MR. CONNER: We're not going to view the video
7 until after lunch. I can go ahead and take the screen
8 down.

9 THE COURT: No, she can -- I'm going to let the CD
10 --

11 MR. CONNER: Okay.

12 MS. STEVENS: CD's in, and I have the opportunity
13 to put in the ... If I do that, your honor, doesn't
14 that ---

15 THE COURT: Well, I'm -- What I'm going to do is
16 I'm going to ...

17 MS. STEVENS: I just want to make sure I ---

18 THE COURT: I understand.

19 (Jury enters the courtroom, 10:30 a.m.)

20 THE COURT: All right, ladies and gentlemen, thank
21 you for your patience. Mr. Conner, you may proceed
22 questioning the witness.

23 DIRECT EXAMINATION BY MR. CONNER RESUMES:

24 Q. And I show you here State's Exhibit Number 1 and
25 ask you again does that truly and accurately reflect

1 what happened there? The man stood before you and
2 demanded the money?

3 A. Yes, sir.

4 Q. And what could you tell about him from your viewing
5 of him?

6 A. I could tell he was a white male. He wasn't old.

7 Q. And what did he have on his face?

8 A. He had on a ski mask.

9 Q. And how high up did it come?

10 A. All the way up. It covered his nose. Came all the
11 way up to his eyes.

12 Q. Okay. Does this one -- This picture accurately
13 reflect him?

14 A. Yes, sir.

15 MR. CONNER: This is State's Exhibit Number 1 if I
16 can approach, Your Honor?

17 THE COURT: Yes, sir.

18 MS. STEVENS: I'd note the Defendant's objection.

19 THE COURT: Objections are noted, and they're
20 overruled. You can publish Exhibit 1 to the jury. And
21 ladies and gentlemen, let me make a couple of comments
22 on that. When an exhibit is published, that is just a
23 legal term for shown to you. I wanted to remind you of
24 a couple things, however. While you're looking at
25 whatever's published to you, the witness is going to

1 continue testifying and questions are going to continue
2 to be asked. So make sure that while you're looking
3 you're also listening and watching to the other
4 testimony in the courtroom. All right, Mr. Conner?

5 Q. And I ask you next to look at State's Exhibit
6 Number 2 and Number 3. And what do those pictures show?
7 Does it show that he had on a ball cap?

8 A. Yes.

9 Q. And his jacket was a camouflage jacket?

10 A. Yes, sir.

11 THE COURT: Your honor, we would ask to publish
12 State's Exhibit Number 2 and 3 at this time.

13 THE COURT: All right, over the Defendant's
14 objection, same is noted.

15 MS. STEVENS: Yes, sir.

16 Q. And I show you here State's Exhibit Number 4. And
17 that picture shows what?

18 A. The knife that he had.

19 Q. The knife in his hand?

20 A. Yes, sir.

21 MR. CONNER: And that's State's Exhibit Number 4.
22 We'd like to publish it, your honor.

23 THE COURT: All right, same objection?

24 MS. STEVENS: Yes, sir.

25 THE COURT: And it's overruled.

1 Q. Now, on this exhibit, State's Exhibit Number 5, did
2 you have an opportunity to listen to the 911
3 conversation you had with the dispatcher in my office?

4 A. Yes, sir.

5 Q. And did you also have an opportunity to listen to
6 it again this morning?

7 A. Yes, sir.

8 Q. And does it -- Does this audio tape of that
9 conversation accurately reflect your conversation with
10 her when you were reporting the robbery?

11 A. Yes, sir. It does.

12 MR. CONNER: Your honor, we'd ask permission to
13 publish that.

14 THE COURT: And that is Exhibit Number 5?

15 MR. CONNER: That's Exhibit Number 5.

16 THE COURT: Ms. Stevens, no objection?

17 MS. STEVENS: I have no objection to that, your
18 honor.

19 THE COURT: All right. Exhibit 5 is -- If you
20 could publish that, Mr. Conner.

21 (Whereupon, audio of 911 call is played.)

22 Q. Now, in addition to that audio tape, did you have
23 opportunity to view a videotape in my office?

24 A. Yes, sir.

25 Q. And did you also have an opportunity to view that

1 here in the courtroom this morning?

2 A. Yes, sir.

3 Q. And is that a fair and accurate representation of
4 what happened there at the time you were robbed?

5 A. Yes.

6 Q. Now, your -- Your store had a camera in it; is that
7 correct?

8 A. Yes, sir.

9 Q. And Mr. McCoon took custody of the tape that was in
10 the -- The Video camera in your store?

11 A. Yes, sir.

12 MR. CONNER: Your honor, we'd ask permission
13 regarding State's Exhibit Number 6, the CD made from the
14 tape.

15 THE COURT: Ms. Stevens?

16 MS. STEVENS: Over defendant's objection.

17 THE COURT: All right. Same objection that was
18 made earlier. You can show the tape. And ladies and
19 gentlemen of the jury, I want to make sure that if you
20 cannot see, especially you folks on the far -- My front
21 right in the box, if you cannot see, just raise your
22 hand. I'll make sure you get positioned or the screen
23 gets positioned where you can see.

24 (Whereupon, video CD of incident is played.)

25 Q. Now, Sharonda, would you answer any questions this

1 lawyer might have for you.

2 A. Yeah.

3 CROSS EXAMINATION BY MS. STEVENS:

4 Q. Okay. You said that you were standing in front of
5 the register facing the door talking on the phone?

6 A. Yes, ma'am.

7 Q. Okay. And what did you say the person was wearing?

8 A. Camouflage coat and a ski mask and a hat.

9 Q. So why did you tell 911 that the person was wearing
10 an orange and gray ski mask?

11 A. It had orange and, and gray.

12 Q. And why did you tell them that he was wearing a
13 pea-colored coat?

14 A. A what?

15 Q. A pea-colored coat?

16 A. No, I never said that.

17 Q. You said that the officer that always checks with
18 you had been gone for about five minutes?

19 A. I said he couldn't have been gone for five minutes.

20 Q. Okay. You said you called 911 on your cell phone?

21 A. Yes, ma'am.

22 Q. How long do you think it took you to decide to --
23 To call on your cell phone when you couldn't get through
24 on your land line?

25 A. When I picked it up, it gave me a busy tone. I

1 hung it up, and I picked it up again. It gave me a busy
2 tone. And then I called with my cell phone.

3 Q. About how long would you say?

4 A. 30 seconds.

5 Q. Okay. Now, when did you say that you pushed the
6 alarm?

7 A. As he was coming into the door.

8 Q. Okay, because I think you said one time it was when
9 he was at the door and another time when he approached
10 the register, so which one was it?

11 A. When he was coming in the door, coming to my
12 register, I pushed the silent alarm button.

13 Q. Okay.

14 A. You don't have to wait until something happens. If
15 you feel uncomfortable, you can push it at any time.

16 Q. And what happens if you push the button?

17 A. It sends a signal to the police telling them
18 there's something going on at the store.

19 Q. Do they generally call and ask you what's going on?

20 A. No. A police officer -- I've never pushed it
21 before. That was my first time pushing it. But from
22 what I was told, they have to come.

23 Q. Okay. You said you saw -- On the tape, you said a
24 dark-colored truck, and then you said black truck. How
25 could you see it? Was it dark?

1 A. It was dark. I could see it because I looked out
2 the window, the glass window.

3 Q. Was there a light on?

4 A. Yeah. We have store lights on our store.

5 Q. Okay. You said this was in the back corner?

6 A. Yes, ma'am.

7 Q. Okay. When -- How long did it take Officer McCoon
8 to come back do you think?

9 A. I'm not exactly remembering how long it took him,
10 because I didn't know what time it was when he left, nor
11 did I know what time it was when he came back. But it
12 wasn't long.

13 Q. Was this person wearing gloves?

14 A. No, ma'am.

15 Q. Did they touch anything?

16 A. Yes, ma'am.

17 Q. What'd they touch?

18 A. Touched the counter, and he touched the bag of
19 money.

20 Q. Okay.

21 A. He ran leaving --

22 Q. You said ---

23 A. --- locked.

24 Q. --- You said you could tell that this person was
25 not old. How?

1 A. Because I could look at his, his eyes, around his
2 eyes. He didn't seem to be old at all.

3 Q. Okay. What was the temperature that night; do you
4 know?

5 A. No.

6 Q. Tell me, where are the lights outside?

7 A. I'm not exact on where they are located
8 specifically, but they are on the store. All around the
9 store.

10 Q. Okay. What was that that you did at the end of the
11 tape? Looked to me like you were pushing some sort of
12 button?

13 A. Excuse me?

14 Q. I said, what were you doing at the end of the tape?
15 It looked like you were pushing some sort of button.

16 A. At the end of the tape, I had to -- I have -- My
17 nails, they used to be long. And I wasn't sure if they
18 sent the signal because it's silent. So I took a pen
19 after he left and pushed it in there again.

20 Q. Okay. And you don't know how long it was when Mr.
21 McCoon showed up?

22 A. No.

23 MS. STEVENS: Okay. I don't have anything further.

24 THE COURT: Redirect?

25 MR. CONNER: I have nothing further.

1 THE COURT: Thank you, ma'am. You can step down.

2 Is this -- Mr. Conner, is this witness to be excused or
3 to remain?

4 MR. CONNER: She's, she's going to remain here for
5 a while.

6 THE COURT: Okay. You can call your next witness.

7 MR. CONNER: Your honor, my next witness is Ronald
8 McCoon.

9 MR. GREENAN: Judge, do you want the screen down?

10 THE COURT: Ms. Stevens, you going to need the
11 screen?

12

13 MS. STEVENS: Not before lunch, your honor.

14 THE COURT: Mr. Conner, you going to need the
15 screen before lunch?

16 MR. CONNER: Not going to need it.

17 THE COURT: All right. Mr. Greenan, you can take -
18 - Take it down while he's being sworn.

19 RONALD McCOON, being first
20 duly sworn, testified as follows:

21 DIRECT EXAMINATION BY MR. CONNER:

22 Q. State your full name and spell your last name for
23 the record.

24 A. Full name is Ronald James McCoon, Jr. Last name is
25 M-c-c-o-o-n.

1 Q. Officer McCoon, where do you work?

2 A. I work for the City of Sumter Police Department.

3 Q. And how long have you been a policeman?

4 A. I graduated academy last part of January of 2006.

5 Q. And how many months then have you been working as a
6 policeman with the City of Sumter?

7 A. When this happened, approximately ten.

8 Q. Ten months prior to this event. So it's been close
9 to two years now that you've worked as a policeman, a
10 year and a half ---

11 A. Close to a year and a half.

12 Q. Now, what did -- You say you graduated from the
13 academy. What -- What is that?

14 A. You have to go through nine weeks of training
15 before becoming a certified police officer. It's up in
16 Columbia. It is run by the State of South Carolina.

17 Q. And you -- In order to continue to be a policeman,
18 you have to pass that program or pass that test they
19 give you; is that right?

20 A. Yes, sir.

21 Q. Now, were you working on November the 27th, 2006
22 and become involved in this case?

23 A. Yes, sir.

24 Q. And had you -- Tell us about going to the store
25 prior to the robbery.

1 A. I was working night shift on this occasion. It was
2 Sunday evening into Monday morning. I worked from six
3 p.m. to six a.m. I work various areas of the city on
4 patrol. And any stores that are open that time of
5 night, I check on the store clerks, make sure they're
6 okay, try to make sure nothing happens to them.

7 Q. And had you been at this store?

8 A. Yes, sir.

9 Q. And how -- how long before the robbery?

10 A. A few minutes. Four or five minutes at the most I
11 had left the store and then this happened.

12 Q. And do you know where you were when you got the
13 call?

14 A. I was approximately at Broad and Wilson Hall.

15 Q. And after receiving that call, did you return to
16 the store?

17 A. Absolutely.

18 Q. At -- By the call, I mean you got a dispatch
19 message that there was a robbery at the store?

20 A. Yes, sir.

21 Q. And did -- After you got there, was -- did you meet
22 with Ms. Alston?

23 A. Yes, I did.

24 Q. And did she tell you what happened?

25 A. She told me very shortly after I left this man came

1 in. She explained -- She identified him as a white
2 person. He had on a camouflage coat of some sort. It
3 had orange, gray in it; a mask that had orange and gray
4 in it; also a ball cap. He was a white male and he had
5 a knife.

6 Q. So she said he was a white male?

7 A. Yes, sir.

8 Q. And she described his, his coat as being
9 camouflage?

10 A. Camouflage with orange and gray in it. Also the
11 mask with the same.

12 Q. Okay. Had a mask also. Now, did she say what he
13 threatened her with?

14 A. She said he had a knife.

15 Q. And did she tell you the color of his truck?

16 A. Yes, she did. She said it was a black truck, and
17 it went -- well, it went northbound on Stamey Livestock,
18 because Stamey Livestock ends at Broad.

19 Q. It's -- That's the end of Stamey Live ---

20 A. That's the end of Stamey.

21 Q. It intersects Broad, and that's the way she --
22 That's where it stops or where it starts?

23 A. Both. Depends which way you're coming from.

24 Q. Okay. Now, did -- did you retrieve the video from
25 the store that night?

1 A. Yes, I did.

2 Q. And did some other officer come there to the store
3 and also look at the video?

4 A. Yes, sir.

5 Q. Who was that?

6 A. Lieutenant Nesbitt viewed the videotape also.

7 Q. That's this gentleman seated over here?

8 A. Yes, sir.

9 Q. And I show you this videotape and ask if you can
10 identify?

11 A. This was the videotape I took and placed into
12 evidence.

13 Q. So you turned it in at the evidence room here?

14 A. Yes, sir, the police department.

15 Q. Okay.

16 MR. CONNER: Your honor, we'd offer that into
17 evidence at this time.

18 THE COURT: All right. Ms. Stevens?

19 MS. STEVENS: No objection, your honor.

20 THE COURT: All right. That will be Exhibit 7?

21 COURT REPORTER: Yes, sir.

22 (Whereupon, videotape from the store marked and
23 entered into evidence as the State's Exhibit Number 7.)

24 Q. When you were in the store, Officer McCoon, was
25 there anybody else in there other than you?

1 A. Not that I remember at the time.

2 Q. And did -- did you ever see the truck yourself?

3 A. I saw a black pickup truck as I was leaving the
4 store turning left onto Stamey Livestock. And I took a
5 left onto Broad Street, just went on checking the car
6 dealerships. We have problems with people breaking in -
7 - trying to break into vehicles at car dealerships. I
8 was starting to look at those. And I didn't get very
9 far down the road when the call came out.

10 Q. And how long would you say after the call came out
11 before you got back to the store?

12 A. Let's see, I have it right here. The call,
13 according to our dispatch, the call came out at 0054,
14 which is 12:54 in the morning. I arrived at 0055, which
15 is 12:55.

16 Q. So in about a minute's time?

17 A. A minute or less.

18 MR. CONNER: I have no further questions of him.

19 THE COURT: Ms. Stevens?

20 CROSS EXAMINATION BY MS. STEVENS:

21 Q. You said that the call came in at 0054. When you
22 say the call, what was the call?

23 A. Armed robbery just happen -- just occurred at Broad
24 and Stamey Livestock Kangaroo.

25 Q. Okay. Is that all it said?

1 A. That's what we got. And that's when I responded.

2 Q. Okay. Now, is what goes out over your radio the
3 same thing that goes out over the county radio in a
4 situation like this?

5 A. She put city and county units armed robbery just
6 occurred at Broad and Stamey. So it went across both
7 channels.

8 Q. Okay. And do you know -- You said that at 0054?

9 A. Yes, ma'am.

10 Q. Do you keep a log of what you do? Like when you
11 get out of your car, do you say this is whatever your
12 number is, I'm going to go check on this Kangaroo?

13 A. At times.

14 Q. Did you happen to do that that night?

15 A. I don't remember if I did or not.

16 Q. Okay.

17 MS. STEVENS: I don't have anything else. Thank
18 you.

19 THE COURT: Redirect, Mr. Conner?

20 MR. CONNER: I have nothing further, your honor.
21 I'd ask that he be excused.

22 THE COURT: All right, Mr. McCoon, you can step
23 down. Any objection to him being excused, Ms. Stevens?

24 MS. STEVENS: No, sir.

25 THE COURT: All right. You can be -- if you'd

1 like, sir, or remain.

2 THE COURT: All right, Mr. Conner, you can call
3 your next witness.

4 MR. CONNER: I'd call Wayne Acevedo.

5 WAYNE Acevedo, being first
6 duly sworn testifies as follows:

7 DIRECT EXAMINATION BY MR. CONNER:

8 Q. State your name, spell your last name correctly,
9 please.

10 A. Wayne Acevedo. Last name is A-z-e-v-e-d-o.

11 Q. And Wayne, where do you work?

12 A. Sumter County Sheriff's Office.

13 Q. And how long?

14 A. I graduated the academy August 11th of 2006.

15 Q. 2006. And when did you go to work for the sheriff?

16 A. I got hired May 26th, 2006.

17 Q. So ---

18 A. Between May and August, I was at the academy.

19 Q. And that was the same course that Officer McCoon
20 was talking about that's a nine-week course?

21 A. Yes, sir. Yes.

22 Q. The -- And were you working on November the 27th,
23 2006?

24 A. Yes, sir.

25 Q. And where were you when you got this call in

1 regards to this armed robbery?

2 A. When the confirmed armed robbery call came out, we
3 were at -- I was at 521 North at Frierson.

4 Q. So you were on Frierson Road or?

5 A. Correct. I was heading west on Frierson Road
6 towards Stamey Livestock.

7 Q. And what did you do when you heard the call?

8 A. When the call came out, I proceeded to drive west
9 on Frierson Road towards Stamey and Shaw Air Force Base.
10 Made a left-hand turn onto Stamey Livestock heading
11 towards Broad. The dispatch said that the suspect
12 vehicle was heading north on Stamey Livestock towards
13 Frierson Road, so he would've been coming towards me.

14 Q. He would've been coming towards you?

15 A. Correct.

16 Q. Was there any other traffic on the road at one
17 o'clock that night?

18 A. No, sir.

19 Q. And did -- Tell us what happened.

20 A. When we got in the vicinity of the recycling center
21 on Stamey Livestock, I observed the vehicle approaching.
22 At that time I didn't have blue lights or sirens on.
23 The vehicle passed me. I observed that it was a black
24 in color pickup truck. I then turned around, initiated
25 blue lights and sirens. And as I came around the

1 corner, the vehicle was making a left on to Frierson at
2 the stop sign. I then went through the stop sign,
3 proceeded to follow the vehicle, got behind the vehicle
4 on Frierson Road heading towards Shaw Air Force Base.
5 At that point I observed that the license plate was
6 covered up, and the vehicle was not stopping. And we
7 continued to go until we passed Sarge and went to Shaw
8 Air Force Base.

9 Q. So you got behind him on Stamey Livestock?

10 A. Well, I -- I was trying to close the gap between
11 us. I was trying to catch up to him because I had to
12 turn around.

13 Q. And when did you turn your blue lights on?

14 A. As soon as I turned around, I turned them on.

15 Q. And he turned left on ---

16 A. Frierson.

17 Q. --- Frierson Road ---

18 A. Correct.

19 Q. --- and headed out behind the Air Force base.

20 A. Yes, sir.

21 Q. And you proceeded after him. How close did you get
22 to him?

23 A. Close enough to where I could see that the license
24 plate was covered up.

25 Q. His license plate was covered up?

1 A. Correct. Couldn't read it.

2 Q. So -- And you had your blue light on at that time?

3 A. Blue lights and sirens, correct.

4 Q. And did he stop?

5 A. No, sir.

6 Q. And when you got up behind Shaw Air Force Base,
7 what happened?

8 A. Well, when you get towards Shaw Air Force Base off
9 Frierson, you either have to make a left to go into the
10 base gate or you continue going straight, which is right
11 past the gate there's barricades set up. And the
12 suspect vehicle drove in through the barricades and
13 stopped at that point only to get out of the vehicle --
14 The suspect jumped out. I drew, had him at gunpoint.

15 Q. All right.

16 A. Proceeded to go with my commands that have him walk
17 backwards towards me. I asked him where the knife was.
18 He said, what knife. Jumped back in the truck and
19 proceeded to turn around and move again.

20 Q. And when he proceeded to take off, what did you do?

21 A. I got back in my vehicle. I had to move over to
22 the left so he wouldn't hit me coming around. When I
23 turned around, I observed Sergeant Ragin from the
24 sheriff's office coming towards me. He then turned,
25 took over primary chase and the chase while I remained

1 the second unit calling the calls to the station.

2 Q. At that point, he was going back up ---

3 A. Frierson.

4 Q. --- or going toward 521 on Frierson Road?

5 A. Correct.

6 Q. And -- and Ragin was ahead of you?

7 A. Correct. He took over primary chase because I had
8 to turn around. Suspect vehicle ---

9 Q. And ---

10 A. --- gained a distance between ---

11 Q. Did y'all have on your blue lights on then?

12 A. Yes, sir.

13 Q. And tell us what happened.

14 A. From that point, Sergeant Ragin took over primary
15 chase. I was calling in locations as I stated across
16 the radio that we were back towards Stamey Livestock.
17 City units came across the radio and said that stops
18 sticks were deployed at Stamey and Frierson. At that
19 point the suspect hit the stop sticks. Sergeant Ragin
20 went by, and as I went by, I hit them and flattened my
21 front right tire. So at that point I had to pull over
22 to change my tire while the chase continued towards 521.

23 Q. Okay. And what's -- what's the purpose of these
24 stop sticks?

25 A. The purpose is to flatten the tires of the suspect

1 vehicle to -- for them either to slow down, or they end
2 up losing control of the vehicle. They can't maintain
3 control to try to stop themselves better.

4 Q. Causes them to have a flat tire in other words?

5 A. To end -- to end the chase, correct.

6 Q. And now, so Sergeant Ragin then proceeded on behind
7 him?

8 A. Correct.

9 Q. And did you -- How did -- Did you get up to Ragin's
10 ...

11 A. Yes. Eventually, after I changed my tire, I
12 continued to the location where I heard on the radio
13 that he had crashed into a convenience store.

14 Q. So you went to the convenience store?

15 A. Yes, sir.

16 Q. And that -- Tell us where that's located.

17 A. It's at the intersection of Old Camden and Queen
18 Chapel Road.

19 Q. And that -- that would've been on the other side of
20 521 ---

21 A. Correct.

22 Q. --- now. If you continue down 521 to where it
23 inter -- on -- down Frierson to ---

24 A. After I hit the stop sticks, then I had to ---
25 Frierson and 521. Another county unit was at Frierson

1 and 521 with more stop sticks. The suspect vehicle and
2 the pursuing police officers crossed 521 to the other
3 section of Frierson till they got to Old Camden and made
4 a right, went down to where Old Camden and Queen Chapel
5 meet, and that's where the suspect vehicle drove into
6 the convenience store.

7 Q. And by drove into it you mean he ran his vehicle
8 into ---

9 A. Correct.

10 Q. --- a building?

11 MR. CONNER: I have nothing further. I would now
12 ask that you answer any questions that Ms. Stevens might
13 have.

14 THE COURT: Ms. Stevens?

15 CROSS EXAMINATION BY MS. STEVENS:

16 Q. So what description did you get?

17 A. Okay. When I got the call -- First we got a call
18 that it was a, a hold-up type alarm. And then dispatch
19 came back and said that the clerk had called back to
20 dispatch to confirm that it was an armed robbery. As I
21 was proceeding up Stamey Livestock, we said the suspect
22 was heading north on Stamey Livestock in a black-in-
23 color pickup truck.

24 Q. Okay. And what time was this?

25 A. According to my report, I received the call at

1 0053.

2 Q. Didn't Mr. McCoon just testify that the call out at
3 0054?

4 A. Yes, but the computers in the dispatch might not
5 have the same time. I don't know.

6 Q. Okay. When you passed this truck, were its lights
7 on?

8 A. Yes.

9 Q. Was it speeding?

10 A. Couldn't tell.

11 Q. Don't they train you to ---

12 A. I'm not radar-certified.

13 Q. Okay. When did you fill out your report?

14 A. After I changed my tire, I went back to the
15 convenience store.

16 Q. Okay. Now, were you there when Mr. Lowery was
17 airlifted?

18 A. Yes, ma'am.

19 Q. Did you actually see him when you got -- was in the
20 car?

21 A. No, because if I'm not mistaken, he was in the back
22 of the ambulance by the time I showed up.

23 Q. Did you get a look at him?

24 A. When I stopped and got at the back side of the car
25 at Shaw Air Force Base on Frierson Road?

- 1 Q. No, did you see him after that?
- 2 A. No, nothing after.
- 3 Q. Okay.
- 4 A. But it was the same truck that was there.
- 5 Q. It was the same truck that you had seen at ---
- 6 A. Correct.
- 7 Q. --- Shaw? Okay. But you were never at the
- 8 Kangaroo Gas Station?
- 9 A. The one where the armed robbery took place, no.
- 10 Q. Okay. And how far down Stamey Livestock would you
- 11 say the recycling center is?
- 12 A. I'd say probably about half a mile to three-fourths
- 13 of a mile.
- 14 Q. Okay. So the recycling center is closer to
- 15 Frierson part of Stamey Livestock ---
- 16 A. Yes.
- 17 Q. --- than ---
- 18 A. Than to Broad, correct.
- 19 Q. Do you know what the temperature was that night?
- 20 A. I can't recall.
- 21 Q. Did you wear a coat to work?
- 22 A. No, ma'am.
- 23 Q. You said you asked about a knife. And what did you
- 24 say the response was?
- 25 A. He asked me what knife, and then just ran back to

1 the truck and got back in the truck and drove off.

2 Q. Okay. You said he went through the barricades.

3 How many barricades are there?

4 A. I'd say probably about six or seven maybe.

5 Q. And you have to go like this, right?

6 A. Right. You have -- like in a serpentine shape.

7 Q. And so when he got back in his truck, he had to do
8 the same thing, right?

9 A. Well, he drove around one and then one --- on the
10 grass.

11 Q. Okay.

12 MS. STEVENS: I don't have anything further.

13 THE COURT: Redirect, Mr. Conner?

14 MR. CONNER: Nothing further, your honor.

15 THE COURT: Step down, please.

16 MR. CONNER: We'd ask that he be excused, too.

17 THE COURT: All right. Sir, you can be excused if
18 you'd like. Any objection to that, Ms. Stevens?

19 MS. STEVENS: No, sir.

20 THE COURT: Does anybody on the jury need to take a
21 break? Just raise your hand if you do.

22 MR. CONNER: Your Honor, we'd call Rodney Ragin.

23 RODNEY RAGIN, being first
24 duly sworn, testifies as follows:

25 DIRECT EXAMINATION BY MR. CONNER:

1 Q. Please state your full name, spell your last name
2 for the record.

3 A. Rodney Ragin, R-a-g-i-n.

4 Q. Now, Rodney, where do you work?

5 A. Sumter County Sheriff's Office.

6 Q. And how long have you worked for Sumter County
7 Sheriff?

8 A. Approximately ten and a half years.

9 Q. And what's your capacity with Sumter County Sheriff
10 at this time?

11 A. My position there is a Sergeant on patrol.

12 Q. And were you working the night of this armed
13 robbery back on 11/27/2006?

14 A. Yes.

15 Q. And what were your duties that night?

16 A. That night I was patrolling the north and west
17 portion of Sumter County. I'm a supervisor on patrol,
18 so supervising troops on that side of town.

19 Q. And then Acevedo would be working for you?

20 A. Yes.

21 Q. And did -- did you hear the dispatch message about
22 the armed robbery and the chase?

23 A. Yes.

24 Q. And as a result of that, what did you do?

25 A. I proceeded to head to Stamey Livestock Road where

1 the incident occurred at in search of a black truck when
2 I heard Acévedo responded that he spotted one on Stamey
3 Livestock Road.

4 Q. And then where did you go?

5 A. I proceeded on to Stamey Livestock headed north.
6 When I got to Frierson Road, I made a left. By that
7 time, Acévedo was stating that the subject was stopped
8 at the fence approaching Shaw Air Force Base. As I was
9 making a left, he reported that the subject got back in
10 the vehicle and headed back toward Dalzell at which time
11 I observed a vehicle coming at a rate of speed -- high
12 rate of speed. Went past, I saw it was a truck. I
13 turned around on it and proceeded behind it. The
14 vehicle then went towards Dalzell at which time officers
15 had stop sticks on Frierson Road, and he ran through the
16 stop sticks. I gave him enough distance and as the stop
17 sticks was removed I proceed on behind him. He ---

18 Q. Did you have your blue lights on?

19 A. The blue lights and sirens on.

20 Q. Tell us what happened next.

21 A. The vehicle proceeded through the lights at 521 and
22 Frierson Road. Continued to head toward Dalzell. We
23 then came to Old Camden Highway, made a right -- Vehicle
24 made a right, headed back towards Sumter. Thought the
25 vehicle at this time, the vehicle probably was going

1 about 49, 50 miles per hour. The vehicle then, when it
2 got to Queens Chapel and 521, instead of making a turn
3 and going to Queen Chapel or 521 as continuous, he went
4 straight between the gas pumps and into the building.
5 Had no time enough to enter brake lights.

6 Q. That was -- that was after you'd gone through these
7 stop sticks twice?

8 A. Yes. I remember going through one set of stop
9 sticks. I don't -- I don't remember going through
10 another one. I remember going through one.

11 Q. And what did you observe at the wreck site?

12 A. At the wreck site, I was still -- I was on the
13 radio transmitting to dispatch about what was going on.
14 After the vehicle went into the store, city officers
15 were there behind me. They came up and approached the
16 vehicle. I was still maintaining radio contact with
17 Sumter base letting them know what was going on at that
18 time.

19 Q. So there were several city policeman arrived there

20 ---

21 A. Yes.

22 Q. --- right off your heels ---

23 A. Yes.

24 Q. Answer any questions she might have for you.

25 THE COURT: Ms. Stevens?

1 CROSS EXAMINATION BY MS. STEVENS:

2 Q. The intersection of Queen Chapel and Old Camden
3 Highway, it's not like a, sort of a -- Describe it for
4 those who may not be familiar with it.

5 A. It's more like a, I'll say pie -- slice of pie. It
6 goes -- Queen Chapel comes into it at a straight angle.
7 521 itself curves.

8 Q. So somebody that's not necessarily familiar with
9 that intersection, because I live out there, so I'm
10 familiar with it, it -- Old -- Old Camden Highway goes
11 this way and Queen Chapel kind of goes that way,
12 correct?

13 A. Exactly.

14 Q. So if you were kind of losing control of your
15 vehicle, you might not be able to turn? Correct?

16 A. If -- if they're losing of your vehicle, it may
17 not. But his angle -- He was going at a slow enough
18 speed he could a go either way he wanted to.

19 Q. Now, do you know if he ran over the speed sticks?

20 A. Yes.

21 Q. So was he wobbling or anything?

22 A. No, they was going straight. He just slowing down.

23 Q. You weren't at the Kangaroo, were you?

24 A. No, ma'am.

25 Q. Okay.

1 MS. STEVENS: I don't have anything further.

2 THE COURT: Redirect?

3 MR. CONNER: I have nothing further.

4 THE COURT: Thank you, sir. You can step down.

5 MR. CONNER: We'd ask that he be excused, your
6 honor.

7 THE COURT: All right, Sergeant, you can be excused
8 if you'd like. Ladies and gentlemen, we're going to
9 take a break now for about ten minutes. We'll have you
10 back out here in just a few minutes. Please do not
11 discuss the case.

12 (Jury exits the courtroom, 11:14 a.m.)

13 MR. CONNER: I've got five witnesses, your honor.
14 Some of them will take a rather short period of time.

15 THE COURT: All right.

16 (Jury enters the courtroom, 11:34 a.m.)

17 BAILIFF: Your honor, all the jurors and alternates
18 present in the court.

19 THE COURT: Thank you, sir. All right, Mr. Conner,
20 you can call your next witness.

21 MR. CONNER: Your honor, I'd call Bill Wingate.

22 BILL WINGATE, first being
23 duly sworn testifies as follows:

24 DIRECT EXAMINATION BY MR. CONNER:

25 Q. Please state your full name, spell your last name.

1 for the record.

2 A. William Lee Wingate, III. W-i-n-g-a-t-e.

3 Q. And you go by Bill ---

4 A. Bill, yes, sir.

5 Q. --- right? And Bill, where do you work?

6 A. Sumter Police Department, patrolman division.

7 Q. How long have you worked in Sumter for the police
8 department?

9 A. I've been at Sumter Police Department for
10 approximately ten years.

11 Q. What kind of duties have you had while you've been
12 working there?

13 A. I spent approximately four years on patrol. I was
14 promoted to investigation division where I worked
15 property crimes, armed robberies, murders. Shortly
16 prior to this incident, I was assigned back to patrolman
17 division. Approximately I think about six months back
18 on patrol the night of this incident.

19 Q. So you were working on November the 27th, 2006?

20 A. Yes, I was.

21 Q. And did you get a -- Did you respond in response to
22 the dispatch call involving this armed robbery at the
23 Kangaroo station?

24 A. Yes, I did.

25 Q. And what did you do?

1 A. I was across the other side of town at the time the
2 call came out. I knew -- Actually I was at Alice and
3 Henry Street when the call came out. I knew I could go
4 up Alice -- Alice Drive to Wesmark and come out that way
5 and hit 378. And that's the closest way to the store.
6 I -- I responded to the store. Officer McCoon got there
7 prior to -- to me getting there. Once he got to the
8 scene, as I came by, by that time, dispatch had already
9 advised that a blackened-color with a white man had
10 robbed the store and he left down Stamey Livestock away
11 from -- as I came by I -- on the radio, I asked McCoon
12 if he was 10 4, if the scene was okay, and he said
13 affirmative, so I continued down Stamey Livestock
14 towards where the deputy had gotten behind the black
15 colored truck.

16 Q. And where did you first see the Defendant in his
17 truck?

18 A. As I was approaching I think it's Frierson Road, I
19 overheard on the police radio dispatch advise us that
20 the suspect vehicle had pulled into the passive
21 barricades at Shaw and he had turned around, and he was
22 coming back towards my location at Frierson and Stamey
23 Livestock. There were several other city units in that
24 area at that time. A couple of them were trying to
25 deploy stop sticks. I advised them do not get in his

1 way, do not try to stop him, do not try to block the
2 road. Shortly -- Seven minutes after Trooper Jonathan
3 Parker was killed in a 10 0 out in the county, and I
4 didn't want any of our guys to get in the way of this
5 guy if it was -- happened to be another incident where
6 somebody try to hit a patrol car or anything. So I was
7 telling them to make sure they stayed out of the way.
8 One of the other officers deployed the stop sticks, so I
9 backed up. I got all the way up to the stop -- stop
10 sign at Frierson at Stamey Livestock, and I backed up
11 maybe a hundred feet up the road and sat and waited for
12 them to come back by. But as I pulled up to the stop
13 sign, I could look to the left and I could see him
14 coming, so I backed up and waited for them to come
15 through that intersection. I observed the black pickup
16 truck hit the -- the stop sticks. I waited for the
17 other two sheriff's deputy cars to pass by, and then I
18 pulled in behind them.

19 Q. And where did you go?

20 A. We continued, I guess that was eastbound on
21 Frierson towards 521. We crossed that intersection at
22 that light, continued on to -- to the end of the road by
23 Old Camden Highway. I call it Thomas Sumter Highway.
24 If I would've taken a left there at the end of the road,
25 it would've taken me to Thomas Sumter. I got there, and

1 we took a right going back into what I consider downtown
2 Dalzell. We continued on that way. I remember prior to
3 that one of the deputy cars was slowing down, but I
4 couldn't figure out why he was slowing down. And he
5 kind of pulled over to the side. I was actually the
6 third car in line behind the suspect vehicle. I later
7 learned that he -- he got flat tires from hitting stop
8 sticks, so he pulled over and I went around him. And I
9 was the second car in the pursuit. And I was notifying
10 dispatch of where we were going, our speeds, what
11 direction we're traveling and all. As we were coming
12 into Dalzell right there at the -- at the fork in the
13 road where the store is, I initially thought that the
14 suspect vehicle was going to go around right because I
15 saw him. He kind of kicked up some dust on the inside
16 of the road going around that curve, and then he just
17 straight back up and went -- ran straight into the
18 store.

19 Q. And then did -- What did you do next?

20 A. I got out -- jumped out of the car, tried to go up
21 there and see what all -- to assist. It was a bunch of
22 -- It was smokey. As -- He pretty much pushed the whole
23 front wall of the window portion -- It had bars on the
24 window, so it was all just one piece went straight
25 through the -- the back of the store. They had an

1 audible alarm, so it was very loud. I was trying to
2 advise dispatch what was -- what had happened and that
3 we needed an ambulance and all. Possibly a fire, I
4 didn't know if he'd hit a gas tank out -- I -- I stopped
5 on the outside of the -- stopped my patrol vehicle on
6 the outside of the parking lot because I was unsure if
7 there was any damages to the gas pumps or anything. I
8 ran up there to try to -- to get him out. And it was so
9 loud and dusty, I didn't know if the place was on fire
10 or what, so I backed back up, tried to call dispatch.
11 The sirens and all, the patrol cars were pulling up. So
12 I was going around trying to cut sirens off. Several
13 other officers responding -- They arrived on the scene
14 at that time. They ran in. The dust was -- seemed
15 settled a little bit by that time. They were in there
16 trying to bust the windows and trying to get the subject
17 out of the -- the truck that drove through the store.
18 And I was standing back advising dispatch what we had.
19 Other officers there were having problems breaking the
20 window. And I had a knife in my car that so I was
21 actually running back to get that. But they finally
22 broke -- They broke the window. And they got the -- the
23 suspect out of the -- out of the truck. And we drug him
24 back half way across the parking lot away from the store
25 and lead him out. He was not responsive or anything, so

1 we laid him out on the ground trying to get him away
2 from the store in case there was a fire or anything.

3 Q. And did you recover any items from ---

4 A. When they pulled him out, he had on a big brown and
5 --- camouflage coat. And it was -- When they were
6 pulling out, it was kind of halfway pulled off of him.
7 So once we laid him down to make it easier for us to
8 handcuff him or pat him down in case he had a knife or
9 anything like that. And to secure his hands, we just
10 went ahead and took that coat off of him. As I was
11 taking -- taking the coat off, I went ahead and reached
12 into his -- his pants pockets and grabbed his wallet so
13 we could identify him.

14 Q. And I'll show you here this item here and ask you
15 if you can identify that.

16 A. That's the -- the coat that the suspect had on that
17 we pulled from him, from the vehicle that was -- wrecked
18 into the store.

19 Q. Hold it up a little higher, please.

20 MR. CONNER: Your honor, we'd offer that into
21 evidence at this time.

22 THE COURT: Ms. Stevens?

23 MS. STEVENS: No objection, your honor.

24 THE COURT: All right. That'll be Exhibit 8?

25 COURT REPORTER: Yes.

1 (Whereupon, coat taken off of suspect is marked and
2 entered into evidence as the State's Exhibit Number 8.)

3 THE COURT: Exhibit 8 is in evidence without
4 objection.

5 Q. Next, Officer Wingate, I'm going to show you these
6 two items here and ask if you can identify them.

7 A. This is a black wallet that I retrieved from Mr.
8 Lowery's back pocket. Then I got his South Carolina
9 Driver's License and identified him by it. It was in
10 his wallet.

11 Q. It was in his wallet?

12 A. Yes, sir.

13 Q. And that was on his person at the time?

14 A. Yes, sir.

15 MR. CONNER: Your honor, we'd offer these two items
16 into evidence at this point: a black wallet and a South
17 Carolina Driver's License for Mark James Lowery, Jr.

18 THE COURT: Ms. Stevens?

19 MS. STEVENS: No objection, your honor.

20 THE COURT: Exhibits 9 and 10. Which one's going
21 to be 9, Mr. Conner?

22 MR. CONNER: The wallet.

23 (Whereupon, black wallet and South Carolina
24 Driver's License of Mark James Lowery, Jr., is marked
25 and entered into evidence as the State's Exhibit Number

1 9.)

2 THE COURT: The license?

3 MR. CONNER: Driver's license or identification
4 card. I'm not sure. It is a driver's license.

5 THE COURT: All right.

6 (Whereupon, South Carolina Driver's License of Mark
7 James Lowery, Jr., is marked and entered into evidence
8 as the State's Exhibit Number 10.)

9 Q. Now, did you recover any money?

10 A. Yes, sir. When I got the coat off of him, I knew -
11 - some dollars fell out of the pocket. I picked them
12 back up. At that time, I went and I secured them in my
13 patrol -- patrol vehicle until I could get a witness and
14 things settled down so I could come back and have a
15 witness with me and count the money. I secured that in
16 my patrol vehicle in a bag and sent it to the crime
17 scene on the actual accident scene there. It was a
18 little bit of time later when I could get somebody over
19 with me and we could pull it out and actually inventory
20 the contents of the coat. And I did recover \$62 in
21 currency.

22 Q. And I show you these documents here, ask if you can
23 -- if that's the -- Let me see that again. Is that the
24 currency you recovered or copies of it have been made of
25 it.

1 A. That's correct. I -- I recovered one \$20 bill, one
2 \$10 bill and 32 ones.

3 MR. CONNER: Your honor, we'd offer that into
4 evidence at this time.

5 THE COURT: Ms. Stevens?

6 MS. STEVENS: No objection.

7 THE COURT: All right. It'll be Exhibit 11; is
8 that right?

9 COURT REPORTER: Yes, sir.

10 (Whereupon, copies of currency, consisting of 9
11 pages, are marked and entered into evidence as the
12 State's Exhibit Number 11.)

13 MR. CONNER: We can staple that.

14 THE COURT: How many sheets is that just for the
15 record, Mr. Conner?

16 COURT REPORTER: It's 9, your honor. It's 9 pages
17 for Number 11.

18 THE COURT: Okay.

19 Q. Officer Wingate, can you identify the man that you
20 took his coat off of?

21 A. Yes, sir.

22 Q. And he's in the courtroom today?

23 A. Yes, he is.

24 Q. Can you point him out for us?

25 A. Sitting right over there.

1 Q. Right by Ms. Stevens?

2 A. Yes, sir. In the black shirt.

3 MR. CONNER: Your honor, we'd ask that the record
4 reflect that he points to the Defendant.

5 THE COURT: Any objection to that? Dispute that,
6 Ms. Stevens?

7 MS. STEVENS: No, sir.

8 THE COURT: All right. The record will so reflect.
9 All right, Mr. Conner?

10 MR. CONNER: I -- I have nothing further of him.

11 CROSS EXAMINATION BY MS. STEVENS:

12 Q. You weren't at the Kangaroo on Broad Street.

13 A. No, ma'am. I wasn't.

14 Q. Okay. You said that he was non-responsive. What
15 do you mean?

16 A. He didn't walk out. When we got him out of the car
17 for -- When they got him out of the car -- I wasn't up
18 there with them -- just kind of --- He wasn't walking
19 out on his own. He wasn't fighting us. He was just
20 kind of -- he was just -- he was just limp. He wasn't
21 adding or taking away anything from that.

22 Q. Okay. Did you get a good look at him?

23 A. Yes.

24 Q. Was he bleeding?

25 A. I think he had a small -- a little bit of blood on

1 his nose or his lip.

2 Q. But he wasn't talking or anything like that?

3 A. No.

4 Q. Okay. Did you do an inventory of his truck?

5 A. I personally did not do an inventory of his truck.

6 It was back in there -- There was wires hanging down and

7 everything. I did glance in there. There was other

8 money inside the truck and stuff. Due to that being

9 part of a crime scene, once we got him out, we all back

10 outside of the store and basically put up some crime

11 scene tape across the front of the store until the

12 detectives who were coming to process that scene would

13 come in there, and they would take custody of anything

14 else that was found inside the vehicle.

15 Q. And who came and processed the scene?

16 A. Detective Quiroz responded to the scene while I was
17 there.

18 Q. Okay.

19 MS. STEVENS: I don't have anything further.

20 THE COURT: Redirect, Mr. Conner?

21 REDIRECT EXAMINATION BY MR. CONNER:

22 Q. What -- what was done with the Defendant's vehicle,
23 Mr. Wingate?

24 A. After we got it out of the -- out of the store --

25 We got a wrecker to come pull it out of the store, and

1 it was loaded on top, I believe it was on a rollback and
2 it was taken into our impound. It's at a secured
3 location here in town where it was -- It was towed there
4 and locked inside the building overnight till the
5 detectives who were working the case would process it.

6 Q. Okay. Thank you..

7 THE COURT: Any cross?

8 RECROSS EXAMINATION BY MS. STEVENS:

9 Q. What wrecker service towed it?

10 A. I do not recall.

11 Q. Did someone follow that wrecker from the scene to
12 the impound yard?

13 A. Yes, they did.

14 Q. Who did that?

15 A. I did.

16 Q. And you went straight to the impound yard?

17 A. Yes, ma'am.

18 Q. Thank you.

19 MR. CONNER: I have nothing further.

20 THE COURT: You can step down.

21 MR. CONNER: We'd ask --

22 THE COURT: Any objection to him being excused, Ms.
23 Stevens?

24 MS. STEVENS: No objection, your honor.

25 THE COURT: All right, you can leave or stay,

1 whatever you'd like.

2 MR. CONNER: All right. Your honor, next I'd call
3 Officer Quiroz.

4 D.R. QUIROZ, being first duly
5 sworn testifies as follows:

6 DIRECT EXAMINATION BY MR. CONNER:

7 Q. State your full name, spell your last name for the
8 record.

9 A. Daeburto R. Quiroz. Q-u-i-r-o-z.

10 Q. Officer Quiroz, where do you work?

11 A. Sumter Police Department.

12 Q. And how long have you worked at Sumter Police
13 Department?

14 A. Approximately ten years.

15 Q. And were you working back on November the 27th,
16 2006 and become involved in the case we are trying
17 today?

18 A. I was the detective on call in.

19 Q. Did you go out to Rabon Sav-On after the --- Were
20 you in the line of people following, or how did you --
21 Where -- where were you?

22 A. No, sir. I -- like I say, I was a detective on
23 call that weekend. And I was called at my residence
24 that -- to respond to an armed robbery at Stamey
25 Livestock. On my way over there, they notified me that

1 the vehicle was being followed and wrecked at the
2 Rabon Sav-On store, whatever, the convenience store. So
3 I contacted Detective Nesbitt who is the duty supervisor
4 at the time, notified him that we had two different
5 locations. He responded to the incident location at
6 Stamey and Broad Street, and I responded to Old Camden
7 Highway.

8 Q. So you went out where the vehicle had run into
9 Rabon Sav-On?

10 A. Yes, sir.

11 Q. Now, what did you do after you got there?

12 A. When we got there, made an observation of the
13 incident. And like they mentioned before, it was inside
14 the store itself, all the way to the back. A mess so we
15 didn't really go -- Went in there, looked around at the
16 way --- Until they were able to -- to come pull it out
17 before we did any inventory or anything other than
18 taking some photographs of the -- the area.

19 Q. And did -- did you take some items from the scene
20 that night?

21 A. Yes, sir. After they pulled it out of the store, I
22 did try to inventory as best I could. I did retrieve
23 some items out of the vehicle.

24 Q. And did -- did you -- This item here, is that one
25 of the things that you removed and turned in?

1 A. Yes, sir.

2 MR. CONNER: We'd offer this into evidence at this
3 time.

4 THE COURT: Any objection?

5 MS. STEVENS: No, sir..

6 THE COURT: All right. That'd be Number 12. Is
7 that right?

8 COURT REPORTER: Yes, sir.

9

10 MR. CONNER: It's a Browning ball cap.

11 (Whereupon, Browning ball cap is marked and entered
12 into evidence as the State's Exhibit Number 12.)

13 Q. And did you also recover some currency,
14 specifically three \$5 bill and six \$1 bills?

15 A. Yes, sir.

16 Q. And I show you these copies here and ask you if
17 those are the ones you -- that you recovered?

18 A. Yes, sir.

19 Q. And you turned that in ---

20 A. Yes, sir.

21 Q. --- evidence room?

22 A. Yes, sir.

23 MR. CONNER: Your honor, we'd offer that into
24 evidence at this time.

25 THE COURT: Any objection?

1 MS. STEVENS: I'd like to approach the bench, your
2 honor.

3 (Off the record discussions at the bench.)

4 THE COURT: All right. Go ahead, Mr. Conner.

5 Q. Now, the currency that you recovered, Quiroz, where
6 was it located?

7 A. It was floorboard of the pickup truck.

8 Q. Floorboard of the pickup truck. And this cap
9 that's been marked as 12, Browning cap, State's Exhibit
10 Number 12, where was it?

11 A. I believe it was on the seat area.

12 Q. On the seat. But it was in the pickup?

13 A. Yes.

14 MR. CONNER: Your honor, I -- I'm offering photos
15 he says he recovered from the floorboard into evidence
16 also.

17 THE COURT: Those are photocopies of ---

18 MR. CONNER: Photocopies of the currency.

19 THE COURT: Ms. Stevens, any objection to that --
20 those coming in ---

21 MS. STEVENS: No, sir.

22 THE COURT: --- as Exhibit 13? All right, in
23 without objection. How many sheets is that?

24 MR. CONNER: It's three I believe. Let's -- it is
25 three. Three sheets.

1 (Whereupon, copies of currency, consisting of 3
2 pages, is marked and entered into evidence as the State's
3 Exhibit Number 13.)

4 Q. I also show you this item. Can you identify it?

5 A. Yes, sir. It's a knife.

6 Q. Knife.

7 THE COURT: Any objection to that Ms. Stevens?

8 MS. STEVENS: No, sir. Your Honor.

9 Q. Did -- did Lieutenant Nesbitt also come out there
10 later?

11 A. Yes, sir. After, you know, after he got done with
12 Stamey Livestock.

13 Q. He came to the Sav -- Rabon Sav-On after he had
14 already gone to the other place?

15 A. Yes, sir.

16 Q. Answer any questions that this lawyer might have
17 for you.

18 A. All right.

19 MS. STEVENS: Which one did you just put in?

20 CROSS EXAMINATION BY MS. STEVENS:

21 Q. In your report you say that you had 26 -- you found
22 \$26 in currency?

23 A. 15 one -- three \$5 bills and six \$1 bills.

24 Q. Okay. So you have two different reports that say
25 two different things. Did you not fill out this report

1 right here?

2 A. Let me see.

3 Q. Is that not your signature at the bottom of it?

4 A. Yes, that's my signature.

5 Q. And how much currency does it say you found?

6 A. I'm trying to locate it. Currency, \$26.

7 Q. Okay, so now you're saying it was only \$21?

8 A. I might have made a mistake.

9 Q. Okay. What color does it say that the ball cap is
10 on that report?

11 A. It doesn't say. It says Browning ball cap.

12 Q. Okay. Now, why would this inventory be different
13 than the one that you have in your hand?

14 A. This is just a, more or less notes of -- kind of
15 like Form that the officer who's taking over the case,
16 what was found and what we took. Went in a little more
17 detail on the -- on the chain of custody and then you
18 turn it in.

19 Q. Okay. Did you see Mr. Lowery when he was still in
20 his truck?

21 A. No, ma'am. I got there after.

22 Q. Was your son at the scene?

23 A. Yes.

24 Q. Was he there as -- as part of his duties?

25 A. Yes, he was there as a patrol officer.

1 Q. Okay.

2 MS. STEVENS: I don't have anything further.

3 THE COURT: Redirect, Mr. Conner?

4 REDIRECT EXAMINATION BY MR. CONNER:

5 Q. Where is your son at this time?

6 A. Was deployed to Iraq.

7 Q. Okay. And I show you this item, evidence inventory
8 and chain of custody form and ask you if you completed
9 that in this case?

10 A. Yes, sir. I did.

11 Q. And the -- the items that we have here, the
12 Browning ball cap, State's Exhibit Number 11, is that
13 listed on the chain of custody form?

14 A. Yes, sir, it is. One Browning ball cap, dark green
15 and orange in color.

16 Q. Dark green and orange?

17 A. Yes, sir.

18 Q. That's what you've got listed on there?

19 A. Yes, sir.

20 Q. And that's the sheet that you gave to the evidence
21 people when you turn stuff in; is that right?

22 A. Yes, sir. As I said, it's a little more detailed.

23 Q. And the --

24 COURT REPORTER: You said 11; it's 12.

25 MR. CONNER: It is State's Exhibit Number 12. I

1 beg your pardon.

2 Q. And the funds, did you list the serial numbers on
3 that document when you turned it in?

4 A. Yes, sir. I just did a -- I listed beside Item 6
5 3, quantity 3 \$5 bills.

6 Q. Three \$5 bills?

7 A. Yes, sir.

8 Q. And did you write the serial numbers on ---

9 A. Yes, sir, I did. I wrote all the serial numbers.

10 Q. And did -- did you -- the ones, did you write the
11 serial numbers down for those?

12 A. Yes, sir, I did. The -- item seven, 6 in quantity.

13 Q. Six?

14 A. Yes, sir.

15 Q. Six \$1 bills?

16 A. Yes, sir.

17 Q. And you wrote the serial numbers down?

18 A. Yes, sir.

19 Q. And the -- the knife, how did you describe it on
20 that document?

21 A. One Quantity, One Gerber Brand silver in color
22 pocket knife.

23 Q. One Gerber pocket knife?

24 A. Yes, sir.

25 Q. Silver in color? And that's what you have for

1 State's Exhibit Number 14?

2 A. Well, it -- that item eight.

3 Q. We had it marked State's Exhibit Number 14.

4 A. Yes, sir.

5 Q. But that was on your list?

6 A. Yes, sir.

7 MR. CONNER: Your honor, we'd offer this inventory
8 into evidence at this time?

9 THE COURT: Ms. Stevens?

10 MS. STEVENS: I don't have an objection, your
11 honor.

12 THE COURT: All right. Exhibit 15 is in without
13 objection. You said you do or do not?

14 MS. STEVENS: I do not object, your honor.

15 (Whereupon, inventory form is marked and entered
16 into evidence as the State's Exhibit Number 15.)

17 MR. CONNER: I have no further questions of him.

18 THE COURT: Ms. Stevens, I'll give you your last
19 shot.

20 MS. STEVENS: Yes, sir, your honor.

21 RE CROSS EXAMINATION BY MS. STEVENS:

22 Q. Did you do a complete inventory of the truck?

23 A. Not a 100% complete inventory of it. I did the
24 best I could do with the time and what we had right there
25 after it was taken down into the impound, our impound.

1 They did more thoroughly.

2 Q. Okay. Did you get all of the money that was in the
3 truck out?

4 A. I got what I could -- what I could get out of the
5 truck.

6 Q. Okay.

7 MS. STEVENS: I don't have anything further.

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

9 A. Thank you.

10 MR. CONNER: We'd ask that he be excused.

11 THE COURT: Any objection, Ms. Stevens?

12 MS. STEVENS: I have no objection.

13 THE COURT: All right. You may be excused if you
14 like.

15 MR. CONNER: And I'm going to call Lieutenant
16 Nesbitt at this time, your honor.

17 KENNETH LEE NESBITT, SR., being
18 first duly sworn, testifies as follows:

19 DIRECT EXAMINATION BY MR. CONNER;

20 Q. State your full name, spell your last name for the
21 record.

22 A. Kenneth Lee Nesbitt, Sr. It's spelled N-e-s-b-i-t-
23 t.

24 Q. Lieutenant Nesbitt, where do you work?

25 A. I work with the Sumter Police Department.

1 Q. And how long have you worked for the Sumter Police
2 Department?

3 A. Approximately 24 years.

4 Q. And what's your present capacity or present job
5 with the Sumter Police Department?

6 A. My current assignment is the recruiting office.
7 I'm the recruiting officer. But I also still have duties
8 as the backup, secondary crime scene officer.

9 Q. And tell us about other duties that you've had in
10 your 24-year experience with the city police?

11 A. I've worked in just about all of the different
12 areas of the police department. The patrol division, I
13 was a supervisor there. Worked in the traffic division.
14 I was a juvenile detective at one time. I was the
15 supervisor of the narcotics unit there one time. Excuse
16 me. Then I was transferred to the detective division
17 where I was an investigator and later became the
18 supervisor in that unit. And was transferred to the
19 crime scene, CSI, section with the crime scene
20 investigation section. I also, after serving there full
21 time for three years, became the supervisor of the
22 detective division. And from that point on, I was the
23 backup crime scene officer.

24 Q. Okay. And did you respond to this armed robbery
25 call back on November the 27th, 2006?

1 A. Yes, I did.

2 Q. Where did you go, and tell us what you did.

3 A. I responded to the scene, the Kangaroo at the
4 corner of Broad Street and Stamey Livestock Road. And
5 while I was there, I talked to the clerk and found out
6 what happened, and I viewed the security tape. And I
7 also processed the crime scene. What I mean by that is I
8 found out from the clerk what area the suspect went in in
9 the store and what he may have touched, and I took
10 fingerprint powder and dusted the counter and also the
11 inside of the door with --- looking for fingerprints.
12 Didn't find any fingerprints of any value. I'm also
13 qualified latent print examiner, so I was able to look at
14 some smudges that I did find on the -- the door and the
15 counter and tell that there was nothing there of value
16 for identification, nothing that was good enough quality
17 to tell who it belonged to. But that's not uncommon in
18 processing scenes: that we find some evidence that
19 fingerprints were left, but nothing of any value. It's
20 not like you see on TV where every time somebody touches
21 something you always -- always get their fingerprint.
22 That's not the case at all. And in this case, I did not
23 get any fingerprints that would've been of any value to
24 identify.

25 Q. Did you -- You say you looked at the videotape?

1 A. Yes.

2 Q. And is that the video that's been turned -- was
3 turned over to Mr. McCoon and -- and turned into
4 evidence?

5 A. Yes, it is.

6 Q. Then after doing that, did you go out to Rabon Sav-
7 On?

8 A. Yes, sir, I did.

9 Q. And tell us about your observations there.

10 A. When I arrived at Rabon's superette, the - the
11 suspect had already been taken to the hospital. And I
12 basically stood by there for a while trying to find out
13 what happened because I was the detective supervisor on -
14 - on duty that night. And basically was trying to get a
15 grasp on everything that occurred. I stayed there for a
16 period of time. I'm not sure exactly how long. And at
17 some point, I know I told officers on the scene that we
18 needed to tow the vehicle to our impound area. And I am
19 one of only, at that time, two people that actually had
20 access to the impound area. It was a secured area. And
21 so I told them to -- to tow the vehicle there, and I met
22 them, the officer and the wrecker, at the impound area
23 later. And I opened up the secure area and let them --
24 so that we could put the vehicle in there. And secured
25 it by setting the alarm and left the vehicle there for

1 the full time, I'm sorry, the full-time evidence
2 technician to search the vehicle later is normally the
3 way we do it.

4 Q. So you went with the -- What wrecker service made
5 the -- the haul?

6 A. It was Sumter Wrecker -- Sumter Wrecker Service.

7 Q. And you -- you went down and let the wrecker
8 service in the impound area and locked the vehicle in?

9 A. That's correct.

10 Q. That's an impound area that's under your control?

11 A. Yes, sir. There were only two at that time had
12 access to it, and that was another Lieutenant, Trooper
13 Duggin and myself.

14 Q. That's this gentleman seated here on the end -- on
15 the right-hand end of the first row?

16 A. That's correct.

17 Q. Okay. Answer any questions Ms. Stevens might have
18 for you.

19 CROSS EXAMINATION BY MS. STEVENS:

20 Q. Don't the wrecker services usually fill out some
21 sort of inventory when they tow something for you guys?

22 A. I'm not real sure. I -- I am not normally involved
23 with the vehicle from when it's first seized. I'm only -
24 - During that time, I would normally meet them at the
25 impound area and -- So I'm not real sure exactly what

1 their procedure is on that.

2 Q. Is it normal for a police officer to follow a
3 wrecker to the impound yard?

4 A. Yes, ma'am. If we -- if we feel like that vehicle
5 is evidence or we consider it a crime scene or there's
6 evidence in the vehicle, then we would commonly have an
7 officer follow it to maintain the chain of custody of the
8 vehicle until it is secure.

9 Q. Okay. Well, then wouldn't you normally fill out a
10 chain of custody form?

11 A. Sometimes we would on the vehicle, and sometimes we
12 actually only fill out a chain of custody with all the --
13 with the items that are seized from the vehicle when it's
14 searched. So in this case, I did not fill out a chain of
15 custody on the vehicle, but I've seen records where
16 officers that searched the vehicle later did fill out
17 chains with the items and then turn it into evidence.

18 MS. STEVENS: Okay. I don't have anything further.

19 THE COURT: Redirect?

20 MR. CONNER: I have nothing further of him, your
21 honor.

22 THE COURT: Thank you, sir. You can step down.

23 A. Thank you.

24 MR. CONNER: We'd -- we'd ask that he be excused,
25 your honor.

1 THE COURT: Any objection?

2 MS. STEVENS: No objection.

3 THE COURT: All right. You may leave, sir, if you
4 like.

5 MR. CONNER: Your honor, I'd call at this time
6 Truman Duggin.

7 TRUMAN DUGGIN, being first
8 duly sworn, testifies as follows:

9 DIRECT EXAMINATION BY MR. CONNER:

10 Q. Please state your full name, spell your last name
11 for the record.

12 A. Truman R. Duggin, D-u-g-g-i-n.

13 Q. Okay. Officer Duggin, where do you work?

14 A. Work with the Sumter Police Department. I'm a
15 Lieutenant over the investigative services section, which
16 includes polygraph, crime scene ... And automated ---
17 Verification system.

18 Q. And how long have you worked at the Sumter Police
19 Department?

20 A. I've been employed 14 years full time. My last
21 five years before I retired from the Air Force, I was a
22 reserve police officer, so I have a total of 19 years
23 associated with law enforcement.

24 Q. And you say you retired from the Air Force?

25 A. Yes, sir. I'm retired as an EATER, a senior master

1 Sergeant. Basically I was a -- I started out as a crew
2 chief on aircraft and then end up in -- The last position
3 in charge of quality assurance.

4 Q. And that -- You -- you retired here at Shaw Air
5 Force Base?

6 A. Yes, sir. Whereby the 1987 and retired in 1993 and
7 received honorable discharge.

8 Q. I think if you're working for the police that you
9 had. Now, did you -- Were you working the night of this
10 incident, or did you come into contact with this case
11 later?

12 A. I came into contact with it later. Lieutenant
13 Nesbitt was the on-call supervisor. As a supervisor back
14 in investigations, we rotate call. And with him being
15 qualified as a crime scene investigator, it's kind of
16 double duty whenever we're on.

17 Q. And did -- Tell us about your involvement with the
18 case and what you did.

19 A. Well, the -- My main involvement was processing the
20 evidence and gather -- gathered everything and packaging
21 it. And I did the search warrant. Search warrant was
22 obtained by the detective and given to me. And I went
23 down to our city impound secured area and served the
24 search warrant on the vehicle.

25 Q. And tell us about processing the vehicle.

1 A. On the November 28th, 2006, I went down to our
2 impound area. I arrived at 11:30 p.m. I departed at
3 3:30 p.m. So I was there for two hours. I initiated the
4 search warrant on a black 2000 Ford -- 2001 Ford Ranger,
5 that's a pickup, tag South Carolina [REDACTED]. And I, upon
6 my arrival which I'll go over. I processed the vehicle
7 for fingerprints using black powder. The exterior of the
8 vehicle was covered with mud, extremely dirty. There
9 were some prints developed and lifted. Our automatic
10 fingerprint identification system. I examined the truck
11 for blood; there was none noted. And I processed some
12 items at the scene. Put my evidence collection consisted
13 of a -- a honey bun, potato chips, snacks, they were in
14 the engine compartment. Chips, popcorn, snack boxes,
15 they were with the bed of the truck. A camouflage mask
16 from the driver's floorboard; a multi-tool on the
17 driver's floorboard; assorted papers from the driver's
18 floorboard and rear seat area, passenger floorboard;
19 inside the auto manual; papers from -- just various
20 papers; a Browning ball cap brown in color. That was
21 from the passenger floorboard. A Gerber knife that was
22 open on the passenger floorboard; a black handle folding
23 knife that was closed under the rear passenger's -- rear
24 passenger side seat on the floor, and two laden lift
25 cards with prints from the passenger side door. So that

1 -- processing and examination of the vehicle and the
2 items that I seized.

3 Q. And do you have any of those items here in court
4 with you today?

5 A. Yes, sir. The -- the bag contains numerous items.

6 Q. Now you say you recovered a Browning ball cap. Do
7 you have that?

8 A. Yes, sir. I do. It's this item here.

9 MR. CONNER: Your honor, we'd offer that item into
10 evidence at this time.

11 THE COURT: All right. Any objection?

12 MS. STEVENS: No objection.

13 THE COURT: All right. That'll be Exhibit 15?

14 COURT REPORTER: 16.

15 THE COURT: 16.

16 (Whereupon, Browning ball cap is marked and entered
17 into evidence as the State's Exhibit Number 16.)

18 Q. And a camo mask?

19 A. Yes, sir. There's a camouflage mask. And I have
20 reconstructed, if you will, on a piece of cardboard, but
21 this cardboard was something I added at the lab to --
22 instead of just having it wadded up, to give you an idea
23 of what the mask looks like.

24 THE COURT: Any objection to the camo mask?

25 MS. STEVENS: No, sir.

1 THE COURT: All right, that's Exhibit 17.

2 (Whereupon, camo mask is marked and entered into
3 evidence as the State's Exhibit Number 17.)

4 Q. And you say there were some papers in there. What
5 kind of papers did you ultimately find?

6 A. Was looking for papers for identification to who --
7 find out who owned the car being the vehicle and a
8 Simpson Hardware receipt, a number of receipts in the
9 Plaza Hardware receipt, a receipt from something
10 hardware, and a fourth, a pink-colored Simpson Hardware
11 receipt. And it's an employment application from John
12 Evans made at Baxley and Company. And it is filled out.

13 Q. What's the -- what the connection between these
14 documents and the Defendant?

15 A. They all have the name Mark Lowery and the John
16 Evans Manufacturing is more specific marked James Lowery,
17 Jr.

18 MS. STEVENS: Yes, I have an objection.

19 THE COURT: To these documents he's just referenced

20 ---

21 MS. STEVENS: Uh-huh.

22 THE COURT: --- you do have an objection?

23 MS. STEVENS: Yes, sir.

24 THE COURT: All right, ladies and gentlemen, if you
25 would go to your jury room for just a minute, we'll take

1 up a matter briefly outside of your presence. Please do
2 not discuss the case.

3 (Jury exits the courtroom, 12:24 p.m.)

4 THE COURT: All right. Could I see the documents?

5 MS. STEVENS: Yes, sir. Nice try, Harry, but this
6 has his criminal record on it.

7 THE COURT: All right. All right, let's talk about
8 these one at a time and perhaps -- do you object to all
9 of them?

10

11 MS. STEVENS: No, just the last one.

12 THE COURT: All right. So you do not object to the
13 Simpson's Hardware pink -- pink receipt, Ms. Stevens

14 MS. STEVENS: No, sir.

15 THE COURT: Or the Manning, South Carolina
16 Simpson's Hardware, the Wesmark Simpson's Hardware, or
17 the other Simpson's Hardware receipt; is that right?

18 MS. STEVENS: No, sir.

19 THE COURT: So -- and they will be admitted as 18
20 and 19, 20 and 21? Is that what you're saying, Ms.
21 Stevens?

22 MS. STEVENS: Yes, sir.

23 THE COURT: All right, the application from, I'll
24 just call it. Since that -- oh, John Edwards
25 Manufacturing Company. You object to that on what basis?

1 MS. STEVENS: It's got his criminal record on it,
2 your honor.

3 THE COURT: Is there any other objection to that?

4 MS. STEVENS: No.

5 THE COURT: All right, Mr. Conner, what about that
6 reference to his criminal record? It's the middle of the
7 top page there.

8 MR. CONNER: Well, your honor, we'd ask just to
9 substitute the first page of -- admit the first page and
10 delete this back page. I believe it's two pages anyway.

11 THE COURT: Looks like there might be more than
12 two. I can't tell.

13 MR. CONNER: It's at least two in it. I'd just
14 remove the -- the back page. The front page shows his
15 name, and he's applying for a position as a welder's
16 helper. Do you --

17 MS. STEVENS: No problem.

18 THE COURT: All right. What are we calling the
19 front page?

20 MS. STEVENS: It's just got the --

21 MR. CONNER: This -- The page with John Evan
22 Manufacturing Company and their business address and then
23 it says position applied for and the applicant's name.

24 THE COURT: All right. You don't object to that?

25 MS. STEVENS: No, sir.

1 THE COURT: All right, that -- that will come in
2 then -- How do you propose to do it since this envelope
3 is sealed?

4 MR. CONNER: Cut -- cut the ---

5 MS. STEVENS: --- sealing it for that purpose, your
6 honor.

7 THE COURT: All right. Mr. Conner, do you have a
8 problem with taking the unobjected to piece of paper out
9 and just marking that one, or do we need to preserve it
10 in some fashion other than exhibit sticker?

11 MR. CONNER: I'd just take it out, and this is all
12 we'd need to produce.

13 THE COURT: All right. Ms. Stevens, you don't have
14 an objection to this page coming in?

15 MS. STEVENS: No, sir.

16 THE COURT: All right. Does that take care of
17 anything you needed to bring up to me?

18 MS. STEVENS: Yes, sir.

19 THE COURT: All right, you ready for the jury?

20 MS. STEVENS: Yes, sir.

21 THE COURT: All right, let's go ahead and mark
22 these in the order that you want to mark them in, Mr.
23 Conner. And if you would, Melissa, just call them out --

24 -

25 MR. CONNER: This -- this is coming out.

1 THE COURT: Call out the numbers as you put the
2 sticker on it, and tell me what it is.

3 MS. STEVENS: What number are these again?

4 THE COURT: Ma'am?

5 MS. STEVENS: What number are these again?

6 COURT REPORTER: It's 18 through 22.

7 THE COURT: 18 is the pink Simpson's receipt. 19
8 is the Manning Simpson's Hardware receipt. 20 is the
9 Wesmark Simpson Hardware receipt dated October the 6th.
10 Did I say 20? 20 is that receipt. 21 is the October 13,
11 2006 Simpson's receipt. And 22 is the front page of the
12 John Evans application.

13 (Whereupon, pink Simpson's Hardware receipt;
14 Manning Simpson's Hardware receipt; Wesmark Simpson
15 Hardware receipt dated October the 6th; October 13, 2006
16 Simpson's receipt; and the front page of the John Evans
17 application are marked and entered into evidence as the
18 State's Exhibit Numbers 18, 19, 20, 21, and 22
19 respectively.)

20 THE COURT: All right. In their current form then,
21 Ms. Stevens, you do not object to those?

22 MS. STEVENS: Yes, sir, your honor.

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

24 (Jury enters the courtroom, 12:31 p.m.)

25 BAILIFF: Your honor, we have all the jurors and

1 alternates back in the courtroom.

2 THE COURT: Thank you, sir. Thank you for your
3 patience, ladies and gentleman. All right, Mr. Conner?

4 DIRECT EXAMINATION BY MR. CONNER RESUMES:

5 Q. Sir, you found these various different papers: the
6 a job application as well as Simpson's receipts there in
7 Mark Lowery's name; is that correct?

8 A. Yes, sir.

9 Q. And those were all in -- in this vehicle?

10 A. That's correct.

11 Q. And I show you these two photographs and ask if you
12 can identify them.

13 A. Yes, sir, I can. The -- These are photos that the
14 vehicle -- the -- the black Ford pickup that I received
15 at the city impound and did the search warrant on.

16 MS. STEVENS: No objection.

17 THE COURT: All right. That'll be 23 and 24. Now,
18 are 18 through 22, they're in -- they're in without
19 objection; is that correct, Ms. Stevens?

20 MS. STEVENS: Yes, sir, your honor.

21 THE COURT: All right. And 23 and 24 are in
22 without objection. Those are photos of the vehicle, Mr.
23 Conner?

24 MR. CONNER: That's correct.

25 (Whereupon, photographs of black Ford pickup are

1 marked and entered into evidence as the State's Exhibit
2 Numbers 23 and 24.)

3 Q. Now, did you find any knives in the vehicle?

4 A. Yes, sir, I did. Two. The one that is open was in
5 the front. The one that was closed was in the back. And
6 on the one that is opened, this is done at the lab -- put
7 on a piece of cardboard and held in a place.

8 THE COURT: No objection?

9 MS. STEVENS: No objection.

10 THE COURT: All right, two knives. Which one is
11 going to be 25, Mr. Conner. Get the witness to identify
12 which one is on cardboard, the brand of it?

13 A. The knife, what's in the -- the cardboard, there is
14 -- It is open. The way it is open is a Gerber folding
15 knife.

16 THE COURT: All right, that will be 25; is that
17 right?

18 MR. CONNER: That'd be Number 25.

19 (Whereupon, Gerber folding knife, is marked and
20 entered into evidence as the State's Exhibit Number 25.)

21 THE COURT: And 26 is what kind?

22 A. Item number 26 is a black handled Knife. The brand
23 was unknown.

24 (Whereupon, black handle knife, is marked and
25 entered into evidence as the State's Exhibit Number 26.)

1 Q. And you said something early on about fingerprints.
2 Did you have any success with that?

3 A. No, sir. I don't -- There was a report published
4 by our agency examiner. One image -- one latent was
5 examined against Mark Lowery's with -- results and the
6 second image, the second latent was no sufficient
7 quality.

8 Q. Do you know where those prints might have come
9 from?

10 A. The two latent lift cards were from the passenger
11 side door.

12 Q. The -- Now, these photographs, State's Exhibit
13 Number 1, Number 2, Number 3, Number 4, did -- did you
14 take those photographs?

15 A. Yes, sir. These are digital images that I took out
16 at the -- at the store when I was reviewing the tape.

17 Q. So tell us -- tell them -- Tell the ladies and
18 gentlemen of the jury how you did that.

19 A. The -- the VHS security surveillance tape, the way
20 it was -- It's got several different cameras that runs on
21 time lapsed photography. So just to view it on a regular
22 home-style VHS, it comes in extremely fast and garbled up
23 because it's trying to look at several cameras. It's --
24 You can't make heads or tails out of it. So I went back
25 to the store, and I watched the video. And as it -- it

1 was going through, I'd stop it and I'd get the still
2 motion and take a photograph of it using a digital
3 camera. And so these were photographs of the TV screen
4 that they have at the store.

5 Q. All right. So then if I understand you right, you
6 took this exhibit here, State's Exhibit Number 7, out to
7 the store because you couldn't -- couldn't make heads or
8 tails out of it on your machine?

9 A. That's correct.

10 Q. So you took it to the store and you put this in and
11 played it on the store video?

12 A. That's correct.

13 Q. And while it was playing, you would stop it in
14 different places and take those photos that you took
15 there?

16 A. Yes, sir.

17 Q. Those photos came from this video?

18 A. Yes, sir.

19 Q. The store video?

20 A. That's correct.

21 Q. Answer any questions the defense lawyer might have
22 for you, please, sir.

23 CROSS EXAMINATION BY MS. STEVENS:

24 Q. You said you took pictures of the truck. Did you
25 take pictures of the inside of the truck?

1 A. Yes, ma'am.

2 Q. What kinds of things did you find inside the truck?

3 A. Different clothes. I think some foods. It was a
4 list that I found.

5 Q. Were there a lot of camouflage-type clothing?

6 A. Yes, ma'am.

7 Q. Like coats and pants and shirts?

8 A. I remember -- I don't recall what items without
9 reviewing the photographs, but yes, there was, quote,
10 camouflage clothing.

11 Q. And what type of people generally where camouflage
12 clothing? Hunters?

13 A. That would be one.

14 Q. Okay. And do hunters usually carry knives?

15 A. That's possibility, yes.

16 Q. Okay. Now, you weren't at either scene, correct?
17 You weren't at the Kangaroo?

18 A. That's correct. I wasn't

19 Q. And you didn't go to Rabon?

20 A. No.

21 Q. You just took pictures of the truck afterwards?

22 A. I got a City impound search warrant.

23 Q. Was there any money in the car?

24 A. No, ma'am. None that I -- that I've listed.

25 Q. Okay. And if there had been, you would've

1 definitely listed it?

2 A. Yeah.

3 Q. Okay. Now, did these knives of -- did any of them
4 -- were any of them identified by Ms. Alston as the one
5 that was used?

6 A. Not that I'm aware of.

7 Q. Okay.

8 MS. STEVENS: I don't have anything further.

9 THE COURT: All right. Any redirect?

10 REDIRECT EXAMINATION BY MR. CONNER:

11 Q. Office Duggin, you recovered some items from this
12 vehicle obviously from what you've just said. But do you
13 operate an evidence room there in your department?

14 A. Yes, sir. I do.

15 Q. And did you also receive in your evidence room ??
16 Money that was turned in by Officer Quiroz and Bill
17 Wingate?

18 A. Yes, sir.

19 Q. And did -- did you in these copies of -- of funds
20 that y'all ...

21 A. Yes, sir. They came in -- I was packaging the
22 items ...

23 Q. And -- and the ball cap that was turned in by Mr.
24 Quiroz, did you see that?

25 A. Yes, sir.

1 Q. And the knife that was received by Mr. Quiroz, did
2 you receive that?

3 A. Yes, sir. I did.

4 Q. And also the wallet and driver's license that was
5 received by Bill -- or recovered by Bill Wingate, did he
6 turn that into you?

7 A. Yes, sir. All of those were packaged stuff -- I
8 packaged the items.

9 Q. You packaged each one ---

10 A. Yes, sir.

11 Q. --- and -- And also the Browning coat?

12 A. That's correct. Yes, sir.

13 Q. This one?

14 A. Yes, sir. I received that in evidence also.

15 Q. With -- with the items you had listed?

16 MR. CONNER: I have nothing further of him.

17 RECROSS EXAMINATION BY MS. STEVENS:

18 Q. Did you see a paper bag in the truck?

19 A. I'd have to go back and look at the -- the
20 photographs.

21 Q. But were you aware ---

22 A. --- about the car ---

23 Q. --- were you aware that the victim said she put the
24 money in a paper bag?

25 A. No, I don't agree -- recall hearing that.

1 Q. Okay. Thanks.

2 THE COURT: All right.

3 MR. CONNER: I have nothing further.

4 THE COURT: You can step down. Thank you, sir.

5 Any, any objection to going to lunch now, Mr. Conner or
6 Ms. Stevens?

7 MS. STEVENS: No, sir.

8 MR. CONNER: I have no objection.

9 THE COURT: All right, ladies and gentlemen, we're
10 going to break for lunch at this time. It's 12:45, and I
11 think that that clock says 1:45, I apologize.

12 MS. STEVENS: 1:45.

13 THE COURT: Please be back in your jury room at
14 2:30, which is an hour and 45 minutes from now. And
15 we'll resume the trial at that time. Do not discuss the
16 case amongst yourselves. Don't begin to form any
17 opinions in your own mind. Don't discuss it with anyone
18 else. Thank you.

19 (Jury exits the courtroom)

20 (Jury enters the courtroom, 2:45 p.m)

21 THE COURT: Ms. Jackson:

22 MS. JACKSON: Yes.

23 THE COURT: I'm going to appoint you as the
24 foreperson in this jury. And it's not because you're --
25 simply just because you're sitting there, but I -- And

1 let me tell you what that's about just a little bit,
2 okay? You do not have any greater power than anybody on
3 this jury. You are simply, in general respect, the
4 spokesperson who your -- and you will also -- are charged
5 with the responsibility at the time that you deliberate
6 this case and everyone who wants to speak has the chance
7 to speak for as long as they want. So you don't have any
8 greater vote. You don't have any power. The only thing
9 you are is a spokesperson for the jury, and you're
10 charged begin making sure that everyone who wants to
11 speak does speak. So from now on until the end of the
12 trial, you also have an assigned seat. And that's that
13 seat right there. So you and the alternate will be the
14 last two to enter the courtroom. You understand that?

15 MS. JACKSON: Yeah.

16 THE COURT: All right. Mr. Conner? And by the
17 way, ladies and gentlemen, the reason for the delay after
18 lunch was I had to hear very briefly a civil matter and
19 that took five minutes or so, and I apologize for the
20 delay. All right, Mr. Conner?

21 MR. CONNER: May it please the court, we call
22 Marcus Johnston.

23 MARCUS JOHNSTON, being first
24 duly sworn, testifies as follows:

25 DIRECT EXAMINATION BY MR. CONNER:

1 Q. State your full name, spell your last name for the
2 record.

3 A. Marcus Johnston, J-o-h-n-s-t-o-n.

4 Q. Mr. Johnston, where do you work?

5 A. I work for Linsco Private Ledger. I'm a operations
6 manager for a local branch here in town.

7 Q. And what type -- What do y'all do?

8 A. Basically a retirement firm. We do long-term
9 retirement brokerage stuff.

10 Q. And prior to becoming involved in that kind of
11 work, where did you work?

12 A. I worked for the police department here in Sumter.

13 Q. And how long did you work for them?

14 A. About two years.

15 Q. And before you worked for the police department
16 here in Sumter, where did you work?

17 A. I was a state trooper with South Carolina Highway
18 Patrol.

19 Q. And how long did you work for them?

20 A. For five years.

21 Q. And why -- When you were working for the police
22 department here in Sumter, what -- what were your duties
23 at that time?

24 A. I was a -- an investigator in the violent crimes
25 division.

1 Q. And how long did you do that?

2 A. For about a year.

3 Q. And were you working November the 27th, 2006 and
4 become involved in investigating this case?

5 A. I did.

6 Q. And in that capacity, did you have an opportunity
7 to talk with people who had been involved in the case and
8 also to interview the Defendant?

9 A. I was able to speak with everybody involved, yes.

10 Q. And when -- when you -- When did you interview the
11 Defendant?

12 A. The morning after the -- the crime occurred.

13 Q. And where did you interview him?

14 A. We interviewed him at -- He was brought back to the
15 police station. We have an interview room back in
16 investigator services division, so we -- He was
17 interviewed there.

18 Q. And who was present when you were interviewing him?

19 A. It was myself and another detective, Detective
20 Ross.

21 Q. And did either one of y'all threaten him to get him
22 to talk to you?

23 A. No, sir.

24 Q. Did you promise anything in order for him to talk
25 with you?

1 A. No, sir.

2 Q. Did he talk to you freely and voluntarily?

3 A. He did.

4 Q. And did -- Before talking with him, did you advise
5 him of what's called his Miranda Rights?

6 A. I did.

7 Q. And I show you this form and ask you if you can
8 identify it.

9 A. Yes, sir. This is the Miranda form that we use
10 during the course of interviews at the police department.

11 Q. And is that particular copy that you have in your
12 hand, is -- is it the one that you used when you were
13 talking with this Defendant, Mark James Lowery, Jr.?

14 A. Yes, sir.

15 Q. Did -- did you read him his rights, or did you just
16 let him read them, or tell me about the conversation with
17 him?.

18 A. Well, basically just read the whole page. He, you
19 know, put the paper in front of him, make -- and so make
20 sure he can visibly see it and began reading the -- the
21 form. You know, while I was reading the form, he
22 basically -

23 MS. STEVENS: Your Honor ...

24 THE COURT: Yes, ma'am.

25 MS. STEVENS: We might have to come up to ...

1 THE COURT: All right.

2 (Off the record bench discussion).

3 THE COURT: And I apologize, but if you'll go to
4 your jury room for just a minute, I'll have you right
5 back out very shortly. Please do not discuss the case.

6 (Jury exits the courtroom, 2:51 p.m.)

7 THE COURT: All right, Mr. Conner, Ms. Stevens
8 raised a concern over here side bar about the witness
9 commenting on any statement that the Defendant may have
10 made that he was familiar with his Miranda warnings. Mr.
11 Johnston, if you would just refrain from referencing that
12 ---

13 A. Yes, your honor.

14 THE COURT: --- we'll get to the point of whether
15 or not they were read or recited or however else. Just
16 don't reference any -- any point about him ever having
17 been arrested or convicted of anything in the past. Is
18 that suitable, Mr. Conner?

19 MR. CONNER: That's correct.

20 MS. STEVENS: Yes, sir.

21 THE COURT: Ms. Stevens? All right, so you
22 understand the boundary line there?

23 A. Yes, sir.

24 THE COURT: All right. We ready for the jury?

25 MS. STEVENS: Yes, sir.

1 THE COURT: Okay.

2 MS. STEVENS: Sorry about that.

3 THE COURT: Now, are you going to be offering that
4 document into evidence?

5 MR. CONNER: We are.

6 THE COURT: Is there going to be any objection to
7 that?

8 MS. STEVENS: To the Miranda form?

9 THE COURT: Yes, ma'am.

10 MS. STEVENS: No, ma'am -- no, sir.

11 MR. CONNER: We all have to ---

12 THE COURT: The Miranda statement itself. Other
13 than of course you have -- made your motion yesterday
14 about the voluntariness, Jackson versus Deno, and I
15 allowed -- or I denied your motion at that time. Now,
16 what is going to be the position of the State on the
17 statement itself coming in?

18 MR. CONNER: We're -- we're offering it into
19 evidence.

20 THE COURT: All right. Now, what's your response
21 to that?

22 MS. STEVENS: If he's going to testify to what he
23 told him, why do they need the statement in evidence?

24 THE COURT: Mr. Conner?

25 MR. CONNER: Well, that -- He -- he's not -- he's

1 not going to testify that they told me thus and so and
2 thus and so. He's going to testify that this is the
3 statement he made, and this is what he said.

4 MS. STEVENS: But that's not in his handwriting.

5 MR. CONNER: It's signed by him.

6 THE COURT: Is the witness going to testify to what
7 Mr. Lowery told him? Yesterday at the hearing he said
8 that Mr. Lowery told him certain things and at some point
9 he recited some things in the presence of Ms. Colclough,
10 I believe it was, and she typed as the Defendant spoke.
11 And then after that, the Defendant read what was typed
12 and then signed it.

13 MR. CONNER: We going to offer the signed document
14 into evidence.

15 THE COURT: All right, Ms. Stevens, you object to
16 that?

17 MS. STEVENS: Yes, sir.

18 THE COURT: On what basis?

19 MS. STEVENS: It's cumulative. If he's going to
20 testify to what he said, why do they need to see it in
21 writing?

22 THE COURT: All right, I'll have to hear the
23 testimony in full from this witness before I decide that
24 there is some cumulative concern that I have, but let me
25 address that as it comes.

1 MS. STEVENS: Yes, sir.

2 THE COURT: All right. Ready for the jury?

3 MS. STEVENS: Yes, sir.

4 THE COURT: Okay.

5 MS. STEVENS: But I have no objection to the
6 Miranda form.

7 THE COURT: All right.

8 (Jury enters the courtroom, 2:55 p.m.)

9 THE COURT: Thank you, ladies and gentlemen, for
10 that -- for just giving us that time period briefly. All
11 right, Mr. Conner, you can resume.

12 DIRECT EXAMINATION BY MR. CONNER RESUMES:

13 Q. Did you advise him of his Miranda Rights?

14 A. I did.

15 Q. And just usually -- Did you use that form that you
16 -- that I handed up to you?

17 A. Yes, sir.

18 MS. STEVENS: Okay.

19 MR. CONNER: We offer this Sumter Police Department
20 Interview Form into evidence at this time, your honor.

21 THE COURT: Any objection.

22 MS. STEVENS: No objection, your honor.

23 THE COURT: All right. What number is that?

24 COURT REPORTER: 27.

25 (Whereupon, Sumter Police Department Interview Form

1 is marked and entered into evidence as the State's
2 Exhibit Number 27.)

3 THE COURT: 27 is entered without objection.

4 Q. Now, using State's Exhibit Number 27, tell us what
5 you informed him of or what you advised him of his
6 rights.

7 A. Basically just put this paper out in front of him
8 and reading word for word everything the form says.
9 Would you like me to read it?

10 Q. Yes, read it.

11 A. It says, before we ask you any questions, you must
12 understand your rights. You have the right to remain
13 silent. Anything you say can be used against you in
14 court. You have the right to talk to a lawyer or advise
15 (sic) before we ask you any questions and to have him or
16 her with you during the questioning. If you cannot
17 afford a lawyer, one will be appointed for you before any
18 question and if you wish. If you decide to answer any
19 questions now without a lawyer present, you will still
20 have a right to stop answering at any time until you talk
21 with a lawyer. And the form goes on, and in the bottom
22 here it's got a waiver of rights. And it says, before
23 any questioning, I was furnished the above statements of
24 my rights, and it has at 8:59 a.m. on the 27th --
25 11/27/06 at the Sumter Police Department by Officer John

1 -- Johnston of the Sumter Police Department. It goes on
2 to say, I have -- I have read or had read to me this
3 statement of my rights. I understand what my rights are.
4 I'm willing to answer questions at this time without a
5 lawyer present. No promises or threats have been made to
6 me, and no pressure has been used against me. Signed
7 Mark Lowery, Jr., dated same as above and time and
8 witnessed by myself and Detective Ross.

9 Q. So you advised him of those rights. He said he
10 understood them?

11 A. That's correct.

12 Q. He didn't ask any questions in regards to them?

13 A. No, he did not.

14 Q. And he indicated on the -- by his signature that he
15 would waive his rights to have a lawyer present and talk
16 to?

17 A. That's correct.

18 Q. And did he talk to you freely and voluntarily?

19 A. He did.

20 Q. Did you or the other detective in the room threaten
21 him to get him to talk to you?

22 A. We did not.

23 Q. And I -- Don't tell me exactly what he said at this
24 time, but did he talk to you in the room there?

25 A. He did.

1 Q. And did he indicate that he was willing to talk and
2 tell everything?

3 A. He did, yes.

4 Q. And then did you take him over to another office
5 where he met Ms. Colclough or Ms. Colclough joined y'all
6 and did he continue to talk and give his statement?

7 A. He did.

8 Q. And did -- How -- What was the procedure there?

9 A. Well, once we talked about circumstances, I -- I
10 told him I wanted to get a written -- written statement
11 from him. He agreed. We walked over to Ms. Colclough's
12 office. Sat right there. He basically, you know,
13 verbalized to her about what the incidents that took
14 place, and she typed it exactly as he said it. He was
15 allowed -- able to read over that, you know, once it was
16 done. He looked over it, and then he signed the bottom
17 of it.

18 Q. And I'll show you this document here and ask if you
19 can identify this.

20 A. Yes, sir.

21 Q. What is that?

22 A. This is the statement that he gave that day to Ms.
23 Colclough?

24 Q. And that's the statement that Ms. Colclough typed
25 up?

1 A. That's correct.

2 Q. And after it was typed up, he signed it?

3 A. He did.

4 Q. And you witnessed it?

5 A. I did.

6 Q. And she witnessed it?

7 A. She did.

8 Q. And both of y'all signed too that you were
9 witnessing his signature?

10 A. Yes, sir.

11 MR. CONNER: Your honor, we'd offer this statement
12 into evidence at this time.

13 THE COURT: Ms. Stevens?

14 MS. STEVENS: I -- I still object, your honor.

15 THE COURT: On the basis that it's cumulative?

16 MS. STEVENS: Yes.

17 THE COURT: All right. Objection's overruled.

18 It's Exhibit 28.

19 (Whereupon, typewritten statement signed by Mr.
20 Lowery, is marked and entered into evidence as the
21 State's Exhibit Number 28.)

22 MR. CONNER: And we'd request permission to publish
23 it by having Mr. Johnston read it at this time, your
24 honor.

25 MS. STEVENS: Your honor, if he's going to read it

1 to him, why do they need to take it back to the jury room
2 with them? That was -- my objection earlier was that it
3 was going to be cumulative.

4 THE COURT: Well, he's reading the document.. He's
5 going to publish now the document that's been entered
6 into evidence, so your objection's overruled.

7 Q. All right.

8 A. It's got --

9 THE COURT: Read it top to bottom.

10 A. Yes, sir. This is entitled Suspect Statement. It
11 has November 27th, 2006 at 9:26 a.m. at the Sumter Police
12 Department. It has a date of birth and Social Security
13 Number and some other information and telephone number
14 for Mr. Lowery. It says, I, Mark James Lowery of [REDACTED]
15 [REDACTED], Summerton, South Carolina 29148,
16 having been advised of my constitutional rights and
17 having signed a waiver of those rights, do hereby give
18 the following statement freely and voluntarily without
19 fear or threat or promise or reward to Detective Marcus
20 Johnston who has identified himself as a police officer.
21 The statement starts, on November 26th, 2006, I left a
22 family gathering. I went and dropped off my son --
23 dropped my son off and went to my girlfriend's house.
24 Things were going good. Nightfall came, and me and my
25 girlfriend got into an argument. I left her house. I

1 was just driving around stressing and thinking about my
2 family. My family expected a lot out of me. My
3 girlfriend has two kids, and she expects a lot out of me.
4 I have a son and Christmas was coming up, and I'm trying
5 to pay for everything. I pulled into the gas station to
6 get a pack of cigarettes. My girlfriend called and I was
7 sitting in the truck talking to her. She was arguing and
8 fussing with me. I hung up the phone and looked around.
9 There was no one in the parking lot.. I had no intention
10 of robbing the store when I pulled up. But once I hung
11 the phone up, I was angry. I had \$10 in my pocket, and
12 that had to take me the whole week for lunch and gas. It
13 all happened so fast. One moment was I thinking about my
14 problems and everything, and the next thing I was in the
15 store telling the cashier to give me the money. I then
16 got in my truck and was gone before you know it. The
17 police got behind me. I actually pulled over and got
18 out. The cop started fussing and pointing a gun at me.
19 I got back into my truck and said forget it. I just gave
20 up on everything going on. I took off in my truck and
21 the police starting chasing me. I had never been in the
22 area before. I remember reaching over to the passenger
23 seat looking for something. I woke up, and that's the
24 last thing that I remember. I was in a helicopter and
25 going to the hospital. As far as the lady in the store,

1 I had no intent of harming or hurting her in any way. It
2 really had nothing to do with her. It was just so much
3 stress. I don't know what happened to the money. I had
4 it in my coat pocket when I jumped into the truck. I
5 don't know what happened to the knife. I may have thrown
6 it into the passenger seat. I don't know where the money
7 or the knife is at now.

8 The bottom of the statement says, I have -- I have
9 read or had read to me the above statement consisting of
10 one page and attest that it is a true and accurate
11 account to the best of my knowledge of the events which
12 took place on or about or during the above given time. I
13 have received a copy of this statement from Detective
14 Marcus Johnston, signed Mark Lowery, Jr., dated November
15 27th, 2006. Witnessed by Theresa Colclough and myself,
16 Marcus Johnston.

17 Q. Answer any questions Ms. Stevens might have for
18 you, please.

19 THE COURT: Ms. Stevens?

20 CROSS EXAMINATION BY MS. STEVENS:

21 Q. You said that you talked to everyone involved in
22 the case before you talking to Mr. Lowery; is that
23 correct?

24 A. I was -- Well, at that time, I was -- I was talking
25 about Mr. Lowery.

1 Q. The question was you spoke to everyone involved and
2 Mr. Lowery?

3 A. I -- I spoke with Mr. Lowery that morning about the
4 case. I wasn't able to speak with every single police
5 officer that was on that scene though that night.

6 Q. Did you talk to any of them?

7 A. I talked with some of them, yes.

8 Q. Who brought him back to Sumter?

9 A. Officer Wingate I believe.

10 Q. Where did he bring him from?

11 A. He came from Richland Memorial Hospital.

12 Q. Do you know how he got to Richland Memorial
13 Hospital?

14 A. Yes, ma'am. He was flown there.

15 Q. How was he flown there?

16 A. In a helicopter.

17 Q. Do you know what kind of injuries he had?

18 A. I -- not particularly, no ma'am.

19 Q. So you weren't suffering convulsions at the scene?

20 A. No, ma'am.

21 Q. Did you see any visible injuries?

22 A. Not -- at the time that I saw him, maybe a few
23 scratches but, you know, nothing significant.

24 Q. Okay. Did he tell you that he was very tired?

25 A. He -- he -- in fact, he did. He told me that he

1 was tired and asked me if he could have a cup of coffee,
2 so I got him a cup of coffee.

3 Q. Did you ask him if he was on any sort of
4 medications?

5 A. I didn't.

6 Q. Isn't that something that you would normally ask
7 just to make sure that someone is not taking something
8 that would affect their judgement?

9 A. Under those circumstances, as far as I was
10 concerned, he was released by Richland Memorial Hospital,
11 so he was perfectly capable -- capable of sitting there
12 having a conversation with me.

13 Q. Are you a doctor?

14 A. I'm not a doctor, no, ma'am.

15 Q. Did you tell him it would -- if he cooperated, it
16 would go easier on him?

17 A. I didn't say that. No, ma'am.

18 Q. Did Mr. Ross say that?

19 A. No, ma'am.

20 Q. If he was so cooperative and wanted to talk, why
21 didn't he write the statement himself?

22 A. This is the practice that we use. Just about every
23 case that I've ever had we've always sat down with Ms.
24 Colclough in her office and have her type the statement
25 out.

1 Q. Is that just the Defendants or is that all
2 statements?

3 A. Interviews with victims, witnesses, suspects.

4 Q. So you would be surprised to know that the victim
5 in this case handwrote hers?

6 A. I mean, that's -- that's not unusual.

7 Q. Make up your mind. Which way do you do it?

8 A. Well, it's done both ways. Sometimes they write.
9 Sometimes it's typed.

10 Q. Okay. You were not at the Kangaroo, were you?

11 A. I was not. No.

12 Q. And you were not at Rabon's, were you?

13 A. No, ma'am.

14 Q. Did you see the videotape?

15 A. Yes, ma'am.

16 Q. Before you spoke to Mr. Lowery?

17 A. No, ma'am.

18 Q. Is there a -- any sort of tape from any of the
19 police officers during the chase?

20 A. I'm not aware of any tapes. I have not seen any
21 tapes, no, ma'am.

22 Q. Okay.

23 MS. STEVENS: I don't have anything further.

24 THE COURT: Redirect?

25 REDIRECT EXAMINATION BY MR. CONNER:

1 Q. Mr. Johnston, did the Defendant seem to understand
2 what was going on?

3 A. He did.

4 Q. And in your law enforcement experience, have you
5 had lots of opportunities to deal with people who were
6 under the influence of various different substances?

7 A. I have.

8 Q. Is that a frequent occurrence particularly with
9 highway patrolman, with dealing with intoxicated people?

10 A. Yes, sir.

11 Q. And did this Defendant seem to be okay to you?

12 A. He was fine. Yes, sir.

13 Q. Was he coherent?

14 A. He was.

15 MR. CONNER: I have no further questions, your
16 honor.

17 THE COURT: Ms. Stevens?

18 RECROSS EXAMINATION BY MS. STEVENS:

19 Q. It's pretty easy to tell when somebody's
20 intoxicated from alcohol, isn't it?

21 A. From alcohol, yes. And sometimes -- I've had
22 experiences in my -- during in my career with people
23 who've been under influence or taken excessive medication
24 as well, yes.

25 Q. Unprescribed medication though?

1 A. I have had instances where people have taken -- had
2 actually medication that was prescribed to them and just
3 taken more than what they needed to take, and it affected
4 their ability to speak, drive or whatever.

5 Q. But it doesn't always have to affect that?

6 A. It doesn't always have to affect it?

7 Q. I mean ---

8 A. I guess it just depends on what -- Every
9 situation's different.

10 Q. Exactly. Every situation's different.

11 A. Yes.

12 Q. Thank you.

13 THE COURT: All right.

14 MR. CONNER: I have no further questions of him.
15 I'd ask that he come down.

16 THE COURT: Mr. Johnston, step down.

17 MR. CONNER: I'm going to call Theresa Colclough,
18 your honor.

19 THERESA COLCLOUGH, being
20 first duly sworn, testifies as follows:

21 DIRECT EXAMINATION BY MR. CONNER:

22 Q. State your full name, spell your last name for the
23 record.

24 A. Theresa Colclough. Last name C-o-l-c-l-o-u-g-h.

25 Q. And Ms. Colclough, where do you work?

1 A. At the Sumter Police Department.

2 Q. And how long have you worked for the Sumter Police
3 Department?

4 A. 17 years, eight months. Approximately.

5 Q. What -- what's your job at the Sumter Police
6 Department at this time?

7 A. I am the secretary for the city investigative
8 service division for the Sumter Police Department. I
9 basically take most of the statements from victims,
10 witnesses and suspects and also other related job.

11 Q. And were you working back in November of 2006?

12 A. Yes, sir.

13 Q. How long have you worked in your present job?

14 A. Approximately 17 years.

15 Q. The -- And do -- do you recall taking a statement
16 in this case?

17 A. Yes, sir. I do.

18 Q. And tell us about the procedure.

19 A. Okay. After the Defendant is interviewed by the --
20 by the detective, the detective then brings that
21 Defendant to my office. And at that time he introduces
22 the Defendant to me and tells them that Mrs. Colclough's
23 about to take your statement. At that time, I begin
24 taking the statement from the Defendant.

25 Q. And do you type it up as he talks?

1 A. Yes, sir. I do type the statement up as the
2 Defendant talks, sitting right here close enough from
3 probably here to right here. And they're in close
4 proximity.

5 Q. And in this particular case, did Officer Johnston
6 threaten this Defendant in your presence?

7 A. No, sir.

8 Q. Did he offer him any hope of any reward as he
9 talked with you?

10 A. No, sir.

11 Q. Did he seem to be talking to you freely and
12 voluntarily ---

13 A. Yes, he was.

14 Q. Did he seem to understand the conversation that you
15 had with him or the conversation that Mr. Johnston was
16 having with him?

17 A. Yes, sir.

18 Q. Did he -- did he -- Did you perceive that he might
19 have any medical problem or any other problem, any
20 substance abuse problem, that would've made it unlikely
21 that he understood what was going on?

22 A. No, sir.

23 Q. And I show you this document here, State's Exhibit
24 Number 28 and ask you to examine that.

25 A. Yes, sir. This is the suspect's statement and my

1 signature as a witness at the bottom for taking his
2 statement.

3 Q. So after it was typed up, then he signed it; is
4 that correct?

5 A. Yes, sir. After the statement is typed, as the
6 Defendant speaks -- I type as they speak. And then the
7 statement's given back to the Defendant. He's then
8 instructed to read the statement. If he wants to make
9 any changes at that time, tells me so. I will make
10 changes if it is necessary, if he wants me to change
11 anything. And at that time, if he agrees with the
12 statement, he then signs his signature. Then it's
13 witnessed by myself and the detective.

14 Q. Answer any questions that this lawyer might have
15 for you.

16 CROSS EXAMINATION BY MS. STEVENS:

17 Q. You weren't in the room when the original interview
18 was done?

19 A. No, ma'am.

20 Q. Okay. And the time at the top of the statement, is
21 that the time that he began ---

22 A. Yes.

23 Q. --- speaking to you?

24 A. Yes, ma'am.

25 Q. Okay. And was Mr. Johnston doing any talking?

1 A. No, ma'am.

2 Q. So what was he doing?

3 A. Mr. Johnston was just standing there. He brought
4 him into the office. Told him that he needed to tell Ms.
5 Colclough what happened during the incident. At that
6 time, Mr. Lowery started -- the Defendant started
7 talking, and Mr. Johnston just stood there as he took the
8 statement.

9 MS. STEVENS: I don't have anything further.

10 THE COURT: Redirect?

11 MR. CONNER: I have nothing further. I'd ask that
12 she be excused.

13 THE COURT: Thank you, ma'am. You can step down.
14 Any objection to that, Ms. Stevens?

15 MS. STEVENS: No, sir, your honor.

16 THE COURT: Anything else, Mr. Conners?

17 MR. CONNER: Your honor, we would rest at this
18 point.

19 THE COURT: All right. Ladies and gentlemen, we're
20 going to take a brief recess. The -- the rules that we
21 have or that I referenced earlier requires to do so at
22 this time. So please go to your jury room. Please do
23 not discuss the case. We'll have you back out very
24 shortly.

25 (Jury exits the courtroom)

1 THE COURT: If you'd like, before I speak with him
2 about his -- his intentions with regard to his testimony?

3 MS. STEVENS: Yes, sir, your honor.

4 THE COURT: We'll take a break for a few minutes.
5 You say you do need some time?

6 MS. STEVENS: Yes, sir.

7 THE COURT: All right.

8 MS. STEVENS: We'd like to have his parents involved
9 in this discussion?

10 THE COURT: That would be fine. Is your -- is your
11 office available, Melissa?

12 COURT REPORTER: Yes, sir.

13 THE COURT: All right, you can go in the court
14 reporter's office as long as there's a guard outside the
15 door.

16 (Off the record)

17 THE COURT: All right. Mr. Lowery, come forward.
18 I tell you what, just stand right where you are and raise
19 your right hand.

20 MARK LOWERY, being first duly sworn, testifies as
21 follows:

22 THE COURT: All right. Now, Mr. Lowery, I'm going
23 to explain to you at this time, sir, of your rights. And
24 now is the time in the case where you can, if you so
25 choose, present your defense. A part of the defense you

1 may choose to present would be testifying yourself if you
2 so choose. I wanted to let you know, and I'm sure your
3 lawyer has done so, but the Fifth Amendment to the
4 Constitution states that no person shall be compelled in
5 any criminal case to be a witness against himself. And
6 that is what is sometimes known as the right -- right to
7 remain silent. And also, it's known as the right against
8 self-incrimination. And what that means is that you
9 cannot be forced or required to testify in this case.
10 You have the right to testify. And you have the right
11 not to testify. Now no one, including me, Mr. Conner, or
12 even your own lawyer, no one can make you testify. Do
13 you understand that?

14 MR. LOWERY: Yes, sir.

15 THE COURT: All right. The right that you have
16 under the Fifth Amendment is a personal right. Again, no
17 one can waive that right except for you. If you decide
18 to testify, you will be subject to the same rules of
19 evidence and the same general rules that govern the
20 testimony given by other witnesses, and you can be
21 examined and cross examined just like these other
22 witnesses. Do you understand that?

23 MR. LOWERY: Yes, sir.

24 THE COURT: In addition, if you have any
25 convictions involving dishonesty or false statements,

1 those -- those conviction can be put into evidence or you
2 can be questioned about those convictions. Now, if you
3 want to testify, you can. And if you decide to testify,
4 that decision on your part must be made freely,
5 voluntarily, and intelligently with full knowledge of
6 your rights under the Fifth Amendment and the
7 consequences of your decision to testify. Now, if you
8 decide not to testify, I will tell the jury that they
9 cannot in any way hold that against you. As a matter of
10 fact, I will tell them that they cannot give it any
11 weight whatsoever, and that they cannot even discuss it
12 amongst themselves or even consider it in their own
13 minds, that being the fact that you did not testify.
14 There's also a charge that I give the jury that I cannot
15 even use the word failure to testify when I explain the
16 facts that they cannot consider the fact that you did not
17 testify in any way against you. Now, you've been talking
18 with your lawyer. You've spent probably the last 20
19 minutes or so talking with your lawyer and I believe your
20 father. I don't know if your mother was in there. Both
21 parents were in there?

22 MR. LOWERY: yes, sir.

23 THE COURT: All right. Have you had enough to talk
24 with your lawyer and your family?

25 MR. LOWERY: Yes, sir.

1 THE COURT: All right. Do you understand
2 everything I've explained to you?

3 MR. LOWERY: Yes, sir.

4 THE COURT: All right. Do you have any questions
5 about what I have explained to you?

6 MR. LOWERY: No.

7 THE COURT: All right. Have you discussed fully
8 with your lawyer and your family whether or not you will
9 testify?

10 MR. LOWERY: Yes, sir.

11 THE COURT: All right. Now, I don't know if you
12 have any other witnesses to call before you would
13 testify, but do you wish to talk to your lawyer at -- at
14 -- right now any further? If you would like to do that,
15 I will let you do that.

16 MR. LOWERY: No.

17 THE COURT: All right. Do you wish to testify?

18 MR. LOWERY: No, sir.

19 THE COURT: All right. Ms. Stevens, is there --
20 Are there any other questions or inquiries that you would
21 like for me to make as far as your client's concerned?

22 MS. STEVENS: No, sir.

23 THE COURT: Your estimation of our records ...

24 MS. STEVENS: Yes, sir.

25 THE COURT: All right. And, Mr. Lowery, if during

1 the course of any presentation of the defense you may
2 make, if you change your mind, all you have to do is let
3 your lawyer know and she'll let me know. And I know, Ms.
4 Stevens, I did not ask you if you had any motions to
5 make. Do you have any motions at this time?

6 MS. STEVENS: Obvious -- obviously, your honor,
7 when the State rests, it's incumbent upon the Defendant
8 to make a motion for a directed verdict. I am not going
9 to make a directed verdict motion on the failure to stop
10 for a blue light, your honor. As I told the jury in my
11 opening statement, we have never contested that he did
12 fail to stop for a blue light. However, on the armed
13 robbery, your honor, there is no direct evidence that my
14 client was involved in an armed robbery. And if there is
15 no direct evidence that my client was involved in the
16 armed robbery, then there's no evidence, direct evidence,
17 that my client was in possession of a knife during the
18 commission of a crime of violence. Also, your honor, I -
19 - I don't know if the -- as -- Does the State have to
20 prove that armed robbery is a crime of violence to
21 actually charge him with that?

22 THE COURT: I don't know whether they have to prove
23 it. Well, I guess at that point I would reference the
24 jury charge that I have. Let's see. Mr. Lowery, you can
25 remain standing or have a seat, whichever you -- you

1 would like.

2 MS. STEVENS: Stand.

3 THE COURT: All right. The charge on possession of
4 a weapon during the commission or attempt to commit a
5 violent crime states the Defendant is charged with
6 possession of a weapon during the commission of or
7 attempt to commit a violent crime. The State must prove
8 beyond a reasonable doubt that the Defendant visibly
9 displayed a knife during the commission of a violent
10 crime. A knife which is an instrument or tool with a
11 sharp cutting blade, so forth and so on. In order for
12 you to find the Defendant guilty of possession of a
13 weapon during commission of a violent crime, you must
14 first find the Defendant guilty of either committing a
15 violent crime or attempting to commit a violent crime.
16 And then the charge that I have says armed robbery is a
17 violent crime. That's not something that has to be
18 proven by evidence. It is something that is established
19 by law.

20 MS. STEVENS: Okay, your honor. So therefore, my
21 directed verdict motion is that there is no direct
22 evidence that my client committed the armed robbery or --
23 and therefore, was in possession of a knife during the
24 commission of a crime of violence.

25 THE COURT: All right. I'll respectfully deny your

1 motions. I think that all is a jury issue. The jury
2 will be instructed on the object to the statement
3 testified to by Mr. Johnston and offered into evidence on
4 the issues of voluntariness and so forth. His statement
5 itself is evidence of his commission of this crime. So
6 I'm going to deny your motion. Plus the clerk testified
7 as to the knife. And while she did not obviously
8 identify Mr. Lowery, there is circumstantial evidence
9 that it was him. And there's also direct evidence by
10 some. If the jury chooses to accept that.

11 MS. STEVENS: Yes, sir.

12 THE COURT: All right. Now, is the Defendant going
13 to present any evidence?

14 MS. STEVENS: No, sir, your honor.

15 THE COURT: All right. Would you like to take a
16 few minutes to talk to me now about the charge that I'll
17 give? Is it -- is it both of your desire to move to the
18 closing arguments and jury charge at this time?

19 MS. STEVENS: Your honor, obviously I'd like to
20 have more time to prepare a closing argument simply
21 because of the seriousness of what is going to happen to
22 Mr. Lowery if he is indeed found guilty. However, your
23 honor, I'd leave it up to your discretion.

24 THE COURT: Mr. Conner?

25 MR. CONNER: Your honor, it would suit me just as

1 well to do it first thing in the morning.

2 THE COURT: All right. Well, let's do this. I'll
3 have the jury come back at 9:30. If -- if you could ---

4 MS. STEVENS: Would you like me to rest first, your
5 honor?

6 THE COURT: We -- right, I'm going to have you rest
7 and then explain to the jury that the circumstances are
8 such that in the interest of everyone time-wise that we -
9 - it'd be best to pick up in the morning. But I'm not
10 going to let them know that they might get out of another
11 jury selection.

12 MS. STEVENS: Because then they'll be doing the
13 happy dance.

14 THE COURT: Yeah. Mr. Bradley, would you go try to
15 find Mr. Jackson or somebody from the solicitor's office
16 and see if they want me. All right, we'll -- What we'll
17 do then, we'll have the jury come back in. I'll let you
18 rest.

19 MS. STEVENS: Yes, sir.

20 THE COURT: And then I'll turn them loose for the
21 rest of the day, and then we'll spend 15 or 20 minutes
22 talking about the charge.

23 MS. STEVENS: Okay. I just, you know, figured,
24 your honor, also this is -- There's 29 pieces of
25 evidence. I'd like to think that they're going to review

1 each one. I just don't -- I don't want to be here to
2 seven or eight o'clock.

3 THE COURT: I think that's fair. If you'd go get
4 the jury for me.

5 (Jury enters the courtroom, 3:52 p.m.)

6 BAILIFF: Your honor, we have all the jurors
7 present in the courtroom.

8 THE COURT: Thank you. Ladies and gentlemen, thank
9 you for your patience. And the longer I'm in this
10 courtroom, the more aware I am of that clock. It tells me
11 it's ten minutes to four. And I was hoping it wasn't ten
12 minutes to five, because I know that would've been a long
13 time you were in the jury room. All right, Ms. Stevens,
14 does the Defendant choose to call any witnesses?

15 MS. STEVENS: No, sir, your honor. The Defense
16 rests.

17 THE COURT: All right. Thank you very much.
18 Ladies and gentlemen, the -- As I indicated to you
19 earlier, the trial is conducted in stages. The next
20 stage of the trial will be for the attorneys to give you
21 their closing arguments. And then after that, I will
22 give you the charge of the law. Because of the time -- I
23 usually use as a rule of thumb that if I am not able to -
24 - or if you're not able to hear arguments and the charge
25 before beginning at 3:15 or 3:30, because of the time

1 that that takes, you would not have an adequate
2 opportunity to deliberate this case without going
3 substantially into the evening. And as an accommodation
4 to primarily you and the attorneys and the parties, I'm
5 going to ask you to be back at 9:30 in the morning. And
6 at that time, we will -- we'll hear closing arguments and
7 the jury charge. And then you would be free to
8 deliberate the case. Now, do not begin discussing this
9 case among yourselves until I tell you that you can. And
10 do not discuss this case with anyone in any way
11 whatsoever. And do not begin to form or express any
12 opinions even in your own mind about any -- any
13 resolution of this case until I tell you that you can do
14 so. All right, if you will be back in your jury room at
15 9:30, we will resume the trial at that time. Thank you.

16 (Jury exits the courtroom, 3:53 p.m.)

17 THE COURT: All right. Are there any charges you
18 may want to give me, Ms. Stevens tomorrow morning, but
19 let me go through the charges that I propose to give.
20 Both of you are probably familiar with all of these.
21 First of all, the charge that the fact of the charge or
22 arrest or the indictment is not evidence of anything.
23 The standard charge to the jury being the fact,
24 credibility charge will be something that both of you
25 have heard numerous times. I'll give the charge on the

1 distinction between circumstantial evidence and direct
2 evidence. The -- the Dennison's Charge. There's a
3 reasonable doubt charge that I give I know Mr. Conner's
4 probably heard before. Ms. Stevens, I don't know if
5 you've heard mine. But the gist of it is, and I'll give
6 you a copy of it if you'd like to have it for your
7 argument. It basically states that reasonable doubt is
8 not an imaginary doubt, it is not a weak doubt, but it's
9 a substantial doubt. And then the gist of it is that
10 reasonable doubt is a doubt which makes an honest,
11 sincere, conscientious juror in search of the truth
12 hesitate to act and it is proof which leaves you firmly
13 convinced of the Defendant's guilt. I do also add that
14 reasonable doubt may arise from evidence which in the
15 case or from the lack or absence of evidence in the case.
16 And I also tell the jury that the simple fact that the
17 jury might engage in a full and free discussion of the
18 issue of guilt or non-guilt does not in and of itself
19 mean that reasonable doubt exists in any given case. On
20 the issue of Mr. Lowery not testifying, I do not use the
21 word failure since that's prohibited by case law. I tell
22 them that it's not a factor to be considered in any way.
23 It must not be considered at all. He has the right to
24 remain silent, and the assertion of that right must not
25 be considered at all during deliberations and that they

1 are to draw no conclusions from the fact that he did not
2 testify, and it should not even be discussed in the jury
3 room. And the reasoning behind that is that the burden
4 of proof is on State. The armed robbery comes from
5 Section 16-11-330. I will give you that charge, a
6 photocopy of that charge as well. And the blue light
7 charge comes from 56-5-750. And the possession of weapon
8 during the commission of a violent is 16-23-490. I'll
9 give you a copy of that as well. At some point, probably
10 at the time that I am discussing or after I have
11 discussed reasonable doubt or the fact that the Defendant
12 did not testify, I will charge them on the factors they
13 are to consider with regard to the statement of the
14 Defendant which was admitted into evidence. And I will
15 give both of you a copy of that as well if you want it.

16 MS. STEVENS: Yes, please.

17 THE COURT: It's about two and a half pages. In a
18 general sense, it says that while the court has
19 determined that that statement is admissible, the jury
20 makes the ultimate decision as to whether or not the
21 Defendant made the statement and that, if he did make the
22 statement, whether it was made voluntarily and of his own
23 free will. And then I go into the listing of the items
24 that they can take into consideration as to whether or
25 not it was made freely and voluntarily. Of course that

1 was your argument, Ms. Stevens, that under the
2 circumstances, the jury should not make that finding
3 beyond a reasonable doubt. But it's a threshold matter.
4 I did conclude that it could come in.

5 Anything else that you can think of off the top of
6 your head, Mr. Conner?

7 MR. CONNER: No, your honor.

8 THE COURT: I do have a criminal intent charge.
9 And I do have a charge, Ms. Stevens, that I'm sure you
10 would want that the charges are independent of each
11 other.

12 MS. STEVENS: Yes, sir.

13 THE COURT: In other words, a verdict on one does
14 not control the verdict on the other, which is a
15 practical matter, would permit the jury to find guilt as
16 to ---

17 MS. STEVENS: One without having to find guilt with
18 the other.

19 THE COURT: Right.

20 MS. STEVENS: Yes, sir.

21 THE COURT: And also, what -- what do you think
22 about mere presence charges, unnecessary in this case? I
23 know the defense always wants them, and the State is not
24 always thrilled with that. And these are found where
25 possession is an element for -- But just think about that

1 and I'll give you, if you want, a copy of the mere
2 presence charge that I use.

3 All right. If you would get here probably at
4 shortly after nine tomorrow. If you have any additional
5 charges, that would help me out a lot since we'll move
6 straight into the arguments and charge at that time.

7 Okay?

8 MS. STEVENS: Thank you, your honor. And I would
9 like photocopies of the ones you ---

10 THE COURT: Okay. Step on back to my office.

11 (Court adjourns)

12 (Court resumes)

13 THE COURT: All right. Mr. Conner and Ms. Stevens,
14 in my office, we briefly went over both verdict scenario.
15 I think Lori gave you the form.

16 MS. STEVENS: Yes, sir.

17 THE COURT: Is there agreement that if the jury
18 finds the Defendant not guilty of armed robbery, then
19 they would not be able to find the -- possession of a
20 knife during the commission of a violent crime.

21 MS. STEVENS: Yes, sir.

22 THE COURT: Does the verdict form look satisfactory?

23 MS. STEVENS: It says County of Clarendon. But
24 other than that, it's fine.

25 THE COURT: Well, I'll change that. We'll change

1 that and ---

2 MS. STEVENS: But other than that, your honor, it's
3 fine.

4 THE COURT: The substance of it is okay?

5 MS. STEVENS: Yes, sir.

6 THE COURT: All right. Mr. Conner?

7 MR. CONNER: I'm satisfied with it.

8 THE COURT: All right. As far as the argument did
9 the Defendant introduce any evidence, I don't recall ---

10 MS. STEVENS: No, sir.

11 THE COURT: So Defendants go last?

12 MS. STEVENS: Yes, sir.

13 THE COURT: How long do you think you'll need? Not
14 to hold you specifically to it, but just for me to
15 anticipate?

16 MR. CONNER: I'd say 15 minutes at the most.

17 MS. STEVENS: Twenty minutes at the most.

18 THE COURT: After the arguments are over, I'll ask
19 the jury to show by hand if they need to take a break or
20 not. All right, you ready for the jury?

21 MS. STEVENS: Yes, sir.

22 THE COURT: Mr. Conner?

23 MR. CONNER: Yes.

24 THE COURT: All right.

25 (Jury enters the courtroom, 9:35 a.m.)

1 BAILIFF: Your honor, we have all the jurors and
2 alternates present in the courtroom.

3 THE COURT: Thank you, Mr. Bradley. All right,
4 ladies and gentlemen, we're now ready to move forward
5 with the trial of this case. And as I told you
6 yesterday, the evidentiary portion of the trial has --
7 has been concluded. And now it's the opportunity for the
8 lawyers to give you their closing arguments. And after
9 that I will give you the charge on the law. And I will
10 remind you as I did at the beginning of the trial what
11 lawyers say is not evidence. It would be up to those of
12 you who deliberate this case to use your collective
13 memories and common sense to determine what the true test
14 -- what the testimony actually was. And you are to rely
15 on your memory if a lawyer says something that does not
16 correspond with your collective memories of the
17 testimony, and of course you go with your memory.

18 Having said that, however, this portion of the
19 trial is no less important than any other portion of the
20 trial. And it is certainly incumbent on you to give the
21 lawyers your utmost attention. And also, when I give you
22 the charge, to give your utmost attention to me. After
23 the arguments are over, I'll ask you by show of hands if
24 anyone needs to take a break, so don't be concerned. All
25 right. Is the State ready to proceed?

1 MR. CONNER: We're ready, your honor.

2 THE COURT: All right, Mr. Conner?

3 CLOSING ARGUMENTS FOR THE STATE BY

4 MR. CONNER: May it please the court.

5 THE COURT: Yes, sir.

6 MR. CONNER: Ladies and gentlemen of the jury, I
7 want to thank you for your attention and ask for your
8 attention for a few minutes longer this morning. The --
9 We've got, and you have, in your jury room, you'll have
10 these photos. I hold up just one of them at this time,
11 and I know you can't see it in great detail. This is
12 State's Exhibit Number 1. It's one of the ones that was
13 circulated through the jury. There's four of them that
14 Officer Duggin off of the -- off of the video by taking a
15 -- taking a shot of them. He played them on a TV and
16 took a shot ?? A still photo to kind of show you the
17 detail of what's happening. Sometime ?? On -- on the
18 machine, it goes through rather fast and you don't get a
19 good close look at it. And this gives you a better look.
20 You have these photos. I ask you to examine them because
21 there are a lot of -- there's a lot of important
22 information here. There's -- there's a camouflage coat.
23 There's a mask on his face. There's a ball cap on his
24 head. And there's a knife in his hand.

25 And now, why is that important? Because the police

1 got there rapidly. They were on this thing within about
2 a minute's time. They stopped him -- pursued him right
3 there in the road from where it happened. We were
4 fortunate in that regard. And let's look at the items we
5 got that you can connect with that photo. It's this --
6 this jacket. And I won't take it all the way out and --
7 I'll have to put it back in but you've got it. You can
8 take it out and look at it. You can -- it's State's
9 Exhibit Number 8. Now Bill Wingate, one of the city
10 policeman, said that when he got there ?? Had run his
11 vehicle into Rabon's Sav-On store out in the Dalzell
12 community. And they got there and extracted him from the
13 vehicle and that he had on that jacket that's in that
14 bag. And that he had money. And -- and one of these
15 items here, this one I hold in my hand, State's Exhibit
16 Number 11, is about 60 -- I believe it was \$62, you can
17 count it if you like, that he got out of his pocket. And
18 incidentally, the -- Detective Quiroz said that he had
19 gotten some money, and this is a copy of his. And this
20 is his inventory sheet where he -- he turned it in to his
21 -- to the evidence room. It's got his name on the
22 bottom. It's State's Exhibit Number 15. And the copy of
23 the money is State's Exhibit Number 13.

24 The -- Quiroz got this money out of the floorboard
25 of the truck. And incidentally, in the Defendant's

1 statement, he -- he says that he didn't know where the
2 money went, but the last thing he remembered was putting
3 it in his coat pocket. That's in this statement. I'm
4 going to talk about that in a few minutes. Also, in this
5 -- in this photo; or in the four photos you have, you can
6 see -- best of all in this one I hold in my hand, State's
7 Exhibit Number 1, you can see that he's got on a mask.
8 And here is the -- is the mask that came out of the
9 truck. Officer Duggin recovered that when he went down
10 to the impound there and processed the -- the -- the
11 vehicle, to check, to look to see what was there.
12 The -- you -- Quite frankly, from looking at the
13 photograph, it's hard to say that you can tell exactly
14 that it was a knife. You can tell he's got something in
15 his hand. But I can't tell you that it's this knife
16 which was recovered from his vehicle. Or I can't tell
17 you it's this knife that was recovered from his vehicle.
18 But I can tell -- I can't tell you it's this knife, but
19 it was a knife. This lady said it was a knife, and I
20 don't see any -- in the -- from looking at the photo,
21 it's obvious that he had something in his hand. There's
22 no reason to doubt her word in that regard. And all
23 three of these knives, any one of them could be used to
24 do what he did here.

25 And Mr. Quiroz recovered one of those knives. And

1 Mr. Duggin recovered the other two. The -- the ball cap,
2 this picture, State's Exhibit Number 1, if you look at it
3 closely, you can see that ball cap. And I believe in
4 State's Exhibit Number 2 and 3 you can see he had on a
5 ball cap and you can see it maybe better in those two
6 photos, 2 and 3, than you can in State's Exhibit Number
7 1. But in all of them you can see the ball cap. And
8 we've got two ball caps, Mr. Duggin recovered the white
9 one. Both of them happen to be Browning I believe. This
10 is State's Exhibit Number 12. This was recovered by
11 Quiroz, and it's on his evidence turn-in sheet, one
12 Browning ball cap green and orange in color. And this is
13 what was recovered from the Defendant by Quiroz.

14 The -- Another thing that I think was helpful in
15 this case was she gave a description of -- of his
16 vehicle. It wasn't much of a description. You've heard
17 it. You've heard her tape. She was really excited, but
18 she said it was a black truck and it went up Stamey
19 Livestock Road. And that Officer Acevedo, the little guy
20 from the sheriff's department, happened to be in the
21 vicinity. And he came right down Stamey Livestock
22 meeting the Defendant. And he met him there he said at
23 the recycle center or in the vicinity of the recycle
24 center, and he turned around on him and turned on his
25 blue lights.

1 The -- this woman was -- was really excited. But
2 what she told Mr. McCoon who's seated back there in the
3 blue shirt on the second row, he testified that he -- he
4 was the first officer to get to her after this thing
5 happened. And I've just jotted down a few notes, but my
6 recollection of what -- what she told him or what he
7 reported that she said, he was a white male. That he had
8 on a camo coat and a camo mask, a camouflage coat and
9 camouflage mask. That he used a knife and that he left
10 going north on Stamey Livestock Road and he was driving a
11 black truck. And -- and as Mr. Acevedo told you, one
12 thing that was helpful in that kind of a situation there
13 was that it was one a.m. in the morning. Not much
14 traffic on the road. It's the onliest vehicle he met.
15 And it was a black truck. And it was -- it was close in
16 the proximity of the business that had been robbed.

17 Now, another thing I think's interesting to think
18 about is what he did. You know, I -- I have a friend
19 that has a little saying. He says the guilty fled when
20 no one pursues. And this -- that's what he did. When he
21 turned on the blue light, what did he do? He didn't
22 stop. He didn't stop. And why didn't he stop? Because
23 he knew he had done something wrong and panicked. Now,
24 there are other reasons for not stopping. Like maybe he
25 didn't have a driver's license. Sometimes that might

1 cause a person to flee knowing that he -- he didn't have
2 a driver's license. But this -- this fellow had a
3 driver's license because Bill Wingate recovered that off
4 of him as State's Exhibit Number 10. So he had no real
5 reason to flee.

6 Now, he got up there behind the Air Force base and
7 the officer got out, the Defendant got out. And he
8 thought and the officer thought at that point in time he
9 was going to turn himself in. However, Mr. Acevedo said
10 to him, where is the knife. And I submit to you this
11 fellow, maybe he was driving along there not stopping for
12 the blue light, he knew he'd done wrong. But then it got
13 to thinking about things. I could stop, maybe just get
14 me for a traffic violation or something, and he stopped.
15 But then when Acevedo said where is the knife. And
16 Acevedo pulled his gun on him, he knew that he was the
17 suspect in the armed robbery, that he was the target.
18 That they had him. And what did he do? He ran. The
19 guilty flees when no one pursues. He knew at that point
20 in time he was being stopped for armed robbery.

21 Now, let's talk about this -- this statement a
22 little bit. One of the things that the police are
23 required to do is give a person when they talk to them a
24 -- the -- the -- what's called their Miranda Rights.
25 And that's on this form here, State's Exhibit Number 27.

1 And they have to give it to them. In other words, they
2 have to give them the Miranda Rights in order to -- to
3 legally have a conversation with them. But I mean, the
4 judge is going to give you some further instruction on
5 that this morning. This is the form -- this is the form
6 that the officer indicated he read twice to him off of.
7 And this is the form that he signed saying that he
8 waived, or give up, those rights to have a lawyer present
9 and all that. But they -- they have to tell them that
10 you have a right to remain silent. So he was told that.
11 Anything you say can be used against you in court. You
12 have the right to talk to a lawyer for advice before we
13 ask you any questions and to have them present with you
14 during the questions. Well, you might wonder why would
15 somebody give up these rights knowing that they've done
16 wrong. I submit to you this is the kind of case where
17 they give up those rights to remain silent because they -
18 - they know they've been caught red-handed. Somebody's
19 caught outside of a business robbing it. Somebody's
20 caught with the stolen property in their hands. It's not
21 -- I submit to you that's the kind of situation where a
22 person says, well, the best thing for me to do is give an
23 excuse for what I've done and not just totally deny it.
24 And that's what he did in this case. He gave them this
25 statement.

1 And I think you can break this statement down into
2 parts. The first part of it is his excuse for why he did
3 what he did. In other words, his girlfriend was
4 stressing him out and he was short on money and the --
5 Christmas was coming. Things of that -- this happened
6 in November. He had an argument with his girl, he was
7 short on money. That was his excuse. Then he -- he
8 admits that he goes into a -- a -- two or three lines
9 there we he admits that he did the act. And then he
10 talks about the police chase. You know, one thing Ms.
11 Stevens may or may not want to discuss with you is he
12 didn't know what -- he didn't know what he was doing, but
13 I submit to you that he did know what he was doing. You
14 know, this lady from the police department, she's got no
15 axe to grind. The secretary that comes that sat there
16 and typed up the statement. She just types it up just
17 like they said. And he -- he goes into the chase, so he
18 knew that there was a police chase. He knew, first of
19 all, that there was a robbery. And he knew that there
20 was a police chase. And he knew that there was a
21 helicopter ride to the hospital. So -- and he knew that
22 he had put the money in his coat.

23 Let's read it. On November 26th, 2006, I left a
24 family gathering. I went and dropped my son off and went
25 to my girlfriend Kristen's house. Things were going

1 good. Nightfall came and me and my girlfriend got into
2 an argument. I left her house. I was just driving
3 around stressing and thinking about my family. My family
4 expected a lot of me. My girlfriend has two kids, and
5 she expects a lot of me. I had a son, and Christmas is
6 coming up. And I'm trying to pay for everything. I
7 pulled up at a gas station to get a pack of cigarettes.
8 My girlfriend called and I was sitting in the car -- in
9 the truck talking to her. She was arguing and fussing
10 with me. I hung up the phone and looked around. In
11 other words, that's his excuse: he was stressed about the
12 family. His girlfriend and his children, or her
13 children, and his child. A shortage of money. I hung up
14 the phone and looked around. There was no one in the
15 parking lot. I had no intention of robbing the store
16 when I pulled up. Once I hung the phone up, I was angry.
17 I had \$10 in my pocket, and that had to take me the whole
18 week for lunch and gas. It all happened so fast. One
19 moment I was thinking about my problems and everything
20 and the next I was in the store telling the cashier to
21 give me the money. I then got into my truck and was gone
22 before you know it. The police got behind me. I
23 actually pulled over and got out. That's what Mr.
24 Acevedo said, too. The cop started fussing and pointing
25 the gun at me. I got back into my truck and said forget

1 it. I just gave up on everything going on. I took off
2 in my truck, and the police started chasing me. I had
3 never been in the area before. I remember reaching over
4 to the passenger seat looking for something. I woke up
5 and that's the last thing I remember. I was in a
6 helicopter going to the hospital. He knows all the
7 details. As far as the lady in the store, I had no
8 intent of harming or -- of harming or hurting her in any
9 way. It really had nothing to do with her. It was just
10 so much stress. I don't know what happened to the money.
11 I had it in my coat pocket. That's what Bill Wingate
12 said he found 60-something dollars. Then there was what
13 Quiroz found in the floorboard. I don't know what
14 happened to the knife. I might have thrown it into the
15 passenger seat. I don't know where the money or the
16 knife is at now. That's his statement.

17 Ladies and gentlemen, all these items that are on
18 this disc and in that box down there are yours. They're
19 the evidence in this case. If there's some -- some
20 assistance you need with them, we can give you assistance
21 and play them. In other words, if you wanted to hear the
22 video or want to look at the video again, you wanted to
23 hear the 911 call. The pictures and everything and the
24 clothing, they're yours to examine and look at up close.
25 I submit to you that the police have done a good job.

1 Now, one thing that I don't know, or I'm not going
2 to be able to get back up here and talk with you again,
3 so I've got to say now what I'm going to say. And Ms.
4 Stevens is going to have the last argument here. And she
5 might bring up some things that I haven't addressed. The
6 -- one thing that you might -- she might say something
7 about what this young lady said in the 911 call. And how
8 accurate or inaccurate that was. Well, I'll tell you one
9 thing, this -- this girl was excited. And I don't blame
10 her. Anybody would've been excited under the
11 circumstances. She had just been robbed. She was
12 calling for help. And she responded rapidly. And as you
13 might remember, on the -- on the 911 tape, she told the
14 lady she got on the cell phone because she was getting a
15 busy signal. And so she -- she said she used her cell
16 phone. But she told the lady that she had punched the
17 alarm button that was there in the store for her to
18 punch, which should've sent a signal. And the lady said,
19 well, we just got that just as -- as we got your -- your
20 call. We were getting that -- that message. So she
21 responded right away, and -- and that was good.

22 The -- you know, you -- you can quibble about what
23 she said. Like one thing I think, she said something
24 about this mask being orange and gray. But if you look
25 at it closely, you can say well, maybe that's kind of an

-1 orange or maybe it's tan. There's -- there's some green
2 in it. Then somebody else might say there's some gray
3 there. In any event, she didn't have an opportunity, or
4 she -- She had some opportunity, but her -- here's a
5 fella standing in front of her with a knife saying give
6 me -- give me the money and threatening her. And she's
7 not looking at that garment to see exactly every spec of
8 color that might be in it and trying to distinguish
9 between whether this is tan or whether it's a kind of an
10 orange color. But it was plenty accurate, your honor, or
11 ladies and gentlemen.

12 And the -- the video and these pictures tell the
13 story. And it matches up with the evidence that these
14 officers found. I submit to you that you've heard in
15 this case should be guilty on all counts. I thank you
16 for your attention.

17 THE COURT: Thank you, Mr. Conner. Ms. Stevens?

18 CLOSING ARGUMENTS FOR THE DEFENSE BY

19 MS. STEVENS: These are pictures that were taken
20 from the vehicle. And as Mr. Conner said, look at them
21 and look at them closely. Because there's things that
22 you can't see in them. Like you can't see my client's
23 face. So it wasn't my client. You can't tell if it's
24 one of these hats. You can't really tell if it's that
25 coat. You can't even tell it's a knife. As I told you

1 the other day, yesterday, I wanted you to listen to what
2 you do hear and what you don't hear and be cognizant of
3 what you do see and what you don't see. There are three
4 knives that were taken into evidence. Ms. Alston was
5 here yesterday. She even testified after Mr. Conner
6 asked that she had reviewed some of the evidence. Did
7 she look at these? Why didn't she identify, yes, that
8 was the one? Mr. Conner can't have it both ways. Either
9 she gave a really excellent description or she didn't.
10 He wants to tell you she gave an excellent description
11 when it helps him, and then say, oh, but the little
12 details don't really matter. You can't have it both
13 ways. Either she was very observant and gave a great
14 description, or she didn't.

15 He wants you to look at the coat and say, well,
16 this coat might be orange and she was scared so she might
17 not have noticed. She said not, in her own words, 30
18 seconds maybe after the robbery she gave a description
19 over the air. I trust that description because her
20 memory was fresh. It had just happened. He had just
21 walked out. I don't want you to think that I don't feel
22 for Ms. Alston or that Mr. Lowery doesn't feel for Ms.
23 Alston, because what happened to her is terrible. I
24 cannot even imagine what she went through. But that
25 doesn't mean that Mr. Lowery did it.

1 There was testimony that Mr. Lowery was airlifted
2 from the scene of the car crash. And as I told you the
3 other day, we're not denying that he ran from the police.
4 We are denying that he was running from the police
5 because he committed an armed robbery. But he was
6 airlifted from the scene. That means that somebody at
7 the scene thought that his injuries were severe enough to
8 get a helicopter to take him over to Columbia. Now, he
9 wrecked his truck about one o'clock in the morning, okay?
10 So I don't know how long it takes a helicopter to get
11 here. I don't know how long it takes them to decide to
12 bring a helicopter over here. But somebody made the
13 decision. The helicopter came. The helicopter took him.
14 He gets over to Columbia, and I don't know about you, but
15 if you got to have a way to get to see an emergent --
16 somebody in the emergency room, it's not quick. But yet,
17 eight hours later, after being in an accident, airlifted
18 over to Columbia, seen by medical staff, released, driven
19 back to Sumter straight to the law enforcement center
20 where he told Mr. Johnston that he was tired, that he
21 didn't -- he didn't feel good, he gives a statement.

22 Now, I've never been in this situation, so I can't
23 tell you what I do. But I submit to you that he knew he
24 had run from the police. He knew he was in trouble for
25 that. And if somebody told me it would go easier on me -

1 - on you if you cooperate with me, I might be willing to
2 say anything. Because I'm scared. Because I know I'm in
3 trouble. Because they tell me they're going to help me.
4 They tell me they're going to make it easy for me. I
5 might be willing to say almost anything. Your saw
6 pictures of the truck somewhere in here.

7 MR. CONNER: I think they're in that box.

8 COURT REPORTER: They're in that box.

9 MS. STEVENS: In here, okay. Look at that. There
10 was testimony from Mr. Wingate that it was noisy and
11 dusty and that his truck went all the way through the
12 store. I don't know if any of you have ever seen
13 Rabon's, but it went all the way through the store. The
14 accident was pretty serious. I submit to you that he had
15 a pretty good bump on his head. And maybe he didn't
16 really know what he was saying.

17 If you look at the pictures, you cannot identify
18 the person from either the video or the pictures. The
19 victim said the jacket and ski mask were orange and gray.
20 I don't see any orange, and I don't see any gray. Mr.
21 Duggin testified that there was a whole bunch of camo
22 stuff, camouflage stuff, in the truck. And I asked him,
23 I said, well, don't hunters where camouflage. And he
24 said yeah. And I said, well, don't hunters usually have
25 knives in their car. He said yeah. So I submit to you

1 that my client had a bunch of camo stuff in his truck
2 because he's a hunter, not because he went and robbed a
3 store.

4 There were no fingerprints at the scene. That's
5 convenient. And then Mr. Duggin said that he took
6 fingerprints from the passenger side of the truck. I
7 thought that was very interesting. Why would he do that?
8 I submit to you it's because there might have been
9 somebody else in that truck, and they knew that. There
10 might have been somebody else in that truck wearing an
11 orange mask.

12 There's a discrepancy between the inventories: \$26,
13 \$21. Not that that really matters, but she said that she
14 put the money in a bag. Where's the bag? I asked them,
15 I said, did you find the bag. And they said no. And
16 none of the police officers that were following him,
17 three or four of them, testified that they saw anything
18 flying out of that car. The white mask, the white coat,
19 the bag, black knife. They said they were pretty close
20 to him and going pretty fast. And they didn't testify
21 they saw anything flying out the car.

22 People run from the police for many reasons. And
23 Mr. Conner gave you one: they don't have a driver's
24 license. We're going to be hypothetical here.
25 Hypothetically, there could've been drugs in his truck.

1 There could've been an open bottle of alcohol in his
2 truck. Could've been anything in his truck. Could be
3 any number of reasons why he ran.

4 I don't know if any of you have been on Stamey
5 Livestock Road, but it's kind of dark and it's kind of
6 wave -- weavy and -- and everything. But the recycling
7 center is probably four times closer, five times closer,
8 much closer to Frierson than to Broad. It's toward the -
9 - almost the very end. Because when you get to the
10 recycling center, you pass a couple of -- of houses, and
11 then basically you're at Frierson.

12 McCoon testified that when he left after checking
13 in on her, he saw a black truck turn down Stamey
14 Livestock and go down Stamey Livestock. I submit to you
15 that that was my client turning onto Stamey Livestock at
16 that time. There are some parts of his statement that
17 are -- that aren't his own voluntary thoughts. And one
18 of them is that he didn't know that area very well. He's
19 not from there. He's from Summerton. So he's on a
20 strange road, got something in truck he probably
21 shouldn't have. He doesn't want to get caught, so he's
22 driving slow. I submit to you that that black truck that
23 McCoon saw turn onto Stamey Livestock as he was leaving
24 was my client and that somebody else robbed that store
25 after McCoon left.

1 I want you to listen to the audio tape. I think
2 that's a good idea. Mr. Conner told you to listen to the
3 audio tape. And the reason is because of the description
4 that she gives right after it happened. Mr. Conner wants
5 to say that -- Well, first of all, I think it's amazing
6 that Mr. Conner can actually get in my client's mind. I
7 didn't realize that we were that far advanced. He
8 doesn't know what my client was thinking. None of know
9 what my client was thinking but my client. Just because
10 the police were chasing him and he got out and they
11 pulled a gun on him, that doesn't mean that he's guilty
12 of armed robbery. That part of his statement is true.
13 They pulled a gun on him and he was fussing, and he was
14 scared, so he got back in his truck. When Mr. Acevedo
15 said where's the knife, my client said what knife,
16 because he didn't know what Mr. Acevedo was talking
17 about.

18 He wants to tell you that, you know, Ms. Colclough
19 has no axe to grind. Of course she doesn't. But she
20 wasn't there for the original interview. My client
21 signed his waiver of rights at nine o'clock, and she said
22 at 9:26, almost 30 minutes later, is when she started
23 typing the statement. She doesn't know what happened in
24 that 30 minutes. And I'm not suggesting that Mr.
25 Johnston has any personal thing against my client, but

1 they have to solve cases. He likes clear cases.

2 Sometimes they get overzealous in what they do in their -
3 - their search for truth and justice. You've seen that
4 on TV. You've seen it in the news. It's not that
5 they're bad people. They're just -- they want to protect
6 the public and they get a little overzealous when they
7 do.

8 Mr. Conner wants to tell you that by looking at his
9 statement that he knows all these details. How could he
10 know all these details if he didn't do it? Well, Mr.
11 Johnston testified that he talked to several officers
12 before he interviewed Mr. -- Mr. Lowery. And guess who
13 one of them was, Mr. Wingate. If Mr. Lowery was eager to
14 talk as Mr. Johnston suggests he was, why didn't he tell
15 Mr. Wingate the whole story? Mr. Wingate testified. He
16 didn't say Mr. Lowery told me anything. He didn't even
17 testify. Only reason I know that is because I asked Mr.
18 Johnston. So all these details that he knew about the
19 money in the coat, well, who knew that? Mr. Wingate.
20 Who'd Mr. Johnston talked to right before he interviewed
21 Mr. Lowery? Mr. Wingate. Mr. Wingate knew all the
22 details, because he was there at the scene of the wreck.
23 He knew about the coat. He knew about the money. He
24 knew about the airlifted. He knew about all that.

25 This is a -- this is a serious incident. And not

1 to diminish what happened to Ms. Alston in any way, but I
2 submit to you that my client is entitled to a fair and
3 equitable trial, and he is innocent until proven guilty
4 beyond a reasonable doubt. And I'm not going to read
5 reasonable doubt to you because that's what the judge is
6 going to do in a few minutes when he starts his charge.
7 It's not any doubt; it's reasonable doubt. And he's
8 going to tell you that if you have a reasonable doubt
9 that my client committed this armed robbery, that you
10 have to rule in his favor because that is the way our
11 system works. Just because my client was arrested does
12 not mean he is guilty. Just because my client and his
13 family are in here today does not mean that my client is
14 guilty.

15 We're not telling you that we're innocent of
16 failure to stop for a blue light. So that one when you
17 go back in the jury room is going to be pretty easy.
18 We're admitting it. He did that. He did not commit
19 armed robbery. I submit to you that when you go back in
20 the jury room and you look and you listen and you think
21 and you discuss, that you will find my client guilty of
22 failure to stop for a blue light but not guilty of armed
23 robbery. Thank you.

24 THE COURT: Thank you, Ms. Stevens. All right,
25 ladies and gentlemen, my charge is going to take probably

1 close to 30 minutes. Does anyone need to take a break
2 for about five minutes? Just raise your hand. That'll
3 be perfectly fine. All right.

4 All right, ladies and gentlemen, as you know, the
5 Defendant in this case is charged in this indictment with
6 armed robbery, possession of a knife during the
7 commission of violent crime, and failure to stop for a
8 blue light. Of course, ladies and gentlemen, as I have
9 told you, the Defendant has entered a plea of not guilty
10 to all of these charges, and that plea puts the burden on
11 the State to prove his guilt beyond a reasonable doubt.
12 Now, during this charge, I am going to reference numerous
13 terms -- well, not numerous, but many terms. And at some
14 point I will define all those terms for you. Those terms
15 include reasonable doubt -- I will define armed robbery.
16 I will define failure to stop for a blue light. I will
17 define possession of a weapon during the commission of a
18 violent crime. I will define many other terms as well.
19 So listen carefully and I'll be able to -- to hopefully
20 give you an excellent sense for what the law is and as it
21 applies to this case.

22 Now, the charge in and of itself is somewhat
23 difficult to give because I tried cases for 20 years
24 before I became a judge. And as these two lawyers did,
25 very few lawyers read their closing argument to you.

1 Obviously, lawyers have notes and they reference those
2 notes, but they don't read their -- their argument like
3 run Dick -- run -- see Dick run. They don't do that.
4 However, my charge so that it will be complete, from time
5 to time it will require me to read things to you. But
6 while that's occurring, please don't let your attention
7 wander. Because not only during all other stages of the
8 trial of this do the parties expect your undivided
9 attention, they also expect your undivided attention to
10 the charge as well.

11 Now, ladies and gentlemen, the deliberations that
12 you will conduct will culminate in this verdict form.
13 And madam forelady, it will be your responsibility to
14 complete the verdict form. The verdict form has three
15 inquiries on it. And once you hear this charge and once
16 you examine the verdict form, you should see very clearly
17 what the process will involve. And again, madam
18 forelady, your responsibility is to complete the verdict
19 form and make sure that the deliberations are conducted
20 in an orderly fashion and also to relay any questions
21 during the deliberation process to me, and he'll bring
22 those to me. So don't be concerned about that.

23 Now, again, ladies and gentlemen, the fact that a
24 person's arrested for a crime, charged with a crime and
25 indicted for a crime is not evidence of anything. The

1 indictment that I've referenced is simply an accusation.

2 It is proof of nothing. And, again, the Defendant's plea
3 of not guilty puts the burden of proof on the State to
4 prove his guilt beyond a reasonable doubt.

5 Now, the evidence that you are to consider in this
6 case is the testimony that you have heard from this
7 witness stand and any exhibits that have been introduced.
8 The exhibits include I believe a CD and also an audio
9 tape. If you want to review the videotape, that would be
10 made -- or review the CD, that would be made available to
11 you. If you want to hear the audio tape, that will be
12 made available to you as well. Now, ladies and
13 gentlemen, the Defendant comes into the courtroom clothed
14 or cloaked with the presumption of innocence. And the
15 presumption of innocence remains with the Defendant
16 throughout this case, and it entitles him to a verdict of
17 not guilty unless the State has established his guilt
18 through evidence beyond a reasonable doubt.

19 Now, a person is never required to prove himself
20 innocent. And the burden again is on the State to prove
21 guilt beyond a reasonable doubt. The words presumption
22 of innocence are not a mere legal catch phrase. The
23 presumption of innocence is a substantial right that
24 every Defendant enjoys and to which every Defendant is
25 entitled. And as I indicated to you at the beginning of

1 this trial, the presumption of innocence is like a robe
2 of righteousness that remains on the Defendant's
3 shoulders until it is removed by evidence convincing you
4 of guilt beyond a reasonable doubt.

5 Now, obviously during this trial, you and I have
6 had certain duties to perform. As I told you at the
7 beginning of this case, you are the sole judges of the
8 facts. The only difference between me and you is that
9 you don't have a law degree and you don't have a black
10 robe. But you come armed into this courtroom with a very
11 valuable tool, and that is your common sense. And I'll
12 reference common sense throughout this charge. But your
13 verdict is to be based on calm reason and -- and the
14 exercise of your good common sense. As the fact-finders,
15 it is your responsibility and your responsibility alone
16 to determine what the truth is. And it is your
17 responsibility and your responsibility alone to determine
18 whether or not the State has met its burden of proof
19 beyond a reasonable doubt in this case.

20 Now, as the judge of the law, it's my
21 responsibility to charge you on the law. And it is your
22 responsibility as jurors to accept the law as I give it
23 to you. You cannot base your verdict on this case on
24 what you think the law is or what you think the law
25 should be. You have to accept the law as I give it to

1 you even though it may -- it may not be what you thought
2 the law was. An example is on Liberty Street, the speed
3 limit's 40 miles an hour. If you think the speed limit
4 ought to be 35 miles an hour and you are sitting as
5 jurors in a speeding ticket case and the evidence was
6 that the Defendant was going 38, you can't say well, he's
7 guilty because I think the speed limit ought to be 35.
8 That's -- that's a very simple example. But again, the
9 idea is that you have to accept the law as I give it to
10 you.

11 Now, also, ladies and gentlemen, you are not to
12 infer from anything that I may have said or done during
13 this trial as to whether I favor one side of the other
14 because, truly and simply, I do not. If -- again, if I
15 said anything or done anything in that regard, you can
16 put that out of your mind because I don't have any role
17 in playing fact-finder in this case. That's your role.
18 The law doesn't even allow me to have an opinion about
19 the facts of this case, because it's your job and your
20 job alone to be the fact -- fact-finders.

21 Now necessarily, as I indicated to you at the
22 beginning of the trial, in your role as fact-finders, you
23 necessarily have to pass upon or decide upon the
24 credibility or believability of witnesses. Now, in
25 passing upon credibility, you can consider certain

1 things. And I will list a few, but you can consider
2 anything else as well. What was the manner and
3 appearance of the witness who testified? Was he or she
4 straightforward or hesitant in answering a question? How
5 did the witness come to know the facts that he or she
6 testified to? Or what was his or her ability to know
7 those facts? You could also consider whether there is
8 some reason a witness would want to give testimony which
9 would help or hurt one side or the other. In other
10 words, was that witness biased or prejudiced? Also you
11 can consider was -- was the testimony of a witness
12 strengthened or weakened by other testimony or evidence,
13 and was the testimony of a witness strengthened or
14 weakened by some other statement that witness may have
15 made on a prior occasion.

16 Again, as I told you at the beginning of this
17 trial, you can believe as much or as little of a
18 witness's testimony as you think's proper. You can
19 believe the testimony of one witness against many
20 witnesses or just the opposite. You can believe part of
21 what a witness has to say and reject the rest. Now, I
22 will tell you that you do not determine truth by counting
23 up the number of witnesses who testified as to a
24 particular proposition. In other words, you don't say
25 five said this, four said this, therefore we have to

1 believe the five. That's common sense, and obviously you
2 would not do that.

3 I further charge you that the fact that testimony
4 is not contradicted does not mean that you have to accept
5 it as true. You still have to gauge the credibility of
6 the witness to determine the believability or truth of
7 the facts offered through the testimony. Now, keep in
8 mind you have one objective in this case, and that is to
9 seek the truth regardless of the source from which it
10 comes as long as it comes from evidence which is
11 introduced in this trial or evidence that was not
12 introduced that you think should've been.

13 Now, there are two types of evidence that are
14 generally presented during a trial. These are called
15 direct evidence and circumstantial evidence. Direct
16 evidence is the testimony of a person who claims to have
17 knowledge of a event such as an eyewitness. Now,
18 circumstantial evidence is proof of a chain of facts and
19 circumstances that indicate the existence of a fact. Now
20 the law makes no distinction whatsoever between the
21 weight or value to be given to either direct or
22 circumstantial evidence, nor is a greater degree of
23 certainty required of circumstantial evidence than of
24 direct evidence. In other words, you should weigh all of
25 the evidence in this case whether it is direct or

1 circumstantial. Now, after weighing this evidence, and
2 weighing evidence is entirely a mental process. If you
3 are not convinced of the guilt of the Defendant beyond a
4 reasonable doubt, you must find under your oath that the
5 Defendant is not guilty.

6 Now, ladies and gentlemen, I referenced earlier
7 this rule book that we go by. In that rule, there is
8 nothing that tells a jury how to weigh evidence. That is
9 purely a mental process. And again, that's where your
10 collective common sense comes in and that's how you weigh
11 evidence: based on what you think is the truth in this
12 particular case.

13 Now, ladies and gentlemen, I further charge you
14 that a statement alleged to have been made by the
15 Defendant has been admitted into evidence in this case.
16 While the Court has determined that the statement is
17 admissible, I instruct you that you make the ultimate
18 decision of whether or not the Defendant made the
19 statement. Now, if you determine that the Defendant did
20 make the statement and that hasn't been proven to you
21 beyond a reasonable doubt, then you must determine
22 whether the statement was made by the Defendant
23 voluntarily and of his own free will. Now that means --
24 voluntarily and of free will means that the statement was
25 not caused by pressure, force, fear, threat, coercion or

1 intimidation, or by hope or promise of leniency or a
2 reward of any kind. In determining whether the statement
3 was voluntary, you should consider both the
4 characteristics of the Defendant and the details of the
5 question. Some of the factors that you must consider are
6 the age of the Defendant, the Defendant's education or
7 lack of education, the Defendant's mental ability of
8 capacity, the Defendant's intelligence, the Defendant's
9 background and environment, the place -- the place and
10 length of detention, the nature of the questioning, and
11 the advice or lack thereof to the Defendant of his
12 Constitutional rights including but not limited to the
13 right to remain silent, that any statement could be used
14 against him in a court of law, the right to have a lawyer
15 present during the questioning, and that if he could not
16 afford a lawyer that a lawyer would be appointed to
17 represent him without cost, and that he could stop making
18 a statement at any time during questioning until a lawyer
19 was present, and basically that he could stop making a
20 statement at any time. Now you have to carefully
21 consider all of the surrounding circumstances before you
22 give any weight to an alleged statement that has been
23 introduced into evidence.

24 Now, the State has the burden of proving beyond a
25 reasonable doubt that the alleged statement was

1 voluntary. If you determine it was voluntary, then you
2 may give the statement any further consideration that you
3 deem appropriate. You must decide what weight, if any,
4 should be given to the alleged statement. Now, if you
5 determine that the alleged statement, if made, was not
6 the free and voluntary statement of the Defendant, I
7 instruct you that you should not consider the statement
8 at all.

9 Now, ladies and gentlemen, I instruct to you and
10 emphasize that the fact that the Defendant did not
11 testify in this case is not a factor to be considered by
12 you in any way in your deliberation and in your
13 consideration on the question of the guilt or non-guilt
14 of the Defendant. Now, the fact that the Defendant did
15 not testify should not be considered by you in any manner
16 whatsoever. A Defendant has the Constitutional right in
17 this trial to remain silent. And the assertion of this
18 right must not be considered by you in your
19 deliberations. Now, I repeat that you are not to draw
20 any conclusions at all from the fact the Defendant did
21 not testify. Now the fact that the Defendant did not
22 testify should not even be discussed in the jury room,
23 and it should not even be in your mind at all. The
24 burden of proof, as I have stated to you, is on the State
25 in every respect. The Defendant again, as I told you

1 earlier, is not required to prove his innocence. The
2 burden of proof remains on the State to prove the guilt
3 beyond a reasonable doubt. And again, ladies and
4 gentlemen, the fact that the Defendant did not testify is
5 to be given no consideration whatsoever.

6 Now, in a criminal prosecution of this type, as
7 I've already stated to you several times, the State, that
8 means the prosecution, has the burden of proof. The
9 Defendant has no burden, and he is presumed innocent.
10 Now, the prosecution has to prove its case to the
11 standard of proof beyond a reasonable doubt before a
12 finding of guilt may occur. Now, if the State fails to
13 meet this high burden, the Defendant is entitled to a
14 verdict of not guilty. Now, I have probably used the
15 words reasonable doubt 20 times, and now I'm going to
16 define that for you.

17 So you are asking yourself right now what is
18 reasonable doubt. Reasonable doubt is not an imaginary
19 doubt. It is not a weak doubt. It is a substantial
20 doubt. It is a doubt which the very words imply. It is
21 -- it is a doubt which you can give or assign a reason
22 based on the testimony and the evidence in this case.
23 Now, a reasonable doubt is a doubt which makes an honest,
24 sincere, and conscientious juror in search of the truth
25 hesitate to act. It is proof that leaves you firmly

1 convinced of a Defendant's guilt.

2 Now, if you have a doubt for which you can give a
3 reason as to the guilt of the Defendant, then he is
4 entitled to a verdict of not guilty. Now, reasonable
5 doubt may arise from evidence which is in the case.
6 Reasonable doubt can also arise from the lack of or
7 absence of evidence in the case. And you make the
8 determination of whether or not reasonable doubt exists
9 as to the guilt of the Defendant. Now, I further charge
10 you that the simple fact that a jury engages in a full
11 and free discussion of the issues of guilt and non-guilt
12 in this case with a normal conversation of give and take
13 on the issues does not automatically in and of itself
14 mean a reasonable doubt exists in this case.

15 Now, specifically, ladies and gentlemen, the
16 Defendant in this case is charged with armed robbery. In
17 order to prove this offense, armed robbery, the State
18 must first prove beyond a reasonable doubt that the
19 Defendant took personal property from the person or
20 presence of another person. Property is in the presence
21 of a person if it is within that person's reach,
22 inspection, observation or control so that the person
23 could, if not overcome with violence or prevented by
24 fear, keep possession of the property. Now, the State
25 also has to prove beyond a reasonable doubt that the

1 Defendant carried the property away intending to
2 permanently deprive the owner of the property and to keep
3 the property for the Defendant's own use. The slightest
4 removal of the property or the complete possession of the
5 property even for an instant by the Defendant is
6 sufficient to show a taking and carrying away of the
7 property as long as that has been shown prudent to you
8 beyond a reasonable doubt.

9 Now, the taking and carrying away of the property
10 must have been done with violence or by putting the owner
11 of the property in fear of violence. Finally, the State
12 must prove beyond a reasonable doubt that the Defendant
13 was armed with a deadly weapon during the robbery. And
14 deadly weapon is any instrument, article or substance
15 which is likely to cause death or great bodily harm. Now
16 whether an instrument had been used as a deadly weapon
17 depends on the facts and circumstances of each case. And
18 the following are examples of instruments which may be
19 deadly weapons: a pistol, shotgun, rifle, dagger, knife,
20 slingshot, metal knuckles, razor, gasoline, firebomb,
21 Molotov cocktail, and lighter fluid. A gun may be a
22 deadly weapon even if it is not operating.

23 Now, ladies and gentlemen, the Defendant has also
24 been charged with possession of a weapon during the
25 commission of a violent crime. The State must prove.

1 beyond a reasonable doubt that the Defendant visibly
2 displayed a knife during the commission of a violent
3 crime. A knife means an instrument or tool with a sharp
4 cutting blade whether or not fastened to a handle which
5 can be used to inflict a cut, slash or wound. In order
6 to find the Defendant guilty of possession of a weapon
7 during the commission of a violent crime, you must first
8 find the Defendant of either committing the violent crime
9 or attempting to commit. And I further charge you that
10 armed robbery is a violent crime. And I'll discuss in
11 just a few minutes, ladies and gentlemen, questions one
12 and two which deal with armed robbery and possession of a
13 knife during the commission of a violent crime on the
14 verdict form and how you're to address that.

15 Now, the Defendant is also charged with failing to
16 stop for a blue light. In order to prove this crime, the
17 State must prove beyond a reasonable doubt that the
18 Defendant was driving a motor vehicle; that the Defendant
19 was driving the motor vehicle on a road or highway of
20 this state; that the Defendant was signaled to stop by
21 law enforcement vehicle by means of a siren or flashing
22 light and that the Defendant did not stop. Now, to
23 determine whether or not there are mitigating
24 circumstances which would justify the Defendant's failure
25 to stop for the blue light, you may consider actual road

1 conditions, actual roadside conditions and other
2 conditions such as lighting and weather. Any other
3 circumstances you believe to reasonably justify the
4 alleged violation can also be considered by you.

5 Now, an official signal requiring a motorist to
6 stop may be a siren or flashing lights, but both are not
7 required. Any attempt to increase the speed of a vehicle
8 or in some manner to avoid the pursuing law enforcement
9 vehicle when signaled by siren or flashing light may be
10 considered as evidence of failure to stop for a blue
11 light, but that's merely an evidentiary fact that you are
12 to take into consideration by you along with all the
13 other evidence in this case and to be given the weight
14 that you decide it should receive.

15 Now, ladies and gentlemen, criminal intent is a
16 necessary element of each crime that must be proved by
17 the State beyond a reasonable doubt. Now, intent, and
18 specifically criminal intent, is always something that
19 the jury has to determine. There's no secret that
20 there's no way that medical science can resect a person's
21 brain and look in that brain to determine what a person
22 may or may not have intended -- intended on any given
23 occasion. So the law states that criminal intent may be
24 inferred from the circumstances shown to have existed
25 both before and after a pertinent fact. And that's how

1 you make a determination of whether or not the element of
2 criminal intent has been established beyond a reasonable
3 doubt. And that's simply -- a criminal intent is simply
4 a state of mind that operates jointly with an act or
5 omission in the commission of a crime. And it's a mental
6 state, a conscious wrong-doing. And again, it's up to
7 you to determine what the Defendant intended to do or did
8 not intend to do based on circumstances shown to have
9 existed. And again, the State has to prove criminal
10 intent beyond a reasonable doubt.

11 Now, ladies and gentlemen, as I previously charged
12 you, the verdict form contains three inquiries. The
13 first -- first let me point out it has the case caption
14 on the top. It's got the indictment number and it has
15 the word verdict. Question number one says, as to the
16 charge of armed robbery, we the jury unanimously find
17 that the Defendant, and there are two choices. One is
18 not guilty. The other is guilty. The verdict form then
19 says, that if your verdict on this count, armed robbery,
20 is not guilty, then you are to skip to question two which
21 concerns the possession of the knife and go to question
22 three. That's because, ladies and gentlemen, if you find
23 that the State has not established beyond a reasonable
24 doubt that the Defendant was guilty of armed robbery --
25 in other words, if you're finding he's not guilty on that

1 point, then you necessarily would have to find that the
2 Defendant not guilty of possession of a white -- a knife
3 during commission of a violent crime. So again, if you
4 find the Defendant not guilty for armed robbery in
5 response to question one, you simply go to question three
6 which concerns failure to stop for a blue light.

7 Now, ladies and gentlemen, if you find the
8 Defendant guilty of armed robbery, then you do go to
9 question two and then, finally, question three as to the
10 charge of failure to stop for a blue light, we the jury
11 unanimously find that the Defendant, again, either not
12 guilty or guilty. Now, with regard to the charge of
13 failure to stop for a blue light and the charges of armed
14 robbery and possession of a knife during the commission
15 of a violent crime, the blue light charge is separate and
16 distinct from the other two. In other words, your
17 verdict on one and two do not control your verdict on
18 number three. And that should be made very, very clear
19 to you when you go through the verdict form. Now,
20 ladies and gentlemen, you've heard me reference the word
21 unanimous. Your verdict has to be unanimous. That means,
22 all of you must agree. This is not a majority vote.
23 This is a unanimous proposition. Now, it's your job,
24 madam forelady, to allow everyone who wants to speak to
25 speak fully and completely. And it's not your right to

1 cut off debate. You simply make sure that an orderly
2 deliberative process is conducted and, again, everyone
3 who wants to speak should be given that opportunity. And
4 your signature on the verdict form will be right under
5 this statement that says, I certify this is the unanimous
6 decision of the jury. And you would not be permitted to
7 sign the verdict form and date it until your verdicts on
8 all three of these charges are unanimous in accordance
9 with the instructions that I've given to you.

10 Now, I'm not concerned with what your verdict
11 ultimately is. My concern is that you take your oath
12 extremely seriously because the State of South Carolina
13 expects and is entitled to a fair trial. The Defendant
14 expects and is entitled to a fair trial at your hand.
15 And as I told you earlier, the word verdict comes from a
16 Latin word which means speak the truth. And you folks
17 are the only people in the world who are going to render
18 a verdict in this case. And I -- I have noticed that
19 throughout this trial you have paid very, very close
20 attention to the witnesses, and you will have your
21 collective memories of what they had to say with you in
22 the jury room. You'll also have the exhibits with you in
23 the jury room. And you will have access to the videotape
24 and to the audio tape should you want to either see or
25 hear either or both of those. _____

1 Now, some might say this is a bit dramatic, but you
2 do have the honor of Sumter County and the State of South
3 Carolina in your hands. And it is your duty to uphold
4 that honor by rendering a verdict in this case that
5 speaks the truth. Again, the State expects it. It is
6 entitled to that. And the Defendant expects and is
7 entitled to that. And you are not out to reward any
8 friends or punish any enemies. Your job is to solely
9 make sure that your verdict does speak the truth.

10 Now, in a moment, ladies and gentlemen, I'm going
11 to send you to your jury room. And the next thing that
12 you will hear is a knock on your door. And it will be
13 one of two things. Under our rules, the lawyers have the
14 opportunity and the right to bring to my attention
15 anything that they think I may have left out of the
16 charge or that I may have incorrectly charged. That's
17 part of the rules. If that is the case, then I will
18 bring back out the -- the bailiff will bring you back out
19 and I will instruct you accordingly. The knock on the
20 door might also be the fact that the bailiff is there
21 with the verdict form and the exhibits. The lawyers and
22 court reporter are charged with the responsibility of
23 making sure that all the exhibits are in order and
24 complete, and they'll be packaged up and handed to the
25 bailiff who would walk down the hall and hand those to

1 you.

2 Whichever the case may be, if I have to give you
3 further instructions or if the bailiff simply comes down
4 with the exhibits and the verdict form, that will take a
5 few minutes. Do not begin discussing the case until the
6 bailiff comes to the door with the verdict form and the
7 exhibits and he tells you that you can. So at this time,
8 I'm going to ask you to go to your jury room. Do not
9 discuss the case. And Ms. Vizthum, you can stay with me.
10 You can sit right there. Everyone else, if you would, go
11 with the Bailiff to the jury room, we'll be back with you
12 very shortly. And Ms. -- madam forelady, if the jury has
13 any concerns, it's now 20 minutes to 11. We won't forget
14 about you. If the lunch hour approaches, don't be
15 concerned about that. So if you have any concerns or
16 questions, you'll have a note pad with you. All right?

17 (Jury exits the courtroom, 10:43 a.m.)

18 THE COURT: All right. Any additional charges or
19 any exceptions from the State?

20 MR. CONNER: None, your honor.

21 THE COURT: From the defense?

22 MS. STEVENS: No, sir, your honor.

23 THE COURT: All right. Ms. Vizthum, you are the
24 alternate juror in this case. That means that you
25 would've been stepping in for a juror who was not able to

1 continue for whatever reason. That's not the case, so
2 you are not committed to engage in the deliberations in
3 this case. And you are free to go at this time. I
4 believe Ms. -- Mr. Bradley can let you know when you go
5 down the hall when you might have to call back or report
6 back. But I certainly do appreciate your time and your
7 service in this case. And I also noticed that you paid
8 very close attention, but unfortunately, the law does not
9 permit 13 jurors to deliberate. And last week or the
10 week before, I can't remember what county I was in, one
11 person got selected as an alternate in two straight cases
12 and didn't get to deliberate either one. So that's the
13 way it happens sometimes. Thank you very much for your
14 time and your attention.

15 (Off the record discussions.)

16 THE COURT: Okay, let's put on the record that ---

17 MS. STEVENS: I don't know where he went, but
18 they're all there.

19 THE COURT: Well, all right, you -- you ---

20 MS. STEVENS: Melissa and I did it.

21 COURT REPORTER: They're all there. We counted
22 them.

23 THE COURT: All right. I'll take y'all's word for
24 it.

25 COURT REPORTER: Yes, sir.

1 MS. STEVENS: Thank you, your honor.

2 (Off the record.)

3 THE COURT: All right. What number is that note?

4 COURT REPORTER: Court's Number 4, sir.

5 THE COURT: Court's Exhibit 4 is a note from the
6 jury that they would like to see the video recording
7 again. And the reason I wanted everyone in here is that
8 it was projected onto a screen by laptop with a CD in the
9 -- in the laptop. So what I propose that we do is have
10 Mr. Greenan and a bailiff go into the jury room, set up
11 the -- what do you call that big white thing?

12 MS. STEVENS: Screen.

13 THE COURT: Screen. Well, I think they ought to see
14 it on a screen if that's the way they saw it in the
15 courtroom.

16 MS. STEVENS: Well, also I think with 12 of them
17 trying to squeeze around a laptop might be difficult.

18 THE COURT: We need to set up the screen.

19 MR. GREENAN: All right.

20 THE COURT: And let Mr. Greenan and the bailiff go
21 in there. Of course, the only thing that can be said to
22 the jury is here's how you work ---

23 MS. STEVENS: This ...

24 THE COURT: --- the stop button, the pause -- the
25 pause button, the rewind button. And you can set it up

1 at the beginning and then they can do with it what they
2 want. And is there any objection to going forward with
3 that procedure?

4 MR. CONNER: I think Jackson thinking on that was
5 that they could do it on the machine. He could -- the
6 operator can play it over and over and let people come up
7 and stand close to the laptop, look at it.

8 THE COURT: My concern, though, is that -- is that
9 what they saw in the courtroom was the big screen. And
10 that's the way I want them to look at it in there. Does
11 the Defendant have any objections to just the laptop?

12 MS. STEVENS: No, I think they need to see it on the
13 screen, your honor.

14 THE COURT: I -- I think they need to see it on the
15 screen the way it was shown in the jury room. So we need
16 that projector equipment.

17 MR. GREENAN: Yes, sir. I need to set that up.

18 THE COURT: And as far as ---

19 MS. STEVENS: Do you want to just bring them in here
20 if they're going to watch it on the screen?

21 THE COURT: No, because they might want to talk
22 about it.

23 MS. STEVENS: Okay.

24 THE COURT: And I don't think that we need --
25 certainly don't need to make them feel like they have to

1 be quiet. Because if -- if you did it that way, they
2 would watch it and go back in the jury room and talk
3 about it and then come back in and say, well, let's look
4 at it again. So I think it needs to be set up in the
5 jury room with the screen.

6 MR. GREENAN: Okay.

7 THE COURT: Now, as far as what the bailiff and Mr.
8 Greenan say or do, just -- is there any objection to them
9 -- to Mr. Greenan, with the bailiff being his escort,
10 simply telling them this is how you work the machine?

11 MS. STEVENS: No, sir. No objection.

12 THE COURT: All right, Mr. Conner?

13 MR. CONNER: I have none.

14 THE COURT: Okay. Of course the bailiff will make
15 sure that no other statements are made either by him or
16 by Mr. Greenan. And I know you won't, but ---

17 MR. GREENAN: Yes, sir.

18 THE COURT: --- that safeguard will be in place.
19 All right, anything else? How long is that going to take
20 you?

21 MR. GREENAN: Maybe ten minutes. It's in my office.

22 THE COURT: Is there any objection to the bailiff
23 telling the jury that we're going to get that equipment
24 in there very shortly and they can just continue with
25 their deliberations in the meantime?

1 MS. STEVENS: No, sir. No objection.

2 THE COURT: Mr. Conner?

3 MR. CONNER: None.

4 THE COURT: All right, Mr. Bradley, if you'd go down
5 to the jury room and tell them that we're going to
6 accommodate their request and that the equipment will be
7 in there in a few minutes and they can continue their
8 deliberations.

9 (Off the record.)

10 THE COURT: All right, there's a note from the jury
11 that's been marked as Court's Exhibit Number 5. And it's
12 -- has today's date on it and says, number one, who's
13 initials are in the jacket? In parentheses are the
14 letters t-h-p. And it said, and I'll let y'all read the
15 note of course, and it says and on other items. Number
16 two, where is the hospital's discharge instructions that
17 the officer would've gotten when he picked him up from
18 Richland Hospital? Number three, what was the truck
19 plate covered with? Those are the three questions, and
20 it's signed by the forelady. My -- my inclination would
21 be to have the jury come out and tell the jury that
22 they're certainly free to ask such questions, but they
23 are to make their determinations in this case based on
24 the evidence on the record. And for that reason, no
25 additional information can -- no additional evidence is

1 going to be taken. Does the State have any particular
2 position on that?

3 MR. CONNER: I don't know that we have any other
4 alternative but to answer as you've suggested.

5 THE COURT: Ms. Stevens?

6 MS. STEVENS: Yes, sir.

7 THE COURT: All right. Now, when the jury comes in,
8 and this is an instruction that I always give. When the
9 jury comes in and to answer this question, just in case
10 that there are any jurors whose eyes look out toward
11 State side or the Defense side, no one make any type of
12 gestures. Don't nod your head, shake your head, and
13 don't do anything that would have any potential for an
14 impression on the jury. All right, you can bring in the
15 jury.

16 (Jury enters the courtroom, 11:21 a.m.)

17 THE COURT: All right. Thank you, ladies and
18 gentlemen, for your patience. The question that you've
19 sent out, madam forelady, has the sticker on it for my
20 identification purposes. The question number one says,
21 whose initials are in the jacket? And in the parentheses
22 are the initials t-h-p. And then it says, and on other
23 items. Number two, where is the hospital's discharge
24 instructions that the officer would have gotten when he
25 picked him up from Richland Hospital? And number three,

1 what was the truck plate covered with? And of course, it
2 has your signature. My instruction to you, ladies and
3 gentlemen, is that you've heard all the evidence that
4 would be presented in this case. And that the -- the
5 procedure does not involve the taking of any additional
6 evidence on any matters other than what you've already
7 heard and seen. So the answers to these questions, if
8 any, will remain unanswered. And you are to base your
9 decisions in this case solely on the evidence that you've
10 heard and in accordance with the other instructions that
11 I gave you. Now, however, madam forelady, that does not
12 mean that your questions are in any respect, whether it
13 be these are other questions, are inappropriate. You'll
14 certainly free to answer (sic) those questions, but under
15 the law I can only give you response -- the response that
16 I have given you. All right. If you have any additional
17 questions, certainly do it in the same manner you just
18 did and we will take it from there. You're free to
19 continue to deliberate. And if it gets close to the 12
20 o'clock hour, we'll probably discuss -- I'll discuss with
21 the lawyers issues pertaining to lunch and so forth, so
22 don't think we've forgotten about you. All right?

23 (Jury exits the courtroom, 11:23 a.m.)

24 (Off the record.)

25 THE COURT: If -- or when the -- when the jury's

1 verdict is pronounced, I would appreciate it if no one
2 would make any facial expressions or any noises for that
3 matter in reaction to it. So let's just maintain order.
4 All right, sir, you can bring in the jury.

5 (Jury enters the courtroom, 11:50 a.m.)

6 THE COURT: All right. Madam forelady, I understand
7 the jury's reached a verdict?

8 FORELADY: Yes, sir.

9 THE COURT: Is it unanimous?

10 FORELADY: Yes.

11 THE COURT: All right. You can hand it to the
12 bailiff. All right, Mr. Lowery, if you would stand,
13 please. Publish the verdict.

14 BAILIFF: In the State of South Carolina, county of
15 Sumter in the Court of General Sessions, the State of
16 South Carolina versus Mark James Lowery, Jr., Defendant,
17 docket number 2007-GS-43-206, as to count one -- as to
18 the charge of armed robbery, we, the jury, unanimously
19 find the Defendant guilty. As to the charge of
20 possession of a knife during the commission of a violent
21 crime, we, the jury, unanimously find the Defendant
22 guilty. As to the charge of failure to stop for blue
23 light, we, the jury, unanimously find the Defendant
24 guilty. Signed by the forelady, Jacqueline Jackson,
25 dated 9-12-07. Ladies and gentlemen of the jury, this is

1 your verdict so say by raising your right hand, please.

2 THE COURT: Thank you. Let the record show that the
3 12 jurors all raised their right hand. All right, you
4 can have a seat, Mr. Lowery. Ms. Stevens, anything
5 before the jury's discharged?

6 MS. STEVENS: No, sir.

7 THE COURT: Would you like the jury polled?

8 MS. STEVENS: Yes, your honor.

9 THE COURT: All right. Mr. Bradley?

10 MR. BRADLEY: Ladies and gentlemen, when your name
11 is called, please stand and answer my two questions.
12 Swanee Ramsey. Is this your verdict and still your
13 verdict?

14 JUROR: Yes.

15 MR. BRADLEY: Thank you. Your may be seated. Kevin
16 Bennett. Is this your verdict and still your verdict?

17 JUROR: Yes, sir.

18 MR. BRADLEY: Thank you. Rena Welch. Is this your
19 verdict and still your verdict?

20 JUROR: Yes, sir.

21 MR. BRADLEY: Thank you. David Branson. Is this
22 your verdict and still your verdict?

23 JUROR: Yes, sir.

24 MR. BRADLEY: Thank you. Tiffany Lurke. Is this
25 your verdict and still your verdict?

1 JUROR: Yes.

2 MR. BRADLEY: Thank you. Patricia Dobson. Is this
3 your verdict and still your verdict?

4 JUROR: Yes, sir.

5 MR. BRADLEY: Thank you. Charlie Wright, Jr. Is
6 this your verdict and still your verdict?

7 JUROR: Yes.

8 MR. BRADLEY: Thank you. James B. Eubank. Is this
9 your verdict and still your verdict?

10 JUROR: Yes, sir.

11 MR. BRADLEY: Thank you. Delores Jenkins. Is this
12 your verdict and still your verdict?

13 JUROR: Yes.

14 MR. BRADLEY: Thank you. Jennifer -- Jennifer
15 Pendarvis. Is this your verdict and still your verdict?

16 JUROR: Yes, sir.

17 MR. BRADLEY: Thank you. Julia Green. Is this your
18 verdict and still your verdict?

19 JUROR: Yes.

20 MR. BRADLEY: Thank you. Jacqueline Jackson. Is
21 this your verdict and still your verdict?

22 JUROR: Yes.

23 MR. BRADLEY: Your honor, the jury has been polled,
24 and the verdict stands.

25 THE COURT: All right. Anything from the State

1 before the jury's discharged?

2 MR. CONNER: I have nothing further, your honor.

3 THE COURT: Anything else from the Defendant before
4 the jury's discharged?

5 MS. STEVENS: No, sir, your honor.

6 THE COURT: All right. Ladies and gentlemen, that
7 concludes your service in this case. And as I indicated
8 to you earlier, I am not concerned with what the jury's
9 verdict is. I am most concerned that you paid attention
10 and took your oath very seriously. And I think that you
11 did pay very close attention to the evidence in this
12 case, and you have fulfilled your oath. When your jury
13 service for the week is over, you can talk about this
14 case to anyone that you want. Now, what I want you to
15 refrain from doing for the rest of this week while your
16 jury service is still continuing is not to discuss this
17 verdict amongst yourselves or with any other members of
18 the entire jury panel. Now, after your service this week
19 is over, you can talk about this case to anyone that you
20 want to talk about it to. However, if someone at the
21 conclusion of your jury service or even before your
22 service is over approaches you for whatever reason and
23 wants to talk to you about this case, just tell them that
24 they're not permitted to do so. If that person persists,
25 then you simply let someone in the Clerk of Court's

1 office know and that -- they will let me know, and I -- I
2 will handle that. Again, after your jury service is
3 complete this week, the same thing would apply. If
4 someone wants to talk to you about this case and you do
5 not want to, tell them that. And again, if they persist,
6 you simply get that person's name and let the court staff
7 know. You are free to go at this time. And I'm going to
8 ask you to be back in this courtroom, what we call
9 courtroom number two, at 2:30 today. We'll continue with
10 trials at that time. And I don't know how you've been
11 coming into the courthouse. I suspect you may have been
12 coming in -- how have they been coming in?

13 (Off the Record Discussion)

14 THE COURT: All right. Thank you very much for
15 your time in this case, and we'll see you back at 2:30.

16 (Jury exits the courtroom 11:56)

17 THE COURT: Now, Ms. Stevens, do you have any
18 motions at this time?

19 MS. STEVENS: Your honor, I would like to renew all
20 of my objections that were raised during the trial at
21 this time.

22 THE COURT: Would you like ten days to make those
23 motions? Any -- any additional motions?

24 MS. STEVENS: Your honor, I will be filing a motion
25 to appeal, but that is not something that is done ...

1 that is something that is done through the Clerk of
2 Court. I'd like to make a motion to set aside the
3 verdict based on the fact that it was based on not enough
4 evidence for the jury to have reached the decision that
5 they made. There was no direct evidence that my client
6 participated in this armed robbery, your honor.

7 THE COURT: All right. Well, your motion is
8 respectfully denied. Anything else on the issue of
9 motions?

10 MS. STEVENS: No, sir, your honor.

11 THE COURT: All right. Is the State prepared to
12 proceed with the sentencing?

13 MR. CONNER: We are, your honor.

14 THE COURT: Is the Defendant prepared?

15 MS. STEVENS: Yes, sir, your honor.

16 THE COURT: All right. Mr. Conner?

17 MR. CONNER: May it please the court.

18 THE COURT: Yes, sir.

19 MR. CONNER: Your honor, he's been served with a
20 notice of our intent to seek life without parole in this
21 case. The -- I will hand up the paperwork in that
22 regard where he was served and, I think Ms. Stevens was
23 served. I also have indictments from Charleston County
24 where he was found guilty of two attempted armed
25 robberies. The indictments themselves are 2002-10-376

1 and also 2002-10-109 where he entered pleas to attempted
2 armed robbery. He was charged with armed robbery in that
3 case. I note just as a matter of interest, your honor,
4 that both the victims in those cases were women, and he
5 used a knife in both of those instances also and entered
6 a plea of guilty. The -- He also has a breach of trust
7 conviction from January of 2000 on and a purse snatching.
8 He got three years suspended to three years probation on
9 the purse snatching and ten years suspended three years
10 probation on the breach of trust.

11 THE COURT: All right, what -- When was the sentence
12 imposed posed on the 2002 indictment from Charleston
13 County?

14 MR. CONNER: It was imposed January the 30th of
15 2002. Actually the incidents occurred in July of 2001.
16 I hand up those indictments and the sentence sheets, your
17 honor.

18 THE COURT: All right. Ms. Stevens, does -- do you
19 contest the, first of all, the -- the guilty pleas to two
20 counts of attempted armed robbery in Charleston County?

21 MS. STEVENS: No, sir, your honor.

22 THE COURT: Do you contest service of the life
23 without parole notice upon you and Mr. Lowery?

24 MS. STEVENS: No, sir, your honor.

25 THE COURT: All right. The record will reflect then

1 that, according to the affidavits presented by Mr.
2 Conner, that notice of intention to seek sentence of life
3 without parole in this case was delivered to Ms. Stevens
4 on May 21, 2007 and to the Defendant on May 29, 2007.
5 And you said you do not contest that there is a
6 conviction for the purposes of 17-25-45 of a most serious
7 offense, that being the two attempted armed robberies
8 which were combined into one plea?

9 MS. STEVENS: Yes, sir, your honor.

10 THE COURT: You ...

11 MS. STEVENS: I do not contest.

12 THE COURT: All right.

13 MS. STEVENS: If you ask me if I think the law is
14 wrong, that's a completely different thing.

15 THE COURT: Well, the law -- the applicable law of
16 course in this state, just for the record, is 17-25-45.
17 And it says notwithstanding any other provision of the
18 law except in cases where the death penalty's imposed, a
19 person who has been -- has one or more prior convictions
20 for a most serious offense when he or she is subsequently
21 convicted of another most serious offense, those are two
22 strikes, and a sentence of life without parole is
23 mandatory.

24 MS. STEVENS: Yes, sir, your honor.

25 THE COURT: Not only makes the sentence mandatory,

1 but it makes the service of the notice mandatory on the
2 solicitor's office.

3 MS. STEVENS: Yes, sir, your honor.

4 THE COURT: The jury having found Mr. Lowery guilty
5 of armed robbery, which is a most serious offense, and
6 having had the prior conviction of attempted armed
7 robbery, which is a most serious offense, what does the
8 Defendant -- or what would you like to say in the way of
9 sentencing?

10 MS. STEVENS: Your honor, the statute is clear. My
11 client is aware that -- that this would be the outcome if
12 he were found guilty. And that is one reason, your
13 honor, why we tried the case. I know that you have no
14 discretion in this case. He understands what the
15 sentence is. And his family is here. They understand
16 what is going to happen. Even though I don't feel that
17 it's -- it's fair, I understand that it is the law and
18 that you have no choice, your honor.

19 THE COURT: All right. First of all, Mr. Lowery, do
20 you have anything to say?

21 MR. LOWERY: What can I say? I don't believe
22 there's nothing I can say that would waiver this
23 sentencing in any way. I was -- I come to the trial
24 under the impression that I could be found not guilty.
25 And due to my -- a great deal of my ignorance to the

1 legal system, I wasn't able to participate in my trial
2 quite as much as I wish I could have.

3 THE COURT: What -- what fact -- What are you
4 talking about there?

5 MR. LOWERY: I just wish I would've knew a lot more
6 about the legal system about certain things, objections
7 and certain things being admitted into evidence. I wish
8 I had a little more education on the legal system. I
9 really don't understand how this is going to be a charge
10 with my third offense whereas one -- the two in
11 Charleston County were wrapped in together as one.

12 THE COURT: Well, the law is, Mr. Lowery, is that
13 the two in Charleston County are wrapped into one.
14 That's one most serious offense. The law says if you are
15 convicted of a subsequent most serious offense, that
16 being today, then that subjects you to life without
17 parole. There's a difference for what we call serious
18 offenses. Then you get three.

19 MR. LOWERY: Okay.

20 THE COURT: But a most serious, you only get two.
21 So that's -- that's the way that works. Anything else
22 you'd like to say?

23 MR. LOWERY: Not that I know of, your honor.

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

25 Anything that any members of his family would like to

1 say, Ms. Stevens?

2 MS. STEVENS: No, sir, your honor. They have been
3 here to support Mark. We were all hopeful that perhaps
4 reasonable doubt would have been found as to the armed
5 robbery. They know what's going to happen. They would
6 just ask that after you sentence him that you allow him
7 at least to give his mother a hug and a kiss goodbye.

8 THE COURT: Mr. -- Mr. Conner, what's the -- what's
9 the penalty toward possession of a weapon during a
10 violent crime? I don't have those sentencing sheets with
11 the CER code in front of me.

12 MS. STEVENS: It's zero to five, your honor.

13 MR. CONNER: Up -- up to five years.

14 THE COURT: All right.

15 MR. CONNER: We -- we should have a sentencing
16 sheet.

17 (SENTENCE OF THE COURT)

18 THE COURT: All right. Ms. Stevens, you are correct
19 that regardless of whether one disagrees with the law or
20 agrees with it, the statute as written leaves me no
21 choice. Even if I wanted to impose a different sentence,
22 I could not. I do sentence you, Mr. Lowery, to life in
23 prison without parole in the charge of armed robbery, and
24 for possession of a weapon during a violent crime, even
25 though the sentence may not be necessary, five years

1 concurrent. And failure to stop for a blue light, five
2 years concurrent. And that means that the sentences will
3 be served together, but that certainly does not diminish
4 the fact that the sentence for armed robbery ... Anything
5 else, Mr. Conner?

6 MR. CONNER: I don't -- could we make that three
7 years on the blue light, your honor?

8 MS. STEVENS: I think the sentence is 90 days to
9 three years, your honor.

10 THE COURT: On failure to stop, all right, well,
11 then three years. I thought it was five. All right. Do
12 you have a sheet for me, Mr. Conner?

13 MR. CONNER: I -- I don't. I don't know what
14 happened to it, but we don't have them in this file.
15 I'll get -- get you a sheet.

16 THE COURT: It is zero to three. All right.
17 Anything else, Ms. Stevens or Mr. Conner?

18 MS. STEVENS: No, sir, your honor.

19 MR. CONNER: Nothing further.

20 THE COURT: We'll make the notice of intention to
21 seek the sentence of life without parole Court's Exhibit,
22 the two affidavits of service a Court's Exhibit, and the
23 plea materials from Charleston County a Court's Exhibit.

24 MS. STEVENS: Yes, sir, your honor.

25 THE COURT: All right. Thank you very much. And

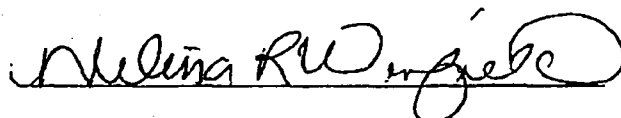
1 Mr. Lowery can have a few moments to speak to his parents
2 either -- either in this courtroom or in the confines of
3 an office that's appropriately secured with the judgment
4 of the security staff. Thank you.

5 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED MELISSA R. WINFIELD, CERTIFIED VERBATIM COURT REPORTER FOR THE THIRD JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR SUMTER COUNTY, SOUTH CAROLINA, ON THE 14TH DAY OF APRIL, 2008.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

A handwritten signature in cursive script, reading "Melissa R. Winfield", written over a horizontal line.

MELISSA WINFIELD, CVR

STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

RECORDED

2010 APR 14 PM 12:35

County of Sumter)Mark Lowery Jr.)

Full name and prison number, if any, of applicant.)

v.)

APPLICATION FOR

POST-CONVICTION RELIEF 2010-CP-43-803

Name of Respondent)

JAMES L. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly, handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention Broad River Inst.
4460 Broad River Rd. Columbia S.C. 29210
2. Name and location of Court which imposed sentence Sumter County
General Sessions
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 2007-LS-43-206 Armed Robbery
 - (b) 2007-LS-43-206 Failure To Stop For Blue Light
 - (c) 2007-LS-43-206 Possession of Weapon/Violent Crime
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) September 10, 2007 Life Without Parole
 - (b) Same as above
 - (c) Same as above

5. Check whether a finding of guilty was made

(a) after a plea of guilty _____

✓(b) after a plea of not guilty Trial by Jury

(c) after a plea of nolo contendere _____

6. Did you appeal from the judgment of conviction or the imposition of sentence? YES

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. South Carolina Court Appeals

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Sentence and Conviction Affirmed

ii. _____

iii. _____

(c) the date of each such result:

i. N/A

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. N/A

ii. _____

iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) N/A

(b) _____

(c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective Assistance of Counsel.

(b) Denial of Due Process.

(c) Ineffective Assistance of Counsel For Failure To Object.

Ineffective Assistance of Counsel For Failure To Adequately Investigate - Before And During Trial, And Failure to properly prepare for Trial.

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

(a) See applicant's Brief (Forth Coming)

(b) _____

(c) _____

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law?

NO

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

NO

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) NO

(d) any other petitions, motions or applications in this or any other Court?

NO

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. N/A

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? NO - First PCB Filing

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. _____
- iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) First P.C.B. Filing
- (b) _____
- (c) _____

16. 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 application with respect to this conviction, which you filed? YES

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

- i. Lauren B. Stevens (Esquire)
- ii. Sumter Bar - Public defender
- iii. S.C. Court of Appeals - Appellate Defender - Robert M. Pachak

(b) the proceedings at which each such attorney represented you:

- i. Trial and Sentencing
- ii. Same as above
- iii. Direct Appeal

18. State clearly the relief you seek in filing this application.

Vacate Sentencing and Conviction and Remand For A
New Trial.

19. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)
)
 COUNTY OF Richland)

VERIFICATION

I, Mark Lowery Jr., 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.

Mark J. Lowery Jr.

Sworn to and subscribed before me

This 13th day of April, 2010.

Susan D. Johns L.S.

Notary Public for South Carolina

My Commission Expires My Commission Expires
March 5, 2018

**APPLICATION TO PROCEED WITHOUT PREPAYMENT
 OF COSTS AND AFFIDAVIT
 IN SUPPORT THEREOF**

I, Mark Lowery Jr., 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 proceeding or give security therefor.

Mark J. Lowery Jr.
 Applicant

Sworn to and subscribed before me

This 13th day of April, 2010

Susan D. Johns L.S.

Notary Public for South Carolina

My Commission Expires: My Commission Expires
March 5, 2018

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Mark Lowery, Jr., #281488,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2010-CP-43-0803

RETURN AND MOTION TO DISMISS

(Appointment of Counsel Requested)

The Respondent, making its Return to the application for post conviction relief (PCR) filed April 14, 2010, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. The Applicant was indicted for (1) Armed Robbery, (2) Failure to Stop for Blue Light, and (3) Possession of a Knife During the Commission of a Violent Crime (2007-GS-43-0206). He was represented by Lauren Stevens, Esquire. Applicant proceeded to a jury trial before the Honorable George C. James, Jr. On September 12, 2007, Applicant was found guilty and was sentenced to life imprisonment for Armed Robbery and to three (3) years imprisonment for Failure to Stop for Blue Light, sentences to be served concurrently.

A notice of appeal was filed and an appeal perfected. Following the submission of an Anders brief, the appeal was dismissed. State v. Lowery, Op. No. 2009-UP-537 (S.C. Ct. App. filed November 19, 2009). The Remittitur was sent on December 7, 2009.

Attached herewith and incorporated herein are the records of the Sumter County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, the appellate records, and the trial transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current application, Applicant fails to set forth any grounds for relief, referencing only a "forthcoming" brief; as of the date of this Return no such brief has been received. Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCP.

III.

The Respondent submits that this Application for Post-Conviction Relief should be summarily dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160. An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;

3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

S.C. Code Ann. § 17-27-20 (1976). Because Applicant has failed to set forth any basis for relief, the Court should summarily dismiss this application for post-conviction relief.

IV.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, having made its Return, the State requests that the application be summarily dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160.

[Signatures on next page.]

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MARY S. WILLIAMS
Assistant Attorney General

By: Mary S. Williams
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

Feb. 4, 20 11.

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

MARK LOWERY, JR.

STATE OF SOUTH CAROLINA

Respondent,

IN THE COMMON PLEAS COURT

DOCKET NO.: 2010-CP-43-803

AMENDED APPLICATION FOR POST
CONVICTION RELIEF

The Applicant through undersigned Counsel states that the Application for Post Conviction Relief was filed on April 14, 2010, and wishes to add the following to that application:

INEFFECTIVE ASSISTANCE OF COUNSEL AND EXHIBITS OF EVIDENCE

- (A) Trial Counsel was ineffective in conceding petitioner's guilt and as a result denied Petitioner his constitutional right to a fair trial. In Support, exhibit number 1 consisting of transcript pages 48, 52, 198, 200, 201, and 204.
- (B) Trial Counsel was ineffective in failing to object to trial Judge's erroneous reasonable doubt instruction that denied petitioner his constitutional right to a fair trial. Exhibit number 2, consisting of Transcript pages 215 and 216.
- (C) Trial Counsel was ineffective in failing to object to trial Judge impermissibly commented Upon a fact of the case during his charge that was to be determined by the jury, Exhibit Number 3 consisting of Transcript page 216,
- (D) Trial Counsel was ineffective in failing to adequately investigate and prepare prior to trial for the Jackson v Denno 378 U. S. 368 (1964), hearing. See exhibit number 4, which also supports Issue J. Also Exhibits 5, (Transcript pages 17, 18, 28, 29, 30, 33, 82, and 229, exhibit 6, hospital records, also in support of issues E and F. exhibit 7, the SLED Toxicology report case L06-16585, also supports issues E, F. and H. Exhibit 8 pictures would have supported trial Counsel's argument at the Jackson v Denno hearing to suppress Petitioner's statement and to support her argument to jury of Petitioner's serious condition that night and the involuntariness of Petitioner's statement. This also supports exhibits E and H, and exhibit 9, a true copy of the Sumter County Magistrate's court record which also supports E, F. and H.
- (E) Trial counsel was ineffective in failing to be prepared and alerted to the facts in relation To the Law of Petitioners case, which rendered counsel's assistance ineffective. See

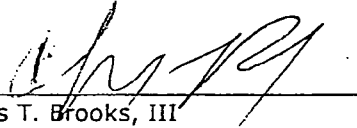
Exhibits 6-9, and Exhibit 10, consisting of Transcript pages 52,189,190,198, 200,201, and 204 for support.

- (F) Trial Counsel was ineffective in failing to make a proper argument to the jury concerning the voluntariness of petitioner statement, rendered counsel's assistance ineffective. See previous exhibits 6, 7, 8, 9 along with exhibit 11, transcript pages 39, 213,214,229, and 231.
- (G) Trial counsel was ineffective in failing to challenge prosecutions questions to alleged victim that he, petitioner was the robber in the store, and in so doing seeking the identification of petitioner, the weapons, the vehicle, or the clothing the petitioner was arrested in, this rendered counsel's assistance ineffective. See exhibits 12 and 13, as well as exhibit 14, Transcript pages 37, 51, 59, 71, 72, 73, 82.
- (H) Trial counsel was ineffective in failing to call S. C. State trooper J. B. Baker as a defense witness who could have supported statements of events, as a result rendered counsel's assistance ineffective, exhibits 12, 13, and 14 for support.
- (I) Trial Counsel ineffective³ in failing to challenge the voluntariness of the miranda Warning which rendered counsel's assistance ineffective. Exhibit No. 15 and 16.
- (J) Trial Counsel was ineffective in failing to do a complete and thorough investigation of the chain of custody prior to trial, which rendered counsel's assistance ineffective. See exhibits 17, 18, 19, 20, 21, and 22.
- (K) Trial Counsel was ineffective in failing to do a complete and thorough investigation of The video and CD admitted at trial as evidence and in so doing rendered counsel's Assistance ineffective. Exhibit No. 23 and 24.
- (L) Trial counsel was ineffective in failing to object to or challenge petitioner's criminal Record being shown to the jury. This denied Petitioner his constitutional right to a Fair trial. Exhibit No. 25.
- (M) Trial counsel was ineffective in failing to complete a thorough investigation and in failing to pursue at suppression hearing the issue of whether the investigator's promises rendered the defendant's statement involuntary when there was reasonable probability that the Judge would have suppressed the statement which contained the only direct evidence the State would use in the trial for armed robbery. This rendered

counsel's assistance ineffective.

(N) Trial Counsel was ineffective in failing to interview or call Detective Ross as a Defense witness, when Mr. Ross was the only other investigator present when The defendant's alleged statement was given. This rendered counsel's assistance Ineffective.

RESPECTFULLY SUBMITTED ON BEHALF OF
APPLICANT, Mark Lowery, Jr.



Charles T. Brooks, III
Attorney for Applicant
309 Broad Street
Post office Box 3512
Sumter, South Carolina, 29150
(803) 418-5708

September 8, 2011

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STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

MARK LOWERY, JR.

Applicant

STATE OF SOUTH CAROLINA

Respondent,

RECORDED

2011 MAR 24 AM 11:23

IN THE COMMON PLEAS COURT

JAMES C. CAMPBELL NO.: 2010-CP-43-803

CLERK OF COURT
SUMTER COUNTY, S.C.AMENDED APPLICATION FOR POST
CONVICTION RELIEF

The Applicant through undersigned Counsel states that the Application for Post Conviction Relief was filed on April 14, 2010, and wishes to add the following to that application:

INEFFECTIVE ASSISTANCE OF COUNSEL

Failure to object

Failure to adequately investigate before or during trial

Failure to present factual evidence

Failure to call a critical/material/character witness for trial defense

Failure to prepare for trial

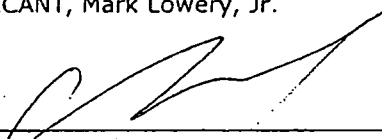
DENIAL OF DUE PROCESS

Newly discovered evidence/after discovered evidence

That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State and,

That there exists evidence of material facts not previously presented and heard that requires vacating of the conviction or sentence in the interest of justice.

RESPECTFULLY SUBMITTED ON BEHALF OF
APPLICANT, Mark Lowery, Jr.


 Charles T. Brooks, III
 Attorney for Applicant
 309 Broad Street
 Post office Box 3512
 Sumter, South Carolina, 29150
 (803) 418-5708

March 18, 2011

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

Court of Common Pleas
2010-CP-43-000803

Mark Lowery, Jr.

-vs-

State of South Carolina

:
:
: Transcript of Record
:
:

Thursday, October 27, 2011
Sumter, South Carolina

B E F O R E:

The Honorable R. Ferrell Cothran, Jr., Judge.

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

Charles T. Brooks, III, Esquire
Attorney for the Applicant

Robert D. Corney, Assistant Attorney General
Attorney for the State

Dianne A. Rutledge
Circuit Court Reporter

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23

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25

1 MR. CORNEY: May it please The Court, Your Honor.

2 THE COURT: Yes, sir.

3 MR. CORNEY: Your Honor, this is Mark Lowery. This is
4 docket No. 2010-CP-43-0803. Mr. Lowery was a true bill
5 indictment in the February 2007 term of the Sumter County
6 grand jury for armed robbery, failure to stop for a blue
7 light, possession of a knife during the commission of a
8 violent crime.

9 He proceeded to jury trial September 10, 2007 before
10 Judge James where he was convicted of counts.

11 Mr. Lowery received a life without parole sentence for
12 the armed robbery, 5 years for possession of a knife, 3
13 years for failure to stop for a blue light. Also the
14 sentences were to run concurrent.

15 Mr. Lowery had a notice of appeal filed and an appeal
16 perfected, which was dismissed following submission of an
17 Anders Brief on his behalf. The remittitur was December 7,
18 2009. And he filed a timely P.C.R. application April 14,
19 2010.

20 The state moved to -- with a motion to dismiss the
21 case on February 4, 2011 because no specific grounds had
22 been alleged at that time in his application. At that
23 point his application was amended with a brief that was
24 filed September 12th, 2011. And those grounds are the
25 grounds he's going to move forward on today from what I

Mr. Lowery - Direct by Mr. Brooks

4

1 understand..

2 He is represented by Mr. Brooks.

3 THE COURT: Okay. Yes.

4 MR. BROOKS: Ready, Judge?

5 THE COURT: Yes, sir.

6 MR. BROOKS: I call Mr. Lowery to the stand.

7 MARK LOWERY, JR., being

8 first duly sworn, testified as follows:

9 CLERK: State your name please, and spell your last
10 name for the record.

11 MR. LOWERY: Mark Lowery, Jr. L-o-w-e-r-y.

12 DIRECT EXAMINATION BY MR. BROOKS:

13 Q Mark, how are you today?

14 A Fine. How are you?

15 Q I know you're nervous.

16 A Very much.

17 Q Take a deep breath. All right. You had Ms. Stevens
18 representing you in this case; is that correct?

19 A Yes, sir.

20 Q All right. And you raise this P.C.R., post conviction
21 relief, alleging ineffective assistance of counsel?

22 A Yes, sir.

23 Q All right. And one of the issues that you raise --
24 what I consider to be your major issue was in regards to
25 the Jackson v. Denno hearing that dealt with your

1 statement?

2 A Yes, sir.

3 Q Okay. You were basically intoxicated at the time and
4 under the influence of drugs; is that correct?

5 A Yes, sir.

6 Q And you felt that that should have been a basis to
7 have that statement thrown out?

8 A Yes, sir.

9 Q Even if it had not been thrown out, the fact that you
10 were intoxicated and on drugs and for the D.U.I. -- that's
11 what you were originally arrested for and taken to the
12 hospital; is that correct?

13 A Yes, sir.

14 Q That should have been somehow shown to the jury?

15 A Yes, sir.

16 Q Because the state's position was what?

17 A The state's position was that I arm robbed the store,
18 and then I ran from the police strictly because I was
19 running for armed robbery.

20 Q And what this would have shown was that you were
21 running because of the D.U.I.?

22 A It would absolutely have shown I was just running
23 because I was under the influence. You know, I had drugs
24 in my system. I wasn't functioning correctly.

25 Q Okay. One of the things in your application was that

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1 Ms. Stevens didn't show these records, didn't bring these
2 records to court; is that correct?

3 A Yes, sir.

4 Q One of the records is from your hospital stay at
5 Tuomey; is that correct?

6 A Yes, sir.

7 Q And in that -- to what you've seen in that record is
8 that you -- you were inebriated, you were under the
9 influence of alcohol; is that correct?

10 A Yes, sir.

11 Q And that's when those statements were taken; isn't
12 that correct?

13 A Yes, sir.

14 Q Okay. As a matter of fact, instead of Tuomey, you
15 were flown by helicopter to Palmetto Richland in Columbia?

16 A Yes, sir.

17 Q Okay. And you got these records, and these are your
18 records from Palmetto Richland?

19 A Yes, sir.

20 MR. BROOKS: Your Honor, we would submit this as
21 Applicant's Exhibit No. 1 is Palmetto Richland emergency
22 room notes -- typed up notes that talk about him being
23 under alcohol.

24 THE COURT: What says the state? Any objection?

25 MR. CORNEY: Oh, no objection, Your Honor. I'm sorry.

1 THE COURT: Okay. It's in without objection.

2 (Palmetto Health Richland Records, 3 pages, marked in
3 evidence as Applicant's Exhibit No. 1.)

4 Q In addition to that alcohol, you also had cocaine in
5 your system?

6 A Yes, sir.

7 Q Okay. And then there actually has been a SLED report
8 where they have taken your -- they had taken your blood and
9 done an analysis of that evening, and toxicology reported
10 that you were positive for cocaine; is that correct?

11 A Yes, sir.

12 Q And this is the SLED report that you wrote off and got
13 it; is that correct?

14 A Yes, sir.

15 (Pause.)

16 MR. BROOKS: Your Honor, we would move this in as
17 Applicant's No. 2.

18 THE COURT: What says the state?

19 MR. CORNEY: No objection, from the state, Judge.

20 THE COURT: That's in without objection.

21 (SLED Lab report, 2 pages, marked in evidence as
22 Applicant's Exhibit No. 2.)

23 Q In addition to that, Trooper Baker of the highway
24 patrol is the one that had you arrest -- arrested you for
25 the D.U.I.; is that correct?

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1 A Yes, sir.

2 Q And you were actually faced with those charges and he
3 was the one that accompanied you to the hospital; is that
4 correct?

5 A Yes, sir, he was at the hospital during the whole
6 time. He's the one that requested the blood be drawn from
7 me.

8 Q And he's the one that actually requested that blood be
9 drawn and he's the one that actually charged you with
10 D.U.I.?

11 A Yes, sir.

12 Q Now, that D.U.I. case was subsequently dismissed?

13 A Due to the fact of my life sentence.

14 Q Because of your incarceration. But in fact, you were
15 arrested for D.U.I. on that particular night?

16 A Yes, sir.

17 MR. BROOKS: Okay. Judge, I do have a magistrate's
18 court report that shows the case dismissed. But I think we
19 would just ask The Court to take judicial notice that he
20 was arrested for D.U.I. by Trooper Baker that night. I
21 don't think there's any dispute.

22 THE COURT: The state agree with that?

23 MR. CORNEY: Your Honor, I don't have anything in my
24 records anywhere of that fact. If it happened, it
25 happened. But that's not part of his P.C.R. application.

1 If you just want to take notice of that, I have no
2 objection to that. But if he's going to raise allegations
3 of that, it's not in his P.C.R. application.

4 MR. BROOKS: Well, Judge, our theory is that -- Mr.
5 Lowery's theory is that Ms. Stevens could have called Mr.
6 Baker as part of the Jackson v. Denno process in regards to
7 the statement.

8 In addition to that, she perhaps could have called him
9 to talk about the fact that he was arrested for the D.U.I.,
10 had blood drawn, and got into the issue about the drugs to
11 show this is why he was running from the police, which
12 would have been in opposition to the state's theory that
13 he was running from the police because of the armed
14 robbery.

15 It's in the transcript -- and we're going to be
16 getting into it. Ms. Stevens talks about him being guilty
17 for failure to stop for blue lights. So there was some
18 culpability on some -- obviously, some crimes. They were
19 obviously much, much, much minor than what he was
20 originally convicted of; that's where we're going with
21 that.

22 MR. CORNEY: Your Honor, I don't think Trooper Baker
23 is here to testify today, so I don't think that even really
24 needs to be addressed, unless he's here to present any
25 testimony.

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1 MR. BROOKS: What we're just doing is just basically
2 saying that he was arrested for D.U.I. Of course, we put
3 in the blood. We put in the -- the -- the -- the Palmetto
4 Richland report.

5 THE COURT: As far as the state's position is, you
6 don't deny he was arrested for D.U.I., do you?

7 MR. CORNEY: Your Honor, I'll tell you ---

8 THE COURT: Or you don't know?

9 MR. CORNEY: This is where I'm at. I don't see
10 anything in the application -- in the record anywhere
11 referring to a D.U.I. I think Ms. Stevens -- I think she
12 concedes that the D.U.I. was a part of that. I didn't have
13 any notice of it based on the record. But if that's what
14 happened, I'll concede to that.

15 THE COURT: Okay.

16 MR. BROOKS: And, Judge, just for the record, I have
17 the report where it has the date of violation 11/27/2006,
18 the same date that all this was going on.

19 THE COURT: Okay.

20 Q That your understanding, Mr. Lowery?

21 A I can elaborate a little bit more.

22 Q We'll come to it. We'll come to it in just a minute.

23 A Okay.

24 Q Now, you also had pictures of them putting you in the
25 hospital and taking you to Palmetto Richland; is that

1 correct?

2 A Yes, sir. As far as Ms. Stevens' argument to the jury
3 during Jackson v. Denno was a lot about my physical
4 condition. You know, my physical trauma and concussion and
5 convulsions and different things like that. And those
6 pictures were there and available. And I was just curious
7 for her argument why ---

8 Q These were not -- these were not used; is that
9 correct?

10 A Yeah. They were not used.

11 (Pause.)

12 MR. BROOKS: We would move these in as Applicant's No.
13 3.

14 THE COURT: What is that?

15 MR. BROOKS: These are a set of pictures that were
16 taken of him being transported to Palmetto Richland that
17 evening.

18 THE COURT: Okay. Any objection?

19 MR. CORNEY: No objection, Your Honor. I assume those
20 are copies from the originals. I think they accurately
21 reflect the scene that night. No objection to it.

22 THE COURT: Okay. They're in without objection.

23 (Black and white photos, 6, marked in evidence as
24 Applicant's Exhibit No. 3.)

25 Q Now, Mr. Lowery ---

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1 A Yes, sir.

2 Q --- you wanted to elaborate?

3 A Yes, sir.

4 Q Go ahead.

5 A Okay. To start off with, when Ms. Stevens filed a
6 motion for Jackson v. Denno, I was wondering why she didn't
7 present the pictures to support our argument to the grand
8 jury (sic) -- I was wondering why she -- you know, at the
9 time I didn't think about the D.U.I. or things like that.
10 But that obviously is available. There was SLED records
11 available. You know, the state trooper could have
12 testified, you know, he was at the hospital and saw my
13 condition the entire time.

14 Furthermore, it's during -- during the trial, you
15 know, when I first stood up, the judge asked me how I pled.
16 I pled not guilty to all three charges. And then
17 throughout the trial, opening statement, throughout the
18 trial, and closing statement she proceeded to state several
19 different times on different pages that I was guilty of
20 failure to stop for a blue light beyond all doubt.

21 I'm not sure where the pages are at right this second.
22 But if you give me just a moment.

23 (Pause.)

24 Okay. On page 48 it says the defendant has entered a
25 plea on page transcript 48, 13 through 16. It says, the

1 defendant has entered a plea of not guilty on all these
2 charges and that plea puts the burden of proof on the state
3 to prove the guilt beyond a reasonable doubt.

4 The record on page 52, lines 9 through 15 Ms. Stevens
5 states, We're not denying that we ran from the police.
6 We're not denying that he was guilty of failure to stop for
7 a blue light. We're not contesting -- we're only
8 contesting the guilt of armed robbery.

9 Further down on 13 through 15 she states, I submit to
10 you that my client was merely in the wrong place at the
11 wrong time.

12 So, I mean, she was giving no reason as to why she was
13 conceding my guilt through the entire trial, telling them I
14 was guilty, while the state's entire argument was I was
15 guilty of failure to stop for a blue light because I had an
16 armed robbery.

17 Q Okay.

18 A You know, I was -- absolutely in the state's closing
19 argument he stated several times, this man is guilty of
20 armed robbery; that's why he ran.

21 So in essence I feel like she was bolstering the
22 state's claim. You know, instead of saying well -- to the
23 jury, he had a D.U.I. Well, he had drugs in his system.
24 Here's proof he had alcohol in his system.

25 Q So you felt it would have been advantageous if she

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1 could have gotten into the fact that you were arrested for
2 D.U.I. that night?

3 A I feel like she didn't counter the state's theory at
4 all. And therefore all the jury could hear was their
5 theory on why I ran. There was no real theory presented on
6 why I ran.

7 Q And you felt that that prejudiced your case; is that
8 correct?

9 A Absolutely. I felt it prejudiced my case.

10 Q Was there any other evidence that tied you to this
11 case?

12 A No. The statement -- the statement that I gave was
13 the only direct evidence that tied me to the case.

14 Now, as far as her not presenting the medical record,
15 hospital records, and that SLED report in Jackson v. Denno,
16 I feel like I was prejudiced because the judge wasn't
17 afforded to see that; therefore, he ruled against us.

18 Now, he bound it over to the jury. He said, I'm going
19 to turn this over to the jury and I'm going to allow them
20 to determine the voluntariness of this statement beyond a
21 reasonable doubt.

22 Now, the jury -- the jury -- at that point Ms. Stevens
23 knew she had to make an argument to the jury on this issue.
24 She knew that it was out of the judge's hands, it was in
25 the jury's hands, and she had to convince the jury this is

1 an involuntary statement.

2 Yet, it still didn't come off about the D.U.I., the
3 drugs, the alcohol. None of that came up.

4 But she did put up the argument about me being in the
5 hospital and so on and so forth. I had a head injury and
6 things like that.

7 When the jury went in to deliberation, they came out
8 of deliberation. On page 229 they came out of deliberation
9 and requested to the judge that they get my hospital
10 records.

11 Q And that's on the record?

12 A Yes, sir.

13 Q Okay.

14 A On page 229. I can read it for you if you just give
15 me one second.

16 Q The Court has the transcript.

17 A Okay.

18 Q And these are the hospital records that we just
19 submitted to Judge Cothran here a few minutes ago?

20 A Yes, sir. They requested that they see them.

21 And the judge told them to determine on the statement
22 -- they had to determine the statement beyond a reasonable
23 doubt to whether or not they put any weight to this
24 statement.

25 So it's obvious if they come out of deliberation

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1 requesting to see some type of hospital records, that they
2 had some reasonable doubt about this voluntary statement.

3 Q And you feel that if they had the hospital record, or
4 at least had gotten into evidence by bringing the records
5 custodian to testify that you were incarcerated -- I mean
6 intoxicated that night, that that would have had an impact
7 on the outcome of your case?

8 A Absolutely. I feel I was prejudiced by it completely
9 because the jury was not afforded all the facts in the
10 trial. They were not afforded the chance to see them. And
11 when the judge denied them, they had to go back in
12 deliberation and make a determination without all the
13 facts.

14 Q So the jury never got to know that you were
15 intoxicated and the jury never got to know that you had a
16 D.U.I. and that might have been the reason why you were
17 running from the police?

18 A Exactly right.

19 Q Okay. All right. We covered that.

20 A Yes, sir.

21 Q Is there anything else you wanted to cover in regards
22 to Ms. Stevens' ineffectiveness?

23 A There are a few other things. I was never identified
24 in this armed robbery. I was never asked to be put in a
25 lineup -- not before trial or during trial. Ms. Stevens

1 never asked the victim to I.D. me at trial. She never once
2 said, Well, can you I.D. my client as the robber?

3 She never asked her to identify any of the clothing
4 that was taken from me. She never said, Is this the
5 clothing that the robber was wearing?

6 There was three different weapons at trial, but yet
7 the victim was never asked to I.D. which weapon that was --
8 she was never asked to I.D. my truck. And I'm like I feel
9 like that if the jury would have heard the victim up here
10 say she couldn't I.D. none of this stuff -- primarily me as
11 the robber -- then I feel like, Yeah, it would have made a
12 tremendous impact on the jury. I feel like I was
13 prejudiced greatly by it.

14 If they would have heard this victim up there say,
15 Well, I can't I.D. him. I can't I.D. the truck or the
16 weapon or nothing, then I believe coupled with the fact
17 that the statement -- you know, the statement and all that
18 and the conceding of the guilt and bolstering the state's
19 argument on their theory, yeah, I feel like, you know, that
20 they believe I was the robber.

21 Q Okay.

22 A Furthermore, there's a page in here I want to read
23 real quick on that where the -- where the prosecution
24 stated on record that I was in fact the robber. And I
25 didn't -- I didn't think that was right. Give me just one

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1 second.

2 (Pause.)

3 Okay. On page 58, 19 through 25, Officer MaKoom
4 (phonetic) was asked a question -- I mean, the victim was
5 asked a question. Did MaKoom -- and did he come back
6 there?

7 Yes.

8 And did he get the video from the store?

9 Yes.

10 Now, I have -- now, have you had the opportunity to
11 view these photographs -- and I'll show them to you. On
12 page 59, 1 through 16 it says, That is the photograph. Can
13 you identify those?

14 The victim answered, Yes.

15 The prosecution asked her: Do they fairly and
16 accurately represent what happened when the defendant was
17 in your store?

18 Now, I'd never been identified -- not before or during
19 trial. She plainly stated, the defendant had a mask on and
20 covered up his whole face. He had a hat on. The clothes
21 weren't the same color.

22 So how can the prosecution ask her, Do these pictures
23 represent the defendant in your store?

24 She says, Yes, these pictures are accurate.

25 So, I mean, the jury, they hear this. And they're

1 thinking, she's made a positive I.D. on me. And she ---

2 Q Do you think that's something Ms. Stevens should have
3 objected to?

4 A I do. I feel like -- not only do I feel like she
5 should have objected to that. I feel like it prejudiced me
6 because the jury might have felt like they was hearing a
7 positive I.D.

8 Q Okay.

9 A Furthermore, I feel like she was ineffective by never
10 asking her to I.D. me, you know. If she could have gotten
11 off of prejudice, because she didn't. You know, the victim
12 never I.D.'d me.

13 Q All right. Are there any other issues?

14 A There are a couple others. There was -- we raised the
15 issue of an ineffective assistance of counsel claim to get
16 some evidence thrown out. And I don't feel like she did a
17 proper investigation on the chain of custody.

18 Since I've been in prison, I wrote the police
19 department and I got a policy and procedure on the Sumter
20 County chain of custody. The chief of police sent me the
21 policy and procedure on that -- on how it goes.

22 Now, I got several reports here from Officer Wingate,
23 to Lieutenant Nesbitt where they're stating where I got
24 inconsistencies throughout the whole chain of custody. I
25 mean, Officer Wingate stated he took several clothing --

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1 several pieces of clothing from me and at the crime scene;
2 that he -- they presented at trial.

3 But yet in the transcript he states that he sent it --
4 when he collected it, he sent it to an on-scene crime scene
5 lab. So -- but I have no record -- I have no chain of
6 custody where he passed it onto this -- this crime lab or
7 whoever.

8 Then he says he got it back and him and a witness
9 inventoried the evidence. I have no list of who this
10 witness is that was with him.

11 Q You feel like that's something that Ms. Stevens should
12 have objected to?

13 A I feel like ---

14 Q To suppress it; is that correct?

15 A I feel like that there's several things she could have
16 investigated more thoroughly on the chain of custody issue
17 that would have -- when she -- when we put in chain of
18 custody issue, she raised two issues on one officer. And
19 the judge stated -- the judge stated in there that he
20 thought it raised significant eyebrows to what she had
21 raised. And it was obvious he was intrigued by what she
22 was saying. If you give me just a second.

23 (Pause.)

24 Okay. Okay. Right here. On page 106, 4 through 13
25 Officer Wingate states, When they pulled him out, he had on

1 a big brown coat camouflage jacket. Okay. He says they
2 laid him down, we pulled the jacket off.

3 So once he was down so it was easier to handcuff him.
4 Okay. He says he secured my hands and he retrieved several
5 things out of the coat, took the coat, and some money, and
6 my wallet.

7 On page 108, 9 through 12 he states -- I mean, the
8 prosecutor asked him: Did you recover any money?

9 He says, Yes. When I got the coat off of him, I knew
10 some dollars fell out of his pocket. I picked them up. At
11 that time I secured them in my patrol vehicle until I could
12 get a witness to witness thing -- and things settled down,
13 so I could come back and have the witness and me count the
14 money. I secured that in my patrol vehicle in a bag and
15 then sent it to a crime scene on the actual accident scene
16 there.

17 I don't know nothing about a crime scene at the
18 accident scene. I know -- sent this stuff to -- how long
19 this person had it, what was done with the stuff, when he
20 got it back, who was the witness that saw him inventory
21 it.

22 I feel like all that is -- you know, it would have
23 played in a great deal in trying to get the evidence
24 suppressed.

25 Q Okay.

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1 A Later on he then turned the truck over to a Detective
2 Quarts (phonetic), Sr. He showed up. There was no chain
3 of custody of him turning it over to the detective. The
4 detective ended up turning it back over to him.

5 Q Let me ask you this. Got the issue about the chain of
6 custody. You elaborated on that. Is there any other
7 issues that we haven't covered besides chain of custody or
8 the issue of the voluntariness of your statement, alcohol,
9 and drugs?

10 A Well, there's just one other -- there's one other
11 thing on the chain of custody I'd like to bring to the
12 point, and that was Lieutenant Nesbitt who stated -- he
13 stated at the impound yard that he did not fill out a chain
14 of custody form. And it plainly states in the police
15 policy I got that -- if I can put that policy in evidence,
16 I don't know. But it states in the policy, anybody that
17 turns a vehicle in to the impound yard, it has to be placed
18 in to evidence with a full, complete report and a chain of
19 custody form and if -- the evidence technician has to be
20 notified. None of that was done.

21 And I got him stating right here on record that he was
22 in control of the impound area, and he didn't -- and he
23 didn't fill out a chain of custody form.

24 If you will hold on one second, I'll point you out
25 that.

1 (Pause.)

2 He was asked on the stand on page 127, lines 2 through
3 15, Is it normal for a police officer to follow a wrecker
4 to impound?

5 Yes, ma'am. If we feel that this vehicle is evidence
6 or considered a crime scene, or there's evidence in the
7 vehicle, then we commonly have an officer follow to
8 maintain the chain of custody until the vehicle is secure.

9 They asked the question: Well, then wouldn't you
10 normally fill out a chain of custody form?

11 Lieutenant Nesbitt answers. Some times we would on
12 the vehicle. Some times we actually fill out a chain of
13 custody with all of the items that are seized in it. In
14 this case I did not fill out a chain of custody form on the
15 vehicle.

16 However, that's incorrect -- I mean, it's correct that
17 he didn't fill out that form. But policy states he has to.
18 Their police policy states any time it's turned in, they
19 have to -- what I'm getting at, if Ms. Stevens had done the
20 investigation, she would have found all these
21 inconsistencies, and she could have presented them.

22 I mean, I could sit here for another 10 minutes and go
23 into the breaks in the chain of custody if I thought -- I
24 don't know if I should or not, I mean.

25 Q Well, I think we covered chain of custody issues as it

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1 relates to ineffective assistance of counsel. Your
2 allegation is that Ms. Stevens did not do as good a job of
3 investigating to raise those issues and ask that those
4 things perhaps be suppressed. We covered that.

5 A Well, it's just that she didn't -- she raised two
6 issues. She just didn't raise all of the issues. I feel
7 like if she had done a proper investigation, she would have
8 found -- I mean, Officer Wingate's incomplete report,
9 incomplete chain of custody. She would have found
10 Detective Quarts incomplete. She would have found
11 Lieutenant Nesbitt's incomplete.

12 She would have found no chain of custody form pass
13 between them. And all that, I believe, would have weighed
14 heavily on the suppression hearing. And I believe the
15 judge would have decided in my favor.

16 I was prejudiced greatly because that was a
17 suppression hearing to get evidence suppressed. But, yet,
18 the stuff wasn't presented. And by it not being presented,
19 I was prejudiced because the judge decided against me and
20 allowed this evidence in.

21 Even though it was circumstantial evidence, I still
22 believe it weighed against me.

23 Q Was there anything else?

24 A Yes, sir.. If you just hold on a second.

25 (Pause.)

1 During the interview -- the initial interview at the
2 police department when my statement was given, there was
3 two detectives there. There was a Detective Ross
4 (phonetic) and a Detective Johnson. However, only
5 Detective Johnson showed up at trial.

6 Now, I was wondering why didn't Detective Ross show
7 up? She never asked him -- being as we was at saying the
8 statement was involuntary, I was under the influence, so on
9 and so forth. No one ever questioned Detective Ross. She
10 never interviewed him. She never said anything.

11 Furthermore, Detective Johnson had coerced me during
12 the -- during the statement he told me that if I gave a
13 statement, he would speak up on my behalf at the bond
14 hearing, which in fact he did. For a second offense armed
15 robbery, facing a life sentence, I was granted a \$10,000
16 bond. I bonded out of jail for like \$800.

17 Now, as good as that was for me, the only reason I got
18 it was because Johnson spoke up at that bond hearing.

19 Q You were out of jail prior to going to trial?

20 A Yes, sir.

21 Q Okay.

22 A On a \$10,000 surety bond. Now, I -- I -- I spoke to
23 Ms. Stevens and told her that the detective had made -- you
24 know, promising me different things and that he followed
25 through, and he went to the bond hearing and spoke on my

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1 behalf. However, she never investigated any of that. She
2 never said nothing to him. She never -- you know, she
3 actually tried -- did you make any promises?

4 He said, No.

5 But she never checked on any of that. She never
6 checked to see if she could get a record of the bond
7 hearing or anything like that.

8 Q Okay.

9 A And I feel like she could have called Detective Ross
10 and said, Well, how did the interview go? Did Mr. Johnson
11 offer him anything? Did he go to the bond hearing and
12 speak on his behalf? How did Mr. Lowery acting in there?
13 How was he functioning?

14 There was no affidavit from Mr. Ross.

15 Q Okay.

16 A So I feel like that's another issue.

17 But just for the record, I'd like to read my issues
18 back and put them on the record.

19 Q They're on the record. That's what this lady here is
20 doing. They're all on record. They've already been done.

21 A I mean ---

22 Q Is there anything else?

23 A Several other things, but I'm trying to be as short as
24 possible here. Covered the issue of conceding my guilt.
25 The Jackson versus -- the issue of the Jackson v. Denno

1 hearing. Covered the issue of her -- I feel like she was
2 ineffective by not calling South Carolina State Trooper
3 Baker. The argument out there, Jackson v. Denno hearing.

4 The main thing is just the issue on the statement and
5 the hospital records and the jury being denied the right to
6 see them. The SLED records. The state trooper's
7 testimony, so on and so forth.

8 Q Okay.

9 A I don't -- I don't believe there's anything else I
10 could place on the record at this time. The identification
11 issue. The chain of custody issue. I don't feel like I
12 really covered the chain of custody issue. But ---

13 Q You covered it.

14 A I mean, I understand I covered it verbally. But I
15 didn't quote any of the pages that needed to be looked at.

16 Q The transcript is in the record. It's all on the
17 record. You covered it.

18 A Is there any way I could put forth -- I need to put
19 forth the officer's reports to show -- the police policy
20 and procedure, I'd like to put that into evidence if I can,
21 being that the burden of proof is on me to find the
22 evidence that's here for me to build.

23 Q Proceed.

24 A Yes, sir.

25 (Pause.)

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1 MR. CORNEY: Assuming that is the fact that it's
2 introduced, I have no objection to it.

3 THE COURT: Okay.

4 MR. CORNEY: Assuming it is a complete version of that
5 that Sumter County police would issue.

6 MR. BROOKS: Pursuant to Sumter Police Department
7 General Orders 203 to 216. We submit this as Applicant's
8 4.

9 (Sumter Police Department General Orders 203 - 216, 17
10 pages, marked in evidence as Applicant's Exhibit No. 4.)

11 THE COURT: All right.

12 Q Mr. Lowery, I think that's it. We got the policy and
13 procedures in. We covered the chain of custody. We've
14 covered all those other issues.

15 A Might I ask. Earlier when you had the magistrate
16 court paperwork on the D.U.I. ---

17 Q The judge has taken judicial notice that you were
18 arrested that night by Trooper Baker.

19 A Okay. Does that consist ---

20 Q It's on the record.

21 A I mean, does that consist of being a piece of my
22 evidence? I mean, I'm fighting a life sentence here, so.

23 Q It's your evidence.

24 A You know, I'm fighting a life sentence. I'm really --
25 I'm trying to make sure I cover all the bases.

1 Q Mr. Lowery, this lady right here, the court reporter,
2 she's making a record of everything that's said and
3 everything that's been put in for the judge. We have a
4 transcript of your trial. It's on the record. All right.

5 A The things I had you filed for me, my issues or
6 whatever, all that's a part of the record?

7 Q That's all a part of the record.

8 A Okay.

9 Q It's got clocked and stamped on it. It's part of the
10 record.

11 A Okay.

12 Q All right?

13 A All right.

14 MR. BROOKS: Answer any questions of the Attorney
15 General.

16 CROSS EXAMINATION BY MR. CORNEY:

17 Q Mr. Lowery, do you recall meeting with Ms. Stevens to
18 go over the charges against you and kind of discuss what
19 defenses you might obtain to the charges?

20 A Yes, sir, we discussed several things.

21 Q Okay. Failure to stop for a blue light charge, is
22 that something you discussed that you may need to concede
23 that issue at trial?

24 A I -- we talked about it on several different occasions
25 on whether or not to bring it up or not. And I was under

Mr. Lowery - Cross by Mr. Corney

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1 the impression that if it was brought up, everything would
2 be brought out. That -- you know, like the D.U.I. and
3 things supporting it. I mean, I knew the way it looked I
4 was running from armed robbery; that's the way of painting
5 it, you know. I was under the impression if -- if -- if we
6 said I was guilty of it, then everything would come out
7 behind it. But it didn't.

8 Q On the night in question you were chased by -- you
9 were chased by several police cars and you ultimately
10 wrecked your truck that night?

11 A Yes, sir.

12 Q And you were air lifted after that -- out of that
13 accident to the hospital; is that right?

14 A Yes, sir.

15 Q So there's no doubt you were running from the police
16 that night. They had their lights on behind you, and you
17 wrecked your car, and they pulled you out of that car?

18 A I did. But the reason when I -- I'm not debating on
19 whether or not I ran. I'm debating on the reason behind
20 why I ran. I'm debating that she didn't come back the
21 state's theory on why I ran.

22 Q Okay. So you concede at this point -- what you're
23 saying is that you don't have any problem with the problem
24 she conceded you ran from a blue light, and that charge was
25 the correct charge?

1 A No. I absolutely have a problem with it. I
2 absolutely have an issue with her conceding my guilt
3 because she didn't -- she didn't say anything to support
4 it. She didn't say anything to say this is why he ran.
5 She just said, he ran. And the state's saying he ran
6 because he was guilty of armed robbery. So, yeah, I had an
7 issue with it.

8 Q But you don't concede that you were running from the
9 police that night, that you're guilty of a failure to stop
10 for a blue light charge? That particular charge taken on
11 its own, you don't concede that -- I mean, you do concede
12 that you're guilty of that charge?

13 A I understand that I'm guilty of that charge.

14 Q Okay. So there's probably no issue with Ms. Stevens
15 conceding at trial that you were guilty of that charge
16 because you did run from the police, you did wreck your
17 car, and you were pulled out of that car. There's no
18 question that you ran from the police that night?

19 A It doesn't matter. It's up to the jury to make a
20 determination. It was up to the state to make the burden
21 to prove that. It wasn't up to her to say that I was
22 guilty.

23 Q I think before Mr. Brooks was questioning you, you
24 said the only evidence against you was the statement that
25 you gave, right?

Mr. Lowery - Cross by Mr. Corney

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1 A Yes, sir.

2 Q Okay. What about ---

3 A Only direct evidence.

4 Q Excuse me?

5 A Only direct evidence.

6 Q The coat they pulled out of your car that night that
7 matched the description given by the victim, the mask that
8 was pulled out of there?

9 A None of it matched the description. I can quote in
10 policy where -- and police reports where she said it was
11 orange and gray. The coat was orange and gray. The hat
12 was orange and gray. The mask was orange and gray.

13 However, the coat that they presented at trial was green
14 and black.

15 Q Those were inconsistencies that Ms. Stevens cross
16 examined on?

17 A She did.

18 Q She did a good job calling that evidence into
19 question, right?

20 A She never asked the victim to identify a coat. She
21 never said, Does this coat -- is this the coat the robber
22 was wearing?

23 Q Do you remember the mask was brought in at trial and
24 showed ---

25 A Yes, sir, I believe it was.

1 Q And it was showed -- it was also brought out there
2 were some inconsistencies in the exact coloration and
3 description of the mask?

4 A Yes, sir.

5 Q Okay. So she did a good job on that also calling
6 those into question?

7 A I'm not -- I'm not arguing that she didn't bring out
8 the inconsistencies. I'm arguing the fact that the jury
9 never heard the victim say that was not the stuff the
10 robber was wearing.

11 Q Okay. Look and see the Jackson v. Denno hearing.
12 Obviously, you gave a statement to the police that night,
13 right?

14 A Yes, sir.

15 Q And that was a confession to this crime?

16 A No. I was under the impression I was talking about my
17 prior arm robberies.

18 Q You did sign an initial miranda waiver sheet at that
19 time, right?

20 A I did. I did.

21 Q And ---

22 A Naturally, if I'm arguing I was under the influence
23 when I gave the statement, I had to be under the influence
24 when I gave the miranda signature.

25 Q Detective Johnson, I think, was one of the two

1 officers that took that statement from you?

2 A Johnson?

3 Q Yes, sir.

4 A Yes, sir.

5 Q And he testified during that Jackson v. Denno hearing,
6 right?

7 A He did.

8 Q Part of his testimony was that when he started reading
9 the miranda rights, you stopped him and said, oh, I know
10 all about those?

11 A Again, I was under the influence. People say I was
12 under the influence of alcohol and cocaine. I'd been up
13 for two days. I had -- I had just gotten in a severe car
14 wreck. I could have been saying anything to this man.

15 Q Okay. So you were impaired, obviously, based on your
16 allegations, but not so impaired that you didn't understand
17 your miranda rights. You said, I ---

18 A Absolutely.

19 Q --- know what you're about to say and I know them all?

20 A I -- I was too -- I was too impaired to understand my
21 miranda rights. Let's get that absolutely clear.

22 Q Okay. He read them to you anyway even though you said
23 you understood them at that point before he finished?

24 A He says he read them to me. He says I signed them.

25 He says I gave this statement, which was the statement of

1 this armed robbery.

2 Q Okay. And Ms. Stevens even brought out during the
3 Jackson v. Denno hearing a lot of testimony saying he was
4 on pain killers. You know, this was his condition at the
5 time of the wreck. She brought out a whole bunch of
6 testimony on those allegations that I think you now raise
7 of why you don't think it was a voluntary statement?

8 A Yes, sir.

9 Q And those are all in the record. That was all brought
10 before the judge during that hearing?

11 A She brought it up verbally, but she produced no
12 records to support her argument when the record existed.

13 Q But there's some testimony in there as to these
14 officers saying, Yeah, we knew he did suffer a terrible
15 accident. We never asked him if he was on any pain
16 medication, right?

17 A We got the officers saying that they knew I had
18 suffered an accident and that he didn't -- he admitted he
19 did not ask me if I was on pain medication.

20 Q Okay. You testified a little bit later on as part of
21 hearing that you were in fact on pain medication, right?

22 A Yes.

23 Q So even without those papers, the judge knew you had
24 testified you were on pain medication. And you're saying
25 that that influenced your decision to give that statement?

Mr. Lowery - Cross by Mr. Corney

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1 A If you read in -- if you read in the same page as I
2 believe you are, you'll see several areas where the judge
3 asked her directly, Do you have any proof, Ms. Stevens, to
4 support this? Is there any proof to back up what you're
5 saying?

6 And she said, No.

7 Q Okay. But in your testimony from that Jackson v.
8 Denno hearing on page 25, lines 19 through 20, you said,
9 Yeah, I suppose I gave that statement freely and
10 voluntarily?

11 A No.

12 Q Page 25, line 19 through 20. You didn't say that?

13 A Would you show it to me?

14 Q You said -- and I'll read it into the record. Well, I
15 mean, there was conversation. I mean, I suppose it was
16 freely and voluntary. That's your testimony, right?

17 A Again, if I gave it, I was under the influence.

18 Furthermore, when I entered the interview room with him, if
19 I gave anything freely and voluntary, it was about my prior
20 record of arm robbery. It had nothing to do with a current
21 arm robbery.

22 Q You weren't under the influence of any pain
23 medications, drug, or alcohol on the date of this hearing,
24 were you? The date of your trial in that Jackson v. Denno
25 hearing?

1 A No, sir.

2 Q Okay. So you admit that it was freely and voluntary,
3 and you weren't under the influence of anything at that
4 point in time, right?

5 A At that point in time I was not. However, when it was
6 given, I was.

7 Q Okay. Did you ever tell Ms. Stevens that you were
8 under the influence of cocaine that night?

9 A Yes.

10 Q That was something you discussed with her?

11 A I told her I was under the influence of drugs.

12 Q You were under the influence of drugs. Did you
13 specify pain medication drugs or cocaine or any other drug?

14 A No.

15 Q That was something you never talked to her about. So
16 she could have thought during your discussions that it was
17 pain medication?

18 A She knew I was under the influence of alcohol. She
19 knew I was drunk. She knew I was under the influence of
20 drugs. I mean, she knew I'd just gotten in a severe car
21 wreck. She was arguing all of this on the suppression
22 hearing on the statement. And, I mean, why wouldn't she
23 get the records to support -- or to at least investigate
24 them, to at least look at them and make a judgment call on
25 -- or to present them to support the argument.

Mr. Lowery - Cross by Mr. Corney

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1 Q Okay. As far as you know, you never mentioned the
2 words cocaine to her? You never said, I was on cocaine,
3 those words, you never ---

4 A Drugs. I said drugs.

5 Q Okay. As far as the chain of custody issue, that's
6 something Ms. Stevens investigated pretty thoroughly on
7 cross examination, isn't it?

8 A She investigated only one issue that I remember, and
9 that was on a Detective Quarts where he made a double
10 statement -- where he wrote double reports on the same
11 thing.

12 Q But wasn't there some testimony given that this is the
13 wrecking crew that took the car that night, they took it
14 directly to the impound. And, in fact, the officer that
15 did testify that you referred to earlier who said he didn't
16 fill out a custody report, even said, you know, I didn't
17 fill it out. And the officer later filled out the custody
18 report, right?

19 A But the police policy states it can't even be put in
20 impound without a custody form being filled out, without a
21 full chain of custody and a full police report.

22 Q You don't dispute there's testimony given there that
23 somebody filled out a police report?

24 A It can't be somebody. It has to be the person that it
25 was in his hands, he turned it over to the impound yard.

1 Lieutenant Nesbitt accepted the control of it. It had to
2 be him. It can't be somebody else.

3 MR. CORNEY: Beg The Court's indulgence for one
4 minute, Your Honor.

5 (Pause.)

6 Q This officer, is it Detective Ross I think you said is
7 the other officer that was in the room when you gave your
8 statement?

9 A Yes, sir.

10 Q And was that something you discussed with Ms. Stevens,
11 having him there to testify at trial?

12 A I asked her several times did she speak to Mr. Ross
13 about it, had she talked to him, had she asked him how --
14 all we have is Johnson, who is arguing the suppression of
15 the statement. So I was like, have you talked to Ross?

16 You know, did he tell you how I was acting? Did he tell
17 you about, you know, what Johnson said he'd do for me?

18 Q And Officer Johnson testified -- it's his testimony,
19 he said no real promises were made to you to give that
20 statement, correct?

21 A He did state that he made no promises. However, he
22 did. I informed Ms. Stevens he made promises to me; that
23 he told me if I cooperated, things would go a whole lot
24 easier on me.

25 MR. CORNEY: Beg The Court's indulgence one minute,

1 Your Honor.

2 (Pause.)

3 Q Did you ever discuss with Ms. Stevens the strategy of
4 her wanting to get the last argument during closing
5 arguments?

6 A We did. I asked her several times about admitting
7 pieces of evidence, putting things in, things like that.

8 And she kept telling me that she wanted last argument. She
9 thought it was best that she close out the hearing.

10 And, you know, I can't force her to enter any
11 evidence. I couldn't make her enter anything. However, I
12 asked her to enter several things. You know, I asked her
13 -- we discussed my testimony, things like that. And we
14 discussed if we put -- I believe if we put a witness up, it
15 would have killed last argument.

16 Q So that was based on your understanding and
17 discussions with her that that was a trial strategy she
18 chose for you, not to present anything, I want that last
19 argument; that's important, right?

20 A That's what she chose. I wanted to put in evidence.
21 I wanted to put up witnesses. However, Ms. Stevens chose
22 to take the last argument. I'm sitting at trial facing a
23 life sentence. I didn't know that I could stand up and
24 speak and order her to put stuff in or order a witness. I
25 mean, I was just -- I was trying to do it the best I could.

1 Q You don't have any witnesses here today to testify for
2 you, do you?

3 A No, sir.

4 Q Just very briefly, just to refer back to some of the
5 facts. The testimony that was presented by these officers
6 who were involved in this chase. Their testimony -- would
7 you agree was that they showed up very, very shortly after
8 this robbery, within a minute, I think, of when the
9 dispatch was given, right?

10 A I was -- I think I was a couple miles away from the
11 robbery scene when the cop got behind me.

12 Q Okay. And their testimony was within a minute of that
13 dispatch coming out of an armed robbery, they were at the
14 scene right there and saw a car pulling away, right?

15 A Absolutely not.

16 Q That wasn't their testimony?

17 A No.

18 Q They had a quick response time ---

19 A No one said they saw my car leaving the scene of the
20 crime.

21 Q Heading in the opposite direction on the road?

22 A No. They said I was -- Ms. Stevens even verified at
23 trial that the cop -- the first cop got behind me stated he
24 got behind me a mile or two -- it might have been two miles
25 away from it, back behind Shaw Air Force Base.

1 Q And you stopped at one point and get out of the car,
2 right?

3 A I did.

4 Q Jumped back in and kept going, right?

5 A No. I got out and the officer drew a gun on me and
6 started screaming about a weapon. And that's when I got
7 back in the vehicle.

8 MR. CORNEY: I believe that's all the questions I
9 have.

10 MR. BROOKS: No other questions, Judge.

11 THE COURT: Okay. You can step down. Thank you.

12 (The witness leaves the witness stand.)

13 MR. BROOKS: We call Ms. Stevens to the stand.

14 LAUREN STEVENS, being first
15 duly sworn, testified as follows:

16 CLERK: State your name please, and spell your last
17 name for the record.

18 MS. STEVENS: Lauren Boswell Stevens, S-t-e-v-e-n-s.

19 DIRECT EXAMINATION BY MR. BROOKS:

20 Q Ms. Stevens.

21 A Yes.

22 Q How are you?

23 A I'm wonderful, Charles. How are you?

24 Q I'm good. You represented Mr. Lowery as a public
25 defender; is that correct?

1 A I did indeed.

2 Q Did you check out any hospital records?

3 A No, I did not.

4 Q Did you try and get anything about the fact he had a
5 D.U.I. that night?

6 A No, I did not.

7 Q Did you try to bring Trooper Baker in to testify about
8 that?

9 A No, I did not.

10 Q Testify about -- Trooper Baker testify about taking --
11 getting his blood taken and come back with cocaine?

12 A I never received those documents because I did not
13 represent him on the D.U.I.

14 Q Did he, being Mr. Lowery, tell you that he was
15 intoxicated that night and under the influence of drugs?

16 A I remember him telling me that he was under the
17 influence of drugs when he gave his statement. But I don't
18 recall whether he told me he was under the influence of
19 alcohol. I'm not saying he did not, I'm just saying I
20 don't recall.

21 Q Did you -- of course, the argument was made you tried
22 to keep his statement out?

23 A Yes.

24 Q But none of those things, like hospital records or
25 forensic records about his drugs, that was not shown to the

Ms. Stevens - Direct by Mr. Brooks

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1 judge during the Jackson v. Denno hearing?

2 A No, it was not.

3 Q And while you were not representing him on a D.U.I.,
4 you were aware that he had been charged with D.U.I. that
5 evening?

6 A Yes.

7 Q And you had conceded that he was guilty of failure to
8 stop for a blue light because he was trying to run from the
9 police for something else and not what the state was saying
10 he was running from?

11 A Correct.

12 Q But you didn't put in any evidence and talk about
13 there was a D.U.I., to show there was another crime. You
14 didn't do any of that?

15 A I did not mention a D.U.I. specifically, no.

16 Q Did you challenge any of the chain of custody issues
17 that Mr. Lowery has raised here today?

18 A I did bring the chain of custody issues up at trial,
19 yes, but perhaps not all the ones Mr. Lowery has brought
20 forth.

21 Q So if it's not shown in the record, you don't dispute
22 the ones that you didn't bring forward?

23 A Correct.

24 Q Okay. Was he out of jail on bond? Do you recall?

25 A I know that we did get him a \$15,000 surety bond. And

1 I do believe he did get out of jail on that bond.

2 Q Were there any offers in this case?

3 A I do not have any in my file. We were dealing with
4 Harry Connor.

5 Q Did Mr. Lowery tell you about the officer promising
6 him something?

7 A He did tell me that when he gave his statement the
8 officer did make promises.

9 Q Okay. Did you bring in the other officer from that
10 interrogation?

11 A I did not.

12 Q And did you have any private investigator assist you
13 in this case?

14 A I did not.

15 MR. BROOKS: Beg The Court's indulgence, Your Honor.

16 (Pause.)

17 Q Mr. Lowery -- he did indicate to you during trial that
18 he wanted to put in evidence?

19 A No, he did not.

20 Q Is it no he didn't, or perhaps you don't recall?

21 A No, he did not.

22 MR. BROOKS: Beg The Court's indulgence.

23 (Pause.)

24 Q You didn't show any of the pictures from Mr. Lowery's
25 accident when he was taken to Palmetto Richland, you didn't

1 try to get any of those in during the Jackson v. Denno
2 hearing, did you?

3 A No.

4 (Pause.)

5 MR. BROOKS: No other questions, Judge.

6 THE COURT: He was taken to Richland Memorial. Where
7 was the statement taken?

8 MS. STEVENS: At the law enforcement center.

9 THE COURT: What kind of lapse of time was it?

10 MS. STEVENS: Approximately 8 hours.

11 THE COURT: Okay. Thank you. 8 hours from the wreck
12 or 8 hours from the time he leaves the hospital?

13 MS. STEVENS: I think about 8 hours from the time of
14 the wreck.

15 THE COURT: Okay.

16 CROSS EXAMINATION BY MR. CORNEY:

17 Q Ms. Stevens, did you have the opportunity to review
18 your file from your representation of Mr. Lowery before
19 coming today?

20 A Yes, sir, I did.

21 Q Do you recall during initial meetings with Mr. Lowery
22 to discuss the charges he was facing?

23 A Yes.

24 Q Any ballpark you could give us for the number of times
25 you might have met with him during the course of your

1. representation?

2 A We met quite frequently when he was incarcerated.

3 Q And after he was bonded out?

4 A I don't remember meeting quite as often.

5 Q During your meetings with him were you able to go over

6 the charges he was facing and the indictments and elements

7 of those charges?

8 A Yes.

9 Q Did he understand the potential sentences he was
10 facing?

11 A He did.

12 Q At some point in time you were served with the state's
13 notice of intent to seek life without parole?

14 A Correct.

15 Q Okay. Was that something that you discussed with Mr.
16 Lowery?

17 A Yes.

18 Q And he understood the consequences of being convicted
19 at trial of these charges?

20 A Yes.

21 Q What investigation did you do in preparation for this
22 trial?

23 A I looked over the evidence that was submitted to me.

24 There were disks that included the pictures and the video.

25 I actually live very close to Stamey Livestock Road. I

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1 timed the amount of time it would have taken for someone to
2 get from the corner of 378 and Stamey Livestock to where
3 they first saw Mr. Lowery, and read over the statements of
4 the officers.

5 Q Were you able to interview any witnesses prior to
6 going to trial?

7 A No, I did not.

8 Q Do you recall receiving his discovery file from the
9 state?

10 A Yes, I did.

11 Q Is that something you had the opportunity to review
12 with him?

13 A Yes.

14 Q And that included his statement?

15 A Yes.

16 Q Okay. When going over that statement with him, what
17 were your discussions with him regarding that statement?

18 A We discussed that he was not thinking straight when he
19 gave his statement, that he had been offered help or that
20 they had, you know, made him feel like if he cooperated
21 that things would go better for him.

22 Q Okay. At any point in time did he mention to you that
23 he was under the influence of cocaine?

24 A No, he did not.

25 Q So your main issue with that statement was the

1 prescription medication given to him at the hospital?

2 A Yes.

3 Q And that's something that you raised during the

4 Jackson v. Denno hearing?

5 A Yes.

6 Q Do you feel you effectively cross examined the

7 witnesses and presented testimony to present that defense?

8 A Yes.

9 Q Based on your review of the file were you able to
10 develop an opinion regarding the state's ability to prove
11 his guilt at trial beyond a reasonable doubt?

12 A Obviously, the failure to stop for a blue light was
13 not an issue. I really felt like we had a good chance of
14 beating the armed robbery. He and I discussed that. That
15 is one of the reasons that last argument was so important
16 to me, was because I could point out all the discrepancies
17 in the state's evidence. And studies have proven that
18 juries remember the first thing they hear and the last
19 thing they hear. And it's always my thought that I should
20 be the last thing they hear, not the solicitor the first
21 and the last thing they hear.

22 Q Okay. So that was a substantial portion of your trial
23 strategy in this matter?

24 A Yes. I felt like if we conceded the failure to stop
25 for a blue light, that we were showing honesty, that we

1 weren't trying to hide anything or deny the obvious. And
2 that just because he was guilty of failure to stop for a
3 blue light did not mean that he was also guilty of the
4 armed robbery.

5 Q Okay. I think you testified with the judge. You
6 didn't, obviously, introduce any hospital reports
7 pertaining to medications given to Mr. Lowery?

8 A No, I did not.

9 Q Any particular reason you didn't do that?

10 A Because if you put in any sort of evidence whatsoever,
11 you lose the last argument.

12 Q Okay. And that motion to suppress the statement, the
13 Jackson v. Denno hearing, Judge James ultimately said he
14 believed the statement was voluntarily given, but he wanted
15 to leave the weight of that statement to the jury; is that
16 your recollection?

17 A Correct.

18 Q Okay. Do you feel like you adequately prepared to
19 argue that motion at that time?

20 A Yes, I did.

21 Q Okay. And you feel you sufficiently made the argument
22 to suppress that statement?

23 A Yes, I did.

24 Q There's also a motion to suppress a surveillance video
25 tape and I think there was some kind of subsequent C.D.

1 made from that video. Do you recall that?

2 A Yes.

3 Q There's something -- that issue with the date and
4 times of those video tapes?

5 A They were not correct.

6 Q That was something that you brought about. I think
7 you might have even objected to them?

8 A Yes, I did.

9 Q The introduction of those. Okay. Let's talk about
10 the chain of custody for just a minute. That was something
11 that you challenged at trial, right, the chain of custody?

12 A Yes, it was.

13 Q Particularly, the items that were taken from Mr.
14 Lowery's car after the wreck?

15 A Correct.

16 Q There was a period of time from where the wrecking
17 crew had the car in the back of the truck from the time it
18 was brought into the impound; is that the issue with it?

19 A Yes.

20 Q Okay. And they -- there was some -- some chain of
21 custody, I guess, report made on that, correct?

22 A There was some documentation by, I think then he was a
23 patrolman, whereas he's now a detective.

24 Q Okay. And he provided a chain of custody for the
25 portions that were missing prior to that?

- 1 A Yes.
- 2 Q And you cross examined several witnesses as to the
- 3 remaining portion that you -- kind of haziness in that
- 4 chain of custody?
- 5 A I did.
- 6 Q Do you feel that you adequately brought those issues
- 7 up in front of the jury for them to consider?
- 8 A I believe, yes.
- 9 Q Sheronda Houseman (phonetic) was the victim in this
- 10 case. Do you recall her being the victim?
- 11 A Yes, I recognize the name.
- 12 Q And I don't know if I'm pronouncing it correctly or
- 13 not. She was the first witness to be called to the stand
- 14 at trial, right?
- 15 A Correct.
- 16 Q Do you recall the testimony that she gave?
- 17 A It's in the transcript.
- 18 Q Okay. Would it be fair to say that her testimony
- 19 presented was pretty damaging to Mr. Lowery?
- 20 A I believe that being the victim of a crime in and of
- 21 itself would have gotten her sympathy from the jury. She
- 22 seemed very sure at the time. I did challenge some of her
- 23 inconsistencies in my closing argument and at other
- 24 portions during the trial.
- 25 Q Okay. As you just stated, just to make sure that I'm

1 clear, you feel that you effectively cross examined her and
2 brought out the inconsistencies in her testimony?

3 A I did. And one of the things that Mr. Lowery brought
4 up is why didn't I ask her certain questions about
5 identifying him, identifying the clothes, identifying the
6 knife. You do not ever ask a question you do not know the
7 answer to. And if I'd have asked her any of those
8 questions, her answer on the stand could be very different
9 than her answer in a statement or earlier testimony. And
10 if she had changed her story or pointed Mr. Lowery out or
11 any of those things, it would have been much more damaging
12 than any statement she gave right after the robbery
13 occurred.

14 Q So that one was sort of a risk/reward trial strategy?

15 A Exactly.

16 Q Okay. Now, there were numerous officers involved in
17 this case that testified at trial, right?

18 A Correct.

19 Q I think it was something like nine officers that
20 testified?

21 A That sounds about right.

22 Q Okay. Do you recall an officer by the name of J.B.
23 Baker?

24 A No.

25 Q Okay. There were two officers that testified that

1 were present during Mr. Lowery's statement, right? I mean,
2 Marcus Johnson and Teresa Crawford (phonetic)?

3 A Teresa Cokely is the secretary who usually types out
4 the statements.

5 Q Okay. But the two of them both testified at trial as
6 to Mr. Lowery's statement?

7 A Correct.

8 Q There was a Detective Ross that was also present
9 during Mr. Lowery's statement, right?

10 A Correct.

11 Q And was that something that you'd discussed with Mr.
12 Lowery?

13 A Yes, he did tell me there was someone else in the
14 room.

15 Q Mr. Lowery brought to your attention that he felt he
16 had been promised something by Mr. Ross?

17 A Yes.

18 Q Okay. Was there any reason that Mr. Ross wasn't able
19 to testify, wasn't called to testify at trial?

20 A Again, I did not want to lose last argument.

21 Q You cross examined the other officer that was present
22 during the statement, Officer Johnson -- Detective Johnson,
23 pretty extensively on the voluntariness of Mr. Lowery's
24 statement?

25 A Yes, I did.

1 Q Now, Mr. Lowery chose not to testify at trial, right?

2 A Correct.

3 Q And that was something you had discussed with him?

4 A Yes.

5 Q And, again, sticking with your strategy, you were
6 trying to get that last argument, that played into that
7 decision?

8 A Well, defendants really have two decisions that they
9 can make when they go to trial. And that is whether or not
10 to plead guilty and whether or not to testify. Everything
11 else is up to the attorney. And I made my decisions based
12 on what I thought was best for Mr. Lowery.

13 Q Fair to say that ultimately it was his decision not to
14 testify?

15 A Correct.

16 Q And that was after being advised of his right to do so
17 or not do so in his discretion?

18 A Correct.

19 Q Do you feel you sufficiently called reasonable doubt
20 into question based on the facts of the case during the
21 trial?

22 A I do.

23 Q Okay. And at the close of the trial during the jury
24 charge request Judge James agreed to charge the jury on
25 their duty to decide the voluntariness of Mr. Lowery's

1 statement, right?

2 A Correct.

3 Q Okay. So that was something else left up to the jury
4 ultimately?

5 A Correct.

6 Q Did you see any issues of any of the jury charges
7 given that day?

8 A I did not.

9 Q Okay. You felt the reasonable doubt jury charge given
10 was fairly and accurate representation of the law?

11 A Yes, it was based on a state case.

12 Q Do you feel overall you spent sufficient time
13 preparing for this case and presenting Mr. Lowery's defense
14 at trial?

15 A I do indeed.

16 MR. CORNEY: Okay. Beg The Court's indulgence for one
17 minute, Your Honor.

18 (Pause.)

19 Q Now, you said a minute ago to Mr. Brooks that you
20 didn't introduce any pictures of Mr. Lowery after the crash
21 at trial, right?

22 A Correct.

23 Q Do you think that there was sufficient testimony given
24 as to his condition after that wreck?

25 A Yes.

1 Q Okay. So you think the jury and the judge both fairly
2 got a good feel for the kind of condition he was in?

3 A Yes, I do.

4 Q Without the presentation of any photographs?

5 A Correct.

6 MR. CORNEY: That's all the questions I have, Your
7 Honor.

8 THE COURT: Okay. Anything further, Mr. Brooks?

9 MR. BROOKS: Beg The Court's indulgence.

10 (Pause.)

11 MR. BROOKS: No other questions of Ms. Stevens.

12 THE COURT: You may step down.

13 (The witness leaves the witness stand.)

14 THE COURT: Anything else?

15 MR. BROOKS: Judge, my client -- his position in
16 regards to your question of Ms. Stevens about the time
17 between the hospital and the time of the interrogation at
18 law enforcement, his position is that was 7 hours. I
19 believe Ms. Stevens said 8 hours.

20 I don't necessarily want to call him just to talk
21 about the issue of one particular hour. I'm sure The Court
22 would not have him go through that issue. Maybe the Court
23 will concede my client's version that it was 7 hours.

24 THE COURT: Okay. And I'll make a note that he claims
25 it was 7 hours. And I just couldn't tell from the record

1 whether the police had interviewed him in the hospital or
2 whether he was back at the law enforcement center; that's
3 why I asked that. Okay.

4 MR. BROOKS: That's correct. That's the applicant's
5 case, Judge.

6 THE COURT: All right. And I will read this entire
7 record and review the appropriate case law and let you all
8 know.

9 MR. BROOKS: Thank you, Judge.

10 MR. CORNEY: Thank you very much, Your Honor.

11 THE COURT: Thank you.

12 --- End of transcript of record ---

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1 I, the undersigned Dianne A. Rutledge, official court
2 reporter for the Fifth Judicial Circuit of The State of
3 South Carolina, do hereby certify that the foregoing is a
4 true, accurate, and complete transcript of the record of
5 the proceedings had and evidence introduced in the hearing
6 of the captioned case, relative to appeal, in the Circuit
7 Court for Sumter County, South Carolina on the 27th day of
8 October 2011.

9 I do further certify that I am neither of kin,
10 counsel, nor interest to any party hereto.

11

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December 5, 2012

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Court Reporter

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PALMETTO HEALTH RICHLAND
5 Richland Medical Park Drive
Columbia, SC 29203
(803)434-7000

EMERGENCY DEPARTMENT

PATIENT: Trauma, M060879 DICT: R. Preston Wendell, MD
MR #: 01-32-23-06-5 DOB: [REDACTED]
ADMITTED: 11/27/2006 PT.LOC: PD5
ACCOUNT #: [REDACTED]

DATE OF VISITATION: 11/27/2006

ACCOUNT NUMBER: [REDACTED]

Twenty-six-year-old white male seen and evaluated in pod 6 with Dr. Shelton, attending, present and available.

MODE OF ARRIVAL: Helicopter.

PRIMARY CARE PHYSICIAN: No primary care physician.

CHIEF COMPLAINT: Patient motor vehicle collision.

HISTORY OF PRESENT ILLNESS: Patient being chased from police. Per EMS, went head-on through a store wall window. Patient combative at the scene. Was not cooperative, complained of head and chest pain. They do not know, but otherwise, answering some direct questions appropriately, but on our exam, patient complaining of head, neck, and back pain. No trouble breathing. No trouble vomiting.

REVIEW OF SYSTEMS: Limited secondary to patient's cooperation.

SOCIAL HISTORY: Patient will not cooperate with social history.

PAST MEDICAL HISTORY: Says, "I don't know if I have any medical problems."

ALLERGIES: Unknown.

PHYSICAL EXAMINATION:

VITAL SIGNS: Temp not initially done, blood pressure 145/80, pulse 85, respirations between 15 and 20, 100% on room air.

GENERAL APPEARANCE: Patient on C-collar and spinal board, follows commands, is nontoxic.

HEENT: Notable for deviation of nasal septum. There is some minor bleeding around his nose. Otherwise, head is atraumatic. Extraocular movements intact. Pupils equal, round and reactive to light. Conjunctivae clear. TMs are clear. Mid face is stable. Again, nasal bone showing deviation of the septum towards the right nostril.

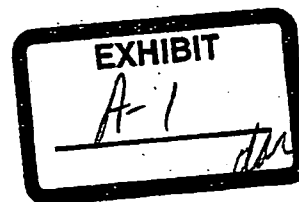
NECK: No step-offs. Mild C-spine tenderness. Trachea midline.

PATIENT: Trauma, M060879

MR #: 01-32-23-06-5

Patient Type: ERR

EMERGENCY DEPARTMENT
Page 1 of 2



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LUNGS: Clear to auscultation bilaterally. Normal respiratory effort.
CARDIOVASCULAR: Regular rate and rhythm, 2+ peripheral pulses.
ABDOMEN: Soft, nontender, nondistended, positive bowel sounds.
MUSCULOSKELETAL: Joints and muscle bellies are notably atraumatic. He does have some mid-thoracic spine tenderness.
SKIN: No rashes, lesions, or wounds.
GU: Patient had good rectal tone, normal-sitting prostate. No gross blood.
NEUROLOGICAL: Cranial nerves 2-12 are intact. Motor and sensation intact. No focal deficits.

MEDICAL DECISION MAKING: Based on patient's presentation, question of altered mental status, and the mechanism, I will do CT scan of the head, C-spine, chest, abdomen, and pelvis and trauma 811 labs to look for traumatic injury.

LABORATORY: Coags were unremarkable. Chem-7 normal. Hemoglobin 16.6. (Alcohol level initially 16, then we did a repeat group of labs and it was less than 10) Initial ABG was unremarkable. CT scans are at this time pending.

EMERGENCY DEPARTMENT COURSE: Patient has been stable, without issue. We will follow up on scans and dispo as indicated.

CLINICAL IMPRESSION:

1. Motor vehicle collision.
2. Nasal septum deviation.
3. Alcohol use.

DISPOSITION: Pending, in accordance with CT results.

ADDENDUM TO PREVIOUSLY-DICTATED ED REPORT. INITIAL DICTATION #2466122.

ATTENDING PHYSICIAN: Stephen L Shelton, MD.

ANCILLARY STUDIES: CT of the face read by myself and surgery team significant for nasal bone and septal fracture with deviation.

EMERGENCY DEPARTMENT COURSE: Continued: The patient was cooperative during his stay in the ED. Had favorable vital signs. No difficulty breathing. Was not complaining of pain. Facial Surgery on call was consulted. They arrived promptly to evaluate the patient. Felt that patient was not in need of urgent reduction or operative repair. Therefore, we felt it safe to discharge the patient in the custody of the police department and have him follow up.

CLINICAL IMPRESSION:

1. Nasal fracture.
2. EtOH use/abuse.
3. Motor vehicle crash.

PATIENT: Trauma, M060879
MR #: 01-32-23-06-5

EMERGENCY DEPARTMENT
Page 2 of 2

PALMETTO HEALTH RICHLAND
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I discussed the assessment and plan with the attending physician who was present in the ED. I investigated the patient's medical record.

DISPOSITION:

1. The patient was discharged home.
2. Provided a motor vehicle crash fact sheet.
3. The patient is to follow up with Dr. Lagrasso in 7 to 10 days at 2 Medical Park. Please call 256-2657 for an appointment.
4. Tylenol as needed for pain.
5. Return to the Emergency Department for difficulty breathing, bleeding, fever, vomiting, or other concerns. These discharge instructions were per Facial Trauma consult.

Reviewed and agree with above note

Dictated by: R. Preston Wendell, MD

RPW:hs edited 11/27/2006

D: 11/27/2006 5:47 A T: 11/27/2006 2:46 P

Job #: 000466122/466235 T Job #: 587159/588599

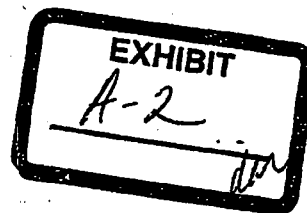
Doc #: 939413

cc: Stephen L Shelton, MD

LABORATORY REPORT

TOXICOLOGY DEPARTMENT

SLED CASE NO. : L06-16585



SLED No :L06-16585

Page 2 of 2

3/19/07

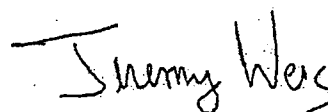
Screen by Fluorescence Polarization Immunoassay (FPIA)

Analyte	Result	Units	Threshold
Cocaine Metabolite	Positive	mg/L	0.10
Opiates	Negative	mg/L	0.20

Analysis by Gas Chromatography/Mass Spectrometry (GC/MS)

Analyte	Result	Units	Threshold
Benzoylgonine	0.45	mg/L	

Synonyms: BE, Cocaine metabolite/hydrolysis product

Jeremy J. Weis
Forensic Toxicologist

Biological specimens processed for testing which are not consumed during analysis will be maintained for 180 days from the completion date of the analysis and then destroyed unless otherwise notified.



P.O. Box 21398, Columbia, South Carolina 29221-1398 Phone (803) 896-7300 Fax (803) 896-7351

figures or errors that would have supported trial counsel argument on
petitioners condition from night of arrest



EXHIBIT

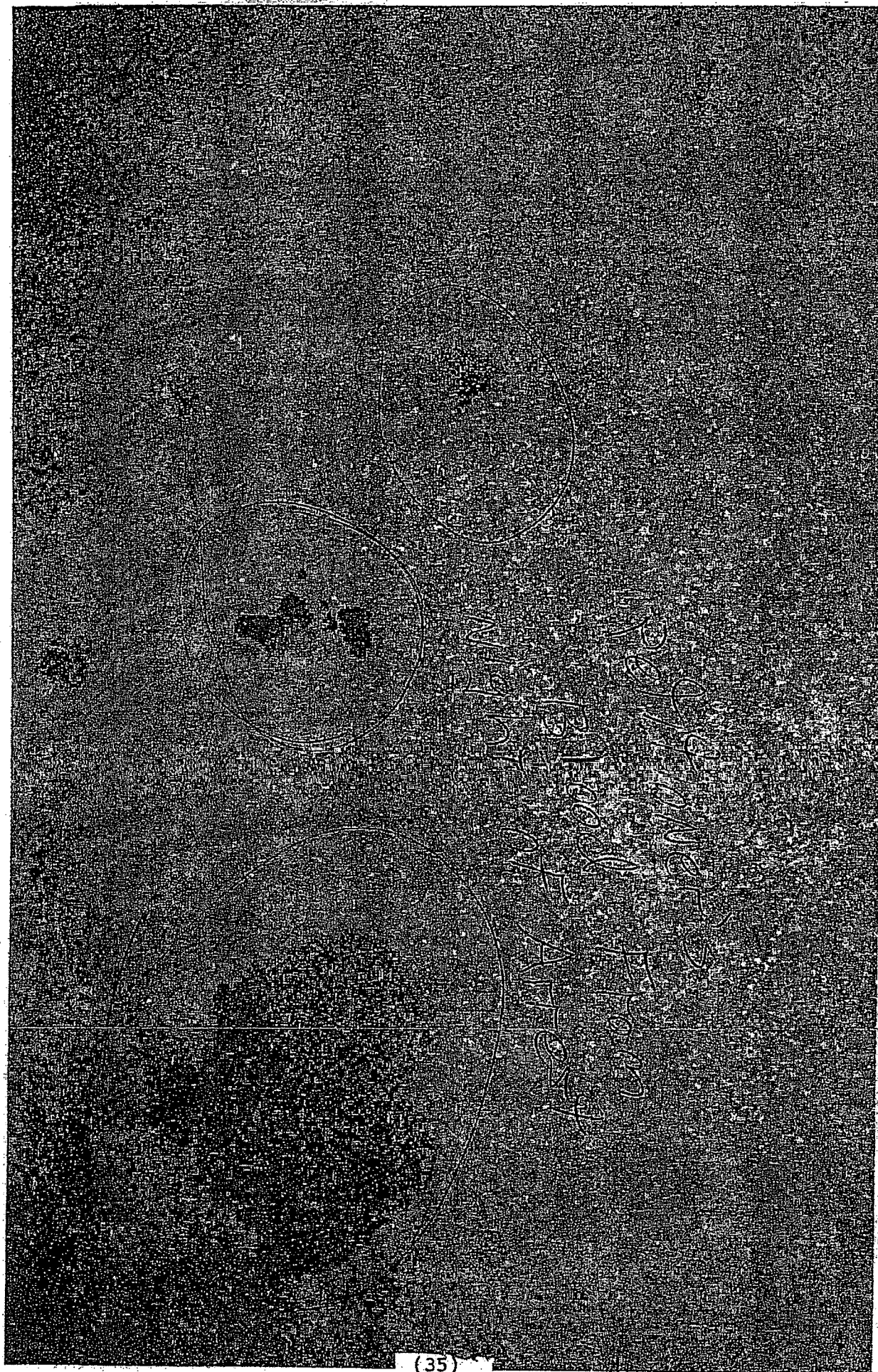
A-3

per

5
pictures to support trial counsel argument



pictures to support trial counsel argument



327
pictures to support trial counsel argument



PICTURES OF PETITIONER'S TRUCK FROM WRECK THE NIGHT OF ARREST
DO SHOW JURY HOW BAD IT WAS



pictures of the store ~~the~~ petitioner wrecked into the night of arrest.





**City of Sumter
Police Department**

*Patty Jaye Garrett Patterson
Chief of Police*

107 East Hampton Avenue
Sumter, SC 29150

Phone (803) 436-2737
FAX (803) 436-2084

ppatterson@sumter-sc.com

*Commitment to
Service Above Self*



A NATIONALLY ACCREDITED
LAW ENFORCEMENT AGENCY

March 28, 2011

(Mark J. Lowery, Jr.)
#281488

Broad River Correctional Institute
4460 Broad River Road
Columbia, SC 29210

Pursuant to your request, attached please find Sumter Police Department General Orders 203 and 216.



SUMTER POLICE DEPARTMENT

General Order 203	Date of Issue 11-20-91	Revision Date 07-15-2005	Pages 5	General Order 203
Subject: WARRANTLESS SEARCH PROCEDURES		Rescinds:		
Reference: CALEA 1.2.4, 1.2.8		Approved:		

PURPOSE

To provide guidelines and procedures officers are to follow in performing warrantless searches.

POLICY

It is the policy of this department to provide all protection afforded to all citizens under the Constitution when performing searches. If at all practical a search warrant should be obtained. Searches without warrant are inherently suspect and, absent a clear exception which allows warrantless searches, a court is more likely to uphold a search conducted under the authority of a warrant. The Department recognizes that time restraints or the need for immediate action does not always allow an officer to obtain a search warrant. Therefore, an officer may conduct a search and seizure under certain conditions even though a warrant has not been obtained: (1) search incident to arrest; (2) consent search; (3) search in exigent or exceptional circumstances; (4) motor vehicle exception; (5) plain view; (6) inventory searches.

I. SEARCH INCIDENT TO ARREST

A police officer may search an arrested person, subject to the following conditions:

1. The arrest is lawful and the search is reasonably related to the circumstances of the arrest.
2. The search is conducted for the purpose of seizing fruits, instrumentality's, contraband, and other evidence of the crime for which the arrest was made, and to prevent destruction or concealment of evidence or to remove weapons or dangerous instrumentality's that the arrested person might use to resist arrest or affect his escape.
3. The arrest is not an excuse to conduct a search.
4. The search is limited in scope to the person of the suspect and the immediate surrounding area. Immediate surrounding area means that area from which the suspect can either obtain a weapon or destroy evidence.
5. The search is substantially contemporaneous with the arrest and conducted in the immediate vicinity of the arrest. An exception to this procedure is that an arrested person may be more thoroughly searched at the corrections center prior to lock up.
6. An officer conducting a search incident to arrest (or by search warrant) may use a degree of force reasonably necessary to:

- a. Protect himself and others present.
- b. Prevent escape.
- c. Prevent the destruction of evidence.

- 7. A search may be made of articles actually in possession of the arrested person and clothing worn at the time of the arrest if search is related to the offense for which the arrest was made.

II. SEARCH BY CONSENT

Consent to search without a warrant may be given in writing or orally. This consent is an abandonment of a Constitutional Right and therefore, will be closely scrutinized. The following considerations are to be satisfied:

- 1. Consent cannot be presumed from silence.
- 2. Consent is to be specifically and intelligently given in clear concise language. Do not accept a nod or any slang phrase that may be subject to alternate meanings.
- 3. Consent must be given freely, knowingly, voluntarily, and without any coercion, intimidation, or threat. Officers must avoid even the appearance of intimidation, threat, or duress.
- 4. Consent is to be given by a person who has immediate right of possession and control of the premises. If there is any doubt as to who has the immediate right of possession and control of the premises/property, a search warrant should be obtained.
- 5. Consent is to be obtained without misrepresentation of fraud. A consent obtained by trick, duress, or misrepresentation voids the consent and makes the evidence inadmissible.
- 6. Consent is to be obtained prior to search. Prior to obtaining consent to search, the police officers must identify themselves and notify the suspect(s) or person(s) in control of the property of the right to refuse.
- 7. Consent is to be limited to the area specified. Consent may be revoked at anytime and the search will cease immediately upon notice of revocation. Evidence found prior to revocation may be retained and used as a basis for immediate arrest or as probable cause to obtain an arrest warrant.

III. SEARCH IN EXIGENT/EXCEPTIONAL CIRCUMSTANCES

An officer may conduct a search without a search warrant when faced with an emergency situation where delay would endanger the officer or others, or where delay will result in removal or destruction of evidence. This rule allows a search without consent, arrest, or search warrant. Exigent circumstances are those which present a "compelling need for immediate official action and a risk that the delay inherent in obtaining a warrant will present a substantial threat if imminent danger to life or public safety." It is an emergency rule only and should not be relied upon in any case where there is time to get a warrant. Exigent/exceptional circumstances include the right to enter and search when in "Hot Pursuit" of a felon if there is reasonable cause to believe that the felon is therein. Exigent/exceptional circumstances may also exist when a stop and frisk results in probable cause for a complete search. (See G.O. 202)

IV. SEARCH OF MOTOR VEHICLES

Searches of motor vehicles should be conducted in accordance with the

following procedures:

1. If at all practical a search warrant should be obtained since the court is more likely to uphold a search conducted under the authority of a warrant. The issuance of a traffic citation is not considered an arrest and, absent other facts and circumstances, does not justify the search of the offender or his vehicle.
2. Practical consideration often dictate that a search of a motor vehicle be conducted without a search warrant. A movable vehicle creates the possibility that it might be transported before a warrant can be obtained. A warrantless search of a motor vehicle is authorized when:
 - a. There is probable cause to believe that there is evidence in the vehicle.
 - b. That such evidence may be destroyed or concealed.
 - c. The vehicle is moving or is capable of being moved out of the jurisdiction.
 - d. If probable cause exists to believe that a motor vehicle contains contraband somewhere in the vehicle, but not in any particular place, then the "Automobile Exception" comes into play and the entire vehicle, including closed containers found in the vehicle, may be searched without a warrant. Containers searched must be a likely repository for the item being sought.
3. If a lawful search of a motor vehicle is conducted without a warrant, anything of evidentiary value is admissible whether or not it is related to the arrest. For example, if an officer is justified in searching an automobile for weapons, and narcotics are found, such narcotics are admissible as evidence.

V. PLAIN VIEW SEARCHES

- A. In certain limited circumstances, a Law Enforcement Officer may make a warrantless seizure of objects in plain view. Three conditions, however, have to be met before the plain view doctrine is applicable:
 1. The initial intrusion, which afforded the view, must have been lawful.
 2. Discovery of the evidence must have been inadvertent.
 3. The incriminating nature of the evidence must have been immediately apparent.
- B. Whenever an officer, in good faith, enters upon private premises in the official performance of his duties, he is not a trespasser. Therefore, anything that he observes in plain view is subject to seizure, without a warrant. In such cases, the usual requirements of search and seizure are not necessary because no "search" is conducted. A "search" implies looking into hidden places for concealed items. It is not a search to observe articles that are open to plain view. It is also permissible for an officer to use a flashlight to make such observations. An observant officer, using the "plain view" doctrine can often be successful in recovering stolen property, unlawful drugs or weapons. Areas such as open fields, streets or roadways may be searched without a warrant. "Curtilage", the immediate yard or out - buildings of a dwelling house is not considered open fields. Any object, person, or activity that can be detected by the five senses from (1) public property, (2) from open fields, (3) or from lawful presence on private property is considered to be in plain view.

VI. INVENTORY SEARCHES

- A. During booking, routine inventory searches of the subject, the

subject's property, and the subject's impounded vehicle, may be searched without a warrant. The justification for such routine searches is the legitimate interest in protecting the confinement area and the arrestee, and in facilitating the administrative handling of personal belongings during incarceration. Keep in mind that an individual taken into protective custody is not an arrestee. Limited inventory searches are permissible. However, they are limited to obtaining identification or to reduce the threat of injury to persons. Large containers such as plastic garbage bags, etc., in the possession of an individual taken into protective custody may be searched without a warrant. This is because objects in the possession of the individual taken into protective custody may pose a threat of injury to persons even if the object is taken into police custody. Protection of yourself and others, therefore, is a valid reason for such a limited search.

- B. A lawful inventory search of a motor vehicle may be conducted without a warrant when the motor vehicle is lawfully impounded by the police if ownership is in question, where the vehicle has been involved in a crime. An inventory search of a motor vehicle must be non-investigatory, and be designed to protect the interest of the property owner, the police, and society. It shall be limited to unlocked areas and or containers, although a search may be conducted of the glove compartment and the trunk. An inventory search does not justify or support numerous subsequent searches without a search warrant.

VII. STRIP AND BODY CAVITY SEARCHES

A. STRIP SEARCH

If an arresting officer has reasonable suspicion that a suspect may be armed or possess contraband that cannot be detected during a pat-down, the officer may perform a strip search, with supervisory approval. Strip searches shall be conducted pursuant to a search warrant or incident to arrest only. Strip searches will not be conducted for traffic violations or any other minor violations of law. The following procedures shall be followed when conducting a strip search:

1. The search will be conducted in a room that has controlled access out of public view.
2. Two officers of the same sex as the suspect will conduct the search.
3. The suspect will be required to disrobe with no assistance from the officers.
4. The officers shall be attentive to any contraband or weapons that may be present while the suspect disrobes.
5. Upon completion of the search the suspect will be required to clothe him/herself with no assistance from the officers.
6. The strip search shall be fully documented in the incident report.

B. BODY CAVITY SEARCHES

Should visual inspection of an arrested person during a strip search and/or other information lead an officer to believe that the suspect is concealing a weapon, evidence or contraband within a body cavity, other than the mouth, the following procedures will be followed:

1. The officer will inform the arrested person of the intention

to conduct a body cavity search, thus giving the subject the opportunity to surrender any contraband material.

2. The arrested person will be kept under constant surveillance until the search is conducted in order to prevent the subject from destroying evidence or contraband.
3. The officer will consult with his/her immediate supervisor to determine whether probable cause exist to seek a search warrant for a body cavity search.
4. If probable cause exist for a body cavity search, an affidavit for a search warrant will be prepared that clearly defines the nature of the alleged offense and the basis for the officer's probable cause.
5. Body cavity searches will be conducted in a controlled environment which provides adequate protection of the arrested person's privacy.
6. On the basis of a search warrant, a body cavity search will be performed by medically trained personnel and witnessed by two officers of the same sex as the suspect.
7. Reasonable force may be used to overcome resistance to accomplish a body cavity search incidental to a search warrant.
8. The body cavity search will be fully documented in the incident report.

SUMTER POLICE DEPARTMENT

General Order 216	Date of Issue 05-31-94	Revision Date 10-1-07	Pages 11	General Order 216
Subject: EVIDENCE AND PROPERTY HANDLING AND CONTROL		Rescinds:		
Reference: CALEA 84.1.1 - 84.1.7, 83.2.1, 83.2.7 - 83.3.2		Approved:		

PURPOSE

To establish the proper methods for the packaging, storage, and disposition of evidence and found property.

POLICY

The proper collection, preservation, and handling of physical evidence is becoming increasingly important. [The "Chain of Custody" from recovery to the time of court presentation is being carefully scrutinized by the courts.] Thus the proper handling of physical evidence may be a determining factor in the successful prosecution of criminal cases. To insure that the physical evidence collected by Sumter Police Department personnel will meet the requirements of the courts, it is necessary to establish standard procedures which will permit the proper collection and preservation of evidence. Found property and confiscated property, while not as critical from a judicial standpoint, must be handled with equal diligence to insure its proper disposition. [All property shall be the responsibility of the person accepting the property until such time as the property is delivered to the Evidence Technician.]

DEFINITIONS

EVIDENCE - Any item of property seized by an officer that is directly related to a case under investigation; the seizure of which is intended for use in the identification of suspect, and or in court presentation in that case.

FOUND PROPERTY - Any lawful item of property, the control of which is assumed by an officer for the purpose of returning the property to its rightful owner, whether the owner is known or unknown.

CONFISCATED PROPERTY - Any item of property seized by an officer that does not meet the criteria above for evidence or found property.

I. EVIDENCE HANDLING PROCEDURES

- A. Officers involved in the evidence collection process should use discretion in collecting evidence. Evidence storage space is critical; therefore, only items of sound evidentiary value should be collected.
- B. Any evidence that is collected or comes into the possession of an officer will be given to the Evidence Technician or placed in an evidence locker as soon as possible with a Completed Chain of Custody Form and an Incident Report. Under no circumstances will an officer store evidence in a desk drawer, vehicle, or at home. All evidence will be turned into

the evidence control system prior to an officer completing his tour of duty.

- C. The Evidence Technician will log all such evidence into the Departments records system prior to ending his/her tour of duty. Exceptions to this requirement are weekends, holidays, illness, or when the amount of evidence received precludes entering all evidence into the records system. In these instances evidence will be secured in the evidence room and entered into the system as soon as possible upon return to duty.
- D. Evidence will not be accepted if the following guidelines are not followed. The evidence will be returned to the Shift Supervisor to ensure procedures are followed and then resubmitted.

II. PACKAGING OF EVIDENCE

- A. There are several different types of packing materials that can be used such as plastic bags, paper bags, biohazard bags, envelopes, boxes and string. All of these come in different sizes. The packaging material should come as close to fitting the object as possible. This makes the evidence look neater when taken to court and allows for easier storage. All packing materials are located in the patrol room. If a problem is encountered in packing an item of evidence notify the Shift Supervisor, Evidence Technician, or Forensic Technician who can assist you in packing the item(s). [A Chain of Custody Form will be initiated by the officer whenever evidence is turned into the evidence control system.] [An incident report or lieutenant's report must be submitted with the Chain of Custody Form. A copy of the Chain of Custody Form must be attached to the police report (pink copy) and submitted through normal routing procedures.] The following are general guidelines to be followed for the packaging of evidence:

1. If practicable, (each item of evidence will be initialed by the seizing officer, dated, and case number written on the item or sealed in a box or bag with initials, date and case number) (use evidence sealing tape whenever practical).
3. (All evidence will be packaged separately and will not be placed in the same bag as any other evidence to prevent any cross contamination of the evidence.)
4. If more than one container has evidence, (show ownership to each container on the Chain of Custody Form) and on the evidence itself.
5. Liquids - No flammable liquids will be brought into the police department. If there is a flammable liquid for evidence either the Forensic Technician or the Evidence Technician will be notified.

B. DRUGS

1. Be very careful when handling drugs as they can be absorbed through the skin.
2. Drug evidence will be separated from all other evidence. A separate Chain of Custody Form and copy of

- the incident report will be submitted.
3. Different type drugs will be placed in different bags to prevent cross contamination. Each bag will be sealed with evidence tape, initialed, dated, and identified with Case Number.
4. If large amounts of narcotics are taken, the OCVC unit will be notified immediately.
5. All drugs, except marijuana, that have a suspect and require analysis at SLED must be packaged in a SLED BEST Kit by the initiating officer.

C. TOOLS

1. Evidence tags, when used, will be attached by a piece of string, wire, or zip tie not with tape.
2. (Officer making the seizure will mark the tool with the officer's initials and date) in a place that will not interfere with other markings that might be important as evidence.
3. If there are markings on the tool to be preserved as evidence, wrap the tool in paper. Also note same on the Chain of Custody Form so it can be examined.

D. WEAPONS

1. All firearms will have an NCIC check made and a copy of the teletype will be attached to the Chain of Custody Form and incident report.
2. If there is not a serial number on the firearm it will be noted on the Chain of Custody Form.
3. All ammo will be placed in a separate bag from the firearm.
4. All firearms will normally be unloaded before being placed into evidence. If the weapon cannot or is not unloaded in order to preserve evidence (i.e. fingerprints) it shall be placed in a safe condition and clearly identified as a loaded weapon and noted on the Chain of Custody Form.
5. Evidence tags, when used, will be attached by string, wire, or zip ties, not with tape.

E. BLOODY CLOTHING/FABRICS

1. Wet items will not be placed in a plastic bag as this causes rapid decomposition and destroys the evidence.
2. If an officer obtains wet clothing the officer will immediately notify the Forensic Technician so the clothing may be properly dried. The officer will have the Chain of Custody Form ready to be turned in along with all paperwork.
3. Bags containing clothing will be individually labeled on the outside with the case number, item description, and victim/suspect name, if available.

F. RAPE EVIDENCE

1. One piece of evidence per bag (to prevent cross contamination).
2. Evidence that must be refrigerated must be processed at once.

3. Notify the Evidence Technician or Forensics Technician at once of any rape evidence so it may be placed in the refrigerator. The evidence may be stored temporarily in the evidence locker equipped with a cooler.

G. DOCUMENTS (checks, notes, etc.)

1. The document is to be placed in a paper envelope. The document is to be handled very carefully as fingerprints can still be obtained. Handle the document only by the edges, if available tweezers should be used.
2. Place only one document per envelope.
3. Do not staple or tape the document to anything. Doing this can destroy pieces of evidence that may be important.

H. PERISHABLE EVIDENCE

1. Perishable evidence such as meat, live plants, etc. will not be kept. A photo will be taken of the item(s) and the item(s) returned to the owner or disposed of. The photo will be attached to the Chain of Custody Form.
2. Perishable evidence such as blood or rape evidence will be turned over to the Evidence Technician as soon as possible for refrigeration.

I. MONEY

1. Any large amounts of money (over \$1000.00) will be turned over to the Evidence Technician immediately.
2. To annotate the Chain of Custody Form the money will be broken down into denominations. For example: (2) two twenty dollar bills, (5) five one dollar bills, (10) ten dimes. Total \$46.00.
3. Any unusual markings on the money will be noted.
4. The money will be put in a zip-loc bag and sealed with evidence sealing tape, (initialed, dated, and case number.)

III. EVIDENCE LOCKERS

Evidence lockers, with locks, are located in the Patrol Locker Room and are to be used for the temporary storage of found, recovered or evidentiary property during periods when the Evidence Technician is not available. The following procedures will be adhered to when placing items in the lockers:

1. These lockers will remain unlocked until used.
2. All property placed in these lockers will be properly packaged and paper work completed.
3. Once locked, the Evidence Technician or his alternate will be the only person with access. Officers will not have keys to get back into the lockers.
4. Cash, in excess of \$1,000, will not be placed in the evidence lockers. Officers will retain custody of the money and contact the Evidence Technician, who will secure the money in

the evidence room.

5. Officers will retain custody of oversized items, which cannot be placed in the evidence lockers, and contact the Evidence Technician, who will secure the evidence. At no time will evidence be taken home, stored in vehicles, or kept in desk drawers.
6. Items of evidence that require refrigeration, i.e. rape kits, blood samples, urine, shall be placed in the ice chest provided with ice. The Evidence Technician or Forensics Technician shall be notified that evidence requiring refrigeration has been placed in the lockers and needs to be transferred to the refrigerator in the evidence room. This type of evidence will not be placed in any other refrigerator within the Department.

IV. EVIDENCE STORAGE AREAS

The primary evidence storage is the evidence room located in the Investigative Services Division. This room is secured with a key lock and has an electronic intrusive device installed. Access to evidence storage areas is limited to the Evidence Technician, Forensic Technician, and Commander of Investigative Support Services. Unauthorized persons will not enter evidence storage areas unless they are accompanied by one of the individuals identified above. The following items will be stored in the following locations:

- A. Weapons will be stored in the wire cage installed for their security. The keys will be removed and stored in a separate location within the evidence room.
- B. Drugs will be stored in the wire cage installed for their security. The keys will be removed and stored in a separate location within the evidence room.
- C. Money will be stored in the safe installed for their security. The keys and combination will be removed and stored in a separate location within the evidence room.
- D. Perishable items will be stored in the refrigerator located in the evidence room.
- E. The evidence lockers located in the locker room are designated as temporary storage lockers.
- F. The fenced in area (bike rack) located at Public Works (City Impound) is designated for storage of bicycles and large items of found property that cannot be stored in the evidence room and does not meet the requirements of being stored in the City Impound secure area.
- G. Large items of evidence, that cannot be stored in the evidence room, confiscated, seized, and/or impounded vehicles, will be stored in the fenced in area located at Public Works (City Impound). (Vehicles may be stored outside of the fenced in area if they don't require the extra security or security for further processing.) The Evidence Technician or Forensic Technician will be notified when items are to be put in this area. (All impounded/seized vehicles will be entered into evidence custody by use of the Chain of Custody Form (keys are to be removed and turned into evidence).)
- H. Vehicles seized for drug related or traffic related incidents will be the responsibility of the OCVC unit or traffic unit depending on the type of incident. They will be responsible

for the care and disposition of the vehicle. Vehicles involved in criminal incidents will be the responsibility of ISD, primarily the investigating detective. Vehicles will be tagged to include case number, incident type, date, seizing officer's name as a minimum.

V. STATUS OF PROPERTY

A record keeping system (shall be maintained by the Evidence Technician) which will reflect the status of (all property held by the Department,) to include:

1. The current location of the property
2. The date and time property was received and released or otherwise disposed
3. The Chain of Custody Form for each item
4. The date and results of all inspections, inventories, or audits.

VI. RECORDS

(All property) held by the Department, including found, recovered, or evidentiary property, (shall be accompanied by a Chain of Custody Form and Incident report.) The Chain of Custody Form filing procedure will be accomplished in the following manner:

1. (Complete the form accurately, legibly, and provide all required information.)
2. Label each item on the form by number designation, i.e., 1 then 2, then 3, etc.
3. Provide sufficient information for identification purposes; indicate quantity, description and the proper routing instructions.
4. Provide sufficient special instructions when necessary for the Evidence Technician to effectively process the item(s).
5. File the original copy.
6. (Secure the property in the appropriate area for storage.)

VII. PROCEDURES FOR REMOVING EVIDENCE FROM STORAGE

A. Officers may remove evidence from storage for court purposes and/or investigative purposes.

1. (Officers removing evidence for any purpose will sign for the evidence on the Chain of Custody Form and indicate the purpose of the removal.)
2. All evidence removed from storage will be returned by the officer removing the evidence. (In the event) it is necessary to leave the evidence with the court, (the officer or (employee removing the evidence) will (secure a signed receipt from an official of the court and return it to the Evidence Technician.)

B. On those occasions when an officer attempts to return evidence that has previously been checked out for court or other purposes and the evidence room is closed the officer will place the evidence in an evidence locker located in the locker room. The Chain of Custody Form will be signed when the Evidence Technician retrieves the returned evidence, he/she will sign the return portion of the report.

VIII. EVIDENCE TRANSMITTAL TO THE CRIME LAB

The Evidence Technician will be responsible for the submission of evidence to the SLED Forensic Lab for examination. Perishable evidence (for example, semen, blood, evidence requiring DNA analysis etc.) should be transported to SLED as soon as possible. The Evidence Technician will be responsible for refrigerating or air drying items of evidence and transporting to the lab.

- A. The officer submitting evidence to the Evidence Technician and filing the related Chain of Custody Form is responsible for requesting laboratory examinations.
- B. When an investigator has been assigned to a case where evidence has been submitted to the crime lab for analysis, he shall be responsible for monitoring the progress of the evidence through lab analysis, case adjudication and property disposal.
- C. When evidence is to be transferred to the SLED Forensic Lab for analysis or other test, a South Carolina Law Enforcement Division (SLED) Forensic Sciences Request Form will be completed. Once an item is transferred to SLED for analysis this form is the Departments receipt for the item(s). The assignment of the evidence to the SLED Forensic Lab for analysis must be recorded in the applicable sections of the Chain of Custody Form.
- D. The SLED Forensic Lab provides a written report of laboratory findings for all requests submitted for laboratory examination.
- E. Written reports of laboratory findings received from the SLED Forensic Lab are to be filed with the case file and ready to be presented in court.
- F. When submitting items for DNA analysis submit known blood standards from victim and suspect if possible. Submit only potentially probative evidence. Items that cannot be used to associate the victim or suspect with the crime should not be submitted.
- G. In sexual assault cases, submit the rape kit and panties first. Any bed linens and clothing should be retained by the agency until further notice from SLED. For further guidance on submitting evidence to SLED see the SLED Evidence Submission Manual.

IX. FOUND PROPERTY

- A. Found property will be handled with the same care as evidence.
- B. Officers finding or receiving found property will first attempt to locate the owner before entering it into the Property Control System. Telephone directory, driver's license, ID cards, credit cards, etc. should be used to locate the owner of found property.
- C. Found property, returned to the owner, will be receipted for on a Lost and Found Property Form.

- D. Found property, not returned to the owner, will be submitted to the Evidence Section with a Chain of Custody Form for processing along with a Lost and Found Property Form.
- E. Bicycles will be tagged by the officer and placed in the bicycle storage area. A copy of the Bicycle Recovery Form will be completed and sent to the ISD Commander/Juvenile unit.

X. INSPECTIONS

- A. At least quarterly the ISS Commander or his designee will conduct an inspection of the Property/Evidence Room to insure compliance to all property control procedures.

Specifically, the inspections should determine that:

1. Provisions of agency directives on property control procedures are being followed,
 2. The Property/Evidence Room is maintained in a clean and orderly fashion,
 3. Property is being protected from damage or deterioration,
 4. Property accountability procedures are being maintained,
 5. (Property having no further evidentiary value is being disposed of promptly.)
- B. Whenever a new Evidence Custodian is designated, a joint inventory of property will be conducted. The purpose of this inventory is to insure that records are correct and properly annotated and to ensure the continuity of custody. During the inventory, a sufficient number of property records will be reviewed with respect to proper documentation and accountability. This inventory will be conducted jointly by the newly designated Evidence Custodian, the outgoing Evidence Custodian (if available) and the ISS Commander. All discrepancies will be documented prior to assumption of property accountability by the new custodian.
 - C. An annual audit of property and property management records will be conducted by a supervisor, designated by the Chief of Police, who is not routinely or directly connected with the property control process. The purpose of this audit is to ensure the integrity of the system and does not require a complete inventory of the property room.
 - D. Unannounced inspections of the property storage areas will be conducted as directed by the Chief of Police. The purpose of these inspections will be to ensure that property accountability and security procedures are being followed properly. This may be accomplished by the random comparison of records with physical property.

XI. DISPOSITION OF PROPERTY

Final disposition of found, recovered and/or evidentiary property will be accomplished after legal requirements have been satisfied. (Generally, disposal will be accomplished in the following manner:)

A. Evidentiary Property

1. Guilty Findings

a. General Sessions cases

If the offender "Pled Guilty" and was "Found Guilty", disposal is permitted 30 days after the finding. (If the offender "Pled Not Guilty" and was "Found Guilty", disposal will be determined by the Solicitor's Office. Impoundment may be necessary in the event the verdict is appealed.)

b. City Court Cases

Immediate disposal after 10 days from final court date for appeal purposes.

2. Not Guilty Findings

a. General Sessions or City Court Cases

Disposal will be accomplished according to the order of the presiding judge. If "no order of the court" is issued and the evidence is not contraband, it shall be returned to the owner. If the owner is not known, the disposal will be accomplished in the same manner as unclaimed property.

In the above circumstances, it shall be the responsibility of the Court Officer to obtain a disposal order from either the judge or the Solicitor.

3. On-going Investigations/No Arrest Made

a. General Sessions Court

Hold for six (6) months and then consult with the Investigative Services Division Commander to determine the continued status of the case.

b. City Court

Hold for three (3) months and then consult with Investigative Services Division Commander to confirm that disposal of the property is permissible.

4. Special Circumstances

In instances when the evidentiary property is very bulky, dangerous to store, prone to easy deterioration, needs special preservatives, or is of essential use to the owner, the Solicitor's Office must be contacted for advice and guidance.

If return to the owner or destruction is permitted, photographs of the property will be taken and destructive identifiers recorded on the Chain of

Custody Form.

5. Manner of Destruction

- a. Alcoholic beverages and food stuffs shall be flushed or crushed.
- b. Handguns/rifles/shotguns shall be destroyed by either a melting or cutting process, or a combination of both (witnessed by the Evidence Technician and one other member of the Department). Legitimate handguns, shotguns and rifles may be auctioned or traded to businesses possessing a valid Federal Firearms License.
- c. Drugs are taken to SLED or alternate facility by the Evidence Technician and incinerated (witnessed by a SLED agent, Evidence Technician at SLED or by Evidence Technician and another Department member if at an alternate location).
- d. All other property shall be destroyed by burning, crushing or shredding.

The Evidence Technician will attest to the destruction by signing, dating and naming the place of destruction on the Evidence Inventory and Chain of Custody Form and/or by written letter.

B. Recovered/Found Property (Non-Contraband) (84.1.1f)

1. Recovered/found property (non-contraband) is property in the custody of the Department's Evidence Technician that can be legally possessed by a U.S. or naturalized citizen.
2. Disposal of this type of property may be accomplished by one of the following methods:
 - a. Property believed to be abandoned, lost, stolen, or otherwise illegally possessed shall be returned to the rightful owner upon reasonable and satisfactory proof of ownership.
 - b. If the rightful owner cannot be identified within sixty (60) days, the Department may affect the sale of the property for cash by means of a public auction. Notice of the auction will be published at least twice (2) in the local newspaper 15 days prior to the auction.
 - c. The owner or other person(s) entitled to possession of such property may claim and recover possession at any time before the public auction upon providing reasonable and satisfactory proof of ownership or right to possession and after reimbursing the Department for all reasonable expenses involved in the custody of property.
 - d. In lieu of an on site public auction the use of authorized internet auction companies may be used.

C. Recovered/Found Property (Contraband)

Disposal will be effected in accordance with Section XI. A. 5. of this directive.

XIII. CIVIL PROCESS

From time to time real and personal property is acquired through civil procedures initiated as a result of criminal arrest. In such proceedings, the Department is represented by the State Attorney General, the Third Circuit Solicitor, or the Department's Attorney as designee of the Attorney General or Solicitor. Throughout the proceedings the property will be maintained in accordance with State Law with final disposition of the property determined by court order.

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

RECORDED IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
2012 MAY 18 PM 12:28

2010-CP-43-00803

Mark Lowery, Jr., #281488,

JAMES L. DUFFELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

CERTIFIED TRUE COPY
OF ORIGINAL FILE

Sherry H. Hester
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 14, 2010. The Respondent made a Return and Motion to Dismiss on February 4, 2011, requesting the application be summarily dismissed for a failure to set forth cognizable grounds for post-conviction relief. Applicant thereafter amended his application with a brief filed September 12, 2011. An evidentiary hearing into the matter was convened on Thursday, February 16, 2012, at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Charles T. Brooks, III, Esquire. The Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying was Applicant's trial counsel, Lauren Stevens, Esquire ("counsel"). This Court also had before it a copy of the transcript of the proceedings against the Applicant, the records of the Sumter County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter

County Clerk of Court. The Applicant was indicted at the February 2007 term of the Sumter County Grand Jury for Armed Robbery, Failure to Stop for a Blue Light and Possession of a Knife During the Commission of a Violent Crime (2007-GS-43-0206). Lauren Stevens, Esquire, represented Applicant on the charges. On September 10, 2007 Applicant proceeded to jury trial before The Honorable George C. James, Jr., where he was convicted of all charges as indicted. Judge James sentenced Applicant to life imprisonment without parole for Armed Robbery, five (5) years imprisonment for the Possession of a Knife and three (3) years imprisonment for the Failure to Stop, all sentences to run concurrently.

A Notice of Appeal was filed and an appeal perfected. Following the submission of an Anders brief on Applicant's behalf by Robert Pachak, Esquire, of the Office of Appellate Defense, the South Carolina Court of Appeals dismissed the appeal by order dated November 19, 2009. State v. Lowery, Op. No. 09-UP-537 (S.C. Ct. App. filed November 19, 2009). The Remittitur was issued December 7, 2009.

The current application for PCR followed. In it, Applicant alleged he was being held in custody unlawfully for the following reasons:

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective Assistance of Counsel.

(b) Denial of Due Process.

(c) Ineffective Assistance of Counsel For Failure To Object.
Ineffective Assistance of Counsel For Failure To Adequately Investigate -
-Before And During Trial, And Failure to properly prepare for Trial.

In his first Amended Application filed March 24, 2011, Applicant set forth the additional allegations as follows:

INEFFECTIVE ASSISTANCE OF COUNSEL

- Failure to object
- Failure to adequately investigate before or during trial
- Failure to present factual evidence
- Failure to call a critical/material/character witness for trial defense
- Failure to prepare for trial

DENIAL OF DUE PROCESS

- Newly discovered evidence/after discovered evidence

Finally, in his second Amended Application filed September 12, 2011, Applicant set forth the following additional allegations:

INEFFECTIVE ASSISTANCE OF COUNSEL AND EXHIBITS OF EVIDENCE

- (A) Trial Counsel was ineffective in conceding petitioner's guilt and as a result denied Petitioner his constitutional right to a fair trial. In Support, exhibit number 1 consisting of transcript pages 48, 52, 198, 200, 201, and 204.
- (B) Trial Counsel was ineffective in failing to object to trial Judge's erroneous reasonable doubt instruction that denied petitioner his constitutional right to a fair trial. Exhibit number 2, consisting of Transcript pages 215 and 216.
- (C) Trial Counsel was ineffective in failing to object to trial Judge impermissibly commented Upon a fact of the case during his charge that was to be determined by the jury, Exhibit Number 3 consisting of Transcript page 216,
- (D) Trial Counsel was ineffective in failing to adequately investigate and prepare prior to trial for the Jackson v Denno 378 U. S. 368 (1964), hearing. See exhibit number 4, which also supports Issue J. Also Exhibits 5, (Transcript pages 17, 18, 28, 29, 30, 33, 82, and 229, exhibit 6, hospital records, also in support of issues E and F. exhibit 7, the SLED Toxicology report case L06-16585, also supports issues E, F. and H. Exhibit 8 pictures would have supported trial Counsel's argument at the Jackson v Denno hearing to suppress Petitioner's statement and to support her argument to jury of Petitioner's serious condition that night and the involuntariness of Petitioner's statement. This also supports exhibits E and H, and exhibit 9, a true copy of the Sumter County Magistrate's court record which also supports E, F. and H.
- (E) Trial counsel was ineffective in failing to be prepared and alerted to the facts in relation To the Law of Petitioners case, which rendered counsel's assistance ineffective. See

Exhibits 6-9, and Exhibit 10, consisting of Transcript pages 52, 189, 190, 198, 200, 201, and 204 for support.

- (F) Trial Counsel was ineffective in failing to make a proper argument to the jury concerning the voluntariness of petitioner statement; rendered counsel's assistance ineffective. See previous exhibits 6, 7, 8, 9 along with exhibit 11, transcript pages 39, 213, 214, 229, and 231.
- (G) Trial counsel was ineffective in failing to challenge prosecutions questions to alleged victim that he, petitioner was the robber in the store, and in so doing seeking the identification of petitioner, the weapons, the vehicle, or the clothing the petitioner was arrested in, this rendered counsel's assistance ineffective. See exhibits 12 and 13, as well as exhibit 14, Transcript pages 37, 51, 59, 71, 72, 73, 82.
- (H) Trial counsel was ineffective in failing to call S. C. State trooper J. B. Baker as a defense witness who could have supported statements of events, as a result rendered counsel's assistance ineffective, exhibits 12, 13, and 14 for support.
- (I) Trial Counsel ineffective³ in failing to challenge the voluntariness of the miranda Warning which rendered counsel's assistance ineffective. Exhibit No. 15 and 16.
- (J) Trial Counsel was ineffective in failing to do a complete and thorough investigation of the chain of custody prior to trial, which rendered counsel's assistance ineffective. See exhibits 17, 18, 19, 20, 21, and 22.
- (K) Trial Counsel was ineffective in failing to do a complete and thorough investigation of The video and CD admitted at trial as evidence and in so doing rendered counsel's Assistance ineffective. Exhibit No. 23 and 24.
- (L) Trial counsel was ineffective in failing to object to or challenge petitioner's criminal Record being shown to the jury. This denied Petitioner his constitutional right to a Fair trial. Exhibit No. 25.
- (M) Trial counsel was ineffective in failing to complete a thorough investigation and in failing to pursue at suppression hearing the issue of whether the investigator's promises rendered the defendant's statement involuntary when there was reasonable probability that the Judge would have suppressed the statement which contained the only direct evidence the State would use in the trial for armed robbery. This rendered

counsel's assistance ineffective.

(N) Trial Counsel was ineffective in failing to interview or call Detective Ross as a Defense witness, when Mr. Ross was the only other investigator present when The defendant's alleged statement was given. This rendered counsel's assistance Ineffective.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, 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, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985)

Jackson v. Denno Hearing

Applicant alleges counsel was ineffective in her presentation of the motion to suppress Applicant's statement to police during the pre-trial Jackson v. Denno¹ hearing. Specifically, Applicant contends he was under the influence of alcohol and cocaine at the time of his arrest, and was improperly coerced by the interrogating officers and, therefore, his statement confessing to the crimes would have been suppressed as not freely and voluntarily given had counsel properly investigated and presented the motion.

Applicant started by explaining that he was arrested on the current charges after crashing his vehicle while fleeing from a police pursuit. Applicant was flown from the scene of the wreck to the local hospital by helicopter. While there, Applicant had blood drawn for drug/alcohol testing and was questioned by police about the crimes, ultimately resulting in a statement confessing to the crimes. Applicant testified that as part of his arrest, he was charged with DUI by the arresting officer, whom he referred to as "Trooper Baker". Applicant alleged counsel

¹ Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964).

should have called Trooper Baker to testify at the pre-trial Jackson v. Denno hearing to support the theory that Applicant was in fact intoxicated when he gave the statement to police and it was therefore involuntary. Applicant went on to say counsel should have introduced several pictures taken of Applicant after his arrest to show Applicant's condition at the time he gave the confession to police. He also alleged counsel should have introduced the results of a SLED toxicology screening that showed Applicant did have both alcohol and cocaine in his system on the night of his arrest.² Applicant stated that, ultimately, the DUI charge was dismissed because of the seriousness of other charges he was facing, but maintained counsel was ineffective for not introducing Trooper Baker's testimony, the SLED toxicology report or pictures of Applicant at the hearing to support the theory that his confession was not given freely and voluntarily. Further, Applicant alleged counsel failed to investigate, interview or subpoena the second officer present during Applicant's confession (Detective Ross) to testify at trial about alleged coercion and promises made to Applicant that induced his statement. Specifically, Applicant alleged the officer taking down his statement (Detective Johnston) promised Applicant that if he gave a confession, Johnston would speak favorably on Applicant's behalf at his future bond hearing.

On cross-examination, Applicant stated he had discussed the "involuntary due to intoxication" theory with counsel prior to trial, but had not disclosed to counsel what substances he was on at the time. Applicant agreed that he had presented testimony at the Jackson v. Denno hearing that he was under the influence of painkillers when he gave his statement. He went on to concede that counsel did in fact elicit testimony from the State's witnesses during the motion hearing about Applicant's severe injuries and possible intoxication, but contends counsel should have produced the SLED toxicology report, hospital records and injury pictures to bolster that

² Both the pictures complained of and the alleged SLED toxicology report were introduced by Applicant and made part of the record before this Court.

testimony. Applicant also stated Detective Johnston testified at the motion hearing about Applicant's apparent understanding of his Miranda Rights and subsequent signing of the waiver of rights form prior to giving the statement. (ROA pp. 10, ln 14 – p. 13, ln 23).³

Counsel likewise testified at the PCR hearing that she did not attempt to subpoena Trooper Baker to testify at the Jackson v. Denno regarding Applicant's alleged intoxication and DUI charge, nor did she introduce any of the hospital records in support of the motion. She said that while she did not introduce the pictures brought forward by Applicant, she believed they were unnecessary as the Court was able to get an accurate idea of Applicant's injuries based the testimony provided and the incident report introduced. She went on to say that because she did not represent Applicant on the alleged DUI charge, she never received any of the documents. Applicant complained of that allegedly showed he was under the influence of alcohol and cocaine at the time of the crash. Counsel did note that she and Applicant had discussed Applicant's supposed intoxication at the time of his statement to police, but said Applicant never informed her of his cocaine use. Counsel stated she was aware of the DUI charge Applicant had received, but did not specifically mention it during the Jackson v. Denno hearing as she was focusing on the painkillers administered at the hospital as the grounds for intoxication. She also noted that the jury would have the opportunity to decide their opinion on the voluntariness and credibility of Applicant's statements during their deliberations regardless of the outcome of the suppression motion. In conclusion, counsel plainly testified she believed she properly prepared for and presented the Jackson v. Denno hearing attempting to suppress Applicant's statement to police.

³ All "ROA" references in this Order refer page cites from the September 9, 2008, Record on Appeal that was prepared and used in Applicant's direct appeal. A copy of the ROA has been made part of the record in this PCR action.

Based on a thorough review of the record in conjunction with the testimony presented at the PCR hearing, I find counsel was not ineffective in this regard. The record before this Court reflects Detective Johnston testified at the motion hearing that neither he nor Detective Ross made any threats or promises to Applicant to induce the confession given, and that Applicant in fact agreed to give a written statement. (ROA p. 12, lns 14 – 23; p. 13, lns 7 - 8). Applicant also testified during the motion hearing, stating that despite having them read to him by police prior to giving a statement, he knew his Miranda Rights, including his right to remain silent, prior to the night of his arrest. Applicant ultimately conceded that his decision to speak with investigators was made “freely and voluntarily”, and identified the signature on the waiver of rights sheet as his own. (ROA p. 25, lns 19 – 20; p. 26, lns 4 – 12). In addition to eliciting ample testimony about Applicant’s injuries from Detective Johnston on cross-examination, counsel presented vigorous arguments in support of suppressing the statement based on Applicant’s numerous injuries from the car wreck and his intoxicated state from the administration of painkillers at the hospital. In support of those arguments, counsel introduced both a witness statement and a copy of the incident report. (ROA pp. 28, ln 18 – p. 29, ln 16). The trial judge ultimately found that the evidence showed the Miranda Warnings were given to Applicant and, while there was evidence to support that the statement was given freely and voluntarily, it would ultimately be a jury issue to pass upon the credibility of the statement and to decide whether the statement was given voluntarily beyond a reasonable doubt. (ROA p. 39, lns 1 – 15).

I first find Counsel was not deficient in her preparation for or presentation of the Jackson v. Denno hearing. Regarding Applicant’s contentions that counsel failed to introduce toxicology reports and/or records of the DUI charge to support the theory that his statement was involuntary due to intoxication, I find these allegations without merit. Applicant readily admitted he did not

disclose to counsel during their discussions what substances he had used on the night in question. Counsel testified similarly saying she knew Applicant had received a DUI charge as a result of the wreck and was given painkillers at the hospital prior to giving his statement to police, but asserted she had no knowledge of Applicant's cocaine use. It is important to note that, under Strickland, *supra*, we must examine whether counsel's performance fell within the range of "reasonableness based on professional norms" in light of the information he was given by Applicant:

"The reasonableness of counsel's actions may be determined or substantially influenced by defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information."

Strickland v. Washington, 466 U.S. at 691, 104 S.Ct. at 2067. Therefore, based on the information given to counsel by Applicant, I find counsel acted reasonably in not further investigating or otherwise arguing intoxication due to cocaine use at the pre-trial hearing, as well as in failing to obtain the toxicology reports to prove cocaine had been used. Further, the information in the record and presented at the PCR hearing reveals Applicant's statement was given roughly eight hours after his initial arrest. This extensive passage of time during which Applicant was at all times in hospital staff and police custody likely would have been sufficient to overcome any contention that Applicant was heavily intoxicated on alcohol when he confessed to the crimes. Counsel made a reasonable decision to pursue an involuntary due to intoxication theory by eliciting witness testimony that revealed Applicant had been given painkillers at the hospital just prior to making the statement. Counsel was also able to effectively establish the injuries Applicant sustained as a result of the crash through testimony and was reasonable in not introducing the photographs Applicant has now brought forth. Accordingly, I

find counsel's performance was not deficient in this regard as it fell within the wide range of reasonableness required under the circumstances.

I additionally find Applicant has failed to prove resulting prejudice based on the above allegations. First, Applicant has not produced the testimony of either Trooper Baker or Detective Ross and has therefore failed to prove resulting prejudice from counsel's failure to subpoena either of them to testify at the pre-trial hearing. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1999)(*A PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial*). Therefore, the allegation that Detective Ross could or would have testified that Applicant was made promises that induced his statement are unsubstantiated and without merit. Further, I find **no** reasonable probability that, had counsel introduced the hospital records, toxicology report or photographs as Applicant complains, the outcome of the Jackson v. Denno hearing, or the entire trial, would have been different. The testimony of multiple witnesses as contained in the record clearly refute Applicant's claim that he was "unaware" of what was going on when he gave his statement or that he otherwise gave the statement involuntarily. Counsel was able to elicit testimony regarding Applicant's injuries from both Applicant and Detective Johnston, who readily admitted Applicant had suffered somewhat severe injuries from the wreck. The introduction of pictures confirming that uncontested testimony would have done nothing to further the point or change the judge's mind about admissibility. Nor would the remaining documents Applicant complains of. In addition to signing a waiver of rights form, Detective Johnson provided testimony that Applicant knew the Miranda Rights before Johnston had the opportunity to read through entirely of them and Applicant readily admitted in his testimony that he knew the Miranda Rights himself

including the right to remain silent. Johnston's testimony about the absence of threats and Applicant's apparent ability to comprehend was confirmed through the testimony of Theresa Colclough, the secretary who typed the statement as Applicant spoke. Based on a thorough review of the record there is no reasonable probability that these items/additional testimonies would have changed the outcome.

Having found neither deficiency nor prejudice in this regard, I find counsel was not ineffective in her preparation for and presentation of the Jackson v. Denno hearing to suppress Applicant's confession statement.

Counsel Improperly Conceded Guilt on Failure to Stop Charge

Applicant also alleges counsel was ineffective in her representation of him at trial because she conceded Applicant's guilt several times throughout the course of trial, prejudicing his case. Applicant testified he believes this concession, along with counsel's failure to counter the state's theory on why Applicant didn't stop for police, improperly bolstered the state's charges against him. On cross-examination, Applicant said he recalled meeting with counsel to discuss the charges he was facing, as well as to develop a defense strategy to be used at trial. Applicant stated part of the theory counsel discussed was conceding Applicant's guilt on the Failure to Stop for a Blue Light charge. Applicant conceded the facts leading to the Failure to Stop charge stemmed from him fleeing from police until he eventually wrecked his truck, from which officers removed him. In the end, Applicant stated he was "not debating" the Failure to Stop charge, but rather was debating the reason why he didn't stop for police that night. Applicant similarly testified at the Jackson v. Denno hearing that he was not denying that he ran from police on the night in question. (ROA p. 23, lns 7 – 8).

Counsel testified that she did in fact concede Applicant's guilt to the Failure to Stop for a Blue Light charge at trial as a strategy to show Applicant's honesty and accountability to the jury. She went on to say the actual Failure to Stop charge itself was never really an issue at trial anyway as the evidence of overwhelming in that regard, but that she did fervently contest the State's theory on why Applicant refused to stop. She also stated she stressed that just because Applicant was guilty of the Failure to Stop charge didn't mean he was guilty of the much more serious Armed Robbery charge.

I find counsel was not ineffective in this regard either. Counsel's reasonably articulated decision to concede a less serious charge which carried overwhelming evidence of guilt in an effort to build the jury's trust in defending a more serious charge is a reasonable trial strategy. See Whitehead v. State, 308 S.C. 199, 417 S.E.2d 529 (1992)(*Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel*); see also Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992). Therefore, I find counsel acted reasonably in this regard and was not deficient. Further, Applicant cannot prove resulting prejudice in this regard as there was overwhelming evidence of his guilt on the Failure to Stop for a Blue Light charge. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994)(*Reasonable probability of a different result does not exist when there is overwhelming evidence of guilt*), citing Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991). Therefore, I find no ineffective assistance of counsel on this allegation.

Failure to Challenge Victim's Testimony About Applicant Being "In Store"

Applicant contends counsel was ineffective for failing to challenge victim's testimony when the solicitor asked her on direct examination whether the photographs he was seeking to

introduce of the store "fairly and accurately represent what happened...when the [Applicant] was in [the] store". Applicant alleges this question by the solicitor was improper as the store clerk involved in the robbery never made an identification of Applicant as the perpetrator. Applicant said he believed counsel should have asked the clerk on cross-examination to make an in-court identification of Applicant, Applicant's truck allegedly used the night of the robbery or the weapon she saw being carried by the perpetrator to undermine solicitor's remark that Applicant had been in the store.

Counsel testified she believed the victim in the matter was receiving sympathy from the jury based on her testimony at trial, which she tried to shake on cross-examination and in closing arguments by challenging inconsistencies between victim's previous statements and trial testimony. Counsel went on to say her fundamental rule of thumb is to never to ask a question of a testifying witness that she doesn't already know the answer to and, in this situation, she was unsure whether the store clerk would be able to identify Applicant if she posed the question. Therefore, she chose not to ask the store clerk for an in-court identification of Applicant or to otherwise object to the solicitor's question.

I find no deficiency, nor resulting prejudice, based on counsel's failure to request the store clerk make an in-court identification of Applicant as the perpetrator in the robbery. First, counsel acted reasonably and prudently in deciding not to pose a question to the store clerk on cross-examination which she did not already know (or have some inclination as to) what the clerk's answer would be. An undesired answer from the clerk would have caused extreme damage to Applicant's defense. Further, counsel was able to effectively bring out the inconsistencies in the clerk's descriptions of the perpetrator and the perpetrator's truck on cross-examination without asking for any in-court identifications. (ROA pp. 75, ln 4 - p. 77, ln 2).

Therefore, counsel was reasonable in this regard. Further, Applicant has failed to prove resulting prejudice. Had counsel's objection to the State's question been made, it would not have probably changed the outcome of the trial. Further, Applicant has failed to produce anything to show that the store clerk would have in fact testified that she couldn't identify Applicant had counsel asked such a question.

Failure to Investigate/Present Motion to Suppress Evidence Based on Faulty Chain of Custody

Applicant's final allegation raised is that counsel was ineffective in her investigation into and presentation of a motion to suppress the evidence of the crime recovered from his truck based on a faulty chain of custody. In support of this allegation, Applicant submitted a copy of booklet outlining police protocol in securing and recording evidence for this Court's consideration in ruling upon the current allegation.

At the PCR hearing, Applicant testified that he believed the specific procedures required to establish a complete chain of custody for collected evidence were not followed by investigators in his case and, had counsel properly investigated the chain, the evidence obtained from Applicant's wrecked truck would have been suppressed at trial. Specifically, Applicant contends inconsistent testimony was presented throughout the trial regarding several pieces of evidence recovered by police; additionally, Applicant contends investigators failed to properly execute the chain of custody form at the impound yard where Applicant's car was towed after the wreck.

During trial, Officer Wingate testified he recovered both Applicant's wallet and coat at the scene of the crash, where he secured the items and inventoried them with the "on scene lab". (ROA p. Officer Quiroz testified he was able to recover and inventory a Browning baseball hat, roughly twenty-one (\$21) dollars in currency and a silver Gerber Brand pocket knife. (ROA pp.

114, ln 21 – p. 117, ln 6). Thereafter, Officer Nesbitt testified that he ordered Applicant's wrecked truck be towed to the department's impound area, which was done by a local towing company with an officer following the truck. Nesbitt testified it was normal policy to have an officer follow the tow-truck from the scene to the impound lot where evidence may be contained therein, but stated he did not fill out a chain of custody form to report the truck being towed from the scene to the impound lot. (ROA p. 127, lns 2 – 17). Nesbitt testified that "sometimes" he would fill out a chain of custody form on the actual vehicle being towed and sometimes he would only do a chain of custody form for the items "seized from the vehicle". (ROA p 127, lns 11 – 17). The next officer to testify, Officer Duggin, stated that he executed an inventory search of the vehicle at the impound lot after securing a search warrant to do so. Duggin stated the overall evidence recovered from the truck was several items including the Browning baseball hat and the silver Gerber knife. Duggin noted, however, that some of the items he mentioned had in fact been previously processed at the scene of the wreck already. (ROA p. 130, lns 3 – 23).

Based on a review of the record, I find counsel was not ineffective in this regard. "Proof of chain of custody need not negate all possibility of tampering, but must establish a complete chain of evidence, as far as practicable." State v. Williams, 297 S.C. 290, 293, 376 S.E.2d 773, 773 (1989) (citing Benton v. Pellum, 232 S.C. 26, 100 S.E.2d 534 (1957)). "While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence – that is, evidence that is unique and identifiable – the establishment of a strict chain of custody is not required." State v. Glenn, 328 S.C. 300, 492 S.E.2d 393 (1997). "If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of

testimony that the item is the one in question and is in a substantially unchanged condition.” State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 – 742 (2005). When introducing non-fungible evidence, all that is required to satisfy the chain of custody is identification and relevance. See State v. Foster, 260 S.C. 511, 197 S.E.2d 280 (1973). In Applicant’s case, the evidence introduced at trial consisted of clothing, pocket knives and other items readily identified by the investigating officers and matching the store clerk’s descriptions. There were no tests performed on the items that would require strict proof of the chain of custody to be established. Therefore, counsel was able to call the reliability and weight of those pieces of evidence into question by establishing issues with the chain of custody on cross-examination. Counsel skillfully cross-examined all witnesses involved with the evidence to bring these discrepancies and omissions to the jury’s attention in an attempt to call the evidence’s reliability into question. Therefore, I find no deficiency on counsel’s part in her performance regarding the evidence recovered from Applicant’s car.

Further, Applicant did not suffer any prejudice as a result of these alleged deficiencies. Any gaps or defects in chain of custody go to the weight or credibility of the evidence and not to its admissibility. State v. Kahan, 268 S.C. 240, 233 S.E.2d 293 (1977); see also State v. Carter, 344 S.C. 419, 544 S.E.2d 835 (2001). Therefore, Applicant’s contention that, absent counsel’s alleged deficiencies, the evidence would have been suppressed is without merit. Counsel clearly pointed out the alleged “incomplete” areas in the chain of custody to the jury, who were then able to take that information into account in deliberations. The testimony presented by officers Accordingly, this Court denies and dismisses it.

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.

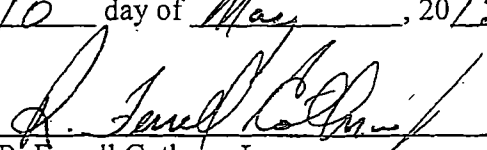
Except as discussed above, this Court finds that the Applicant failed to raise all additional allegations raised in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court notes Applicant 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 (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 10 day of May, 2012


R. Ferrell Cothran, Jr.
Presiding Judge
Third Judicial Circuit

Manning, South Carolina.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Case No: 2010-CP-43-0803

Mark Lowery, Jr. Appellant
S.C.D.C. No.: 281488

v.

The State Respondent

PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 22nd day of May, 2012, I served the foregoing Notice of Appeal, Order of Dismissal, as well as Proof of Service in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on May 22, 2012 addressed to the following as indicated below:

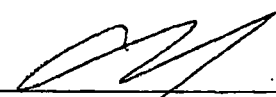
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

South Carolina Office of Appellate Defense
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29211-1589

Office of Attorney's General
Attn: Robert D. Corney, Esquire
Post Office Box 11549
Columbia, South Carolina 29211-1549

Mark Lowery, Jr., 281488
Broad River Correctional
4460 Broad River Road
Columbia, S. C. 29210

Dated: May 22, 2012


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Sumter, South Carolina 29150
(803) 418-5708

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WITNESSES

SUMTER PD

Johnston

DOCKET NO. 2007-GS-43- 2010

The State of South Carolina

County of SUMTER

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2007

THE STATE

vs.

MARK JAMES LOWERY, JR.

ARREST WARRANT NUMBER

J288041

D/A: 11/27/06

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date: 2-22-07

VERDICT

Indictment for

ARMED ROBBERY, FAILURE TO
STOP FOR BLUE LIGHT AND
POSSESSION OF A KNIFE
DURING THE COMMISSION OF A
VIOLENT CRIME

C. KELLY JACKSON, SOLICITOR

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SUMTER)

INDICTMENT FOR
 ARMED ROBBERY, FAILURE TO STOP
 FOR BLUE LIGHT AND POSSESSION OF A
 KNIFE DURING THE COMMISSION OF A
 VIOLENT CRIME

At a Court of General Sessions, convened on February 22, 2007, the Grand Jurors of SUMTER County present upon their oath:

COUNT ONE – ARMED ROBBERY

That MARK JAMES LOWERY, JR. did in Sumter County on or about November 27, 2006, violate Section 16-11-330 of the Code of Laws of South Carolina (1976), as amended, while armed with a deadly weapon, to-wit: a knife, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon, did feloniously take from Sharonda Alston, while she worked at Kangaroo #3382, or in the presence of Sharonda Alston, by means of force or intimidation goods or monies of the said Sharonda Alston and/or Kangaroo #3382, such goods or monies being described: good and lawful monies.

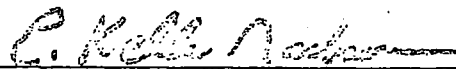
COUNT TWO – FAILURE TO STOP FOR BLUE LIGHT

That MARK JAMES LOWERY, JR. did in Sumter County on or about November 27, 2006, violate Section 56-5-750 of the Code of Laws of South Carolina (1976), as amended, in that while operating a motor vehicle upon the public streets or highways in the State of South Carolina, the said MARK JAMES LOWERY, JR. did fail to stop when signaled to do so by a law enforcement vehicle by means of a siren or flashing light.

COUNT THREE – POSSESSION OF A KNIFE DURING THE
 COMMISSION OF A VIOLENT CRIME

That MARK JAMES LOWERY, JR., was in possession of and did visibly display a knife during the commission of a violent crime, to-wit: armed robbery, in violation of Section 16-23-490, 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.



SOLICITOR